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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.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1650

Methods of Withdrawing Funds From the Thrift Savings Plan

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is amending the regulations on methods of withdrawing funds from the Thrift Savings Plan (TSP) to eliminate the option to transfer a financial hardship in-service withdrawal to an individual retirement account (IRA) or other eligible retirement plan. This is consistent with the Internal Revenue Code's rules for similar distributions from private sector plans. The amendment also incorporates administrative changes in calculating the amount of a financial hardship withdrawal.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Salomon Gomez on (202) 942–1661; Merritt A. Willing on (202) 942–1666; or Patrick J. Forrest on (202) 942–1659. FAX (202) 942–1676.

SUPPLEMENTARY INFORMATION: The Board administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, which has been codified, as amended, largely at 5 U.S.C. 8351 and 8401–8479. The TSP is a tax-deferred retirement savings plan for Federal employees, which is similar to cash or deferred arrangements established under section 401(k) of the Internal Revenue Code (I.R.C.) (26 U.S.C. 401(k)). The TSP is qualified under section 7701(j) of the I.R.C. (26 U.S.C. 7701(j)). Sums in the TSP are held in trust for the TSP participant.

Analysis

Part 1650 was first published in final form in the **Federal Register** on September 18, 1997 (62 FR 49112), and was subsequently amended by a final rule published in the **Federal Register** on June 9, 1999 (64 FR 31052). On July 12, 2001, the Board published a proposed rule with a request for comments in the **Federal Register** (66 FR 36494) to eliminate the option to transfer a financial hardship in-service withdrawal to an individual retirement account (IRA) or other eligible retirement plan. The Board received no comments; accordingly, the Board adopts the provisions of the proposed rule as the final rule.

Analysis

Part 1650 was published in final form in the **Federal Register** on September 18, 1997 (62 FR 49112), and was subsequently amended by a final rule published in the **Federal Register** on June 9, 1999 (64 FR 31052). This proposed rule further amends the final rule.

The Board is amending § 1650.42(b) to provide that a financial hardship withdrawal may no longer be transferred to an IRA or other eligible retirement plan. The Board is eliminating this option to transfer because transfer is available only for distributions which meet the Internal Revenue Service (IRS) requirements for an eligible rollover distribution. However, the IRS no longer considers a financial hardship withdrawal to be an eligible rollover distribution. *See* 26 U.S.C. 402(c)(4). Instead, a financial hardship withdrawal is treated as a nonperiodic payment.

Section 402(c)(4) applies to plans qualified under section 401(k) of the I.R.C. (26 U.S.C. 401(k)); this does not include the TSP, which is a plan qualified under section 7701(j) (26 U.S.C. 7701(j)). Nevertheless, the Board intends to follow the IRC rule that applies to private sector plans. (An age-based in-service withdrawal continues to be eligible for transfer to an IRA or other qualified plan.)

As a consequence of this change, the Board is also eliminating § 1650.31(b) which allows a participant to elect additional tax withholding from a financial hardship in-service withdrawal to ensure that he or she receives an amount adequate to cover the entire financial hardship, after withholding. However, unlike an eligible rollover distribution, a participant can avoid withholding (or can increase withholding) on a nonperiodic distribution by submitting an IRS Form W–4P, Withholding Certificate for Pension or Annuity Payments. Since the participant can obtain the full amount of the withdrawal by submitting this form to the TSP record keeper, the option to increase the amount of the withdrawal is no longer necessary.

Other amendments to § 1650.31 include changes to (b)(2) to clarify that the documentation supporting a financial hardship withdrawal request based upon an extraordinary expense must be dated within 45 days of the request. Section 1650.31 also includes a new paragraph (d). The new paragraph explains that a participant who has a pending Chapter 13 bankruptcy action is not eligible for a financial hardship withdrawal because the TSP presumes that the bankruptcy court is providing adequate funds for the participant's living expenses.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only employees of the Federal Government.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, and 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 801(a)(1)(A), the Board submitted a report containing this rule and other required information to

the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in today's **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1650

Alimony, Claims, Employment benefit plans, Government employees, Pensions, Retirement.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set out in the preamble, 5 CFR Chapter VI is revised as set forth below:

PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

1. The authority citation for part 1650 continues to read as follows:

Authority: 5 U.S.C. 8351, 8433, 8434, 8435, 8474(b)(5), and 8474(c)(1).

2. Section 1650.31 is revised to read as follows:

§ 1650.31 Financial hardship withdrawals.

(a) A participant who has not separated from Government employment and who can demonstrate financial hardship is eligible to withdraw all or a portion of his or her own contributions to the TSP (and their attributable earnings) in a single payment to meet certain specified financial obligations. The amount of a financial hardship withdrawal must be at least $1,000.

(b) A participant will demonstrate financial hardship if he or she meets one or both of the following tests:

(1) Based on TSP calculations, the participant's monthly cash flow is negative (*i.e.,* net income is less than ordinary monthly household expenses).

(2) The participant has incurred, or will incur within the next six months, extraordinary expenses which the participant has not paid, for which he or she has not been and will not be reimbursed, and which cannot be met by his or her monthly cash flow over a period of six months. Documentation of the expenses must be dated within 45 days of the date of the withdrawal request. Extraordinary expenses are limited to the following four types:

(i) Medical expenses payable by the participant and related to the treatment of the participant, the participant's spouse, or the participant's dependents. Generally, eligible expenses are those that would be eligible for deduction as medical expenses for Federal income tax purposes, but without regard to the Internal Revenue Service's (IRS) income limitations on deductibility. However, the following expenses that are allowed by the IRS are not eligible TSP medical expenses: health insurance premiums and expenses associated with household improvements required as a result of a medical condition, illness, or injury to the participant, the participant's spouse, or the participant's dependents. These items are already taken into account elsewhere in the TSP financial hardship calculations.

(ii) The cost of household improvements required as a result of a medical condition, illness or injury to the participant, the participant's spouse, or the participant's dependents which is eligible for deduction as a medical expense for Federal income tax purposes, but without regard to the IRS income limitations on deductibility or the fair market value of the property. Household improvements are structural improvements to the participant's living quarters or the installation of special equipment that is necessary to accommodate the circumstances of the incapacitated person.

(iii) The cost of repair or replacement resulting from a personal casualty loss that would be eligible for deduction for Federal income tax purposes, but without regard to the IRS income limitations on deductibility, fair market value of the property, or number of events. Personal casualty loss includes damage, destruction, or loss of property resulting from a sudden, unexpected, or unusual event, such as an earthquake, hurricane, tornado, flood, storm, fire, or theft.

(iv) Legal expenses for attorney fees and court costs associated with separation or divorce. Court-ordered payments to a spouse or former spouse and child support payments are not allowed, nor are costs of obtaining prepaid legal services or other coverage for legal services.

(c) The amount of a participant's financial hardship withdrawal cannot exceed the smallest of the following:

(1) The amount requested;

(2) The amount in the participant's account that is equal to his or her own contributions and attributable earnings; or

(3) (i) The amount which would both:

(A) Make up the participant's negative cash flow, if any, for a period of six months; and

(B) Pay documented extraordinary expenses, if any.

(ii) If the TSP calculates that the participant has a negative cash flow and extraordinary expenses, the amount of the disbursement is equal to six times the amount of the negative monthly cash flow plus the amount of the extraordinary expenses. If the TSP calculates that the participant has a positive cash flow, the amount of the disbursement is equal to the amount of the documented extraordinary expenses minus six times the amount of the positive monthly cash flow.

(d) A participant is not eligible for an in-service hardship withdrawal during the time he or she has pending a petition in bankruptcy under Chapter 13 of the Bankruptcy Code.

3. Section 1650.42 is revised to read as follows:

§ 1650.42 Taxes related to in-service withdrawals.

(a) When an in-service withdrawal is paid directly to a participant from the TSP, the money is taxable income in the year in which the payment is made. However, a participant does not pay taxes on money that the TSP transfers directly to an IRA or other eligible retirement plan until the money is withdrawn from the IRA or plan.

(b) A financial hardship in-service withdrawal from the TSP is not an eligible rollover distribution, and a participant therefore may not request the TSP to transfer a financial hardship in-service withdrawal to an IRA or other eligible retirement plan. A financial hardship in-service withdrawal is subject to 10% withholding. The withholding is not mandatory; the participant may either avoid the withholding or increase the amount of withholding by submitting an IRS Form W–4P, Withholding Certificate for Pension or Annuity Payments, to the TSP record keeper.

(c) An age-based in-service withdrawal from the TSP is an eligible rollover distribution, and a participant may request the TSP to transfer all or a portion of an age-based in-service withdrawal to an IRA or other eligible retirement plan, consistent with paragraph (d) of this section. If the withdrawal is not transferred, it is subject to mandatory 20% withholding. (The participant may increase the amount of withholding by submitting an IRS Form W–4P to the TSP record keeper.)

(d) A transfer or rollover may be requested by filing with the TSP record keeper a TSP Form 75–T. An eligible retirement plan is a plan defined in the Internal Revenue Code, 26 U.S.C. 402(c)(8). There are four types of eligible retirement plans: an individual retirement account (IRA), an individual retirement annuity (other than an endowment contract), a qualified pension, profit-sharing, or stock bonus plan, and an annuity plan described in

26 U.S.C. 403(a). An eligible retirement plan must be maintained in the United States, which means one of the 50 states or the District of Columbia.

[FR Doc. 01–20862 Filed 8–17–01; 8:45 am]

BILLING CODE 6760–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 226

Open-end Model Forms and Clauses

CFR Correction

In Title 12 of the Code of Federal Regulations, parts 220 to 299, revised as of January 1, 2001, in Part 226, Appendix G is corrected by adding Table G–10(C) as follows:

PART 226—TRUTH IN LENDING (REGULATION Z)

* * * * *

Appendix G to Part 226—Open-End Model Forms and Clauses

* * * * *

G-10(C) -- Applications and Solicitations Model Form (Charge Cards)

Annual fees	Transaction fee for purchases	Transaction fee for cash advances, and fees for paying late or exceeding the credit limit
[Annual fee: $____ per year] [Membership fee: $____ per year] [(*type of fee*): $____ per year] [(*type of fee*): $____]	[$____] [__% of ____]	Transaction fee for cash advances: [$____] [__% of ____] Late payment fee: [$____] [__% of ____] Over-the-credit-limit fee: $____
All charges made on this charge card are due and payable when you receive your periodic statement.		

* * * * *

[FR Doc. 01–55525 Filed 8–17–01; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NM–367–AD; Amendment 39–12374; AD 2001–16–06]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100 and –200 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, that requires initial and repetitive inspections of certain areas of the wing spars to detect cracking or corrosion; and follow-on corrective actions and repair, if necessary. This amendment is prompted by reports of cracks and corrosion in the upper chord of the front and rear spars of the wing and reports of cracks propagating from previously repaired areas. The actions specified by this AD are intended to detect and correct such cracking or corrosion of the upper and lower chords of the wing spars, which could result in reduced structural integrity of the wing.

DATES: Effective September 24, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 24, 2001.

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

FOR FURTHER INFORMATION CONTACT: James Blilie, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2131; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 737–100 and –200 series airplanes was published in the **Federal Register** on May 1, 2001 (66 FR 21700). That action proposed to require initial and repetitive inspections of certain areas of the wing spars to detect cracking or corrosion; and follow-on corrective actions and repair, if necessary.

Comments

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

The manufacturer recommends adding certain wording for clarification to the section of the Notice of Proposed Rulemaking (NPRM) which is entitled ''Explanation of Relevant Service Information.'' The FAA acknowledges that the suggested wording is more precise. However, since that wording does not reappear in the AD itself, no change is necessary.

The manufacturer also suggests that the ''Applicability'' section be changed to read ''Model 737–100 and –200 series airplanes, line number 1 through 310 inclusive, and 323; certificated in any category.'' The effect of the suggested wording would be to clarify that the next generation of 737 models is specifically excluded. The FAA agrees

with the need for this clarification and has changed the AD accordingly.

Conclusion

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

Cost Impact

There are approximately 168 Boeing Model 737 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 45 airplanes of U.S. registry will be affected by this AD.

The FAA estimates that it will take approximately 30 work hours per airplane to do the initial detailed visual and eddy current inspections, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the initial inspections on U.S. operators is estimated to be $81,000, or $1,800 per airplane.

The FAA estimates that it will take approximately 30 work hours per airplane to do the repetitive inspections, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the inspections on U.S. operators is estimated to be $81,000, or $1,800 per airplane, per inspection cycle.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2001–16–06 Boeing: Amendment 39–12374. Docket 99–NM–367–AD.

Applicability: Model 737–100 and –200 series airplanes, line number 1 through 310 inclusive, and 323; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking or corrosion of the upper and lower chords of the front and rear spars of the wing, which could result in reduced structural integrity of the wing, accomplish the following:

Initial Detailed Visual and Eddy Current Inspections (Part I)

(a) Within 12 months after the effective date of this AD: Do an initial detailed visual inspection to detect cracking or corrosion of the upper and lower chords of the front and rear spars, and an eddy current inspection to detect cracking of the vertical legs of the upper chords of the front and rear spars, per Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991. Before further flight following the inspections, do the follow-on corrective actions required by paragraph (d) of this AD.

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

Repetitive Detailed Visual and Eddy Current Inspections (Part II)

(b) Repeat the initial detailed visual inspection required by paragraph (a) of this AD at intervals not to exceed 12 months per Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991. Before further flight following the inspection, do the follow-on corrective actions required by paragraph (d) of this AD.

(c) Repeat the initial eddy current inspection required by paragraph (a) of this AD at intervals not to exceed 48 months per Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991. Before further flight following the inspection, do the follow-on corrective actions required by paragraph (d) of this AD.

Follow-on Corrective Actions (Parts I, II, and III)

(d) Do the follow-on corrective actions (including cleaning spar cavities, removing corrosion, and applying corrosion-inhibiting compound) required by paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) of this AD, as applicable.

(1) If no cracking or corrosion is found, apply a corrosion-inhibiting compound to the accessible areas of the upper and lower chords of both the front and rear spars per Part I or Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991, as applicable.

(2) If any corrosion is found, repair per Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991.

(3) If a horizontal crack is found in the upper chords of the front or rear spars, repair per paragraph (f) of this AD.

(4) If any cracking is found other than that identified in paragraph (d)(3) of this AD, repair per paragraph (d)(4)(i) or (d)(4)(ii) of this AD, as applicable.

(i) If damage of the chords of the front or rear spar is within the limits specified in the service bulletin, before further flight, repair per Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991.

(ii) If damage of the chords of the front or rear spar exceeds the limits specified in the service bulletin, before further flight, repair per paragraph (f) of this AD.

Initial and Repetitive Eddy Current Inspections of Previous Repairs

(e) For airplanes on which a previous repair to the upper chord of the front or rear spar was made per Boeing Service Bulletin 737–57–1067, Revision 3, dated May 24, 1990, or earlier revisions: Within 12 months after the effective date of this AD, do an eddy current inspection of the repair area to detect cracking per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. Repeat this inspection thereafter at intervals not to exceed 12 months. If any discrepancy is found, before further flight, repair per paragraph (f) of this AD. For a repair method to be approved by the Manager, SACO, as required by this paragraph, the approval letter must specifically reference this AD.

Repair

(f) Repair (including removing corrosion; inspecting the rework area for cracks; refinishing the blend-out area; installing a nesting angle repair; and applying chemical film treatment, primer, sealant, and corrosion-inhibiting compound) any discrepancy specified in paragraphs (d)(3), (d)(4)(ii), and (e) of this AD, per a method approved by the Manager, Seattle ACO; or per data meeting the type certification basis of the airplane approved by a Boeing Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the approval letter must specifically reference this AD.

Alternative Methods of Compliance

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

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

Incorporation by Reference

(i) Except as provided by paragraphs (e) and (f) of this Ad, the actions shall be done in accordance with Boeing Service Bulletin 737–57–1067, Revision 4, dated November 7, 1991. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(j) This amendment becomes effective on September 24, 2001.

Issued in Renton, Washington, on August 9, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20697 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–275–AD; Amendment 39–12375; AD 2001–16–07]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400 and 767 Series Airplanes Equipped With General Electric CF6–80C2 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747–400 and 767 series airplanes, that requires modification of the core cowl assemblies of the engines. This action is necessary to prevent failure of the core cowl latches during an engine fire, and consequent in-flight separation of an engine core cowl and its strut fire barrier from the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective September 24, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 24, 2001.

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

FOR FURTHER INFORMATION CONTACT: Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2686; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 747–400 and 767 series airplanes was published in the **Federal Register** on December 5, 2000 (65 FR 75881). That action proposed to require modification of the core cowl assemblies of the engines.

Comments

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

One commenter states that it does not own or operate any of the subject airplanes and, thus, offers no additional comment on the proposed AD.

Requests To Extend Compliance Time

Three commenters request that the FAA extend the compliance time for the proposed modification. One of the commenters requests that the FAA extend the compliance time from 24 months to 36 months after the effective date of this AD, due to its concerns about availability of necessary parts for the modification. The other two commenters request that the FAA extend the compliance time to 48 months after the effective date of this AD. One of these commenters is also concerned about parts availability, while the other commenter wants the extension so that it may accomplish the modification during its regularly scheduled ''C'' and ''D'' checks.

The FAA concurs with the one commenter's request to extend the compliance time to 36 months after the effective date of this AD. We have determined that extending the compliance time to 36 months will allow a sufficient supply of parts to be made available for the required modification without adversely affecting safety. We have revised paragraph (a) of this final rule accordingly.

We do not concur with the other commenters' requests to extend the compliance time for the modification to 48 months. With regard to parts availability, as stated above, we find that a 36-month compliance time will be adequate for a sufficient quantity of parts to be available. With regard to extending the compliance time to allow the modification to be accomplished at a ''C'' or ''D'' check, we have already considered factors such as operators' maintenance schedules in setting a compliance time for the required modification and determined that 36 months is an appropriate compliance time in which the modification may be accomplished during scheduled airplane maintenance for the majority of affected operators. Since maintenance schedules vary from operator to operator, it would not be possible to guarantee that all affected airplanes could be modified during scheduled maintenance, even with a compliance time of 48 months. In any event, we find that 36 months represents the maximum time wherein the affected airplanes may continue to operate prior to modification without compromising safety. No further change to the final rule is necessary in this regard.

Request To Withdraw Proposed Rule

One commenter requests that the FAA withdraw the proposed rule. In the proposed rule, we explained that, in the event of an engine fire, the core cowl latches may fail, and opening of the core cowls breaches the engine fire containment design and could allow the fire to spread to the strut and wing of the airplane. The commenter states that, following extensive review of the engine cowling configuration, it cannot see that the core cowls would open during an engine fire even if the frame is weakened, because the trailing edge of the thrust reverser covers up the leading edge of the core cowl. Therefore, the commenter does not agree that there is risk of a fire spreading to the strut. The commenter further requests that we withdraw the proposed rule because the total cost of the modification that would be required by this AD for its fleet would be very expensive.

We do not concur with the commenter's request to withdraw the proposed rule. With regard to the commenter's doubts about whether failure of the core cowl latches is an unsafe condition, we acknowledge that the commenter is correct when it states that the trailing edge of the thrust reverser covers the leading edge of the core cowl. However, in the event of an engine fire when the aluminum structure supporting the steel latches holding the core cowls closed is significantly weakened, the structural continuity between the hinges at the top of the core cowl and the latches at the bottom no longer exists. Therefore, the structural integrity of the attachment of the core cowl to the airplane is compromised, and aerodynamic loads will force the core cowls to open and subsequently detach from the airplane. As explained in the NPRM, this condition could allow the engine fire to spread to the strut and wing. We have determined that this risk of a fire propagating to the strut and wing is significant and constitutes an unsafe condition that must be addressed.

With regard to the commenter's concern about the cost of the AD, we acknowledge that there are relatively high costs associated with the required modification. For operators with many affected airplanes, the cost could run into millions of dollars. However, in considering whether to issue this AD, we conducted a cost analysis and determined that the costs of the modification required by this AD are commensurate with the level of risk involved, and it is necessary to issue this AD to ensure the continued safety of the affected airplanes.

No change to the final rule is necessary in this regard.

Conclusion

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

Cost Impact

There are approximately 563 Model 747–400 and 767 series airplanes of the affected design in the worldwide fleet.

The FAA estimates that 14 Model 747–400 series airplanes of U.S. registry will be affected by this AD, that it will take approximately 168 work hours (42 per engine) per airplane to accomplish the required modification, and that the average labor rate is $60 per work hour. Required parts will cost approximately $84,732 ($21,183 per engine) per airplane. Based on these figures, the cost impact of the modification required by this AD on U.S. operators of Model 747–400 series airplanes is estimated to be $1,327,368, or $94,812 per airplane.

The FAA estimates that 64 Model 767 series airplanes of U.S. registry will be affected by this AD, that it will take approximately 84 work hours (42 per engine) per airplane to accomplish the required modification, and that the average labor rate is $60 per work hour. Required parts will cost approximately $42,366 ($21,183 per engine) per airplane. Based on these figures, the cost impact of the modification required by this AD on U.S. operators of Model 767 series airplanes is estimated to be $3,033,984 or $47,406 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2001–16–07 Boeing: Amendment 39–12375. Docket 2000–NM–275–AD.

Applicability: Model 747–400 and 767 series airplanes, certificated in any category, equipped with General Electric CF6–80C2 series engines; as listed in Boeing Service Bulletin 747–71–2285 or 767–71–0088, both dated October 8, 1998.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the core cowl latches during an engine fire, and consequent in-flight separation of an engine core cowl and its strut fire barrier from the airplane, accomplish the following:

Modification

(a) Within 36 months after the effective date of this AD: Modify the left- and right-hand core cowl assemblies of the engines per the Accomplishment Instructions of Boeing Service Bulletin 747–71–2285 (for Model 747–400 series airplanes) or 767–71–0088 (for Model 767 series airplanes), both dated October 8, 1998.

Note 2: The Boeing service bulletins reference ROHR Service Bulletin TBC/80C2–NAC–71–028, dated August 1, 1998, as an additional source of service information for accomplishment of the modification.

Spares

(b) As of 6 months after the effective date of this AD, no one may install an aluminum core cowl assembly, part number 224–2301–513 (left-hand) or 224–2302–539 (right-hand), on any airplane.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Operations Inspector or Principal Maintenance Inspector, as applicable, who may add comments and then send the request and any comments to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

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

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Service Bulletin 747–71–2285, dated October 8, 1998; or Boeing Service Bulletin 767–71–0088, dated October 8, 1998; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) This amendment becomes effective on September 24, 2001.

Issued in Renton, Washington, on August 10, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20698 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–302–AD; Amendment 39–12376; AD 2001–16–08]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes Equipped With General Electric Model CF6–45 or –50 Series Engines or Pratt & Whitney Model JT9D–3, –7, or –70 Series Engines; and 747–E4B (Military) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes equipped with General Electric Model CF6–45 or –50 series engines or Pratt & Whitney Model JT9D–3, –7, or –70 series engines; and all 747–E4B (military) airplanes. That AD currently requires repetitive inspections to detect cracking or fracture of the steel attachment fittings of the diagonal brace to the nacelle struts; and replacement of the attachment fittings with new steel fittings, if necessary. This amendment adds new repetitive inspections of the fasteners of the steel attachment fittings of the diagonal brace to the inboard and outboard nacelle struts to find discrepancies; and mandates certain one-time inspections of the existing attachment fittings, installation of new fasteners, and replacement or rework of the fittings, which terminates the repetitive inspections. This amendment is prompted by a report of fatigue cracking in a steel attachment fitting of the diagonal brace to the number 2 nacelle strut. The actions specified by this AD are intended to prevent such cracking or a fracture, which could result in failure of a nacelle strut diagonal brace load path and possible separation of the nacelle from the wing.

DATES: Effective September 24, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 24, 2001.

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

FOR FURTHER INFORMATION CONTACT: Tamara L. Anderson, Aerospace Engineer, Airframe Branch, ANM–120S, Seattle Aircraft Certification Office, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2771; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 99–09–11, amendment 39–11144 (64 FR 19883, April 23, 1999), which is applicable to certain Boeing Model 747 series airplanes and all 747–E4B (military) airplanes, was published in the **Federal Register** on March 29, 2001 (66 FR 17091). The action proposed to continue to require repetitive inspections to detect cracking or fracture of the steel attachment fittings of the diagonal brace

to the nacelle struts; and replacement of the attachment fittings with new steel fittings, if necessary. The action proposed to add new repetitive inspections of the fasteners of the steel attachment fittings of the diagonal brace to the inboard and outboard nacelle struts to find discrepancies; and mandate certain one-time inspections of the existing attachment fittings, installation of new fasteners, and replacement or rework of the fittings, which would terminate the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Several comments were submitted by a single commenter, and the FAA has duly considered these comments.

Increase Cost Impact Estimate

The commenter requests that the FAA revise the Cost Impact section of the proposed rule to increase its estimate of the number of work hours from 76 to 476 work hours for the proposed terminating action. The commenter states that 476 work hours is the estimate given for the terminating action in Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000 (which is referenced as the appropriate source of service information for doing the terminating action in the proposed AD). The commenter states that it is appropriate to include the time necessary for access and close-up because the airplane's engines are not normally removed during a ''C''-check or heavy maintenance visit, but engine removal and re-installation are necessary for the terminating action in the proposed AD.

The FAA concurs. We acknowledge that operators must remove the engines (and re-install them) to do the terminating action required by this AD, and that the airplane's engines may not normally be removed at a maintenance visit that will occur during the compliance times required by this AD. We find, though, that the commenter's estimate of 476 work hours is less than the figure of 516 work hours, which the service bulletin provides. Therefore, we have revised the ''Cost Impact'' section of this final rule to estimate that the terminating action required by this AD will take 516 work hours (including time for gaining access and closing up).

Extend Compliance Time for New Inspection

The commenter requests that the FAA revise paragraph (b) of the proposed AD to revise the compliance time from the latest of 3,000 total flight cycles on any diagonal brace attachment fitting, within 30 days after the effective date of the AD, and within 150 flight cycles after accomplishment of AD 95–10–16 or AD 95–13–07; to the earlier of 18 months after the effective date of the AD and at the next ''C''-check visit after the effective date of the AD. The commenter's rationale is that the repetitive inspections currently required by AD 99–09–01 at the initial inspection threshold and repetitive interval required by that AD have been effective in ensuring that any extensively damaged or failed fittings are found and replaced in a timely manner. The commenter states that it presumes the existing inspections were sufficiently justified and determined to be adequate to maintain the necessary level of safety. The commenter also states that it views the proposed AD's more extensive inspections as supplementing rather than replacing the existing inspections required by AD 99–09–01. The commenter clarifies that, if the FAA grants its request, the repetitive inspections required by AD 99–09–01 should continue until the terminating action in the proposed AD is accomplished.

The FAA does not concur with the commenter's request. In the preamble of AD 99–09–11, we stated that the actions required by that AD were considered to be ''interim action,'' and that further rulemaking was being considered. As stated in the proposed rule, since the issuance of AD 99–09–11, we have reviewed and approved Boeing Service Bulletin 747–54A2196, Revision 1. We have determined that the inspections in that service bulletin provide an increased level of safety over the detailed visual inspections required by AD 99–09–11. We have also received reports that, while doing the new inspections required by this AD, operators have found damaged fittings that would not have been found during the inspections required by AD 99–09–11. For these reasons, the FAA finds it appropriate to supersede the existing AD to require the new inspections at the compliance times specified in Boeing Service Bulletin 747–54A2196, Revision 1. Also note that we have approved that service bulletin (as well as the original issue, dated April 2, 1999) as an alternative method of compliance to AD 99–09–11. No change to the final rule is necessary in this regard.

Extend Compliance Time for Terminating Action

The commenter requests that the FAA revise paragraph (h) of the proposed rule to extend the compliance time for the proposed terminating action from 36 months (after the effective date of the AD) for the diagonal brace to the inboard nacelle struts and 48 months (after the effective date of the AD) for the diagonal brace on the outboard nacelle struts, to 54 months. The commenter notes that the proposed compliance times allow the work involved with the terminating action on both the inboard and outboard nacelle struts to be spread out over only two ''C''-checks. The commenter also notes that there is a lead time of 270 days for obtaining the kit necessary for the terminating action. The commenter states that its recommendation of a 54-month compliance time would allow the work to be spread over two ''C''-checks and a partial ''D''-check and provide sufficient time to obtain the kit necessary for terminating action.

The FAA does not concur with the commenter's request. In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but also the criticality of the strut-to-wing attachments. The commenter did not submit any technical data showing that an extension of the compliance time for the terminating action to 54 months would provide an acceptable level of safety. Thus, the FAA does not find it appropriate to revise the compliance time as requested by the commenter. However, the commenter may submit a request for an adjustment of the compliance times in this AD according to paragraph (i)(1) of this AD. In its request, the operator may want to provide the number of subject airplanes in its fleet, the number of airplanes on which it has done the terminating action, and the schedule for doing the terminating action on the remaining airplanes. The FAA will consider an operator's good-faith attempt to complete the terminating action within the required compliance times. No change to the final rule is necessary in this regard.

Conclusion

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

Cost Impact

There are approximately 745 Model 747 series airplanes of the affected design in the worldwide fleet. The FAA

estimates that 173 airplanes of U.S. registry will be affected by this AD.

The inspections that are currently required by AD 99–09–11 take approximately 4 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $41,520, or $240 per airplane, per inspection cycle.

The new detailed visual inspections/torque checks that are required by this AD will take approximately 12 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the inspections/torque checks required by this AD on U.S. operators is estimated to be $124,560, or $720 per airplane, per inspection cycle.

The new terminating actions (which include, for the inboard pylon, inspection of the existing steel fittings for cracks or damage; replacement if cracked; rework or replacement if damaged; or installation of new fasteners if no cracks; and, for the outboard pylon, detailed visual inspection of the fitting for damage, high frequency eddy current inspection of fastener holes, and installation of new fasteners) required by this AD will take approximately 516 work hours per airplane (including time for gaining access and closing up) to accomplish, at an average labor rate of $60 per work hour. Required parts will cost $13,776 (for airplanes equipped with Pratt & Whitney JT9D series engines) or $31,083 (for airplanes equipped with GE CF6–45 or –50 series engines). Based on these figures, the cost impact of the terminating actions required by this AD is estimated to be $44,736 per airplane (for airplanes equipped with Pratt & Whitney JT9D series engines) or $62,043 per airplane (for airplanes equipped with General Electric CF6–45 or –50 series engines).

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–11144 (64 FR 19883, April 23, 1999), and by adding a new airworthiness directive (AD), amendment 39–12376, to read as follows:

2001–16–08 Boeing: Amendment 39–12376. Docket 2000–NM–302–AD. Supersedes AD 99–09–11, Amendment 39–11144.

Applicability: Model 747 series airplanes equipped with General Electric Model CF6–45 or –50 series engines or Pratt & Whitney Model JT9D–3, –7, or –70 series engines; and all 747–E4B (military) airplanes; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking or fracture of the steel attachment fittings of the diagonal brace to the nacelle struts, which could result in failure of a nacelle strut diagonal brace load path and possible separation of the nacelle from the wing, accomplish the following:

Restatement of Requirements of AD 99–09–11

Repetitive Inspections

(a) Gain access to the attachment fittings of the diagonal brace to the inboard and outboard nacelle struts through the aft fairing doors, and do a detailed visual inspection to find cracking or fracture of the steel attachment fittings of the diagonal brace to the inboard and outboard nacelle struts, at the applicable time specified in paragraph (a)(1) or (a)(2) of this AD.

(1) For airplanes on which the strut and wing modification required by AD 95–10–16, amendment 39–9233, or AD 95–13–07, amendment 39–9287, has not been accomplished: Within 10 days after May 10, 1999 (the effective date of AD 99–09–11, amendment 39–11144), accomplish the detailed visual inspection.

(i) For airplanes equipped with General Electric Model CF6–45 or –50 series engines and/or Pratt & Whitney JT9D–3 or –7 series engines, repeat the inspection thereafter at intervals not to exceed 180 flight cycles.

(ii) For airplanes equipped with Pratt & Whitney JT9D–70 series engines, repeat the inspection thereafter at intervals not to exceed 250 flight cycles.

(2) For airplanes on which the strut and wing modification required by AD 95–10–16, or AD 95–13–07, has been accomplished: Within 30 days after May 10, 1999, or within 150 flight cycles after accomplishment of the modification, whichever occurs later, accomplish the detailed visual inspection.

(i) For airplanes equipped with General Electric Model CF6–45 or –50 series engines or Pratt & Whitney JT9D–70 series engines, repeat the inspection thereafter at intervals not to exceed 600 flight cycles.

(ii) For airplanes equipped with Pratt & Whitney JT9D–3 or –7 series engines, repeat the inspection thereafter at intervals not to exceed 350 flight cycles.

New Requirements of This AD:

Initial/Repetitive Inspections/Checks

(b) For all airplanes: Do a detailed visual inspection and a torque check of the fasteners of the steel attachment fittings of the diagonal brace to the inboard and outboard nacelle struts to find discrepancies (including cracks, loose or broken fasteners, etc.), at the latest of the times specified in paragraphs (b)(1), (b)(2), and (b)(3) of this AD; per Part 2 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000. Repeat the inspections/checks thereafter as specified in paragraph (c) of this AD. Accomplishment of the inspections/checks specified in this paragraph terminates the inspections required by paragraph (a) of this AD.

(1) Before the accumulation of 3,000 total flight cycles on any diagonal brace attachment fitting.

(2) Within 30 days after the effective date of this AD.

(3) Within 150 flight cycles after accomplishment of AD 95–10–16 or AD 95–13–07.

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

Note 3: Detailed visual inspections and torque checks accomplished before the effective date of this AD per Boeing Alert Service Bulletin 747–54A2196, dated April 2, 1999, are considered acceptable for compliance with the inspections/checks specified in paragraph (b) of this AD.

(c) Except as provided by paragraph (d) of this AD: Repeat the detailed visual inspection required by paragraph (b) of this AD, as specified in Table 1 of this AD. Repeat the torque check required by paragraph (b) of this AD at intervals not to exceed 18 months. Repeat the inspections/checks until accomplishment of paragraph (h) of this AD. Table 1 follows:

TABLE 1.—REPETITIVE DETAILED VISUAL INSPECTION INTERVALS

For the	For airplanes in group	Then repeat at the earlier of
(1) Inboard nacelle struts	(i) 1 or 4	Intervals not to exceed 350 flight cycles or 18 months.
	(ii) 2, 3, or 5	Intervals not to exceed 600 flight cycles or 18 months.
(2) Outboard nacelle struts	(i) 1, 2, or 4	Intervals not to exceed 350 flight cycles or 18 months.
	(ii) 3 or 5	Intervals not to exceed 600 flight cycles or 18 months.

(d) For the attachment fittings of the diagonal brace to the inboard nacelle struts only: Instead of doing the repetitive detailed visual inspections per paragraph (c) of this AD, before further flight following the inspections required by paragraph (b) of this AD, do an ultrasonic inspection of the fasteners of the steel attachment fittings to find discrepancies, per Part 4 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000.

(1) Repeat the ultrasonic inspection at intervals not to exceed 1,200 flight cycles, until accomplishment of paragraph (h) of this AD.

(2) Repeat the detailed visual inspection and torque check required by paragraph (b) of this AD at intervals not to exceed 18 months, until accomplishment of paragraph (h) of this AD.

Corrective Actions

(e) If any crack indication is found during any inspection/check required by this AD, before further flight, verify the indication per Part 3 or Part 4 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000, as applicable. If any cracking is verified, before further flight, replace the fasteners with new fasteners, and rework or replace the fitting, as applicable, per Part 5 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000; which terminates the repetitive inspections required by this AD. Where the service bulletin specifies that the manufacturer may be contacted for disposition of certain repair actions, this AD requires such repair to be done per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company designated engineering representative (DER) who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

(f) If any loose or broken fastener is found during any inspection/check required by this AD, before further flight, do a high frequency eddy current inspection of the fastener hole to find cracking or damage, per Figure 6 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000. If no cracking or damage is found, before further flight, oversize the fastener hole and install a new fastener per Part 5 of the Accomplishment Instructions of the service bulletin. If any cracking or damage is found, before further flight, repair per a method approved by the Manager, Seattle ACO, or per data meeting the type certification basis of the airplane approved by a Boeing Company DER who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

(g) If any discrepancy of any attachment fitting is detected during any inspection/check required by this AD, before further flight, replace the fitting with a new steel fitting per a method approved by the Manager, Seattle ACO, or per data meeting the type certification of the airplane approved by a Boeing Company DER who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

Terminating Action

(h) Do the terminating action (for the inboard nacelle struts, includes inspection of the existing steel fittings for cracks or damage and replacement if cracked, rework or replacement if damaged, or installation of new fasteners if no cracks; for the outboard nacelle struts, includes a detailed visual inspection of the fitting for damage, HFEC inspection of fastener holes, and installation of new fasteners), per Part 5 of the Accomplishment Instructions of Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000, at the times specified in paragraph (h)(1) or (h)(2) of this AD, as applicable. Accomplishment of the actions specified in this paragraph constitutes terminating action for the repetitive detailed visual inspections/torque checks specified in paragraph (c) of this AD.

(1) For steel attachment fittings of the diagonal brace to the inboard nacelle struts: Within 36 months after the effective date of this AD.

(2) For steel attachment fittings of the diagonal brace to the outboard nacelle struts: Within 48 months after the effective date of this AD.

Alternative Methods of Compliance

(i)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(2) Alternative methods of compliance, approved previously per AD 99–09–11, amendment 39–11144, are approved as alternative methods of compliance with this AD.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

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

Incorporation by Reference

(k) Except as provided by paragraphs (a), (e), (f), and (g) of this AD; the actions shall be done in accordance with Boeing Service Bulletin 747–54A2196, Revision 1, dated August 17, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(l) This amendment becomes effective on September 24, 2001.

Issued in Renton, Washington, on August 10, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20699 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–342–AD; Amendment 39–12377; AD 2001–16–09]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), which is applicable to all Model A320 series airplanes, that currently requires repetitive measurements of the deflection of the elevator trailing edge; inspections of the elevator servo controls and their attachments; and replacement of worn or damaged parts, if necessary. This amendment requires periodic inspection of the elevators for excessive freeplay, repair of worn parts if excessive freeplay is detected, and modification of the elevator neutral setting. It also revises the applicability to include additional airplane models. This amendment is prompted by additional reports of severe vibration in the aft cabin of Model A320 series airplanes and studies that indicate that the primary cause is excessive freeplay in the elevator attachments. The actions specified by this AD are intended to prevent excessive vibration of the elevators, which could result in reduced structural integrity and reduced controllability of the airplane.

DATES: Effective September 24, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 24, 2001.

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

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: The FAA issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to supersede AD 92–04–06, amendment 39–8177 (57 FR 6068, February 20, 1992). (A correction of AD 92–04–06 was published in the **Federal Register** on April 1, 1992 (57 FR 11137).) AD 92–04–06 is applicable to all Airbus Model A320 series airplanes. The proposed AD was published in the **Federal Register** on March 1, 2001 (66 FR 12913). The action proposed to require periodic inspection of the elevators for excessive freeplay; repair or replacement of worn parts, if excessive freeplay is detected; replacement of the elevator servo controls with modified elevator servo controls; and modification of the elevator neutral setting. The action also proposed to revise the applicability to include additional airplane models.

Comments

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

Support for Proposed AD

Several commenters, including the National Transportation Safety Board, support the proposed AD.

Request To Withdraw the Proposed AD

One commenter (the manufacturer) requests that the proposed AD be withdrawn. The commenter asserts that there is no unsafe condition due to limit cycle oscillation (LCO) of the elevator. The commenter disagrees with the FAA's conclusion that elevator LCO could result in reduced structural integrity and reduced controllability of the airplane. The commenter notes that because LCO is a fixed-frequency vibration with a constant amplitude, it is therefore not a stability problem. The commenter contends that such a phenomenon is well detectable, and the flight crew can determine the significance of the airframe vibration and initiate appropriate corrective action. The commenter claims that, during the period between LCO initiation and uncomfortable vibration, there is no structural concern. The commenter adds that extensive flight tests have been conducted by the manufacturer, with representative backlash configurations combined with low hinge moment, and no adverse effect on handling qualities was found. The commenter considers the actions included in existing tasks in the aircraft maintenance manual (AMM) and service bulletins to be sufficient to address any possible LCO phenomenon. In addition, the commenter does not consider that there would be any benefit from imposing corrective action on an airplane with no vibration reported.

The FAA does not concur with the request to withdraw the proposed AD. The FAA has determined that the A320 elevator LCO, as defined by Airbus, is actually an aeroelastic stability problem (i.e., self-excited and not damped with time), which, if not addressed, could result in reduced structural integrity and reduced controllability of the airplane. The FAA is aware of all of the analytical and experimental investigations conducted by Airbus that have shown that LCO is caused by a combination of low hinge moment and elevator freeplay. The FAA is also aware that the amplitude of the vibration increases with freeplay and airspeed. The FAA disagrees with the Airbus contention that the vibration will be felt by the flight crew, who can initiate the appropriate corrective action. The FAA notes that the modification of the elevator neutral setting would tend to

mask the presence of freeplay and associated vibration, and make the freeplay checks even more critical. The FAA also disagrees with the Airbus contention that there would be no benefit from imposing these actions on airplanes that have not had vibration problems. To address potential LCO events, Airbus has revised the AMM to reduce the allowable freeplay limits, and issued service bulletins to recommend installation of improved spherical bearings to reduce the wear rate, and modification of the elevator neutral setting to ensure that elevators have sufficient hinge moment loading under most flight conditions. The FAA agrees with these recommendations but considers that these actions, except as noted below, must be mandated to ensure the continued safe operation of the fleet, by reducing the likelihood of LCO events and ensuring that the amplitude of any LCO event that does occur is controlled to a level that will not result in reduced structural integrity of the airplane.

The FAA notes that this LCO phenomenon is not unique to Airbus airplanes; the actions required by this AD are consistent with actions taken on other airplanes. The FAA considers this final rule necessary to adequately address the identified unsafe condition.

Request To Remove Requirement To Replace Elevator Servo Controls

One commenter (the manufacturer) considers that the effect of replacing the elevator servo controls would merely improve the wear resistance of the servo control spherical bearings, and would not cure the root cause of the LCO phenomenon. The commenter asserts that mandating the servo control replacement would place an unnecessary financial burden on airlines. (The commenter subsequently clarified this comment as a request to remove this requirement from the proposed AD.)

The FAA concurs. The FAA has determined that replacing the servo controls with new improved controls, as proposed, would provide improved wear resistance but would not prevent wear from occurring. Therefore, the FAA has determined that mandatory replacement is not necessary. Paragraph (c) of the proposed AD has been removed from this final rule. The freeplay checks and rigging change required by this AD will adequately address the identified unsafe condition.

Request To Revise Unsafe Condition

One commenter (an operator) requests that the AD be revised to reflect the position that the identified unsafe condition is instead more a matter of passenger inconvenience. The operator has revised its airplane flight manual (AFM) to include a ''Vibration Section,'' which explains vibration types, methods of identifying vibrations, and specific reporting procedures.

The FAA does not concur. The FAA considers the LCO to be unsafe for the reasons identified in response to the previous comment. No change to the final rule is necessary in this regard.

Request To Extend Compliance Time of the Inspection

Two commenters request that the proposed AD be revised to extend the compliance time for the freeplay inspection. One commenter (an operator) requests that the compliance time be extended from 18 to 18.5 months to correspond to its ''L'' check. This commenter states that the inspection at 18.5-month intervals has proven to be effective at detecting deterioration before elevator-induced vibration is reported. Another commenter (also an operator) reports that, based on its experience, it takes significantly longer than 18 months for the Airbus elevator system components to degrade to a level at which the trailing edge freeplay would fail the test. The commenter suggests that 36 months is a more appropriate inspection interval.

The FAA does not concur with the requests to extend the inspection interval. The FAA has determined that 18 months is the maximum amount of time allowable for these airplanes to continue to safely operate between inspections. The FAA finds that the 18-month compliance time is consistent with the maintenance schedules of most operators. Further, the experience of a couple operators is not sufficient to indicate that the interval should be increased. In the absence of data to justify a longer interval, the FAA finds no reason to deviate from the 18-month interval, as proposed, to accommodate the special maintenance schedules of one operator. No change to the final rule is necessary in this regard.

Request To Extend Compliance Time for Replacement

One commenter (an operator) requests that the proposed AD be revised to extend the compliance time from 18 to 36 months to replace the elevator servo controls. The commenter states that the vendor turnaround time for nonroutine repair of the servo is 26 days, which does not support a servo replacement for its fleet within 18 months, and suggests 36 months for the compliance time for the servo replacement.

As stated previously, the proposed requirement to replace the elevator servo controls has been removed from this final rule. Therefore, no change to the final rule is necessary regarding this comment.

Request To Provide Credit for Actions Completed

One commenter (an operator) states that upgrading the elevator servo controls, uprigging the elevators, and accomplishing a trailing edge play check have been completed on nearly all its airplanes, and asserts that no value would be added by repeating the actions.

The FAA infers that the operator requests the addition of specific language to provide credit for prior accomplishment of those actions. The FAA notes that operators are given credit for work previously performed by means of the phrase in the ''Compliance'' section of the AD that states, ''Required as indicated, unless accomplished previously.'' Therefore, for this AD, if the modification has been accomplished prior to the effective date of the AD, this AD does not require that the action be repeated. No change to the final rule is necessary in this regard.

Request To Revise Cost Estimates

Two commenters request that the proposed AD be revised to indicate that required parts for elevator servo control replacement are not free of charge. One commenter (the manufacturer) notes that the elevator servo bearing replacement is free only on an attrition basis, and not to accommodate the required replacement on all affected airplanes. Another commenter (an operator) notes that removal and upgrade of the elevator servo controls resulted in nonroutine maintenance, costing in excess of $16,666 per airplane.

As stated previously, the proposed requirement to replace the elevator servo controls has been removed from this final rule. Therefore, no change to the final rule is necessary regarding this comment.

Request To Allow Alternative Tooling

Two commenters request that paragraph (a) of the proposed AD be revised to allow the use of ''equivalent tooling'' to perform the inspection for excessive elevator freeplay. One commenter (an operator) states that the proposed AD could be interpreted as requiring the use of the tooling identified in the AMM. The commenter contends that applying this interpretation would preclude credit for previous freeplay checks performed

with the alternative tooling, and that the AD would therefore require all of the operator's airplanes to be inspected within three months. The commenter asserts that use of a calibrated spring scale to apply force along with a pointer affixed to the trailing edge to measure the freeplay provides results equivalent to those provided by the AMM-specified tooling.

The commenter has correctly interpreted the AD as requiring the tooling specified in the AMM. The FAA does not concur with the request to revise the final rule to allow alternative tooling to accomplish the inspection. The commenter did not provide any data regarding this alternative tooling to substantiate that the alternative tooling would provide results equivalent to those intended by this AD. However, under the provisions of paragraph (d) of the final rule, the FAA may approve requests for alternative methods of compliance if data are submitted to substantiate that the use of such alternative tooling would provide equivalent results. No change to the final rule is necessary in this regard.

Request To Allow Alternative Materials

One commenter (an operator) requests that the proposed AD be revised to allow use of 535K001/930K016A primer instead of Mastinox 6856K primer for accomplishment of the elevator servo control replacement. The commenter reports that 535K001/930K016A primer was substituted for Mastinox 6856K primer during the modification because of environmental concerns.

As stated previously, the proposed requirement to replace the elevator servo controls has been removed from this final rule. Therefore, no change to the final rule is necessary regarding this comment.

Request To Refer to Future Revision of CMM

This same commenter requests that the proposed AD be revised to indicate a reference to a future revision of the Lucus CMM. Lucus has advised the commenter that CMM 34–52 misidentified the primer as ''Mastinox 5866K'' primer, which will be corrected to ''Mastinox 6856K'' in the next CMM revision.

As stated previously, the proposed requirement to replace the elevator servo controls has been removed from this final rule. Therefore, no change to the final rule is necessary regarding this comment.

Request To Allow Previous Versions of Service Bulletin

One commenter (an operator) requests that the proposed AD be revised to allow compliance with the modification requirement in accordance with Airbus Service Bulletin A320–27–1114, Revision 01, dated April 11, 1997; Revision 02, dated October 13, 1998; and Revision 03, dated December 3, 1998. Based on experience with this type of vibration, the commenter reports that the elevator neutral setting modification has already been accomplished on numerous airplanes, in accordance with Revisions 01, 02, and 03 of the service bulletin. The commenter adds that Revisions 02, 03, and 04 all state: ''No additional work required for previously accomplished aircraft.''

The FAA partially concurs with the request. (Although the commenter refers to ''item 'C' of the Replacement section,'' the FAA infers that the commenter intended to refer to the ''Modification'' requirement, which was paragraph (d) in the proposed AD.) The FAA agrees that airplanes modified in accordance with Revision 01, 02, or 03 should not be required to repeat the modification in accordance with Revision 04. However, the FAA notes that, after the effective date of the AD, only Revision 04 may be used to ensure that the most accurate information is being followed. This final rule has been revised to include new Note 2, which provides credit for the modification in accordance with Revisions 01, 02, and 03 of the service bulletin, if accomplished prior to the effective date of this AD.

Request To Allow Future Service Bulletin Revision

One commenter requests that the proposed AD be revised to specify a future revision to Airbus Service Bulletin A320–27–1114 (which was cited at Revision 04 as the appropriate source of service information for accomplishment of the modification specified by paragraph (d) of the proposed AD). The commenter notes that Airbus has advised that an upcoming revision of the service bulletin will include additional airplanes not included in Revision 04.

The FAA does not concur. Referring to documents that do not exist at the time the AD is published violates Office of the Federal Register (OFR) regulations regarding approval of materials ''incorporated by reference'' in rules. These OFR regulations require that either the service document be submitted for approval by the OFR as ''referenced'' material, in which case it may be simply called out in the text of an AD, or the service document contents be published as part of the actual AD language. An AD may reference only the specific service document that was submitted and approved by the OFR for ''incorporation by reference.'' In order for operators to use later revisions of the referenced document (issued after the publication of the AD), either the FAA must revise the AD to reference the specific later revisions, or operators must request the approval of their use as an alternative method of compliance (under the provisions of paragraph (d) of this AD). The FAA may consider additional rulemaking if it is determined that additional airplanes must be modified.

Request To Revise Repair Requirements

One commenter (an operator) requests that paragraph (b) of the proposed AD be revised to require that repair be accomplished ''as necessary,'' rather than in accordance with specific AMM task numbers. The commenter notes that those AMM tasks address only the servo control and the elevator, not the rod end bearings. The commenter reports that, for almost every check that revealed freeplay outside the AMM limits, it was necessary to replace the rod end bearings of the servo control to correct the deterioration.

The FAA partially concurs. The FAA notes that repair of rod end bearings is addressed under the AMM procedure referenced in the AD. However, the FAA agrees that the specific repair task number is not included in the AMM procedure. Therefore, paragraph (b) of the final rule has been revised to remove specific AMM task references and clarify that the repair must be accomplished in accordance with the AMM to bring freeplay within AMM-specified limits.

Conclusion

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

Cost Impact

Approximately 352 airplanes of U.S. registry will be affected by this proposed AD.

Inspecting to detect elevator freeplay will take approximately 2 work hours, at an average labor rate of $60 per work

hour. Based on these figures, the cost impact of the initial inspection required by this AD on U.S. operators is estimated to be $42,240, or $120 per airplane.

Approximately 112 airplanes will require adjustment of the elevator neutral setting, which will take approximately 12 work hours, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the required adjustment on U.S. operators is estimated to be $80,640, or $720 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–8177 (57 FR 11137, April 1, 1992); and by adding a new airworthiness directive (AD), amendment 39–12377, to read as follows:

2001–16–09 Airbus Industrie: Amendment 39–12377. Docket 2000–NM–342–AD. Supersedes AD 92–04–06, Amendment 39–8177.

Applicability: All Model A319, A320, and A321 series airplanes; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent excessive vibration of the elevators, which could result in reduced structural integrity and reduced controllability of the airplane, accomplish the following:

Inspection

(a) Within 18 months from the last inspection for excessive freeplay or within 3 months after the effective date of this AD, whichever occurs later: Inspect the elevators for excessive freeplay, using a load application tool and a spring scale assembly, in accordance with Airbus A319/A320 Aircraft Maintenance Manual (AMM) Task 27–34–00–200–001, including all changes through August 1, 2000. Thereafter, repeat the inspection at intervals not to exceed 18 months.

Repair

(b) If any inspection required by paragraph (a) of this AD indicates that the freeplay in the elevator exceeds 7 millimeters: Prior to further flight, repair the elevator or servo controls in accordance with the Airbus A319/A320 Aircraft Maintenance Manual, including all changes through August 1, 2000, to bring elevator freeplay within the limits specified by the AMM.

Modification

(c) For the airplanes listed in Airbus Service Bulletin A320–27–1114, Revision 04, dated December 7, 1999: Within 18 months after the effective date of this AD, shift the elevator neutral setting to minus 0.5 degree, nose-up, in accordance with Airbus Service Bulletin A320–27–1114, Revision 04, dated December 7, 1999.

Note 2: Accomplishment prior to the effective date of this AD of the modification in accordance with Airbus Service Bulletin A320–27–1114, dated December 12, 1996; Revision 1, dated April 11, 1997; Revision 2, dated October 13, 1998; or Revision 3, dated December 3, 1998; is acceptable for compliance with the requirements of paragraph (c) of this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

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

Incorporation by Reference

(f) The modification shall be done in accordance with Airbus Service Bulletin A320–27–1114, Revision 04, dated December 7, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(g) This amendment becomes effective on September 24, 2001.

Issued in Renton, Washington, on August 10, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20700 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–236–AD; Amendment 39–12393; AD 2001–17–02]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, and –800 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 737–600, –700, and –800 series airplanes. This action requires repetitive inspections for corrosion or cracking of the keel beam splices, and corrective action, if necessary. This action also provides an optional terminating action for the repetitive inspections. This action is necessary to find and fix corrosion or cracking of the keel beam splices, which could result in failure of the keel beam and consequent failure of the forward fuselage of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective September 4, 2001.

Comments for inclusion in the Rules Docket must be received on or before October 19, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–236–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-iarcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2001–NM–236–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

Information related to this AD may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: James Blilie, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2131; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: The FAA has received a report that severe corrosion was found on a keel beam splice on two Boeing Model 737–700 series airplanes. At the time the severe corrosion was found, the airplanes had been in service for approximately 22 months since date of manufacture. This corrosion has been attributed to the material of the keel beam splice plates that were installed during production of certain Boeing Model 737–600, –700, and –800 series airplanes. The material, 7150–T6511, is known to be highly susceptible to corrosion. Such corrosion, if not found and fixed, could cause cracking of the keel beam splices, which in turn could lead to rapid degradation of the strength of the keel beam splices, and result in failure of the keel beam and consequent failure of the forward fuselage of the airplane.

This unsafe condition may exist or develop on Model 737–600 and –700 series airplanes up to and including line number 908; and on Model 737–800 series airplanes up to and including line number 455. The keel beam splices on airplanes after those line numbers are made of a more corrosion-resistant material.

Other Relevant Rulemaking

On November 5, 1990, we issued AD 90–25–01, amendment 39–6789 (55 FR 49263, November 27, 1990). That AD applies to all Boeing Model 737 series airplanes and requires implementation of a corrosion prevention and control program (CPCP) specified in Boeing Document Number D6–38528 ''Aging Airplane CPCP, Model 737,'' Revision A, dated July 28, 1989.

The airplanes subject to this new AD are also subject to AD 90–25–01. However, we have previously approved an alternative method of compliance (AMOC) to paragraph (a) of that AD for Boeing Model 737 ''Next Generation'' airplanes (which includes Model 737–600, –700, and –800 series airplanes). This AMOC allows certain inspection thresholds and repetitive intervals listed in Section 8 (''Structural Maintenance Program'') of Boeing Document Number D626A001, dated June 2000 (the ''Maintenance Planning Document'' (MPD) for the Boeing 737 Next Generation airplanes), to be used as an alternative to the thresholds and intervals listed in Boeing Document Number D6–38528, Revision A.

FAA's Determination

We have determined that existing inspections of the keel beam splices included in the CPCP required by the existing AD and in Boeing Document Number D626A001 are not sufficient to ensure that the splices are inspected for corrosion and cracking in a timely manner. This determination is based on the following information:

- Task Number 53–210–00 of Boeing Document Number D626A001, Section 8, dated June 2001, includes repetitive general visual inspections for any discrepancy of the keel beam under the wing-to-body fairing, including the keel beam splice (among other areas). We find that the procedures involved in this inspection are sufficient to ensure that corrosion and cracking of the keel beam splices are found. However, the compliance time for this inspection is 12 years since the airplane's date of manufacture or 36,000 total flight cycles, whichever occurs first, and the repetitive interval is 8 years or 24,000 flight cycles, whichever occurs first. We have determined that the compliance threshold is not early enough and the repetitive interval is too long to ensure that corrosion and cracking of the keel beam splices is found and fixed in a timely manner. (As stated above, severe corrosion of the keel beam splice plates has been found on two Model 737–700 series airplanes within 22 months after the date of manufacture of those airplanes.)
- Task 53–828–00 of Boeing Document Number D626A001, Section 7 (''Zonal Inspection Program''), dated June 2001, contains instructions for an optional general visual inspection for discrepancies in a specific area aft of the keel beam at a suggested repetitive interval of 18 months. However, the procedures do not specifically state that the keel beam splices should be inspected.

Determination of Compliance Time

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, the FAA and representatives of the airplane manufacturer met on July 23 and 25, 2001. (Records of these meetings are available in the Rules Docket for examination by interested persons.) The purpose of these meetings was to allow the manufacturer to provide revised engineering data that could potentially affect the compliance time for the actions required by this AD. Although the manufacturer concurs with our determination that the corrosion

addressed by this AD represents a safety concern, it asserts that the compliance times could be increased over the times we planned to require for the actions in this AD.

The revised data presented primarily consisted of a finite-element analysis (FEA) of the wing and fuselage of the Boeing Model 737 ''Next Generation'' airplanes. The FEA included results of a ''splice plates intact'' model, and an analysis of the model with the keel beam chords rendered ineffective (due to corroded or cracked splice plates) at the body station (BS) 540 location. The manufacturer asserted that the FEA was necessary to properly analyze this area because this area, the lower wing-to-fuselage connection, is highly complex and redundant.

The manufacturer asserted that the buttock line 41 fuel beam and the under-wing longeron would be adequate to react limit load in the case of failure of the keel beam chord splices at BS 540. (Limit load is defined as the highest application of load that is expected to occur in service.) Based on these data, the manufacturer suggested that an 18-month repetitive inspection interval, similar to the MPD inspection of an adjacent area which was described previously, would provide an adequate level of safety.

We have reviewed the revised data provided by the manufacturer and concur that the area is structurally very complex and difficult to analyze, due to the structural interactions of the fuselage and wing. We accept that the alternate load paths shown by the manufacturer's analysis are adequate to react limit load in the event of failure of the keel beam splices at BS 540. However, the fatigue life of the alternate load paths is unknown and is expected to be reduced due to the significant increase in loads.

Given the level of risk, we conclude that urgent airworthiness action continues to be necessary and requires the immediate adoption of this AD without notice and opportunity for prior public comment. However, we have determined that the manufacturer's analysis allows for an increase in the initial inspection threshold and repetitive inspection interval over what we planned to require, as well as an increase in the planned grace period (for airplanes over the initial inspection threshold).

The initial reports of severe corrosion were received in July 2000, on airplanes with line numbers 73 and 90. As described previously, at that time, these airplanes had been in service for approximately 22 months. It was not until May 2001, that we determined the actual extent of the corrosion of the splice plate. As a result, it is possible that there are approximately 400 airplanes at present that are at two years or more since date of manufacture, with some airplanes being as old as 4 years since date of manufacture. Inspection of these airplanes may reveal corrosion considerably in excess of the severe corrosion observed on line numbers 73 and 90.

We originally intended to set a compliance threshold of 12 months since date of manufacture for the initial inspection, with a repetitive inspection interval of 12 months. We intended to allow a grace period of 30 days after the effective date of this AD for airplanes older than 12 months since date of manufacture. As discussed above, due to the revised data provided by the manufacturer, we have determined that the following changes to the compliance times for this AD will provide an acceptable level of safety:

- For airplanes at less than 18 months since date of manufacture as of the effective date of this AD, extension of the initial inspection threshold to the later of 18 months since date of manufacture or 90 days after the effective date of this AD.
- For airplanes at 18 months or more since date of manufacture as of the effective date of this AD, extension of the initial inspection threshold to the later of 24 months since date of manufacture or 30 days after the effective date of this AD.
- For all airplanes, extension of the repetitive inspection interval to 18 months.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design, this AD is being issued to find and fix corrosion or cracking of the keel beam splices, which could lead to rapid degradation of the strength of the keel beam splices, and result in failure of the keel beam and consequent failure of the forward fuselage of the airplane. This AD requires repetitive detailed visual inspections for corrosion or cracking of the keel beam splices, and repair or replacement of splice plates and bolts with new, improved parts, if necessary. This action also provides an optional terminating action for the repetitive inspections.

Interim Action

This is considered to be interim action. We are currently considering requiring the replacement of existing splice plates and bolts with new, improved parts, which is included in this AD as an optional terminating action that terminates the repetitive inspections required by this AD action. However, the planned compliance time for the replacement is sufficiently long so that notice and opportunity for prior public comment will be practicable.

Difference Between This AD and Service Document

Task Number 53–210–00 of Boeing Document Number D626A001 describes a general visual inspection for discrepancies of the keel beam under the wing-to-body fairing, including the keel beam splice. However, we have determined that it is necessary for this AD to require a detailed visual inspection for corrosion or cracking of the keel beam splice only.

Determination of Rule's Effective Date

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

Comments Invited

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

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic,

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2001–NM–236–AD.'' The postcard will be date-stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2001–17–02 Boeing: Amendment 39–12393. Docket 2001–NM–236–AD.

Applicability: Model 737–600 and –700 series airplanes, line numbers 1 through 908 inclusive; and Model 737–800 series airplanes, line numbers 1 through 455 inclusive; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent rapid degradation of the strength of the keel beam splices, which could result in failure of the keel beam and consequent failure of the forward fuselage, accomplish the following:

Repetitive Inspections

(a) Perform a detailed visual inspection for corrosion or cracking of the keel beam splices, according to Boeing Document D626A001 (the ''Maintenance Planning Data Document''), Task Number 53–210–00, dated June 2001. Do the initial inspection at the compliance time specified in paragraph (a)(1) or (a)(2) of this AD; as applicable; and repeat the inspection at least every 18 months, until the requirements of paragraph (c) of this AD have been done.

(1) For airplanes at less than 18 months since date of manufacture as of the effective date of this AD: Inspect within 18 months since date of manufacture, or 90 days after the effective date of this AD, whichever comes later.

(2) For airplanes at 18 months or more since date of manufacture as of the effective date of this AD: Inspect within 24 months since date of manufacture, or 30 days after the effective date of this AD, whichever comes later.

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

Repair or Replacement

(b) If any corrosion or cracking is found during the inspection required by paragraph (a) of this AD, before further flight, repair or replace the splice plates and bolts with new, improved parts, according to a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative (DER) who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

Optional Terminating Action

(c) Replacement of splice plates and bolts with new, improved parts not made from 7150–T6511 material; according to a method approved by the Manager, Seattle ACO, or per data meeting the type certification basis of the airplane approved by a Boeing Company DER who has been authorized by the Manager, Seattle ACO, to make such findings; constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

Spares

(d) As of the effective date of this AD, no person shall install a splice plate made from 7150–T6511 material, or with part number 144A7155–1 or 143A7812–1, on any airplane.

Alternative Methods of Compliance

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

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

Effective Date

(g) This amendment becomes effective on September 4, 2001.

Issued in Renton, Washington, on August 13, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20807 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–01–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 602

OMB Control Numbers Under the Paperwork Reduction Act

CFR Correction

In Title 26 of the Code of Federal Regulations, parts 600 to end, revised as of April 1, 2001, on page 155, § 602.101 is amended by removing the entry for ''31.6051–1T'' following the entry for ''1.6050S–2T''.

[FR Doc. 01–55516 Filed 8–17–01; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 40, 44, 46, 70, and 290

[T.D. ATF–464]

RIN 1512–AC47

Exportation of Tobacco Products and Cigarette Papers and Tubes, Without Payment of Tax, or With Drawback of Tax; Recodification of Regulations (2001R–58P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

ACTION: Final rule (Treasury decision).

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) is recodifying the regulations pertaining to the exportation of tobacco products and cigarette papers and tubes, without payment of tax, or with drawback of tax. The purpose of this recodification is to reissue the regulations in part 290 of title 27 of the Code of Federal Regulations (27 CFR part 290) as 27 CFR part 44. This change improves the organization of title 27.

DATES: This rule is effective on August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Lisa M. Gesser, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue NW, Washington, DC 20226, (202–927–9347) or e-mail at *LMGesser@atfhq.atf.treas.gov*.

SUPPLEMENTARY INFORMATION:

Background

As a part of the continuing efforts to reorganize the part numbering system of title 27 CFR, ATF is removing part 290, in its entirety, and is recodifying the regulations as 27 CFR part 44. This change improves the organization of title 27 CFR.

DERIVATION TABLE FOR PART 44

The Requirements of Sec.:	Are derived from Sec.:
Subpart A	
44.1	290.1
44.2	290.2
Subpart B	
44.11	290.11
Subpart Ba	
44.31	290.31
44.32	290.32
44.33	290.33
44.34	290.34
44.35	290.35
44.36	290.36
Subpart C	
44.61	290.61
44.61a	290.61a
44.62	290.62
44.63	290.63
44.64	290.64
44.65	290.65
44.66	290.66
44.67	290.67
44.68	290.68
44.69	290.69
44.70	290.70
44.71	290.71
44.72	290.72
44.73	290.73
Subpart D	
44.81	290.81
44.82	290.82
44.83	290.83
44.84	290.84
44.85	290.85
44.86	290.86
44.87	290.87
44.88	290.88
44.89	290.89
44.90	290.90
44.91	290.91
44.92	290.92
44.93	290.93
Subpart E	
44.101	290.101
44.102	290.102
44.103	290.103
44.104	290.104
44.105	290.105
44.106	290.106
44.107	290.107
44.108	290.108
44.109	290.109
44.110	290.110
44.111	290.111
44.112	290.112

DERIVATION TABLE FOR PART 44—Continued

The Requirements of Sec.:	Are derived from Sec.:
Subpart F	
44.121	290.121
44.122	290.122
44.123	290.123
44.124	290.124
44.125	290.125
44.126	290.126
44.127	290.127
44.128	290.128
44.129	290.129
Subpart G	
44.141	290.141
44.142	290.142
44.143	290.143
44.144	290.144
44.145	290.145
44.146	290.146
44.147	290.147
44.148	290.148
44.149	290.149
44.150	290.150
44.151	290.151
44.152	290.152
44.153	290.153
44.154	290.154
Subpart H	
44.161	290.161
44.162	290.162
Subpart I [Reserved]	
Subpart J	
44.181	290.181
44.182	290.182
44.183	290.183
44.184	290.184
44.185	290.185
44.186	290.186
44.187	290.187
44.188	290.188
44.189	290.189
44.190	290.190
44.191	290.191
44.192	290.192
44.193	290.193
44.194	290.194
44.195	290.195
44.196	290.196
44.196a	290.196a
44.197	290.197
44.198	290.198
44.199	290.199
44.200	290.200
44.201	290.201
44.202	290.202
44.203	290.203
44.204	290.204
44.205	290.205
44.206	290.206
44.207	290.207
44.207a	290.207a
44.208	290.208
44.209	290.209

DERIVATION TABLE FOR PART 44—Continued

The Requirements of Sec.:	Are derived from Sec.:
44.210	290.210
44.211	290.211
44.212	290.212
44.213	290.213
Subpart K	
44.221	290.221
44.222	290.222
44.223	290.223
44.224	290.224
44.225	290.225
44.226	290.226
44.227	290.227
44.228	290.228
44.229	290.229
44.230	290.230
44.231	290.231
44.232	290.232
Subpart L	
44.241	290.241
44.242	290.242
44.243	290.243
44.244	290.244
44.245	290.245
44.246	290.246
44.247	290.247
44.248	290.248
44.249	290.249
44.250	290.250
44.251	290.251
44.252	290.252
44.253	290.253
44.254	290.254
44.255	290.255
44.256	290.256
44.257	290.257
44.258	290.258
44.259	290.259
44.260	290.260
44.261	290.261
44.262	290.262
44.263	290.263
44.264	290.264
44.264a	290.264a
44.265	290.265
44.266	290.266
44.267	290.267

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule under the Administrative Procedure Act (5 U.S.C. 553), the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. We sent a copy of this final rule to the Chief Counsel for Advocacy of the Small Business Administration in accordance with 26 U.S.C. 7805(f). No comments were received.

Executive Order 12866

This final rule is not a significant regulatory action as defined in Executive Order 12866. Accordingly, this final rule is not subject to the analysis required by this Executive Order.

Administrative Procedure Act

Because this final rule merely makes technical amendments to improve the clarity and organization of the regulations, it is unnecessary to issue this final rule with notice and public procedure under 5 U.S.C. 553(b). Similarly, because this final rule makes no substantive changes and is merely the recodification of existing regulations, good cause is found that it is unnecessary to subject this final rule to the effective date limitation of 5 U.S.C. 553(d).

Drafting Information

The principal author of this document is Lisa M. Gesser, Regulations Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects

27 CFR Part 40

Cigars and cigarettes, Claims, Electronic funds transfers, Excise taxes, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco.

27 CFR Part 44

Aircraft, Armed forces, Cigars and cigarettes, Claims, Customs duties and inspection, Excise taxes, Exports, Foreign trade zones, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Vessels, Warehouses.

27 CFR Part 46

Cigars and cigarettes, Claims, Excise taxes, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Surety bonds, Tobacco.

27 CFR Part 70

Administrative practice and procedure, Claims, Excise taxes, Freedom of information, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surety bonds.

27 CFR Part 290

Aircraft, Armed forces, Cigars and cigarettes, Claims, Customs duties and inspection, Excise taxes, Exports, Foreign trade zones, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Vessels, Warehouses.

Authority and Issuance

ATF is amending title 27 of the Code of Federal Regulations, chapter 1, as follows:

PART 40—MANUFACTURE OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

Paragraph 1. The authority citation for 27 CFR part 40 continues to read as follows:

Authority: 26 U.S.C. 5142, 5143, 5146, 5701, 5703–5705, 5711–5713, 5721–5723, 5731, 5741, 5751, 5753, 5761–5763, 6061, 6065, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6404, 6423, 6676, 6806, 7011, 7212, 7325, 7342, 7502, 7503, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

§§ 40.44, 40.233, 40.235, 40.451, and 40.454 [Amended]

Par. 2. Remove the reference to ''part 290,'' each place it appears, and add, in substitution, a reference to ''part 44'' in the following places:

a. Section 40.44;
b. Section 40.233;
c. Section 40.235;
d. Section 40.451; and
e. Section 40.454.

PART 46—MISCELLANEOUS REGULATIONS RELATING TO TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

Par. 3. The authority citation for 27 CFR part 46 continues to read as follows:

Authority: 18 U.S.C. 2341–2346, 26 U.S.C. 5708, 5751, 5761–5763, 6001, 6601, 6621, 6622, 7212, 7342, 7602, 7606, 7805, 44 U.S.C. 3504(h), 49 U.S.C. 782, unless otherwise noted.

Par. 4. Under the paragraph entitled ''CROSS REFERENCE,'' remove the reference to ''part 290'' and add, in its place, a reference to ''part 44.''

§ 46.255 [Amended]

Par. 5. Amend paragraphs (b) and (c) in § 46.255 by removing the reference to ''part 290'' and adding, in its place, a reference to ''part 44.''

PART 70—PROCEDURE AND ADMINISTRATION

Par. 6. The authority citation for 27 CFR part 70 continues to read as follows:

Authority: 5 U.S.C. 301 and 552; 26 U.S.C. 4181, 4182, 5146, 5203, 5207, 5275, 5367,

5415, 5504, 5555, 5684(a), 5741, 5761(b), 5802, 6020, 6021, 6064, 6102, 6155, 6159, 6201, 6203, 6204, 6301, 6303, 6311, 6313, 6314, 6321, 6323, 6325, 6326, 6331–6343, 6401–6404, 6407, 6416, 6423, 6501–6503, 6511, 6513, 6514, 6532, 6601, 6602, 6611, 6621, 6622, 6651, 6653, 6656–6658, 6665, 6671, 6672, 6701, 6723, 6801, 6862, 6863, 6901, 7011, 7101, 7102, 7121, 7122, 7207, 7209, 7214, 7304, 7401, 7403, 7406, 7423, 7424, 7425, 7426, 7429, 7430, 7432, 7502, 7503, 7505, 7506, 7513, 7601–7606, 7608–7610, 7622, 7623, 7653, 7805.

§§ 70.431, 70.432, and 70.462 [Amended]

Par. 7. Remove the reference to ''part 290'' and add, in its place, a reference to ''part 44'' in the following places:

a. Section 70.431(b)(5);

b. Section 70.432(d); and

c. Section 70.462.

PART 290—EXPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, OR WITH DRAWBACK OF TAX

Par. 8. The authority citation for 27 CFR part 290 continues to read as follows:

Authority: 26 U.S.C. 5142, 5143, 5146, 5701, 5703–5705, 5711–5713, 5721–5723, 5731, 5741, 5751, 5754, 6061, 6065, 6151, 6402, 6404, 6806, 7011, 7212, 7342, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

PART 290—[REDESIGNATED AS PART 44]

Par. 9. Transfer 27 CFR part 290 from subchapter M to subchapter B and redesignate as 27 CFR part 44.

PART 44—EXPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, OR WITH DRAWBACK OF TAX

Par. 10. The authority citation for the newly redesignated 27 CFR part 44 continues to read as follows:

Authority: 26 U.S.C. 5142, 5143, 5146, 5701, 5703–5705, 5711–5713, 5721–5723, 5731, 5741, 5751, 5754, 6061, 6065, 6151, 6402, 6404, 6806, 7011, 7212, 7342, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

Par. 11. Amend the newly redesignated part 44 as follows:

AMENDMENT TABLE FOR PART 44

Amend section:	By removing the reference to:	And adding in its place:
44.31(a)	290.32	44.32
44.32(b)	290.31	44.31
44.33(b)(3)	290.34	44.34
44.33(c)(2)	290.142	44.142
44.35(a)	290.33(c)(2)	44.33(c)(2)

AMENDMENT TABLE FOR PART 44—Continued

Amend section:	By removing the reference to:	And adding in its place:
44.62	290.207	44.207
44.62	290.263	44.263
44.63	290.62	44.62
44.67(a)	290.66	44.66
44.82	290.93	44.93
44.83	290.82	44.82
44.84	290.82	44.82
44.85	290.82	44.82
44.86	290.88	44.88
44.87	290.83	44.83
44.88	290.82	44.82
44.88	290.86	44.86
44.93	290.142	44.142
44.102	290.85	44.85
44.104	290.144	44.144
44.104	290.88	44.88
44.104	290.126	44.126
44.105	290.88	44.88
44.105	290.146	44.146
44.105	290.151	44.151
44.105	290.144	44.144
44.107	290.146	44.146
44.107	290.151	44.151
44.108	290.126	44.126
44.110	290.146	44.146
44.110	290.151	44.151
44.111	290.88	44.88
44.112	290.111	44.111
44.112	290.126	44.126
44.112	290.89	44.89
44.123	290.86	44.86
44.123	290.124	44.124
44.123	290.125	44.125
44.124	290.123	44.123
44.144	290.93	44.93
44.161	290.146	44.146
44.161	290.151	44.151
44.200	290.147	44.147
44.205(d)	290.72	44.72
44.222	290.224	44.224
44.223	290.121	44.121
44.223	290.122	44.122
44.224	290.222	44.222
44.225	290.224	44.224
44.226	290.224	44.224
44.230	290.228	44.228
44.243	290.121	44.121
44.243	290.122	44.122
44.244	290.243	44.243
44.244	290.245	44.245
44.244	290.246	44.246
44.245	290.244	44.244
44.264	290.200	44.200
44.266	290.201	44.201

Signed: May 24, 2001.

Bradley A. Buckles,

Director.

Approved: June 11, 2001.

Timothy E. Skud,

Acting Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 01–20906 Filed 8–17–01; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 946

[VA–119–FOR]

Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: OSM is approving, with two exceptions, an amendment to the Virginia permanent regulatory program (hereinafter referred to as the Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment consists of changes to the Virginia Surface Mining Reclamation Regulations concerning letters of credit. The amendment is intended to revise the Virginia program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Mr. Robert A. Penn, Director, Big Stone Gap Field Office, Office of Surface Mining Reclamation and Enforcement, 1941 Neeley Road, Suite 201, Compartment 116, Big Stone Gap, Virginia 24219, Telephone: (540) 523–4303.

SUPPLEMENTARY INFORMATION:

I. Background on the Virginia Program.
II. Submission of the Amendment.
III. Director's Findings.
IV. Summary and Disposition of Comments.
V. Director's Decision.
VI. Procedural Determinations.

I. Background on the Virginia Program

Section 503(a) of SMCRA permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act. * * *'' and ''rules and regulations consistent with regulations issued by the Secretary'' pursuant to SMCRA. 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Virginia program on December 15, 1981. You can find background information on the Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of

approval in the December 15, 1981, **Federal Register** (46 FR 61085–61115). You can find later actions on conditions of approval and program amendments at 30 CFR 946.11, 946.12, 946.13, 946.15, and 946.16.

II. Submission of the Amendment

By letter dated September 22, 2000 (Administrative Record Number VA–1008) the Virginia Department of Mines, Minerals and Energy (DMME) submitted an amendment to the Virginia program. In its letter, the DMME stated that the program amendment changes the Virginia program rules at 4 VAC 25–130–700.5 and 4 VAC 25–130–800.21 in response to amendments required by OSM in the May 3, 1999, **Federal Register** (64 FR 23542).

On May 3, 1999, OSM approved an amendment to the Virginia program which amended the Virginia Coal Surface Mining Control and Reclamation Act by adding ''letter of credit'' as an acceptable form of collateral bond to satisfy the performance bonding requirements of the Virginia Act. In our approval of the Virginia amendment, we required that the Virginia program regulations be revised to be no less effective than the Federal regulations at 30 CFR 800.5(b), and 30 CFR 800.21(b)(2) concerning letters of credit. We codified this requirement at 30 CFR 946.16(a). The amendment submitted by Virginia is intended to satisfy this required amendment.

We announced receipt of the proposed rulemaking in the October 4, 2000, **Federal Register** (65 FR 59152), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on November 3, 2000. We received three comment letters from Federal agencies. No one requested to speak at a public hearing, so no hearing was held.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendments to the Virginia program. Only the substantive changes submitted by Virginia will be discussed below.

4 VAC 25–130–700.5. Definitions

The definition of ''Collateral bond'' is amended by adding a new paragraph (d) to read as follows.

(d) An irrevocable letter of credit of any bank organized or authorized to transact business in the United States, payable only to the Department at sight prepared in accordance with the Uniform Customs and Practices for Documentary Credits (1993 revision or the UCP revision current at the time of issuance of the letter of credit) International Chamber of Commerce (Publication No. 500).

This new language is substantively identical to the Federal definition of ''Collateral bond'' at 30 CFR 800.5(b)(4), with two exceptions. Virginia uses the phrase ''at sight'' while the Federal rule says ''upon presentation.'' Ballentine's Law Dictionary, 3d ed., defines ''at sight'' to mean ''on presentment; on being shown the instrument.'' Therefore, Virginia's use of the phrase ''at sight'' is no less effective than 30 CFR 800.5(b)(4). The new State language also requires that irrevocable letters of credit be prepared in accordance with the Uniform Customs and Practices for Documentary Credits (1993 revision or the UCP revision current at the time of issuance of the letter of credit) International Chamber of Commerce (Publication No. 500). The Uniform Customs and Practices for Documentary Credits was created by the International Chamber of Commerce and is used in the United States as well as many other countries. The UCP defines the liabilities and responsibilities of banks, the relationship of letters of credits with other documents as well as various other provisions. We find that the incorporation by reference to the 1993 UCP is not inconsistent with the Federal regulations at 30 CFR 800.5(b)(4) and can be approved. However we are not approving the phrase, ''or the UCP revision current at the time of issuance of the letter of credit.'' We are not approving this language because we cannot approve future revisions without reviewing the revisions and understanding their effects on the Virginia program and whether they would render the Virginia program less effective.

4 VAC 25–130–800.21. Collateral bonds

This provision is amended by revising paragraph (a) by adding the phrase ''except for letters of credit'' in the introductory sentence, adding a new paragraph (c), and re-lettering existing paragraph (c) as paragraph (d).

As amended, 4 VAC 25–130–800.21(a) reads as follows.

(a) Collateral bonds, except for letters of credit, shall be subject to the following conditions: The division shall * * *

The counterpart Federal regulations at 30 CFR 800.21(a), concerning collateral bonds, contains this same phrase. We find that the words ''except for letters of credit'' have the same effect in the Virginia program as they do in the counterpart Federal regulations. We find, therefore, that the State amendment does not render the Virginia program less effective than the Federal regulations at 30 CFR 800.21(a) and can be approved.

VAC 25–130–800.21(c) and (d)

These provisions have been amended to read as follows.

(c) Letters of credit shall be subject to the following conditions:

(1) The letter may be issued only by a bank organized or authorized to do business in the United States and must conform to the Uniform Customs and Practice for Documentary Credits (1993 Revision or revision current at the time of issuance of the letter of credit) International Chamber of Commerce (Publication No. 500);

(2) Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the division if not replaced by other suitable bond or letter of credit at least 30 days before its expiration date; and

(3) The letter of credit shall be payable to the Department at sight, in part or in full, upon receipt from the division of a notice of forfeiture issued in accordance with 4 VAC 25–130–800.50.

(d) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the division at the time collateral is offered.

We find that the new language at 4 VAC 25–130–800.21(c) is substantively identical to the counterpart Federal regulations at 30 CFR 800.21(b) concerning collateral bonds, letters of credit, with the following two exceptions. Virginia uses the phrase ''at sight'' while the Federal rule says ''upon demand.'' Virginia's Commercial Code at § 3–108, states that an instrument payable on demand include those payable at sight or on demand. Therefore, Virginia's use of the phrase ''at sight'' is no less effective than the Federal rules. The new State language at 4 VAC 25–130–800.21(c)(1) also provides that letters of credit must conform to the Uniform Customs and Practice for Documentary Credits (1993 Revision or revision current at the time of issuance of the letter of credit) International Chamber of Commerce (Publication No. 500). As previously stated, the UCP defines the liabilities and responsibilities of banks, the relationship of letters of credits with other documents as well as various other provisions. We find that the incorporation by reference to the 1993 UCP is not inconsistent with the Federal regulations at 30 CFR 800.21(b)(1) and can be approved. However we are not approving the phrase, ''or revision current at the time of issuance of the

letter of credit.'' We are not approving this language because we cannot approve future revisions without reviewing the revisions and understanding their effects on the Virginia program and whether they would render the Virginia program less effective.

In addition to our partial approval of the Virginia amendments, we find that the approved provisions fully address the requirements of the required amendment codified at 30 CFR 946.16(a), which can, therefore, be removed.

IV. Summary and Disposition of Comments

Federal Agency Comments

On October 10, 2000, we asked for comments from various Federal agencies which may have an interest in the Virginia amendment (Administrative Record Number VA–1009). We solicited comments in accordance with section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i) of the Federal regulations. Two comment letters were received. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that the Virginia amendment does not impact, nor conflict with any law, policy or regulation enforced by MSHA. The U.S. Department of Agriculture, Natural Resources Conservation Service responded and concurred with the amendments.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(i) and (ii), OSM is required to solicit comments and obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the amendments submitted by Virginia pertain to air or water quality standards. By letter dated October 10, 2000, we requested EPA's comments on the proposed amendment (Administrative Record Number VA–1009).

The EPA responded by letter dated April 11, 2001 (Administrative Record Number VA–1012), and stated that the amendment does not conflict with the Clean Water Act. The EPA provided no other comments.

Public Comments

We solicited public comments on the amendment. We did not receive any public comments.

V. Director's Decision

Based on the findings above, we are approving the amendments to the Virginia program, except as noted below. We are not approving the words, ''or the UCP revision current at the time of issuance of the letter of credit,'' in the definition of ''Collateral bond,'' paragraph (d), at 4 VAC 25–130–700.5; and, we are not approving the words, ''or revision current at the time of issuance of the letter of credit,'' at 4 VAC 25–130–800.21(c)(1). In addition, we are removing the required amendment codified at 30 CFR 946.16(a), which has been satisfied by this amendment.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 946 which codifies decisions concerning the Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of SMCRA and meeting its purposes. Making this regulation effective immediately will expedite that process.

VI. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Since this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have

a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulation.

Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 30, 2001.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 946—VIRGINIA

1. The authority citation for part 946 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 946.12 is amended by revising the section heading and adding new paragraph (c) to read as follows:

§ 946.12 State program provisions and amendments not approved.

* * * * *

(c)(1) We are not approving the words, ''or the UCP revision current at the time of issuance of the letter of credit,'' in the definition of ''Collateral bond,'' paragraph (d), at 4 VAC 25–130–700.5; and

(2) We are not approving the words, ''or revision current at the time of issuance of the letter of credit'' at 4 VAC 25–130–800.21(c)(1).

3. Section 946.15 is amended by adding a new entry to the table in chronological order by ''Date of final publication'' to read as follows:

§ 946.15 Approval of Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
September 22, 2000	[*Insert date of publication in the Federal Register*].	4 VAC 25–130–700.5 (partial approval); 800.21(a), (c)(1) (partial approval), (2) and (3), and (d).

§ 946.16 [Removed]

4. Section 946.16 is removed.

[FR Doc. 01–20903 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 207–0277a; FRL–7026–5]

Revision to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This revision concerns volatile organic compound (VOC) emissions from Phase I gasoline transfer into stationary storage tanks and Phase II gasoline transfer into vehicle fuel tanks. We are approving a local rule that regulates this emission source under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on October 19, 2001 without further notice, unless EPA receives adverse comments by September 19, 2001. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

ADDRESSES: Mail comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

You can inspect a copy of the submitted rule revision and EPA's technical support document (TSD) at our Region IX office during normal business hours. You may also see a copy of the submitted rule revision at the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814

South Coast Air Quality Management District, 21865 East Copley Drive, Diamond Bar, CA 91765

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX; (415) 744–1135.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What Rule Did the State Submit?

Table 1 lists the rule we are approving with the date that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED RULE

Local Agency	Rule #	Rule title	Adopted	Submitted
SCAQMD	461	Gasoline Transfer and Dispensing	04/21/00	07/26/00

On October 4, 2000, this rule submittal was found to meet the completeness criteria in 40 CFR Part 51, Appendix V, which must be met before formal EPA review.

B. Are There Other Versions of this Rule?

We approved a version of Rule 461 into the SIP on October 7, 1996. See 61 FR 52297.

C. What Is the Purpose of the Submitted Rule Revision?

The purpose of the revision to Rule 461 is to revise the rule to include new CARB standards and more frequent reverification testing of vapor recovery equipment.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Rule?

Generally, SIP rules must be enforceable (see section 110(a) of the CAA), must require Reasonably Available Control Technology (RACT) for major sources in nonattainment areas (see sections 182(a)(2)(A) and 182(b)(3)(A)), and must not relax existing requirements (see sections 110(l) and 193). The SCAQMD regulates an extreme ozone nonattainment area. See 40 CFR part 81. Therefore, Rule 461 must fulfill the requirements of RACT.

Guidance and policy documents that we used to define specific enforceability and RACT requirements include the following:

- Portions of the proposed post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044 (November 24, 1987).
- ''*Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations; Clarification to Appendix D of November 24,1987 Federal Register Notice*'' (Blue Book), notice of availability published in the May 25, 1988 **Federal Register**.

Rule 461 was also evaluated against the EPA Draft *Model Rule, Gasoline Dispensing Facility-Stage II Vapor Recovery* (August 17, 1992). In evaluating RACT, EPA also considered information published since the 1992 Draft *Model Rule*, including documents associated with development of CARB's *Enhanced Vapor Recovery Guidelines* (March 23, 2000). EPA, Region IX, has summarized RACT requirements in the EPA Draft *Gasoline Vapor Recovery Guidelines* (April 24, 2000).

B. Does the Rule Meet the Evaluation Criteria?

We believe that this rule is consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. Rule 461 is more stringent than the SIP. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rule

The TSD describes additional rule revisions that do not affect EPA's current action but are recommended for the next time the local agency modifies the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the CAA, EPA is fully approving the submitted rule because we believe it fulfills all relevant requirements. We do not think anyone will object to this, so we are finalizing the approval without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rule. If we receive adverse comments by September 19, 2001, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on October 19, 2001. This will incorporate these rules into the federally-enforceable SIP.

III. Background Information

A. Why Was This Rule Submitted?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. Table 2 lists some of the national milestones leading to the submittal of these local agency VOC rules.

TABLE 2.—OZONE NONATTAINMENT MILESTONES

Date	Event
March 3, 1978	EPA promulgated a list of ozone nonattainment areas under the Clean Air Act as amended in 1977. 43 FR 8964; 40 CFR 81.305.
May 26, 1988	EPA notified Governors that parts of their SIPs were inadequate to attain and maintain the ozone standard and requested that they correct the deficiencies (EPA's SIP-Call). See section 110(a)(2)(H) of the pre-amended CAA.
November 15, 1990	Clean Air Act Amendments of 1990 were enacted. Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q.
May 15, 1991	Section 182(a)(2)(A) requires that ozone nonattainment areas correct deficient RACT rules by this date.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the

Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct in issuing this rule. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 27, 2001.

Jane Diamond,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(280)(i)(A)(*2*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(280) * * *

(i) * * *

(A) * * *

(*2*) Rule 461, adopted on April 21, 2000.

* * * * *

[FR Doc. 01–20780 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD064/122/123–3069a; FRL–7021–3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Administrative Revisions of General Provisions Related to Definitions of Terms and Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Maryland State Implementation Plan (SIP). In this action, EPA is approving revisions which reorganize the structure of the general administrative provisions describing definitions of terms used throughout Maryland's air pollution control regulations, amend the definition of the term ''source,'' and reorganize the provisions governing ambient air quality standards. EPA is approving these revisions to in accordance with the requirements of the Clean Air Act.

DATES: This rule is effective on October 19, 2001 without further notice, unless EPA receives adverse written comment by September 19, 2001. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to Harold A. Frankford, Office of Air Programs, Mail Code 3AP20, U.S. Environmental Protection Agency,

Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; and the Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland, 21224.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford, (215) 814–2108, or by e-mail at *frankford.harold@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On February 6, 1998 and May 14, 2001, the State of Maryland submitted formal revisions to its State Implementation Plan (SIP). These SIP revisions consist of:

(1) Administrative revisions affecting the overall organization of the general definitions section (COMAR 26.11.01.01).

(2) Revisions to COMAR 26.11.01.01B(43), the definition of ''source,'' due to a revision in the organization of the State statute which is cross-referenced in this definition. There are no substantive changes to the wording of any of the definitions subject to this action. On June 12, 2001, Maryland also submitted additional revisions to the chapter governing ambient air quality standards. Maryland provided proof that public hearings were held on the revisions in accordance with the requirements of 40 CFR section 51.102. The State held hearings on January 25 and 26, 1994 with regard to the COMAR rule reorganization, on July 23, 1997 with regard to the revised definition of ''source,'' and on June 14 and 17, 1994 with regard to the reorganized structure of the ambient air quality standards chapter.

II. Summary of SIP Revisions

In the reorganization of COMAR 26.11.01.01, subsection 26.11.01.01A now contains a general purpose statement, while subsection 26.11.01.01B contains all of the general terms which appear throughout COMAR 26.11.XX.XX (Maryland's air pollution control regulations). There are some definitions which are found in subsection 26.11.01.01B, as well as all of the provisions listed in subsection 26.11.01.01C which EPA has never incorporated by reference into 40 CFR Section 52.1070(c). Therefore, EPA is not acting on those provisions in this rulemaking action. The following chart lists the terms for which SIP-approved COMAR citations change as a result of this action:

Definition or term	Current SIP citation (26.11.01.XX)	New SIP citation (26.11.01.XX)
Actual emissions	.01A	.01B(1)
Air pollution	.01A–1	.01B(2)
Allowable emissions	.01A–3	.01B(4)
Capture efficiency	.01A–4	.01B(5)
Certifying individual	.01A–5	.01B(6)
Confined emissions	.01B	.01B(7)
Confined source	.01C	.01B(8)
Continuous emission monitor (CEM)	.01C–1	.01B(9)
Control efficiency	.01C–2	.01B(10)
Control equipment	.01D	.01B(11)
Control officer	.01E	.01B(12)
Department	.01F	.01B(14)
Emissions	.01G	.01B(16)
Fugitive emissions	.01H	.01B(18)
Installation	.01I	.01B(19)
Opacity	.01O	.01B(26)
Operating day	.01O–1	.01B(27)
Oxides of nitrogen (NO_X)	.01O–2	.01B(28)
Particulate matter	.01P	.01B(29)
Particulate matter emissions	.01P–1	.01B(30)
PM10	.01P–2	.01B(31)
PM10 emissions	.01P–3	.01B(32)
Percent seasonal throughput	.01P–4	.01B(33)
Person	.01Q	.01B(34)
Potential to emit	.01Q–1	.01B(35)
Premises	.01Q–2	.01B(36)
Process weight	.01S	.01B(38)
Process weight per hour	.01T	.01B(39)
Reasonably Available Control Technology (RACT)	.01U	.01B(40)
Residual fuel oil	.01U–1	.01B(41)
Secretary	.01V	.01B(42)
Source	.01W	.01B(43)
Stack or chimney	.01X	.01B(44)
Stack Height	.08A(2)	.01B(45)
Standard conditions	.01Y	.01B(46)
Standard industrial classification (SIC) code	.01Y–1	.01B(47)
True vapor pressure (TVP)	.01Z	.01B(48)
Typical ozone season day (TOSD)	.01Z–1	.01B(49)
Unconfined source	.01AA	.01B(50)
Vapor balance line	.01BB	.01B(51)
Vapor pressure	.01CC	.01B(52)

In addition, EPA has recently approved terms already using the revised COMAR citation as part of the Maryland SIP. These terms are:

Definition or term	Current SIP Citation (26.11.01.XX)
Distillate fuel oil	.01B(15)
Fuel-burning equipment	.01B(17)
Modification	.01B(20)
Motor vehicle	.01B(20–1)
New Source Review Source	.01B(24)
Prevention of Significant Deterioration (PSD) Source	.01B(37)
Volatile organic compound (VOC)	.01B(53)

EPA's action does not include the recodification of the following terms which are not historically part of the Maryland SIP: air pollution control equipment, data telemetry, NESHAP source, NSPS source, and odor.

The revised definition of ''source'' found at COMAR 26.11.01.01B(43) consists solely of a revised citation of the Maryland statute [Environment Article, Section 1–101(i)], which is cross-referenced in this term. The SIP-approved cross reference citation is 1–101(h). The revision to ''source'' is necessitated by the insertion of a provision into Section 1–101 of the statute which is unrelated to the statutory definition of ''source.'' There are no substantive changes to this SIP-approved definition.

This rulemaking action does not include EPA's substantive evaluation of the definitions listed in COMAR 26.11.01.01B. These definitions and terms were approved into the Maryland SIP in previous rulemaking actions. EPA is now merely approving the numbering system submitted by the State. EPA's approval of the renumbering system, at this time, does not imply any position with respect to the approvability of the substantive rules. To the extent EPA has issued any SIP calls to the State with respect to the adequacy of any of the rules subject to this recodification, EPA will continue to require the State to correct any such rule deficiencies despite EPA's approval of this recodification.

The revisions to the ambient air quality standards provisions consist of the following changes:

(1) Recodification of the provisions, from COMAR 26.11.03.01 through 26.11.03.07 to COMAR 26.11.04.03 through 26.11.04.09 respectively;

(2) A change in the chapter title to ''Ambient Air Quality Standards;'' and,

(3) The addition of COMAR 26.11.04.02, which states that the chapter contains ''state-adopted national ambient air quality standards'' (which was the title of the former SIP-approved COMAR 26.11.03).

There are no substantive changes either to the wording of this chapter, or to any of the ambient air quality standards described in this chapter.

III. Final Action

EPA is approving the revised citation format of approved SIP provisions found in COMAR 26.11.01.01A and .01B, the revised citation cross-reference found in the definition of ''source'' (COMAR 26.11.01.01B(43)), and revised restructuring of and administrative changes to COMAR 26.11.04.02 through 26.11.04.09. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve this SIP revision if adverse comments are filed. This rule will be effective on October 19, 2001 without further notice unless EPA receives adverse comment by September 19, 2001. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Administrative Requirements

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 Fed. Reg. 28355 (May 22, 2001)). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule; EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under

the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action revising Maryland's general administrative provisions related to certain definitions and terms as well as ambient air quality standards may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: July 20, 2001.

Thomas C. Voltaggio,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart VV—Maryland

2. Section 52.1070 is amended by adding paragraphs (c)(164) and (c)(165) to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

(164) Revisions to the Maryland State Implementation Plan submitted on February 6, 1998 and May 14, 2001 by the Maryland Department of the Environment:

(i) Incorporation by reference.

(A) Letter of May 14, 2001 from the Maryland Department of the Environment transmitting revisions to COMAR 26.11.01.01 (General Administrative Definitions).

(B) The following revised provisions of COMAR 26.11.01.01, effective June 20, 1994:

(*1*) 26.11.01.01A.

(*2*) 26.11.01.01B(1) through .01B(20), except for .01B(3) and .01B(13).

(*3*) 26.11.01.01B(24) through .01B(36), except for .01B(25).

(*4*) 26.11.01.01B(38) through .01B(53).

(C) Letter of February 6, 1998 from the Maryland Department of the Environment transmitting revisions to COMAR 26.11.01.01 (General Administrative Definitions).

(D) Revised COMAR 26.11.01.01B(43) [definition of ''source''], effective June 30, 1997.

(ii) Additional Material.

(A) Remainder of May 14, 2001 submittal.

(B) Remainder of February 6,1998 submittal related to the revised definition of ''source.''

(165) Revisions to the Maryland State Implementation Plan submitted on June 12, 2001 by the Maryland Department of the Environment:

(i) Incorporation by reference.

(A) Letter of June 12, 2001 from the Maryland Department of the Environment transmitting revisions to COMAR 26.11.04 (Ambient Air Quality Standards).

(B) The following revised provisions of COMAR 26.11.04, effective May 8, 1995:

(*1*) Revised chapter title of COMAR 26.11.04.

(*2*) New 26.11.04.03 through .09 (formerly COMAR 26.11.03.01 through .07 [State-Adopted National Ambient Air Quality Standards and Guidelines], effective prior to May 8, 1995).

(*3*) Addition of COMAR 26.11.04.02.

(ii) Additional Material.

(A) Remainder of June 12, 2001 submittal.

[FR Doc. 01–20782 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY130–200117(a); FRL–7036–8]

Approval and Promulgation of Implementation Plans Commonwealth of Kentucky: Approval of Revisions to the 1-Hour Ozone Maintenance State Implementation Plan for Marshall and a Portion of Livingston Counties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to the 1-hour ozone maintenance state implementation plan (SIP) for Marshall and a portion of Livingston Counties, Kentucky (i.e., the Paducah area), submitted on June 14, 2001, by the Commonwealth of Kentucky through the Natural Resources and Environmental Protection Cabinet to correct/revise the original motor vehicle emissions budgets (MVEBs) approved by EPA. Once EPA's approval is effective, the revised MVEBs must be used for transportation conformity purposes in the Paducah area.

DATES: This direct final rule is effective October 19, 2001 without further notice, unless EPA receives adverse comment by September 19, 2001. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: All comments should be addressed to: Mr. Richard A. Schutt, Chief, Regulatory Planning Section, EPA, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

Copies of the State submittal(s) are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Contact: Mr. Richard A. Schutt, (404) 562–9033, *schutt.dick@epa.gov.*

Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Department for Environmental Protection, Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky, 40601. (502) 573–3382.

FOR FURTHER INFORMATION CONTACT: Mr. Richard A. Schutt, (404) 562–9033, schutt.dick@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

EPA designated Marshall and a portion of Livingston Counties, Kentucky, (i.e., the Paducah area) nonattainment under the 1-hour ozone National Ambient Air Quality Standard (NAAQS) effective January 6, 1992 (56 FR 56694). Furthermore, EPA classified the area as ''marginal'' under Title I Part D Subpart 2 of the Clean Air Act Amendments of 1990. EPA approved the Paducah area's redesignation request and maintenance SIP effective April 10, 1995 (60 FR 7124). The maintenance SIP contained emissions inventories and projections for volatile organic compounds (VOC) and nitrogen oxides (NO_X) from all sources for the 1990 base year through 2004, including every three years in the interim. The on-road mobile source VOC and NO_X projections established MVEBs for transportation conformity purposes for the Paducah area. The original MVEBs are shown in Table 1.

TABLE 1.—ORIGINAL PADUCAH AREA MVEBS

[tons/day]

Pollutant	County	1990	1993	1996	1999	2002	2004
VOC	Livingston (Portion)	0.15	0.14	0.15	0.13	0.13	0.13
	Marshall	3.01	2.82	2.90	2.59	2.54	2.54
VOC MVEB		3.16	2.96	3.05	2.72	2.67	2.67
NO_X	Livingston (Portion)	0.14	0.14	0.14	0.13	0.13	0.13
	Marshall	2.93	2.84	2.89	2.71	2.64	2.63
NO_X MVEB		3.07	2.98	3.03	2.84	2.77	2.76

On June 14, 2001, the Commonwealth of Kentucky submitted a revision of the Paducah area maintenance SIP to correct the original MVEBs. Specifically, the MVEBs were revised to reflect corrected assumptions about daily vehicle-miles traveled (DVMT) for the years 1990–2004 in Marshall and Livingston Counties supplied by the Kentucky Transportation Cabinet (KYTC). The revised MVEBs are shown in Table 2.

TABLE 2.—REVISED PADUCAH AREA MVEBS

[tons/day]

Pollutant	County	1990	1993	1996	1999	2002	2004
VOC	Livingston (Portion)	0.20	0.13	0.12	0.12	0.12	0.12
	Marshall	5.03	3.32	3.00	2.98	3.01	3.05
VOC MVEB		5.23	3.45	3.12	3.10	3.13	3.17
NO_X	Livingston (Portion)	0.14	0.14	0.13	0.14	0.14	0.14
	Marshall	3.68	3.66	3.40	3.43	3.54	3.57
NO_X MVEB		3.82	3.8	3.53	3.57	3.68	3.71

The SIP revises only the on-road mobile source emissions estimates and forecasts. The emissions inventories and forecasts for all other sources were not revised. The revised total VOC and NO_X emissions from all sources are shown in Tables 3 and 4, respectively.

TABLE 3.—REVISED PADUCAH AREA TOTAL VOC EMISSIONS

[tons/day]

	1990	1993	1996	1999	2002	2004
Point	96.47	94.03	83.80	84.47	85.13	85.58
Area	1.85	1.87	1.88	1.90	1.91	1.93
Mobile	5.23	3.45	3.12	3.10	3.13	3.17
Non-Road	1.29	1.30	1.31	1.32	1.34	1.34
Total	104.84	100.66	90.12	90.79	91.51	92.02

TABLE 4.—REVISED PADUCAH AREA TOTAL NO_X EMISSIONS

[tons/day]

	1990	1993	1996	1999	2002	2004
Point	5.88	5.93	5.97	6.02	6.07	6.10
Area	0.11	0.11	0.11	0.11	0.11	0.11
Mobile	3.82	3.80	3.53	3.57	3.68	3.71
Non-Road	1.34	1.35	1.37	1.38	1.39	1.40
Total	11.15	11.19	10.98	11.08	11.25	11.32

The Commonwealth of Kentucky forecasted slight increases in total NO_X of 0.10 tons per day in 2002 and 0.17 tons per day in 2004 compared to the 1990 level. The original maintenance plan for the Paducah area was based on

maintaining total emissions at or below the 1990 levels, a year during which the area met the 1-hour ozone NAAQS. However, EPA believes that these slight emissions increases will not adversely impact maintenance of the 1-hour ozone NAAQS in the Paducah area. In addition, the forecasted excess emissions will likely be offset by reductions from federal measures that were enacted and implemented since approval of the original maintenance plan, but for which the Commonwealth of Kentucky did not take credit in the SIP revision. Specifically, NO_X emissions reductions from the Tier 2/ Gasoline Sulfur Rule (65 FR 6697), federal locomotive standards (63 FR 18977), nonroad diesel engine standards (63 FR 56967), and new gasoline spark-ignition marine engine standards (61 FR 52087) should be sufficient to offset the forecasted emissions increases in the SIP.

Per section 175A.(b) of the Clean Air Act, the Commonwealth of Kentucky must submit a revision of the Paducah area maintenance SIP to EPA by April 10, 2003. The revision will update the SIP to maintain the 1-hour ozone NAAQS in the Paducah area for 10 years after the expiration of the current plan. EPA expects the Commonwealth of Kentucky to update all emissions source categories in the revision to the maintenance SIP and to incorporate any applicable Clean Air Act and federal measures that have been enacted since the original maintenance plan was developed.

Once EPA's approval of this SIP revision is effective, the revised MVEBs in Table 2 must be used for transportation conformity purposes in the Paducah area.

II. Analysis of State's Submittal

The procedure for estimating on-road mobile source emissions consists of multiplying together: (1) The level of travel activity (*e.g.,* DVMT), and (2) the emissions factors (*e.g.,* grams of pollutant emitted per mile driven). KYTC collects and forecasts DVMT data for the Paducah area, and the Kentucky Division for Air Quality (DAQ) calculates the corresponding mobile source emissions factors using EPA's MOBILE model.

In developing the original maintenance SIP, KYTC utilized statewide average Highway Performance Monitoring System (HPMS) data to estimate and forecast DVMT in the Paducah area. Since that time, KYTC's supporting data and analytical procedures for DVMT estimation have been upgraded. In the revised maintenance SIP, KYTC's DVMT estimates are based on county-specific travel activity, and the forecasts are based, in part, on county-specific population forecasts. KYTC believes that the revised DVMT estimates and forecasts are more reliable than those used in the development of the original maintenance SIP. The SIP revision documents the new procedures, and EPA finds the procedures to be reasonable for estimating and forecasting DVMT in the Paducah area. The revised DVMT totals for the Paducah area are roughly 20 to 25 percent higher than the original totals. The original and revised DVMT estimates are shown in Tables 5 and 6, respectively.

TABLE 5.—ORIGINAL PADUCAH AREA DVMT

County	1990	1993	1996	1999	2002	2004
Livingston	306,000	327,469	350,000	373,296	398,276	415,097
Marshall	847,000	906,084	968,000	1,033,178	1,102,950	1,149,926
Total DVMT	1,153,000	1,233,553	1,318,000	1,406,474	1,501,226	1,565,023

TABLE 6.—REVISED PADUCAH AREA DVMT

County	1990	1993	1996	1999	2002	2004
Livingston	293,000	327,000	350,000	386,000	422,000	446,000
Marshall	1,070,000	1,176,000	1,198,000	1,323,000	1,461,000	1,550,000
Total DVMT	1,363,000	1,503,000	1,548,000	1,709,000	1,883,000	1,996,000

DAQ used the same MOBILE input assumptions in the development of the revised maintenance SIP (*e.g.,* ambient temperature, registration distributions, fuel volatility, average vehicle speeds) as were used in the original maintenance plan. In addition, for the revised SIP, DAQ included the effects of the 2004 NO_X emissions standard for heavy-duty diesel engines (MOBILE5 Information Sheet #5, http://www.epa.gov/oms/models/mobile5/m5info5.pdf) in 2004 and the National Low Emission Vehicle standard for light-duty gasoline fueled vehicles in years 2002 and 2004 (MOBILE5 Information Sheet #6, http://www.epa.gov/oms/models/mobile5/m5info6.pdf), both of which were approved by EPA after the original maintenance plan was developed.

III. Final Action

EPA is approving the aforementioned changes to the SIP because the revision meets all applicable Clean Air Act statutory and regulatory requirements.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective October 19, 2001 without further notice unless the Agency receives adverse comments by September 19, 2001.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on October 19, 2001 and no further action will be taken on the proposed rule.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive Order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: August 3, 2001.

Russell Wright,

Acting Regional Administrator, Region 4.

Part 52 of chapter I, title 40, *Code of Federal Regulations*, is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

2. In § 52.920 paragraph (e) the table is amended by adding a new entry ''21.'' to read as follows:

§ 52.920 Identification of plan.

* * * * *

(e) * * *

Appendix	Title/subject	State effective date	EPA approval date	Federal Register Notice
*	*	*	*	*
21.	Maintenance Plan Revision for Marshall and a Portion of Livingston CO.	06/14/01	08/20/01	08/20/01

[FR Doc. 01–20784 Filed 8–17–01; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4142a; FRL–7037–7]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Eight Individual Sources in the Pittsburgh-Beaver Valley Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Commonwealth of Pennsylvania's State Implementation Plan (SIP). The revisions were submitted by the Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for eight major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Pittsburgh-Beaver Valley ozone nonattainment area (the Pittsburgh area). EPA is approving these revisions to establish RACT requirements in the SIP in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on October 4, 2001 without further notice, unless EPA receives adverse written comment by September 19, 2001. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Air Quality Planning & Information Services Branch, Air Protection Division, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; and the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Catherine Magliocchetti at (215) 814–2174, or Ellen Wentworth (215–814–2034), at the EPA Region III address above or by e-mail at *magliocchetti.catherine@epa.gov* or *wentworth.ellen@epa.gov.* Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to sections 182(b)(2) and 182(f) of the Clean Air Act (CAA), the Commonwealth of Pennsylvania (the Commonwealth or Pennsylvania) is required to establish and implement RACT for all major VOC and NO_X sources. The major source size is determined by its location, the classification of that area and whether it is located in the ozone transport region (OTR).

Under section 184 of the CAA, RACT as specified in sections 182(b)(2) and 182(f) applies throughout the OTR. The entire Commonwealth is located within the OTR. Therefore, RACT is applicable statewide in Pennsylvania.

State implementation plan revisions imposing reasonably available control technology (RACT) for three classes of VOC sources are required under section 182(b)(2). The categories are:

(1) all sources covered by a Control Technique Guideline (CTG) document issued between November 15, 1990 and the date of attainment;

(2) all sources covered by a CTG issued prior to November 15, 1990; and

(3) all major non-CTG sources. The regulations imposing RACT for these non-CTG major sources were to be submitted to EPA as SIP revisions by November 15, 1992 and compliance required by May of 1995.

The Pennsylvania SIP already includes approved RACT regulations for all sources and source categories covered by the CTGs. On February 4, 1994, PADEP submitted a revision to its SIP to require major sources of NO_X and additional major sources of VOC emissions (not covered by a CTG) to implement RACT. The February 4, 1994 submittal was amended on May 3, 1994 to correct and clarify certain presumptive NO_X RACT requirements. In the Pittsburgh area, a major source of VOC is defined as one having the potential to emit 50 tons per year (tpy) or more, and a major source of NO_X is defined as one having the potential to emit 100 tpy or more. Pennsylvania's RACT regulations require sources, in the Pittsburgh area, that have the potential to emit 50 tpy or more of VOC and sources which have the potential to emit 100 tpy or more of NO_X comply with RACT by May 31, 1995. The regulations contain technology-based or operational ''presumptive RACT emission limitations'' for certain major NO_X sources. For other major NO_X sources, and all major non-CTG VOC sources (not otherwise already subject to RACT under the Pennsylvania SIP), the regulations contain a ''generic'' RACT provision. A generic RACT regulation is one that does not, itself, specifically define RACT for a source or source categories but instead allows for case-by-case RACT determinations. The generic provisions of Pennsylvania's regulations allow for PADEP to make case-by case RACT determinations that are then to be submitted to EPA as revisions to the Pennsylvania SIP.

On March 23, 1998 EPA granted conditional limited approval to the Commonwealth's generic VOC and NO_X RACT regulations (63 FR 13789). In that action, EPA stated that the conditions of its approval would be satisfied once the Commonwealth either (1) certifies that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements currently known to PADEP; *or* (2) demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions as defined in the March 23, 1998 rulemaking. On April 22, 1999, PADEP made the required submittal to EPA certifying that it had met the terms and conditions imposed by EPA in its March 23, 1998 conditional limited approval of its VOC and NO_X RACT regulations by submitting 485 case-by-case VOC/NO_X RACT determinations as SIP revisions and making the demonstration described as condition 2, above. EPA determined that Pennsylvania's April 22, 1999 submittal satisfied the conditions imposed in its conditional limited approval published on March 23, 1998. On May 3, 2001 (66 FR 22123), EPA published a rulemaking action removing the conditional status of its approval of the Commonwealth's generic VOC and NO_X RACT regulations on a statewide basis. The regulation currently retains its limited approval status. Once EPA has approved the case-by-case RACT determinations submitted by PADEP to satisfy the conditional approval for subject sources located in Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland Counties; the limited approval of Pennsylvania's generic VOC and NO_X

RACT regulations shall convert to a full approval for the Pittsburgh area.

It must be noted that the Commonwealth has adopted and is implementing additional ''post RACT requirements'' to reduce seasonal NO_X emissions in the form of a NO_X cap and trade regulation, 25 Pa Code Chapters 121 and 123, based upon a model rule developed by the States in the OTR. That rule's compliance date is May 1999. That regulation was approved as SIP revision on June 6, 2000 (65 FR 35842). Pennsylvania has also adopted regulations to satisfy Phase I of the NO_X SIP call and submitted those regulations to EPA for SIP approval. Pennsylvania's SIP revision to address the requirements of the NO_X SIP Call Phase I consists of the adoption of Chapter 145—Interstate Pollution Transport Reduction and amendments to Chapter 123—Standards for Contaminants. On May 29, 2001 (66 FR 29064), EPA proposed approval of the Commonwealth's NO_X SIP call rule SIP submittal. EPA expects to publish the final rulemaking in the **Federal Register** in the near future. Federal approval of a case by case RACT determination for a major source of NO_X in no way relieves that source from any applicable requirements found in 25 PA Code Chapters 121, 123 and 145.

On January 6, 1995, August 1, 1995, January 10, 1996, January 21, 1997, February 2, 1999, March 3, 1999, and April 19, 2001, PADEP submitted revisions to the Pennsylvania SIP which establish and impose RACT for several major sources of VOC and/or NO_X. This rulemaking pertains to eight of those sources. The RACT determinations for the other sources are, or have been the subject of separate rulemakings. The Commonwealth's submittals consist of Plan Approvals (PA) and Operating Permits (OP) issued by PADEP. These PAs and OPs impose VOC and/or NO_X RACT requirements for each source. These sources are all located in the Pittsburgh area.

II. Summary of the SIP Revisions

The table below identifies the sources and the individual Plan Approvals (PAs) and Operating Permits (OPs) which are the subject of this rulemaking. A summary of the VOC and NO_X RACT determinations for each source follows the table.

PENNSYLVANIA—VOC AND NO_X RACT DETERMINATIONS FOR INDIVIDUAL SOURCES

Source	County	PA# or OP#	Source type	''Major source'' pollutant
AES Beaver Valley Partners, Inc.—Monaca Plant	Beaver	OP 04–000–446	Four Cogeneration Units	NO_X
Duquesne Light/Pennsylvania Power Company—Bruce Mansfield Plant.	Beaver	PA 04–000–235	NO_X and VOC Emitting Sources; Low NO_X Burners.	NO_X/VOC
West Penn Power Company—Mitchell Station	Washington	PA 63–000–016	Coal Boilers; Low-NO_X Burners	NO_X/VOC
Apollo Gas Company—Shoemaker Station	Armstrong	OP 03–000–183	Natural Gas Compressors	NO_X/VOC
Carnegie Natural Gas Company—Fisher Station (formerly Apollo Gas Company).	Armstrong	OP 03–000–182	Natural Gas Compressors	NO_X/VOC
The Peoples Natural Gas Company—Girty Station.	Armstrong	PA 03–000–076	Natural Gas Reciprocating Engines.	NO_X/VOC
The Peoples Natural Gas Company—Valley Station.	Armstrong	PA 03–000–125	Natural Gas Reciprocating Engines.	NO_X/VOC
Texas Eastern Transmission Corporation—Delmont Station.	Westmoreland	OP 65–000–839	Internal Combustion Engines	NO_X/VOC

A. AES Beaver Valley Partners, Inc.—Monaca Plant

AES Beaver Valley Partners, Inc.'s Monaca Plant is a cogeneration plant located in Potter Township, Pennsylvania. The Monaca plant is a major NO_X emitting facility. The PADEP issued OP 04–000–446 to impose RACT for this facility for the installation of low-NO_X burners and combustion optimization. The Commonwealth has imposed NO_X emission limits on AES Beaver Valley Partners' Monaca plant that shall not exceed an excess of .7 lbs/MMBtu from the main stack based on a 30-day rolling average. A yearly NO_X emission limit for this facility is established as 5933 tpy. The annual limit must be met on a rolling monthly basis over every consecutive 12 month period. This facility is subject to record keeping requirements of 25 PA Code section 129.95, and compliance shall be established based on emission data obtained from a certified Continuous Emissions Monitoring System (CEM) installed, maintained, and operated in accordance with 25 Pa. Code Chapters 123 and 139. AES Beaver Valley Partners' Monaca plant is also subject to additional post-RACT requirements to reduce NO_X.

B. Pennsylvania Power Company—Bruce Mansfield Plant

Pennsylvania Power Company's (Duquesne Light) Bruce Mansfield Plant is a power plant located in Shippingport Borough, Pennsylvania. It is a major VOC and NO_X emitting facility. The PADEP issued PA 04–000–235 to impose RACT at the source for the installation of low-NO_X burners with separate over-fire air on Units 1, 2, and 3, and to limit the annual capacity factors on auxiliary Boilers 1, 2, and 3. The NO_X emission limit of 0.5 lbs/MMBtu, based on a 30-day rolling average, applies to each of the units. The tpy limit is based upon a 95 percent annual capacity factor limitation. Reductions in the allowable emission rates below the levels established by this permit shall not be available as Emission Reduction Credits (ERCs) pursuant to 25 Pa. Code section 127.206 unless the reductions are achieved through real reductions of actual or allowable emissions, whichever is lower, through the installation of controls beyond those required by RACT, or any other subsequent regulatory requirement. Auxiliary Boilers 1, 2, and 3 shall operate in accordance with the presumptive RACT limitations identified in 25 Pa. Code section 129.93(c)(5), which identifies RACT as installation, maintenance and operation of the source in accordance with the manufacturer's specifications. The source is required to keep data that clearly demonstrates that the auxiliary boilers' annual capacity factors are less than 5 percent, respectively. VOC RACT for Units 1, 2, and 3 at this plant shall be operational in accordance with the manufacturer's recommendations. Duquesne Light/Pennsylvania Power Company's Bruce Mansfield plant is required to perform stack testing to determine emission rates from Units 1, 2, and 3, to be conducted while the source is operating at the maximum rated capacity as stated in the source's

application. Compliance shall be established based on emission data obtained from a certified CEM installed, maintained, and operated in accordance with 25 Pa. Code Chapter 139, and the PADEP's Source Testing Manual. The source is required to maintain records in accordance with the record keeping requirements of 25 Pa. Code section 129.95. Duquesne Light/Pennsylvania Power Company's Bruce Mansfield plant is also subject to additional post-RACT requirements to reduce NO_X found at 25 PA Code Chapters 121, 123 and 145.

C. West Penn Power Company—Mitchell Station

West Penn Power Company's Mitchell Station is a power plant located in Union Township, Pennsylvania. Mitchell Station is a major VOC and NO_X emitting facility. The PADEP issued PA 63–000–016 to impose RACT for the installation of low-NO_X burners with separate over-fire air on Boiler No. 33. The NO_X emission limit of 0.45 Lbs/MMBtu applies to Boiler No. 33, with a 30-day rolling average. NO_X emissions from Boiler No. 33 shall not exceed 4849 tpy. The NO_X emission limit of 0.2 Lbs/MMBtu, based on a 30-day rolling average, applies to Boilers 1, 2, and 3. The annual NO_X emission limit for Boilers 1, 2, and 3 shall not exceed 575 tpy, each. These units shall burn only No. 2 fuel oil, or natural gas, unless otherwise approved by the PADEP. Compliance with the above limits shall be established based upon emission data obtained from a certified CEM installed, maintained, and operated in accordance with 25 Pa. Code Chapters 123 and 139, and all stack testing shall be performed in accordance with 25 Pa. Code Chapter 139, and the PADEP's Source Testing Manual. Annual limits must be met on a rolling monthly basis over every consecutive 12 month period. Reductions in the allowable emission rates below the levels established by this permit shall not be available as ERCs pursuant to 25 Pa. Code section 127.206 unless the reductions are achieved through real reductions of actual or allowable emissions, whichever is lower, through the installation of controls beyond those required by RACT or any other subsequent regulatory requirement. West Penn Power Company's Mitchell Station is also subject to additional post-RACT requirements to reduce NO_X found at 25 PA Code Chapters 121, 123 and 145.

D. Apollo Gas Company—Shoemaker Station

Apollo Gas Company's Shoemaker Station is a natural gas compressor station located in Bethel Township, Pennsylvania. Shoemaker Station is a major VOC and NO_X emitting facility. The PADEP issued OP 03–000–183 to impose RACT for the OEM (lean combustion retrofit modifications) on the Cooper GMVH–6 and the Cooper GMVH–6c engines at the facility. Apollo Gas Company's Shoemaker Station shall perform stack testing by a qualified testing firm on the Cooper GMVH–6 and the GMVH–6c engines. This testing will be performed every five years on the equipment to determine the emission rates of NO_X and VOC. Testing shall be conducted while the engines are operating at full load and full speed during the ozone season (April to October). Apollo Gas Company's Shoemaker Station shall quantify emissions at each engine semi-annually using a portable analyzer. The source shall submit a complete operating procedure for the portable analyzer, including calibration, QA/QC, and emissions calculations methods. Results from the stack tests shall be retained on site and be made available to PADEP upon request. Stack testing shall be performed in accordance with 25 PA Code Chapter 139 and the PADEP's Source Testing Manual. Two copies of the pre-test protocol shall be submitted to the PADEP for review at least 60 days prior to the performance of the test. The PADEP shall be notified at least two weeks in advance of the test, so that an observer may be present. Two copies of the stack test shall be supplied to the PADEP for review within 60 days of the testing. The source shall maintain records for at least two years, in accordance with the minimum record keeping requirements of 25 PA Code section 129.95. The combined allowable emission rates of the two natural gas fueled engines at the Shoemaker Station are as follows: For the Cooper GMVH–6, the NO_X limits are 8.4 lbs/hr, and 37 tpy. The VOC limits for this unit are 3.2 lbs/hr, and 14 tpy. For the Cooper GMVH–6c, the NO_X limits are 7.0 lbs/hr, and 31 tpy. The VOC limits for this unit are 4.2 lbs/hr, and 18.5 tpy. Reductions in the allowable emission rates below the levels established by this permit shall not be available as ERCs pursuant to 25 PA. Code section 127.206 unless the reductions are achieved through real reductions of actual or allowable emissions, whichever is lower, through the installation of controls beyond those required by RACT or any other subsequent regulatory requirement. Annual limits must be met on a rolling monthly basis over every consecutive 12-month period.

E. Carnegie Natural Gas Company—Fisher Station

Carnegie Natural Gas Company's Fisher Station, formerly the Apollo Gas Company's Fisher Station, is a natural gas compressor station located in Redbank Township, Pennsylvania. Carnegie Natural Gas Company's Fisher Station is a major VOC and NO_X emitting facility. The PADEP issued OP 03–000–182 to impose RACT at this source for the operation of OEM lean combustion retrofit modifications on an Ajax 600 DPC engine, along with a Cooper GMVH–6 (1,350 BHP) engine at the Fisher Station. The source shall perform stack testing by a qualified testing firm on the Ajax 600 DPC engine. This testing will be performed every five years on the equipment to determine the emission rates of NO_X and VOC. Testing shall be conducted while the engines are operating at full load and full speed during the ozone season (April to October). Carnegie Natural Gas Company's Fisher Station is required to perform stack testing in accordance with 25 PA Code Chapter 139 and the PADEP's Source Testing Manual. Two copies of the pre-test protocol shall be submitted to the PADEP for review at least 60 days prior to the performance of the test. The PADEP shall be notified at least two weeks in advance of the test, so that an observer may be present. Two copies of the stack test shall be supplied to the PADEP for review within 30 days of the testing. In addition, Carnegie Natural Gas shall quantify emissions semi-annually from the Ajax 600 DPC using portable analyzers. The source is required to submit a complete operating procedure for the portable analyzer, including calibration, QA/AC, and emissions calculation methods. Results from these tests shall be retained on-site, and be made available to the PADEP upon request. The source shall maintain records for at least two years, in accordance with the minimum record keeping requirements of 25 PA Code section 129.95. The combined allowable emission rates of the two natural gas fueled engines at the Fisher Station are as follows: For the Ajax 600 DPC engine, the NO_X limit is 6.5 g/bhp/hr at full load, full speed conditions; 9.0 lbs/hr at other operating conditions. On a rolling monthly basis in any consecutive 12 month period, NO_X emissions may not exceed 40 tons, and VOC limits may not exceed 6 tons. For the Cooper GMVH–6 engine (1,350 HP), Fisher Station is required to operate this engine in

accordance with the presumptive RACT limitations identified in 25 PA Code 129.93(c)(5), which identifies RACT as the installation, maintenance, and operation of the source in accordance with manufacturer's specifications. The units shall also be operated and maintained in accordance with good air pollution control practices. Fisher Station shall keep data that clearly demonstrates that the stand-by engine's annual capacity factors are less than five percent, or that the operating hours are less than 500 hours per year (hr/yr), on a consecutive 12 month basis. Reductions in the allowable emission rates below the levels established by this permit shall not be available as ERCs pursuant to 25 Pa. Code section 127.206 unless the reductions are achieved through real reductions of actual or allowable emissions, whichever is lower, through the installation of controls beyond those required by RACT or any other subsequent regulatory requirement.

F. The Peoples Natural Gas Company—Girty Station

The Peoples Natural Gas Company's Girty Station is a natural gas compressor station located in South Bend Township, Pennsylvania. The Peoples Natural Gas Company's Girty Station facility is a major VOC and NO_X emitting facility. The PADEP issued PA 03–000–076 to impose RACT for the installation of Pre-stratified controls on Units 1,2, and 4 at the Girty Compressor Station. The emission limits of the units at the Girty Station are as follows:

Unit	Model No.	NO_X limit (lbs/hr)	NO_X limit (tpy)	NMVOC limit (lbs/hr)	NMVOC limit (tpy)
Unit #1, I–R	62–KVG	7.9	35	2.0	8.7
Unit #2, I–R	62–KVG	7.9	35	2.0	8.7
Unit #3, C–B	GMV–4	15.4	67.5	0.9	3.8
Unit #4, I–R	103–KVG	13.2	57.8	3.3	14.5

The Peoples Natural Gas Company's Girty Station is required to perform stack testing to determine the emission rate of NO_X as $NO_2$2, and non-methane volatile organic compound (NMVOC). A pre-test protocol shall be submitted to the PADEP for review at least 30 days prior to the performance of the test. Stack testing shall be performed in accordance with 25 PA Code Chapter 139 and the PADEP's Source Testing Manual. The PADEP shall be notified at least two weeks in advance of the test, so that an observer may be present. Two copies of the stack test shall be supplied to the PADEP for review within 60 days of the testing. The Waukesha-Climax stand-by generator at the Girty Station shall not operate in excess of five percent of the annual capacity factor for that engine. All annual limits must be met on a rolling monthly basis over every consecutive 12 month period.

G. The Peoples Natural Gas Company—Valley Station

The Peoples Natural Gas Company's Valley Station is a natural gas compressor station located in Cowanshannock Township, Pennsylvania. The Peoples Natural Gas Company's Valley Station is a major VOC and NO_X emitting facility. The PADEP issued PA 03–000–125 to impose RACT for the operation of Pre-stratified Charge and Original Equipment Manufacturer's type lean combustion controls on Units 1, 3, and 4 at the Valley Compressor Station. The emission limits of the units at the Valley Station are as follows, where non-methane hydrocarbon limits are expressed as NMHC:

Unit	Model No.	NO_X limit (lbs/hr)	NO_X limit (tpy)	NMHC limit (lbs/hr)	NMHC limit (tpy)
Unit #1, I–R	62–KVG	8.7	38.2	2.2	9.7
Unit #2, I–R	62–KVG	15.9	4.0	0.8	0.5
Unit #3, I–R	48–KVS	17.4	76.2	4.4	19.3
Unit #4, C–B	GMV–6	7.9	34.7	2.0	8.8
Unit #5, I–R	GMV–4	13.9	60.7	0.9	4.0

The Peoples Natural Gas Company's Valley Station is required to perform stack testing to determine the emission rate of NO_X as NO_2, and NMHC on units 1 through 5. A pre-test protocol shall be submitted to the PADEP for review at least 30 days prior to the performance of the test. Stack testing shall be performed in accordance with 25 PA Code Chapter 139 and the PADEP's Source Testing Manual. The PADEP shall be notified at least two weeks in advance of the test, so that an observer may be present. Two copies of the stack test shall be supplied to the PADEP for review within 60 days of the testing. Unit 2 at the Valley Station shall not operate in excess of five percent of the annual capacity factor for that engine. All annual limits must be met on a rolling monthly basis over every consecutive 12 month period.

H. Texas Eastern Transmission Corporation—Delmont Station

Texas Eastern Transmission Corporation's Delmont Station is a natural gas compressor station located in Salem Township, Pennsylvania. Texas Eastern Transmission Corporation's Delmont Station is a major VOC and NO_X emitting facility. The PADEP issued OP 65–000–839 to impose RACT for the installation of screw-in precombustion chambers on the four (4) Ingersoll-Rand (IR) KVS 412 engines, non-selective catalytic reduction (NSCR) on the six (6) IR KVG 410 engines, and the implementation of presumptive RACT on one (1) Leroi L3460 engine, one (1) Caterpillar AR emergency generator, and five (5) heaters at the Delmont Station. Texas Eastern's Delmont Station shall not operate the Leroi L 3460 auxiliary generator, the Caterpillar AR emergency generator, or the Caterpillar 3412 emergency generator more than 500 hours annually per engine. The emission rates of the GS MS 5001 turbine shall be limited as follows: 230 ppmvd of NO_X and annual emissions of 440 tpy of NO_X (at 15 percent O_2); and 25 ppmvd of NMVOC, and annual

emissions of 1 tpy of NMVOC. The emission rates of the Pratt Whitney CG3 turbine shall be limited as follows: 160 ppmvd of NO_X and annual emission of 160 tpy of NO_X (at 15 percent O_2); and 50 ppmvd of NMVOC and annual emissions of 1 tpy of MVOC. The emission rates of each Ingersoll Rand KVG 410 engine shall be limited as follows: NO_X limits of 5 lbs/ hr, and 22 tpy; NMVOC limits of 0.5 lbs/hr, and 1.3 tpy. The emission rates of each Ingersoll Rand KVG 412 engine shall be limited as follows: NO_X limits of 18 lbs/ hr, and 78 tpy; NMVOC limits of 3 lbs/hr, and 12 tpy. Texas Eastern shall use only low ask lubricating oil (0.5 percent or less) in the IR KVG–410 engines. The catalytic convertor of the IR KVG–410 engines shall be equipped with a high temperature alarm and/or shutdown set at 1,350 degrees Fahrenheit or less. The catalysts of these engines shall be physically inspected annually for damage and fouling. A log shall be kept detailing all actions taken to maintain catalyst performance. This file shall be maintained for at least two years and made available to PADEP upon request. Texas Eastern must continuously monitor and record O_2 levels prior to the catalyst on each IR KVG–410 engine. The O_2 levels shall be maintained below 0.5 percent on each engine. Texas Eastern's Delmont Station is required to perform a minimum of one (1) stack test in accordance with 25 PA Code Chapter 139 and PADEP's Source Testing Manual on all sources every five years to verify emission rates for NO_X (as NO_2) and NMVOC. Testing shall be conducted while engines are operating at full load, full speed, and during the ozone season (April to October). All sources operating 750 hours or more during the preceding ozone season shall be stack tested semi-annually to verify the emission rates through either an EPA method stack test or through the use of portable analyzers. All sources operating less than 750 hours during the preceding ozone season shall be stack tested annually to verify the emission rates through either an EPA method stack test or through the use of portable analyzers. For those tests utilizing portable analyzers, the source shall submit a complete operating procedure, including calibration, QA/QC, and emissions calculation methods to the PADEP at least 60 days prior to testing. The accuracy of the portable analyzer readings shall be verified by operation and recording of readings during EPA method stack testing. Results from stack test using portable analyzers shall be retained by the company at the test location and provided annually with the emission statements and at other times as requested by the PADEP. Texas Eastern shall submit a pretest protocol for review at least 60 days prior to performance of the stack tests. The PADEP shall be notified at least two weeks in advance of the test, so that an observer may be present. Two copies of the stack test shall be supplied to the PADEP for review within 60 days of the testing. Reductions in the allowable emission rates below the levels established by this permit shall not be available as ERCs pursuant to 25 Pa. Code section 127.206 unless the reductions are achieved through real reductions of actual or allowable emissions, whichever is lower, through the installation of controls beyond those required by RACT or any other subsequent regulatory requirement. Annual limits must be met on a rolling monthly basis over every consecutive 12 month period. The source shall maintain records in accordance with the record keeping requirements of 25 PA Code section 129.95. At a minimum, the following records shall be kept: operating hours, daily fuel consumption, operating pressures, and operating temperatures. These records shall be maintained for not less than two years and shall be made available to PADEP upon request.

III. EPA's Evaluation

EPA is approving these RACT SIP submittals because PADEP established and imposed these RACT requirements in accordance with the criteria set forth in its SIP-approved RACT regulations applicable to these sources. The Commonwealth has also imposed record-keeping, monitoring, and testing requirements on these sufficient to determine compliance with the applicable RACT determinations.

IV. Final Action

EPA is approving the revisions to the Pennsylvania SIP submitted by PADEP to establish and require VOC and NO_X RACT for eight major sources located in the Pittsburgh area. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on October 4, 2001 without further notice unless EPA receives adverse comment by September 19, 2001. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if adverse comment is received for a specific source or subset of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

V. Administrative Requirements

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' See 66 FR 28355, May 22, 2001. This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the

Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for eight named sources.

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving the Commonwealth's source-specific RACT requirements to control VOC and NO_X from eight individual sources in the Pittsburgh Beaver Valley area may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Nitrogen Oxides, Ozone, Reporting and recordkeeping requirements.

Dated: August 10, 2001.

Judith Katz,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

2. Section 52.2020 is amended by adding paragraph (c)(176) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(176) Revisions to the Pennsylvania Regulations, Chapter 129 pertaining to VOC and NO_X RACT, for eight sources located in the Pittsburgh-Beaver Valley area submitted by the Pennsylvania Department of Environmental Protection on January 6, 1995, August 1, 1995, January 10, 1996, January 21, 1997, February 2, 1999, March 3, 1999, and April 19, 2001.

(i) Incorporation by reference.

(A) Letters submitted by the Pennsylvania Department of Environmental Protection transmitting source-specific VOC and/or NO_X RACT determinations on the following dates: January 6, 1995, August 1, 1995, January 10, 1996, January 21, 1997, February 2, 1999, March 3, 1999, and April 19, 2001.

(B) The following companies' Plan approvals (PA) or Operating permits (OP):

(*1*) Pennsylvania Power Company, Bruce Mansfield Plant, PA 04–000–235, effective December 29, 1994 except for the expiration date.

(*2*) West Penn Power Company, Mitchell Station, PA 63–000–016, effective June 12, 1995, except for the expiration date.

(*3*) Carnegie Natural Gas Company, Fisher Station, OP 03–000–182, effective December 2, 1998, except for the Permit Term.

(*4*) Apollo Gas Company, Shoemaker Station, OP 03–000–183, effective September 12, 1996, except for the Permit Term.

(*5*) Texas Eastern Transmission Corporation, Delmont Station, OP 65–000–839, effective January 9, 1997, except for the Permit Term.

(*6*) The Peoples Natural Gas Company, Valley Station, PA 03–000–125, effective October 31, 1994 except for the expiration date and the time limits in condition 6.

(*7*) The Peoples Natural Gas Company, Girty Station, PA 03–000–076, effective as extended on October 27, 1995, except for the expiration date and time limit in condition 6.

(*8*) AES Beaver Valley Partners, Monaca Plant, OP 04–000–446, effective as revised on March 23, 2001, except for the Permit Term.

(ii) Additional Materials—Other materials submitted by the Commonwealth of Pennsylvania in support of and pertaining to the RACT determinations for the sources listed in paragraph (c)(176)(i) (B) of this section.

[FR Doc. 01–20879 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4128a; FRL–7038–1]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Five Individual Sources in the Pittsburgh-Beaver Valley Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Commonwealth of Pennsylvania's State Implementation Plan (SIP). The revisions were submitted by the

Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for five major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Pittsburgh-Beaver Valley ozone nonattainment area (the Pittsburgh area). EPA is approving these revisions to establish RACT requirements in the SIP in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on October 4, 2001 without further notice, unless EPA receives adverse written comment by September 19, 2001. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Air Quality Planning & Information Services Branch, Air Protection Division, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; Allegheny County Health Department, Bureau of Environmental Quality, Division of Air Quality, 301 39th Street, Pittsburgh, Pennsylvania 15201 and the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Rose Quinto at (215) 814–2182, the EPA Region III address above or by e-mail at *quinto.rose@epa.gov*. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to sections 182(b)(2) and 182(f) of the Clean Air Act (CAA), the Commonwealth of Pennsylvania (the Commonwealth or Pennsylvania) is required to establish and implement RACT for all major VOC and NO_X sources. The major source size is determined by its location, the classification of that area and whether it is located in the ozone transport region (OTR). Under section 184 of the CAA, RACT as specified in sections 182(b)(2) and 182(f)) applies throughout the OTR. The entire Commonwealth is located within the OTR. Therefore, RACT is applicable statewide in Pennsylvania. State implementation plan revisions imposing reasonably available control technology (RACT) for three classes of VOC sources are required under section 182(b)(2). The categories are: (1) All sources covered by a Control Technique Guideline (CTG) document issued between November 15, 1990 and the date of attainment; (2) all sources covered by a CTG issued prior to November 15, 1990; and (3) all major non-CTG sources. The regulations imposing RACT for these non-CTG major sources were to be submitted to EPA as SIP revisions by November 15, 1992 and compliance required by May of 1995.

The Pennsylvania SIP already includes approved RACT regulations for all sources and source categories covered by the CTGs. On February 4, 1994, PADEP submitted a revision to its SIP to require major sources of NO_X and additional major sources of VOC emissions (not covered by a CTG) to implement RACT. The February 4, 1994 submittal was amended on May 3, 1994 to correct and clarify certain presumptive NO_X RACT requirements. In the Pittsburgh area, a major source of VOC is defined as one having the potential to emit 50 tons per year (tpy) or more, and a major source of NO_X is defined as one having the potential to emit 100 tpy or more. Pennsylvania's RACT regulations require sources, in the Pittsburgh area, that have the potential to emit 50 tpy or more of VOC and sources which have the potential to emit 100 tpy or more of NO_X comply with RACT by May 31, 1995. The regulations contain technology-based or operational ''presumptive RACT emission limitations'' for certain major NO_X sources. For other major NO_X sources, and all major non-CTG VOC sources (not otherwise already subject to RACT under the Pennsylvania SIP), the regulations contain a ''generic'' RACT provision. A generic RACT regulation is one that does not, itself, specifically define RACT for a source or source categories but instead allows for case-by-case RACT determinations. The generic provisions of Pennsylvania's regulations allow for PADEP to make case-by case RACT determinations that are then to be submitted to EPA as revisions to the Pennsylvania SIP. On March 23, 1998 EPA granted conditional limited approval to the Commonwealth's generic VOC and NO_X RACT regulations (63 FR 13789). In that action, EPA stated that the conditions of its approval would be satisfied once the Commonwealth either (1) certifies that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements currently known to PADEP; or (2) demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions as defined in the March 23, 1998 rulemaking. On April 22, 1999, PADEP made the required submittal to EPA certifying that it had met the terms and conditions imposed by EPA in its March 23, 1998 conditional limited approval of its VOC and NO_X RACT regulations by submitting 485 case-by-case VOC/ NO_X RACT determinations as SIP revisions and making the demonstration described as condition 2, above. EPA determined that Pennsylvania's April 22, 1999 submittal satisfied the conditions imposed in its conditional limited approval published on March 23, 1998. On May 3, 2001 (66 FR 22123), EPA published a rulemaking action removing the conditional status of its approval of the Commonwealth's generic VOC and NO_X RACT regulations on a statewide basis. The regulation currently retains its limited approval status. Once EPA has approved the case-by-case RACT determinations submitted by PADEP to satisfy the conditional approval for subject sources located in Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland Counties; the limited approval of Pennsylvania's generic VOC and NO_X RACT regulations shall convert to a full approval for the Pittsburgh area.

It must be noted that the Commonwealth has adopted and is implementing additional ''post RACT requirements'' to reduce seasonal NO_X emissions in the form of a NO_X cap and trade regulation, 25 Pa Code Chapters 121 and 123, based upon a model rule developed by the States in the OTR. That rule's compliance date is May 1999. That regulation was approved as SIP revision on June 6, 2000 (65 FR 35842). Pennsylvania has also adopted regulations to satisfy Phase I of the NO_X SIP call and submitted those regulations to EPA for SIP approval. Pennsylvania's SIP revision to address the requirements of the NO_X SIP Call Phase I consists of the adoption of Chapter 145—Interstate Pollution Transport Reduction and amendments to Chapter 123—Standards for Contaminants. On May 29, 2001 (66 FR 29064), EPA proposed approval of the Commonwealth's NO_X SIP call rule SIP submittal. EPA expects to publish

the final rulemaking in the **Federal Register** in the near future. Federal approval of a case-by-case RACT determination for a major source of NO_X in no way relieves that source from any applicable requirements found in 25 PA Code Chapters 121, 123 and 145.

II. Summary of the SIP Revisions

On July 1, 1997 and April 19, 2001, PADEP submitted revisions to the Pennsylvania SIP which establish and impose RACT for several major sources of VOC and/or NO_X. This rulemaking pertains to five of those sources. The remaining sources are or have been the subject of separate rulemakings. The Commonwealth's submittals consist of plan approval and agreement upon consent orders (COs) and enforcement orders (EOs) issued by the Allegheny County Health Department (ACHD). These five sources are located in the Pittsburgh area. The table below identifies the sources and individual COs and EO which are the subject of this rulemaking. A summary of the VOC and NO_X RACT determinations for each source follows the table.

PENNSYLVANIA—VOC AND NO_X RACT DETERMINATIONS FOR INDIVIDUAL SOURCES

Source	County	Consent Order (CO#), Enforcement Order (EO#)	Source type	"Major source" pollutant
Pruett Schaffer, Chemical Company	Allegheny	CO 266	Paint and related coatings	VOC
PPG Industries, Inc	Allegheny	CO 254	Resin and paint	VOC
Reichhold Chemicals, Inc	Allegheny	CO 218	Synthetic hydrocarbon resin	NO_X
Reichhold Chemicals, Inc	Allegheny	CO 219	Synthetic hydrocarbon resin	VOC
Valspar Corporation	Allegheny	EO 209	Paint	VOC

A. Pruett Schaffer Chemical Company

Pruett Schaffer Chemical Company is a paint and related coatings manufacturer located in Pittsburgh, Allegheny County, Pennsylvania. Pruett Schaffer Chemical Company had potential emissions VOC of greater than 50 tons per year (tpy). ACHD issued the facility CO 266. On April 19, 2001, PADEP submitted this CO to EPA on behalf of the ACHD as a SIP revision. The facility consists of two paint manufacturing processes and a storage tank that stores mixed hydrocarbon solvent. Manufacturing is by batch process only. CO 266 does not allow the facility to operate unless the total combined potential facility-wide annual VOC emissions are less than 50 tons per year . In order to limit the potential VOC emissions, the maximum dispersers solvent-based production should not exceed 115,000 gallons per year and 1,965 hours annually. The solvent-based coatings is any coatings with a VOC content equal or greater than 3.5 pounds per gallon, less water and exempt solvents. Annual VOC emissions are determined by EPA AP–42 emission factors applied to the material throughput. Under CO 266, Pruett Schaffer Chemical Company must maintain records to demonstrate compliance with this CO and Article XXI, section 2105.06. Recordkeeping shall include but not limited to records of material type, monthly material usage, total monthly hours of operation, production records of process equipment and monthly usage and type of cleaning solvent used for cleaning and purging equipment, sufficient to perform emission calculations. Compliance with all annual limits must be met on a rolling monthly basis over every consecutive 12 month period and all records shall be maintained at the facility on a twelve months rolling total in order to determine compliance. All records shall be retained for at least five years.

B. PPG Industries, Inc.

PPG Industries, Inc. (PPG) is a resin and paint manufacturing facility located in Springdale, Allegheny County, Pennsylvania. PPG is a major VOC emitting facility. In this instance, RACT has been established and imposed by ACHD in CO 254. On July 1, 1997, PADEP submitted this CO to EPA on behalf of the ACHD as a SIP revision. PPG is a manufacturer of coatings and resins for the general industrial and automotive markets. Manufacturing facilities in this Springdale site include a paint plant and a resin manufacturing plant. The paint plant manufactures coatings for aluminum extrusions, automotive refinishing, and the general industrial and coil coating markets. The resin plant manufactures high temperature polyesters, alkyds, modified epoxies, urethanes and cross linkers for use in paint manufacture.

(1) The Resin Plant

CO 254 does not allow PPG to operate the resin plant at any time while generating VOC emissions unless the facility's thermal oxidizer is in service and all associated emission control systems are operating as required with the conditions of the CO, with the exception of required maintenance and/or repairs. The CO requires that the thermal oxidizer should be properly maintained and operated at all times, with instrumentation to continuously monitor and record the incinerator temperature, with one of three alternative requirements being met and maintained: (a) minimum VOC destruction efficiency of 95 percent by weight; or (b) maximum outlet of 20 ppm VOC by volume (dry basis); or (c) minimum incineration temperature of 1500 degrees Fahrenheit. The thermal oxidizer destruction efficiency shall be determined every five years in accordance with EPA approved test methods and section 2108.02 of Article XXI of ACHD's regulations. All reactor vessels should be equipped with condenser units. The following resin process systems shall be vented to the thermal oxidizer unit at all times when generating VOC emissions: (a) four reactor condenser vents, (b) five raw material weigh tanks, (c) four manual ejectors, (d) five mixers-resin thin down tanks, and (e) seven blenders. Revent systems shall be provided for the following processes: (a) molten raw material storage tanks, (b) molten raw material weigh tanks, (c) mixer unit during product dropping, and (d) finished product tank wagon loading. Dispensing systems shall be used unless they are closed design or minimize free-fall liquids. Under CO 254, PPG must operate and maintain all process and control equipment according to good engineering and air pollution control practices. To minimize VOC emissions, process equipment cleaning must be conducted, floor cleaning operations must employ water based cleaners, and the use of solvents will be limited to spot cleaning. Under CO 254, PPG must maintain records to demonstrate compliance with this CO and Article XXI, section 2105.06. Recordkeeping

shall include but not limited to (a) REECO thermal oxidizer destruction efficiency tests, and (b) daily records of REECO thermal oxidizer operating temperatures. All records shall be retained for at least five years.

(2) The Paint Plant

CO 254 does not allow PPG to process operations involving VOCs at the facility unless all stationary mixers are equipped with covers which completely enclose the mixer openings, except for an opening no larger than necessary to allow safe clearance for a mixer shaft. Such covers shall either extend at least one-half inch beyond the outer rim of the vessel or be attached to the rim. CO 254 also does not allow any stationary mixer operations at the facility unless all covers are closed at all times except when production, sampling, maintenance or inspection procedures otherwise requires access. Portable and stationary vessels must not be used at the facility to process products containing VOCs unless the covers are maintained in good condition, such that when in place, they maintain contact with their respective rims for at least 90 percent of the circumference of the rim. Dispensing systems must not be used unless they are of closed design or minimize free-fall of liquids and filling of solvent borne coatings must not be performed unless they are in a closed system. All grinding mills must be of completely closed design.

Under CO254, PPG must operate and maintain all process and control equipment according to good engineering and air pollution control practices. To minimize VOC emissions, process equipment cleaning must be conducted, floor cleaning operations must employ waterbased cleaners, and the use of solvents will be limited to spot cleaning. Under CO 254, PPG must maintain records to demonstrate compliance with this CO and Article XXI, section 2105.06. Recordkeeping shall include but not limited to (a) records of specific solvents and quantities used, and (b) records of paint production rates by number of batches and quantity of paint produced in each batch. All records shall be retained for at least five years.

C. Reichhold Chemicals, Inc.

Reichhold Chemicals, Inc. (RCI) owns a synthetic hydrocarbon resins manufacturing facility located in Bridgeville, Allegheny County, Pennsylvania. RCI had the potential to emit NO_X in excess of 100 tpy. In this instance, ACHD issued CO218 to RCI. On July 1, 1997, PADEP submitted this CO to EPA on behalf of the ACHD as a SIP revision. The facility consists of six reactors housed in two buildings with emissions controlled by thermal oxidizers. Under CO 218, RCI is not allowed to exceed 95 tons per year of total combined annual facility wide emissions of NO_X. Under CO 218, RCI must maintain records to demonstrate compliance with this CO and Article XXI, section 2105.06. Recordkeeping shall include but not limited to the type of fuel and amount used. All records shall be retained for at least two years.

D. Reichhold Chemicals, Inc.

The RCI synthetic hydrocarbon resins manufacturing facility located in Bridgeville, Allegheny County, Pennsylvania had the potential to emit VOC in excess of 50 tpy. In this instance, ACHD issued CO 219 to RCI. On July 1, 1997, PADEP submitted this CO to EPA on behalf of the ACHD as a SIP revision. The facility consists of six reactors housed in two buildings with emissions controlled by thermal oxidizers. Under CO 219, RCI is limited to a facility-wide emission limit of 47 tons per year of combined emissions of VOC. CO 219 does not allow RCI the associated process equipment to operate unless the thermal oxidizers are properly maintained and operated with: (a) a minimum destruction efficiency of 95 percent; (b) a minimum operating temperature of 1400 degrees Fahrenheit; and (c) a minimum residence time of one-half seconds at all times. In case of a malfunction, RCI may finish processing the material in the associated equipment at the time of malfunction. RCI must not allow the process equipment to operate unless the emissions from the reactors, process vessels, emissions from the reactors and thin tanks are conveyed to their respective thermal oxidizers. CO 219 requires RCI to provide instrumentation for the thermal oxidizers to continuously monitor and record the following: (a) Operating temperature; (b) oxygen level; and (c) fume (inlet) pressure. RCI must record the following information on a daily basis for all reactors: (a) Batch time; (b) finished product per batch; and (c) raw material feed per batch. RCI must conduct emission testing on the thermal oxidizers no less than once every five years to determine the destruction efficiency of VOCs per unit. RCI must submit a written protocol to ACHD for approval at least 45 days prior to the date of the test, and notify ACHD in writing at least 30 days prior to the date of the test. Testing shall not proceed without ACHD approved protocol and according to EPA approved test methods. Under CO 219, RCI must maintain records to demonstrate compliance with this CO and Article XXI, section 2105.06. All records shall be retained for at least two years.

E. Valspar Corporation

Valspar Corporation (Valspar) is a paint manufacturing facility located in Pittsburgh, Allegheny County, Pennsylvania. Valspar is a major VOC emitting facility. In this instance, RACT has been established and imposed by ACHD in EO 209. On July 1, 1997, PADEP submitted this EO to EPA on behalf of the ACHD as a SIP revision. EO 209 does not allow Valspar to process operations involving VOCs at the facility unless all stationary mixers are equipped with covers which completely enclose the mixer openings, except for an opening no larger than necessary to allow safe clearance for a mixer shaft. Such covers shall either extent at least one-half inch beyond the outer rim of the vessel or be attached to the rim. EO 209 does not allow any stationary mixer operations at the facility unless all covers are closed at all times except when production, sampling, maintenance or inspection procedures otherwise requires access. EO 209 does not allow stationary mixers to process products containing VOCs unless the covers are maintained in good condition, such that when in place, they maintain contact with their respective rims for at least 90 percent of the circumference of the rim. Under EO 209, Valspar must maintain records to demonstrate compliance with this EO and Article XXI, section 2105.06. All records shall be retained for at least two years. Also, under EO 209, Valspar must operate and maintain all process and emission control equipment according to good engineering practice.

III. EPA's Evaluation of the SIP Revisions

EPA is approving these RACT SIP submittals because ACHD and PADEP established and imposed these RACT requirements in accordance with the criteria set forth in the SIP-approved RACT regulations applicable to these sources. The ACHD and PADEP have also imposed record-keeping, monitoring, and testing requirements on these sources sufficient to determine compliance with the applicable RACT determinations.

IV. Final Action

EPA is approving the revisions to the Pennsylvania SIP submitted by PADEP to establish and require VOC and NO_X RACT for five major sources located in the Pittsburgh area. EPA is publishing this rule without prior proposal because

the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on October 4, 2001 without further notice unless EPA receives adverse comment by September 19, 2001. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if adverse comment is received for a specific source or subset of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

V. Administrative Requirements

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' See 66 FR 28355, May 22, 2001. This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for five named sources.

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 4, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving the Commonwealth's source-specific RACT requirements to control VOC and NO_X from five individual sources in the Pittsburgh-Beaver Valley ozone nonattainment area of Pennsylvania may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Nitrogen Oxides, Ozone, Reporting and recordkeeping requirements.

Dated: August 10, 2001.

Judith M. Katz,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

2. Section 52.2020 is amended by adding paragraph (c)(165) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(165) Revisions pertaining to VOC and NO_X RACT for major sources, located in the Pittsburgh-Beaver Valley ozone nonattainment area, submitted by the Pennsylvania Department of

Environmental Protection on July 1, 1997 and April 19, 2001.

(i) Incorporation by reference.

(A) Letters dated July 1, 1997 and April 19, 2001, submitted by the Pennsylvania Department of Environmental Protection transmitting source-specific VOC and NO_X RACT determinations.

(B) Plan Approval and Agreement Upon Consent Orders (COs) and an Enforcement Order (EO) for the following sources:

(*1*) Pruett Schaffer Chemical Company, CO 266, effective September 2, 1998, except for condition 2.5.

(*2*) PPG Industries, Inc., CO 254, effective December 19, 1996, except for condition 2.5.

(*3*) Reichhold Chemicals, Inc., CO 218, effective December 19, 1996, except for condition 2.5.

(*4*) Reichhold Chemicals, Inc., CO 219, effective February 21, 1996, except for condition 2.5.

(*5*) Valspar Corporation, EO 209, effective March 8, 1996, except for condition 2.5.

(ii) Additional Materials—Other materials submitted by the Commonwealth of Pennsylvania in support of and pertaining to the RACT determinations submitted for the sources listed in paragraph (c)(165)(i)(B) of this section.

[FR Doc. 01–20883 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4116a; FRL–7037–2]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Eighteen Individual Sources in the Philadelphia-Wilmington-Trenton Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Commonwealth of Pennsylvania's State Implementation Plan (SIP). The revisions were submitted by the Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for 18 major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Philadelphia-Wilmington-Trenton ozone nonattainment area (the Philadelphia area). EPA is approving these revisions to establish RACT requirements in the SIP in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on October 4, 2001 without further notice, unless EPA receives adverse written comment by September 19, 2001. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Air Quality Planning & Information Services Branch, Air Protection Division, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Melik Spain at (215) 814–2299, the EPA Region III address above or by e-mail at spain.melik@epa.gov. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to sections 182(b)(2) and 182(f) of the Clean Air Act (CAA), the Commonwealth of Pennsylvania (the Commonwealth or Pennsylvania) is required to establish and implement RACT for all major VOC and NO_X sources. The major source size is determined by its location, the classification of that area and whether it is located in the ozone transport region (OTR). Under section 184 of the CAA, RACT as specified in sections 182(b)(2) and 182(f)) applies throughout the OTR. The entire Commonwealth is located within the OTR. Therefore, RACT is applicable statewide in Pennsylvania.

State implementation plan revisions imposing reasonably available control technology (RACT) for three classes of VOC sources are required under section 182(b)(2). The categories are: (1) All sources covered by a Control Technique Guideline (CTG) document issued between November 15, 1990 and the date of attainment; (2) All sources covered by a CTG issued prior to November 15, 1990; (3) All other major non-CTG rules were due by November 15, 1992 and apply to the Pennsylvania submittal. The Pennsylvania SIP has approved RACT regulations and requirements for all sources and source categories covered by the CTG's.

On February 4, 1994, PADEP submitted a revision to its SIP to require major sources of NO_X and additional major sources of VOC emissions (not covered by a CTG) to implement RACT. The February 4, 1994 submittal was amended on May 3, 1994 to correct and clarify certain presumptive NO_X RACT requirements. In the Philadelphia area, a major source of VOC is defined as one having the potential to emit 25 tons per year (tpy) or more, and a major source of NO_X is also defined as one having the potential to emit 25 tpy or more. Pennsylvania's RACT regulations require sources, in the Philadelphia area, that have the potential to emit 25 tpy or more of VOC and sources which have the potential to emit 25 tpy or more of NO_X comply with RACT by May 31, 1995. The regulations contain technology-based or operational ''presumptive RACT emission limitations'' for certain major NO_X sources. For other major NO_X sources, and all major non-CTG VOC sources (not otherwise already subject to RACT under the Pennsylvania SIP), the regulations contain a ''generic'' RACT provision. A generic RACT regulation is one that does not, itself, specifically define RACT for a source or source categories but instead allows for case-by-case RACT determinations. The generic provisions of Pennsylvania's regulations allow for PADEP to make case-by case RACT determinations that are then to be submitted to EPA as revisions to the Pennsylvania SIP.

On March 23, 1998 EPA granted conditional limited approval to the Commonwealth's generic VOC and NO_X RACT regulations (63 FR 13789). In that action, EPA stated that the conditions of its approval would be satisfied once the Commonwealth either (1) certifies that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements currently known to PADEP; *or* (2) demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions as defined in the March 23, 1998 rulemaking. On April 22, 1999, PADEP made the required submittal to EPA certifying that it had met the terms

and conditions imposed by EPA in its March 23, 1998 conditional limited approval of its VOC and NO_X RACT regulations by submitting 485 case-by-case VOC/ NO_X RACT determinations as SIP revisions and making the demonstration described as condition 2, above. EPA determined that Pennsylvania's April 22, 1999 submittal satisfied the conditions imposed in its conditional limited approval published on March 23, 1998. On May 3, 2001 (66 FR 22123), EPA published a rulemaking action removing the conditional status of its approval of the Commonwealth's generic VOC and NO_X RACT regulations on a statewide basis. The regulation currently retains its limited approval status. Once EPA has approved the case-by-case RACT determinations submitted by PADEP to satisfy the conditional approval for subject sources located in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties; the limited approval of Pennsylvania's generic VOC and NO_X RACT regulations shall convert to a full approval for the Philadelphia area.

It must be noted that the Commonwealth has adopted and is implementing additional ''post RACT requirements'' to reduce seasonal NO_X emissions in the form of a NO_X cap and trade regulation, 25 Pa Code Chapters 121 and 123, based upon a model rule developed by the States in the OTR. That rule's compliance date is May 1999. That regulation was approved as SIP revision on June 6, 2000 (65 FR 35842). Pennsylvania has also adopted regulations to satisfy Phase I of the NO_X SIP call and submitted those regulations to EPA for SIP approval. Pennsylvania's SIP revision to address the requirements of the NO_X SIP Call Phase I consists of the adoption of Chapter 145—Interstate Pollution Transport Reduction and amendments to Chapter 123—Standards for Contaminants. On May 29, 2001 (66 FR 29064), EPA proposed approval of the Commonwealth's NO_X SIP call rule SIP submittal. EPA expects to publish the final rulemaking in the **Federal Register** in the near future. Federal approval of a case-by-case RACT determination for a major source of NO_X in no way relieves that source from any applicable requirements found in 25 PA Code Chapters 121, 123 and 145.

On September 20, 1995, April 16, 1996, May 2, 1996, July 2, 1997, July 24, 1998, December 7, 1998, April 9, 1999, and April 20, 1999, PADEP submitted revisions to the Pennsylvania SIP which establish and impose RACT for several sources of VOC and/or NO_X. This rulemaking pertains to 18 of those sources. The remaining sources are or have been the subject of separate rulemakings. The Commonwealth's submittals consist of plan approvals and operating permits which impose VOC and/or NO_X RACT requirements for each source. These sources are all located in the Philadelphia area.

II. Summary of the SIP Revisions

The table below identifies the sources and the individual plan approvals (PAs) and operating permits (OPs) which are the subject of this rulemaking. A summary of the VOC and NO_X RACT determinations for each source follows the table.

PENNSYLVANIA—VOC AND NO_X RACT DETERMINATIONS FOR INDIVIDUAL SOURCES

Source	County	Plan approval (PA #) operating permit (OP #)	Source type	''Major source'' pollutant
1. Amerada Hess Corp.	Philadelphia	PA–51–5009	Gasoline Terminal	VOC.
2. Amoco Oil Company	Philadelphia	PA–51–5011	Gasoline Terminal	VOC.
3. Cartex Corporation	Bucks	OP–09–0076	Synthetic Materials Manufacturer.	VOC.
4. Exxon Company, USA	Philadelphia	PA–51–5008	Gasoline Terminal	VOC.
5. GATX Terminals Corporation	Philadelphia	PA–51–5003	Bulk Storage	VOC.
6. Hatfield Quality Meats, Incorporated	Montgomery	OP–46–0013A	Meat Packing	NO_X.
7. J. L. Clark, Incorporated	Lancaster	OP–36–02009	Graphic Arts/Surface Coating.	VOC.
8. Johnson Matthey, Incorporated	Chester	OP–15–0027	Surface Coating	VOC/NO_X.
9. Kurz Hastings, Incorporated	Philadelphia	PA–51–1585	Graphic Arts	VOC.
10. Lawrence McFadden Company	Philadelphia	PA–51–2074	Paint Manufacturer	VOC.
11. Philadelphia Baking Company	Philadelphia	PA–51–3048	Bakery	VOC.
12. Philadelphia Gas Works	Philadelphia	PA–51–4921	Natural Gas Transmission.	NO_X.
13. PPG Industries, Incorporated	Delaware	OP–23–0005	Chemical Manufacturer	VOC.
14. SmithKline Beecham Pharmaceuticals	Montgomery	OP–46–0035	Pharmaceutical Manufacturer.	VOC/NO_X.
15. Teva Pharmaceuticals, USA	Bucks	OP–09–0010	Pharmaceutical Manufacturer.	VOC.
16. The Philadelphian Condominium Building	Philadelphia	PA–51–6512	Cogeneration Plant	NO_X.
17. Warner Company	Chester	OP–15–0001	Lime Kiln	NO_X.
18. Webcraft Technologies, Incorporated	Bucks	OP–09–0009	Graphic Arts	VOC.

A. Amerada Hess Corp.

Amerada Hess Corp. (Amerada) operates a gasoline terminal in Philadelphia, Pennsylvania. Amerada maintains 3 gasoline and 7 distillate oil storage tanks. Amerada also operates a loading rack. VOC RACT is applicable to Amerada based on the facility's potential emissions. Amerada is not a major NO_X-emitting source. The gasoline and distillate oil storage tanks at this facility are covered by existing SIP-approved Pennsylvania VOC RACT regulations. The loading rack is equipped with a vapor recovery unit. The Philadelphia Air Management Services (AMS) issued PA 50–5009 to Amerada. The PADEP submitted PA 50–5009 to EPA as a SIP revisions, on behalf of AMS. The AMS determined that VOC RACT for Amerada's fugitive VOC emissions is the implementation of a visual leak detection and repair (LDAR) program for all pumps, valves, and flanges at the facility. This LDAR program will be conducted quarterly. The records containing the details of all inspections and repairs will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control

devices must be maintained and operated in accordance with good engineering and air pollution control practices.

B. Amoco Oil Company

Amoco Oil Company (Amoco) owns and operates a gasoline terminal in Philadelphia, Pennsylvania. Amoco maintains 5 gasoline storage tanks and operates a loading rack. Amoco is subject to VOC RACT. Amoco is not a major NO_X-emitting source. The AMS issued PA 50–5011 to Amoco. The PADEP submitted PA 50–5011 to EPA as a SIP revision on behalf of AMS. The gasoline storage tanks at this facility are covered by existing SIP-approved Pennsylvania VOC RACT regulations. The loading rack is equipped with a vapor recovery unit. The VOC RACT determination for Amoco's fugitive VOC emissions consists of implementation of a LDAR program for all pumps, valves, and flanges at the facility. This LDAR program will be conducted every other month. The records containing the details of all inspections and repairs will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

C. Cartex Corporation

Cartex Corporation (Cartex) operates a polyurethane foam manufacturing line at its facility in Bucks County, Pennsylvania. The PADEP issued OP 09–0076 to Cartex and submitted it to EPA as a SIP revision. Cartex produces polyurethane foam seat cushions. Urethane is injected into a mold along with a mold releasing agent to aid in the release of the polyurethane foam seat cushions. There are cleaning activities associated with the use of polyurethane on this production line that are responsible for fugitive VOC emissions. VOC RACT is applicable to Cartex based on the facility's potential emissions. Cartex is not a major NO_X-emitting source. Cartex is subject to SIP-approved RACT regulation 25 Pa Code 129.91–129.95. OP 09–0076 requires the use of electrostatic or high volume low pressure application equipment for the application of the mold releasing agents employed at this facility. The operating permit imposes VOC emission limits of 28.1lbs/hr and 49 tons per year (tpy) from Cartex's polyurethane foam manufacturing line and 2.7 tpy from the use of clean-up solvents. The annual limits must be met on a rolling monthly basis over every consecutive 12 month period. The OP includes the record-keeping requirements necessary to demonstrate compliance. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

D. Exxon Company, U.S.A.

Exxon Company, U.S.A. (Exxon) owns and operates a gasoline terminal in Philadelphia, Pennsylvania. The site stores gasoline, distillate oil, and additives in its 13 storage tanks. This facility also operates a loading rack. Exxon is subject to VOC RACT based on the facility's potential emissions. Exxon is not a major NO_X-emitting source. The gasoline, distillate oil and additive storage tanks at this facility are covered by existing SIP-approved Pennsylvania VOC RACT regulations. The loading rack is equipped with a vapor recovery unit. The AMS issued PA 51–5008 to Exxon, and PADEP submitted it to EPA as a SIP revision. The AMS determined RACT for Exxon's fugitive VOC emissions as the implementation of a LDAR program for all pumps, valves, and flanges at the facility. This LDAR program shall be conducted quarterly. The records containing the details of all inspections and repairs will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

E. GATX Terminals Corporation

GATX Terminals Corporation (GATX) owns and operates a bulk storage terminal in Philadelphia, Pennsylvania. The facility's operations include loading and unloading a mixture of organic compounds from barge or ship to storage tanks. Tank rail cars and trucks are loaded from the storage tanks. Support equipment involved in maintaining these operations include, a thermal oxidizer, boilers, oil/water separators, and storage tanks. Fugitive emissions come from the many valves, flanges, and pumps located throughout the terminal. Based on the potential emissions, GATX is subject to a case-by-case VOC and NO_X RACT evaluation pursuant to 25 Pa Code 129.91(d). The AMS issued PA–51–5003 to GATX to establish VOC and NO_X RACT, and PADEP submitted it to EPA as a SIP revision. The PA imposes an annual VOC emissions limit of 59 tpy for GATX's marine vessel loading operations. The marine vessel loading operations will not process petroleum distillate with a vapor pressure greater than 4 Reid vapor pressure (RVP). The 11 tank/truck loading racks are limited to a vapor pressure lower than 4 RVP when processing organic liquids. An emissions cap of 129 tpy of VOC applies to the tank/truck loading racks. The annual limits must be met on a rolling monthly basis over every consecutive 12 month period. There are 6 loading racks that vent to a thermal oxidizer in compliance with 25 Pa Code 129.59. GATX operates 2 boilers in compliance with 25 Pa Code 129.93(c)(1). The storage tanks at this facility are also regulated by existing SIP-approved Pennsylvania RACT regulations. AMS' case-by-case determination for GATX's fugitive VOC emissions imposes implementation of an LDAR program for all pumps, valves, and flanges at the facility. This LDAR program will be conducted quarterly. The records containing the details of all inspections and repairs will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

F. Hatfield Quality Meats, Incorporated

Hatfield Quality Meats, Incorporated (Hatfield) is a meat packing facility. The majority of the emission sources at this facility are subject to SIP-approved presumptive RACT regulations found in Pa Code 129.93, with the exception of a Cleaver-Brooks boiler rated at 50 million British thermal units per hour (MMBtu/hr). All sources above de minimis levels at this facility are already regulated by existing requirements. The PADEP issued OP 46–0013A to Hatfield restricting the heat input of the Hatfield Cleaver-Brooks boiler to no more than 49 MMBtu/hr. This boiler is subject to 25 Pa Code 129.93(b)(2).

G. J. L. Clark, Incorporated

J. L. Clark Inc. (J. L. Clark) operates a decorative metal can coating and graphic arts facility in Lancaster County, Pennsylvania. J. L. Clark produces high quality metal cans using automation, state of the art computerized graphics and precision lithography. J. L. Clark uses high solids coatings. The sources subject to a case-by-case VOC RACT evaluation pursuant to 25 Pa Code 129.91(d) include 3 surface coating lines and 3 printing/surface coating lines. J. L. Clark is not a major NO_X-emitting source. The Commonwealth issued OP 36–02009 to require RACT for the

coating operations as the use of surface coatings that meet the allowable limits listed in 25 Pa Code 129.52 for miscellaneous metal parts, or use of incineration to comply with the control efficiency requirements of 25 Pa Code 129.52 (b)(2), with incineration occurring at a minimum operating temperature of 1400 degrees F with a minimum retention time of 0.3 seconds. The heatset lithographic printing operations at this facility will also use thermal incineration to control the VOCs from the dryers exhaust. Incineration shall not be used when printing inks or varnishes cover less than 50 percent of the sheets as this level of coverage represents minor emissions. OP–36–02009 requires improved work practice standards for the cleaning operations. Records containing data necessary to calculate the VOC content of the coatings and cleaning solvents must be kept by J. L. Clark and reported to the PADEP annually. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

H. Johnson Matthey, Incorporated

Johnson Matthey, Incorporated (Johnson Matthey), operates a catalytic converter manufacturing and Research and Development (R&D) facility in Chester County, Pennsylvania. Johnson Matthey uses 5 surface coating lines and various drying ovens to manufacture autocatalysts. The majority of this facility's VOC and NO_X emissions result from the exhaust released from the thermal breakdown of the coatings applied to the autocatalysts. Johnson Matthey currently uses caustic scrubbing to treat the exhaust that comes from the ovens. Caustic scrubbing helps to remove acetic acid, acetaldehyde, formaldehyde, and hydrochloric acid at high efficiencies. The combination of these chemicals in addition to acetone excludes other VOC and NO_X control technologies (*i.e.*, carbon adsorption and incineration) from consideration. The Commonwealth issued a revised version of OP 15–0027 to Johnson Matthey on April 15, 1999 to establish VOC and NO_X RACT. The OP imposes VOC limits of 3.0 lbs/hr, 15.0 lbs/day and 2.7 tpy on the Devon I & II Hoods, Devon I Oven and Devon II Engine Test Cells and annual NO_X limits of 0.08 tpy, 2.1 tpy and 11.0 tpy, respectively on these units. Lines No. 1 & 2 PGM Drying Ovens, PGM Coater, and Stabilizer & Hard Fire Drying Ovens are limited to 98.3 tpy of NO_X. Lines No. 3 & 4 Stabilizer, Hard Fire and PGM Drying Ovens, and lines No. 3 & 4 PGM coater, Devon II PGS Coater and Devon II PSG Oven are limited to annual NO_X limits of 26.6 tpy. The OP also imposes an operational limitation of 500 hr/year on the facility's Detroit Emergency Generator and Caterpillar Emergency Generators. The OP imposes pressure drop requirements and other operational requirements on the facility's scrubbers. All annual limits must be met on a rolling monthly basis over every consecutive 12 month period. All process equipment and any associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices. The OP requires Johnson Matthey to record and maintain all the information necessary to determine compliance in accordance with 25 Pa Code section 129.95.

I. Kurz Hastings Incorporated

Kurz Hastings, Incorporated (Kurz), owns and operates a printing facility in Philadelphia, Pennsylvania. The facility is equipped with an ink mixing area that consists of mixing vessels, storage tanks, and drums containing raw materials. The mixing room and the cleaning operations at the facility are subject to a case-by-case RACT evaluation. Based on the potential emissions, Kurz is subject to a case-by-case VOC RACT evaluation pursuant to 25 Pa Code 129.91(d).

The AMS issued PA 51–1585 to Kurz imposing work practice standards on the ink mixing area as RACT. The PADEP submitted PA 51–1585 to EPA as a SIP revision on behalf of AMS. Kurz will comply with RACT for VOC by implementing work practices including that all containers of VOC materials be covered when not in use, that the mixing stations be equipped with lids to minimize emissions while in use, that instructions be posted to prevent spills, that all spills be cleaned-up immediately and all cleaning materials be disposed of in closed containers. The OP specifies that the combustion sources at Kurz are subject to the SIP-approved presumptive RACT limits of 25 Pa Code 129.93(c). All combustion sources must be installed, operated, and maintained in accordance with manufacturers' specifications. The records containing the details necessary to determine compliance will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

J. Lawrence McFadden Company

The Lawrence McFadden Company (Lawrence) is a paint manufacturing facility. The paint manufacturing process involves blending pigments with solvents. These mixtures are packaged as final product. The majority of Lawrence's fugitive emissions come from its lacquer manufacturing area. Lawrence is subject to a case-by-case VOC RACT evaluation pursuant to 25 Pa Code 129.91(d). The AMS issued PA 51–2074 to Lawrence to establish VOC RACT, and PADEP submitted it to EPA as a SIP revision. The PA imposes a 50 tpy limit of VOC on the facility to be met on a rolling monthly basis over every consecutive 12 month period. The PA also imposes improved operating procedures and standards in accordance with CTG, *Control of VOC Emissions from Ink and Paint Manufacturing Processes, EPA–450/3/92–013.* The PA also specifies that the 2 combustion sources at Lawrence are subject to the SIP-approved presumptive RACT limits of 25 Pa Code 129.93(c). All combustion sources must be installed, operated, and maintained in accordance with manufacturers' specifications. The records containing the details necessary to determine compliance will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

K. Philadelphia Baking Company

Philadelphia Baking Company (PBC), owns and operates a bread production facility in Philadelphia, Pennsylvania. The facility operates 2 baking ovens (A & B) and 2 boilers (#1 & #2). The boilers each have a rated capacity of less than 10 MMBtu/hr and fire natural gas or propane. The oven heaters fire natural gas or propane. The baking ovens emit VOC (ethanol) from miscellaneous baking products (yeast products) driven off during the baking process. PA–51–3048 was issued to PBC by AMS to establish VOC RACT, and PADEP submitted it to EPA as a SIP revision. AMS requires the use of a catalytic oxidizer on baking ovens A and B. The catalytic oxidizer must comply with the SIP-approved RACT requirements of 25 Pa Code 129.91(f). The two small boilers are subject to the SIP-approved presumptive RACT limits of 25 Pa Code 129.93(c). The records containing the details necessary to determine compliance will be collected and retained in compliance with the RACT

requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

L. Philadelphia Gas Works

Philadelphia Gas Works (PGW) owns and operates a natural gas storage and distribution facility in Philadelphia, Pennsylvania. The facility's emissions result from the use of boilers, natural gas heaters, natural gas engines for electric generation, liquified petroleum (LP)-Air natural gas turbines, and LPG vaporizers. Based on the potential emissions, PGW is subject to a case-by-case NO_X RACT evaluation pursuant to 25 Pa Code 129.91(d). This facility is not a major source of VOC. The Philadelphia AMS issued PA 51–4921 to PGW to establish NO_X RACT, and PADEP submitted it to EPA as a SIP revision. The PA requires the shutdown of PGW's two 96 MMBtu/hr synthetic natural gas boilers and 6 natural gas engines, and the replacement of these boilers with three 58.7 MMBtu/hr boilers that fire natural gas only and are equipped with Peabody parallel flow multi-staged low NO_X burners. These boilers are limited to 0.1 lbs of NO_X/MMBtu. PA 51–4921 requires that PGW conduct performance tests on these boilers. The remainder of the combustion sources at this facility are subject to the SIP-approved presumptive RACT requirements of 25 Pa Code 129.93(c). The records containing the details necessary to determine compliance will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

M. PPG Industries, Incorporated

PPG Industries, Incorporated (PPG) located in Delaware County, Pennsylvania, manufactures a variety of surfactants via batch processing. The facility includes a CI filter press, drop tanks, still feed tank, vacuum pump/atmospheric receiver, slurry tanks and a number of surge, recovery, and storage tanks containing fatty acids, alcohols and other non-ionics. The VOC emissions emanate primarily from the use of isopropyl alcohol (IPA). The facility's fugitive emissions result from leaking valves, pumps, and flanges. Based on the potential emissions, PPG is subject to a case-by-case VOC RACT evaluation pursuant to 25 Pa Code 129.91(d). This facility is not a major NO_X-emitting source. The PADEP imposes RACT for PPG in OP 23–0005. The PPG must use a catalytic thermal oxidizer (CTO) to control VOC emissions from the CI filter press, drop tanks, still feed tank, vacuum pump/atmospheric receiver, and slurry tanks. The operation of these sources must be terminated if the CTO is inoperable. The overall efficiency of the CTO must be 95 percent. The CTO must maintain a minimum temperature of 470 degrees F and must be equipped with a visual means of monitoring the secondary combustion chamber exit gas temperature. There are two (2) drop tanks at this facility that will use a water cooled condenser as the primary control device, prior to being vented to the CTO. The dryer vacuum pump/atmospheric receiver's primary control device is a chilled IPA condenser which must achieve an overall 90 percent removal efficiency prior to being vented to the CTO. The condenser controlling the drop tanks must maintain a temperature of 100 degrees F or less, and the condenser controlling the dryer vacuum pump/atmospheric receiver must maintain a temperature of 80 degrees F or less. The CI filter press, drop tanks, still feed tank, vacuum pump/atmospheric receiver, slurry tanks identified as Sources, 101, 102a, 102b, 103, 104, 105a and 105 b must limit their VOC emissions to 26.5 lbs/hr, and 8.80 tpy. The alcohol and fatty acid tanks identified as Sources 106a and 106b are limited to VOC emissions of 0.5 lbs/hr and 4.4 tpy. The CI piping component fugitives identified as Source 108 must limit VOC emissions to 9.2 lbs/hr and 15.0 tpy. The non-IPA fugitive emissions identified as Source 109 must limit VOC emissions to 9.2 lbs/hr and 15.0 tpy. The CI reactor at this facility is a de minimis source of VOC emissions and is limited by OP 23–0005 to VOC emissions rates of no greater than 3.0 lbs/hr, 15.0 lbs/day, and 2.7 tpy. The records containing the details necessary to determine compliance will be collected and retained in compliance with 25 Pa Code 129.95. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

N. SmithKline Beecham Pharmaceuticals

SmithKline Beecham Pharmaceuticals (SmithKline) operates a Research and Development (R&D) facility located in Montgomery County, Pennsylvania. The R&D facility develops new pharmaceutical products. SmithKline is a major emitter of both NO_X and VOC. The PADEP issued OP 46–0035 to impose VOC and NO_X RACT for SmithKline. Boilers 2 and 3W, rated at 51 MMBtu/hr, are derated to 49 MMBtu/hr. The OP requires the installation of flow transmitters on the existing natural gas orifice plates to permanently restrict the maximum gross heat input of the boilers. The OP specifies a natural gas and fuel oil limitations of less than 49,000 ft^3/hr. and 327 gallons/hr, respectively. Boilers 44 and 45 will operate low NO_X burners with flue gas recirculation. The total amount of No. 2 fuel oil fired in Boilers 44 and 45 shall not exceed 478 and 286 gallons, respectively in any 12-month rolling period. NO_X emissions from the boilers are limited to 30 ppm corrected to 3.0 percent oxygen content when firing natural gas and to 140 ppm corrected to 3.0 percent oxygen when firing No. 2 fuel oil, and 8.2 tpy in a 12 month rolling period. The remainder of the boilers at this facility over 20 MMBtu/hr must perform annual adjustments under 25 Pa Code § 129.93(b)(2) in accordance with EPA guidance document, *Combustion Efficiency Optimization Manual for Operators of Oil and Gas-fired Boilers*, EPA–340/1–83–023, September 1983. The VOC RACT analysis determined that RACT for the boilers (5–15, 1 and 4W) along with the 3 pathological waste incinerators and the emergency generators will be maintenance and operation in accordance with the manufacturer's specifications and good air pollution engineering control practices. The boilers at this facility have low concentrations of VOC emissions in the exhaust streams. There are no technically viable control technologies for controlling VOC emissions at these low levels. OP 46–0035 specifies that SmithKline will apply white paint to its ethyl acetate storage tanks (V–301–V–306) or install new pressure relief vents. All requirements and records necessary to determine compliance are specified in OP 46–0035. All process equipment and associated air pollution control devices must be maintained and operated in accordance with good engineering and air pollution control practices.

O. Teva Pharmaceuticals USA

Teva Pharmaceuticals USA (Teva) operates a pharmaceutical manufacturing facility in Bucks County, Pennsylvania. Teva manufactures acetaminophen. Production of acetaminophen tablets involve mixing a binding agent in solution with isopropyl alcohol. The VOC emissions emanate as the alcohol is removed from the product during the drying stage in the ovens.

The PADEP issued OP 09–0010 to Teva. The PADEP determined VOC emissions have been reduced drastically due to Teva's use of the direct compression process in their acetaminophen production operations. Direct compression does not require the use of a binding agent to produce a granulated product for compression on the tablet press. The PADEP RACT determination requires Teva to use less isopropyl alcohol and to employ no dryer in this new manufacturing process. Total VOC emissions from the facility shall not exceed 24.0 tpy calculated as a 12 month rolling sum over every consecutive 12 month period. The records containing the details necessary to determine compliance will be collected and retained in compliance with 25 Pa Code 129.95.

P. The Philadelphian Condominium Building

The Philadelphian Condominium Building (PCB) owns and operates a 2,200 horse power Cooper Superior dual fuel reciprocating engine in its condominium building. The engine burns natural gas and diesel fuel. Based on the potential emissions, PCB is subject to a case-by-case NO_X RACT evaluation pursuant to 25 Pa Code 129.91(d). This facility is not a major VOC-emitting source. The Philadelphia AMS issued PA 51–6512 to PCB, and PADEP submitted it to EPA as a SIP revision. The AMS determined NO_X RACT for PCB to be the implementation of injection timing retard on its dual fuel reciprocating engine. The PA limits the NO_X emissions from the stack outlet to 4.1 grams per brake-horsepower-hour and 69 tpy. The annual limit must be met on a rolling monthly basis over every consecutive 12 month period. The records containing the details necessary to determine compliance will be collected and retained in compliance with the RACT requirements of 25 Pa Code 129.91–129.94.

Q. Warner Company

Warner Company (Warner) located in Chester County, Pennsylvania manufactures lime. Warner operates two (2) rotary lime kilns that fire pulverized bituminous coal. Rotary lime kiln No. 2 has a heat capacity of 95 MMBtu/hr. Rotary lime kiln No. 3 is rated at 85 MMBtu/hr. Warner is a major source of NO_X. Warner is not subject to a case-by-case VOC RACT evaluation pursuant to 25 Pa Code 129.91(d). The PADEP imposes RACT in OP 15–0001. The OP requires the installation of an oxygen combustion analyzer for rotary lime kilns No. 2 & 3. The NO_X limit for kiln No. 2 is 0.45 lbs of NO_X/MMBtu when firing pulverized bituminous coal and 0.46 lbs/MMBtu of NO_X from Kiln No. 3 when firing pulverized bituminous coal. The hours of operation of the No. 2 & 3 lime kilns is limited to 7,920 hr/year to be met on a rolling monthly basis over every consecutive 12 month period. The PADEP determined that Warner's use of oxygen analyzers to fine tune the air flow rate in the combustion chamber of their pulverized coal fired kilns to reduce NO_X as RACT. The OP requires that stack testing be performed in accordance with 25 Pa Code Chapter 139 and with additional conditions specified in OP 15–0001. All requirements and records necessary to determine compliance are specified in OP 15–0001.

R. Webcraft Technologies, Incorporated

Webcraft Technologies, Incorporated (Webcraft), operates a graphic arts facility. Webcraft is subject to both case-by-case VOC and NO_X RACT evaluations pursuant to 25 Pa Code 129.91(d). The PADEP issued OP 09–0009 to Webcraft to impose VOC and NO_X RACT. Total facility emissions of VOC (excluding Press No. 18) are limited to no more than 40.5 tpy. Total facility emissions of NO_X from all combustion sources (excluding Press No. 18) are limited to no more than 24.23 tpy. Annual limits are to be met on a rolling monthly basis over every consecutive 12 month period. Webcraft uses 7 heatset web offset lithographic printing presses and 2 electropresses. The primary contributor of VOC emissions in these processes is the solvent in the ink, which is driven off in the drying ovens. VOC emissions at this facility also come from fountain solutions and cleaning solvents. Webcraft operates an automatic blanket washing system to remove ink from various press components, while some cleaning solvents are applied manually. The PADEP imposed VOC control requirements consistent with the *September 1993 CTG (EPA–453/D–95–001) for the Offset Lithographic Printing Industry.* The PADEP determined RACT for Webcraft's cleaning solvents as maintenance of low vapor pressure solutions. The fountain solution used on the printing presses does not contain isopropyl alcohol. Instead, Webcraft is required to use alcohol substitutes (2-butoxyethanol or butyl cellusolve) in its fountain solution. OP–09–0009 limits the fountain solution to a concentration of 3.0 percent of VOC or the use of refrigeration at or below 60 degrees F. The Combustion Engineering boiler (49 MMBtu/hr) and the Brian Water Tube boiler are limited to operating restrictions of 2,880 hours and 4,368 hours respectively during any 12-month rolling period. The Combustion Engineering Boiler's fuel consumption is limited to 99,360 gallons of No. 2 fuel oil per year. The 2 electropresses in use at this facility contain dryers that are designed to evaporate and remove toner solvents from the web, treat the solvent laden exhaust, and recycle a part of the treated exhaust air to the process with an efficiency of 99 percent. OP 09–0009 imposes more stringent requirements in conditions 12. A–M on Press No. 18. These include the use of a thermal oxidizer with a inlet temperature of 550 degrees F and a minimum destruction efficiency of 95 percent. Press No. 18 may only be operated when the thermal oxidizer and dryer are operational. The VOC emissions from Press No. 18 due to ink usage is limited to 5.15 tpy calculated as 20 percent of the ink retained on the paper and 95 percent of the ink leaving the press being destroyed by the thermal oxidizer. The total VOC from Press No. 18 from the use of ink, wetting, fountain solution and blanket wash/up clean-up solvent shall be limited to 7.40 tpy. The NO_X emissions from the dryer are limited to 0.53 lbs/hr and 2.32 tpy. The VOC and NO_X emission sources at this facility will be operated and maintained in a manner consistent with good air pollution engineering control practices. All requirements and records necessary to determine compliance are specified in OP 09–0009.

III. EPA's Evaluation of Pennsylvania's SIP Revisions

EPA is approving Pennsylvania's RACT SIP submittals because AMS and PADEP established and imposed these RACT requirements in accordance with the criteria set forth in the SIP-approved RACT regulations applicable to these sources. The Commonwealth has also imposed record-keeping, monitoring, and testing requirements on these sources sufficient to determine compliance with the applicable RACT determinations.

IV. Final Action

EPA is approving the SIP revisions to the Pennsylvania SIP submitted by PADEP to establish and require VOC and NO_X RACT for 18 major sources located in the Philadelphia area. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are

filed. This rule will be effective on October 4, 2001 without further notice unless EPA receives adverse comment by September 19, 2001. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if adverse comment is received for a specific source or subset of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

V. Administrative Requirements

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' See 66 FR 28355, May 22, 2001. This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for 18 named sources.

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving the Commonwealth's source-specific RACT requirements to control VOC and NO_X from 18 individual sources in the Philadelphia area may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Nitrogen Oxides, Ozone, Reporting and recordkeeping requirements.

Dated: August 10, 2001.

Judith M. Katz,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

2. Section 52.2020 is amended by adding paragraph (c)(156) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(156) Revisions to the Pennsylvania Regulations, Chapter 129 pertaining to VOC and NO_X RACT determinations for sources located in the Philadelphia area submitted by the Pennsylvania Department of Environmental Protection on September 20, 1995, April 16, 1996, May 2, 1996, July 2, 1997, July 24, 1998, December 7, 1998, April 9, 1999, and April 20, 1999.

(i) Incorporation by reference.

(A) Letters submitted by the Pennsylvania Department of Environmental Protection transmitting source-specific VOC and/or NO_X RACT

determinations, in the form of plan approvals and operating permits on September 20, 1995, April 16, 1996, May 2, 1996, July 2, 1997, July 24, 1998, December 7, 1998, April 9, 1999, and April 20, 1999.

(B) Plan approvals (PA), Operating permits (OP) issued to the following sources:

(*1*) Amerada Hess Corp., PA–51–5009, for PLID 5009, effective May 29, 1995.

(*2*) Amoco Oil Company, PA–51–5011, for PLID 5011, effective May 29, 1995.

(*3*) Cartex Corporation, OP–09–0076, effective April 9, 1999, except for the expiration date.

(*4*) Exxon Company, U.S.A., PA–51–5008, for PLID 5008, effective May 29, 1995.

(*5*) GATX Terminals Corporation, PA–51–5003, for PLID 5003, effective May 29, 1995.

(*6*) Hatfield, Inc., OP–46–0013A, effective January 9, 1997 (as revised October 1, 1998), except for the expiration date.

(*7*) J. L. Clark, Inc., OP–36–02009, effective April 16, 1999, except for the expiration date.

(*8*) Johnson Matthey, Inc., OP–15–0027, effective August 3, 1998 (as revised April 15, 1999), except for the expiration date.

(*9*) Kurz Hastings, Inc., PA–51–1585, for PLID 1585, effective May 29, 1995.

(*10*) Lawrence McFadden, Inc., PA 51–2074, for PLID 2074, effective June 11, 1997.

(*11*) Philadelphia Baking Company, PA–51–3048, for PLID 3048, effective April 10, 1995.

(*12*) Philadelphia Gas Works, PA–51–4921, for PLID 4921, effective May 29, 1995.

(*13*) PPG Industries, Inc., OP–23–0005, effective June 4, 1997, except for the expiration date.

(*14*) SmithKline Beecham Pharmaceuticals, OP–46–0035, effective March 27, 1997 (as revised October 20, 1998), except for the expiration date.

(*15*) Teva Pharmaceuticals USA, OP–09–0010, effective April 9, 1999, except for the expiration date.

(*16*) The Philadelphian Condominium Building, PA–51–6512, for PLID 6512, effective May 29, 1995.

(*17*) Warner Company, OP–15–0001, effective July 17, 1995 except for the expiration date.

(*18*) Webcraft Technologies, Inc., OP–09–0009, effective April 18, 1996 (as revised October 15, 1998), except for the expiration date.

(ii) Additional Materials—Other materials submitted by the Commonwealth of Pennsylvania in support of and pertaining to the RACT determinations for the sources listed in paragraph (c)(156)(i)(B) of this section.

[FR Doc. 01–20881 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[PA118–4120a; FRL–7038–6]

Approval and Promulgation of Air Quality Implementation Plans for Designated Facilities and Pollutants; Pennsylvania; Conversion of the Conditional Approval of the Pennsylvania Large Municipal Waste Combustor (MWC) Plan to Full Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to convert its conditional approval of the Commonwealth of Pennsylvania's large municipal waste combustor (MWC) plan submitted by the Pennsylvania Department of Environmental Protection (PADEP) to a full approval. EPA is converting its conditional approval to a full approval because the PADEP submitted a revision to the plan which satisfies the condition imposed by EPA in its conditional approval. That condition required the Commonwealth to submit an expeditious compliance schedule for the supplemental emissions guideline (EG) limits promulgated on August 25, 1997. This action converting EPA's conditional approval of the Pennsylvania plan to a full approval is being taken under the Clean Air Act (CAA).

DATES: This rule is effective on October 4, 2001 without further notice, unless EPA receives adverse written comment by September 19, 2001. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and Pennsylvania Department of Environmental Protection, Bureau of Air Quality, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania 17105–8465.

FOR FURTHER INFORMATION CONTACT: James B. Topsale (215) 814–2190 at the EPA Region III address above, or by e-mail at topsale.jim@epa.gov. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION:

I. Background

Section 111(d) of the CAA requires that ''designated'' pollutants controlled under standards of performance for new stationary sources by section 111(b) of the CAA must also be controlled at existing sources in the same source category. Also, section 129 of the CAA specifically addresses solid waste combustion. It requires EPA to establish emission guidelines (EG) for MWC units and requires states to develop state plans for implementing the promulgated EG.

The part 60, subpart Cb, EG for MWC units differ from other EG adopted in the past because the rule addresses both sections 111(d) and 129 CAA requirements. Section 129 requirements override certain related aspects of section 111(d).

On December 19, 1995, pursuant to sections 111 and 129 of the CAA, EPA promulgated new source performance standards (NSPS) applicable to new MWCs i.e., those for which construction was commenced after September 20, 1994) and EG applicable to existing MWCs. The NSPS and EG are codified at 40 CFR part 60, subparts Eb and Cb, respectively. *See* 60 FR 65387 and 65415. Subparts Eb and Cb regulate MWC emissions. Emissions from MWCs contain organics (dioxins/furans), metals (cadmium, lead, mercury), acid gases, (hydrogen chloride, sulfur dioxide, and nitrogen oxides), and particulate matter, including opacity.

On April 8, 1997, the United States Court of Appeals for the District of Columbia Circuit vacated subparts Cb and Eb as they apply to MWC units with the capacity to combust 250 tons per day (TPD) or less than of municipal solid waste (MSW), consistent with its opinion in *Davis County Solid Waste Management and Recovery District* v. *EPA*, 101 F.3d 1395 (D.C. Cir. 1996), *as amended*, 108 F.3d 1454 (D.C. Cir. 1997). As a result, subparts Eb and Cb were amended to apply only to MWC

units with the capacity to combust more than 250 TPD of MSW per unit (i.e., large MWC units). Also, the amended EG made minor revisions to the emissions limitations for four pollutants—hydrogen chloride, sulfur dioxide, nitrogen oxides, and lead. The amended requirements of the NSPS and EG were published in the **Federal Register** on August 25, 1997. *See* 62 FR 45119 and 45124 for the EG amendments.

As a result of the *Davis County* litigation, noted above, compliance with supplemental EG emissions limits for hydrogen chloride, sulfur dioxide, nitrogen oxides, and lead could extend until August 26, 2002, or 3 years after EPA approval of the 111(d)/129 plan, whichever is earlier. However, section 129(f)(2) of the CAA states that requirements promulgated pursuant to sections 111 and 129 must be effective ''as expeditiously as practicable after approval of a State plan.'' As required by section 129(b)(3) of the CAA, on November 12, 1998 EPA promulgated a Federal Implementation Plan (FIP) for large MWCs that commenced construction on or before September 20, 1994. The FIP is a set of emissions limits, compliance schedules, and other requirements that implement the EG for MWC, as amended. The FIP is applicable to those large existing MWCs not specifically covered by an approved State plan under sections 111(d) and 129 of the CAA. Also, it fills a Federal enforceability gap until State plans are approved and ensures that the MWC units stay on track to complete, in an expeditious manner, required pollution control equipment retrofits on or before the final statutory compliance date of December 19, 2000.

On August 23, 1999 (64 FR 45880), EPA promulgated a conditional approval of Pennsylvania's large MWC 111(d)/129 plan. The conditionally approved Pennsylvania plan requires compliance with the original 1995 EG emissions limits by a date no later than December 19, 2000, and compliance with the 1997 EG supplemental emissions limits by a date no later than August 26, 2002, or 3 years after EPA approval of the 111(d)/129 plan, whichever is earlier. After considering the requirements of section 129(f)(2) and the FIP, including the related background information document (#0106–00–002–002, August 20, 1998), EPA determined that the final compliance dates for the supplemental emissions limits, as stipulated in the Pennsylvania 111(d)/129 plan's Federally enforceable state operating permits (FESOPs) and source-specific plan approval (i.e., construction permit), were not expeditious. The conditionally approved Pennsylvania plan contains no economic, technical, or other rationale to justify a compliance date extension until August 26, 2002 for the supplemental emissions limits. Accordingly, EPA considered the plan's interim and final compliance schedules approvable for the original 1995 EG emissions limits, but not the final compliance schedule (August 26, 2002, or 3 years after EPA approval of the state plan, whichever is earlier) for the 1997 supplemental emissions limits. *See* 62 FR 45116.

As previously stated, EPA promulgated a conditional approval of Pennsylvania's large MWC 111(d)/129 plan on August 23, 1999 (64 FR 45880). To fulfill the condition imposed by EPA, PADEP was required to amend the affected facility operating permits, as necessary, and include a final compliance date, no later than December 19, 2000, for the supplemental limits; and then submit the amended permits, as a 111(d)/129 plan revision, to EPA by August 22, 2000.

II. Summary of Pennsylvania's MWC 111d/129 Plan Revision and EPA's Evaluation

On July 7, 2000, PADEP formally submitted the required compliance schedule revisions through the use of amended operating permits. EPA has determined that PADEP has satisfied the condition imposed in the August 23, 1999 conditional approval. In addition, on August 15, 2000, the PADEP provided supplemental information that clarifies certain Lancaster County Solid Waste Management Authority operational requirements for its resource recovery facility's dry lime injection system and the determination of sulfur dioxide and hydrogen chloride percent emission reductions in the combustor units.

III. Final Action

EPA is approving the revision to the Commonwealth's MWC 111d/129 plan submitted by PADEP on July 7, 2000 which requires compliance with the supplemental emissions limits by a date no later than December 19, 2000. As a result of this approval, the conditional nature of EPA's August 23, 1999 approval of the Pennsylvania large MWC 111(d)/129 plan is, hereby, removed and converted to a full approval. Also, EPA accepts the PADEP explanation regarding the operational requirements, noted above, for the Lancaster County Solid Waste Management Authority MWC facility. This action is being published without prior proposal because we view this as a noncontroversial amendment and because we anticipate no adverse comments. In a separate document in the ''Proposed Rules'' section of this **Federal Register** publication, we are proposing to approve the plan revision. This action will be effective without further notice unless we receive relevant adverse comment by September 19, 2001. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. Any parties interested in commenting must do so at this time. EPA will not institute a second comment period. If no such comments are received by September 19, 2001, you are advised that this action will be effective on October 4, 2001.

IV. Administrative Requirements

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, (May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq. Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a 111(d)/129 submission, to use VCS in place of a 111(d)/129 plan submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule converting EPA's conditional approval of the Commonwealth of Pennsylvania's MWC 111(d)/129 plan does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 10, 2001.

Judith Katz,

Acting Regional Administrator, Region III.

40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart NN—Pennsylvania

2. Section 62.9640 is revised to read as follows:

§ 62.9640 Identification of plan.

The 111(d)/129 plan for municipal waste combustors (MWC) units with a capacity greater than 250 tons per day (TPD) and the associated Pennsylvania Department of Environmental Protection operating permits that were submitted to EPA on April 27, 1998, and as amended on September 8, 1998, and July 7, 2000, including supplemental information dated August 15, 2000. All affected facilities must achieve full compliance with all 111(d)/129 plan requirements on or before December 19, 2000.

3. Section 62.9642 is revised to read as follows:

§ 62.9642 Effective dates.

(a) The effective date of the submitted 1998 111(d)/129 plan is October 22, 1999.

(b) The effective date of the submitted 2000 111(d)/129 plan revision is October 4, 2001.

[FR Doc. 01–20892 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 01–05]

Alternative Dispute Resolution

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is issuing new regulations implementing the Administrative Dispute Resolution Act. The new regulations expand the Commission's Alternative Dispute Resolution (''ADR'') services, addressing guidelines and procedures for arbitration and providing for mediation and other ADR services. This rule replaces current subpart U—Conciliation Service, with a new subpart U—Alternative Dispute Resolution, that contains a new Commission ADR policy and provisions for various means of ADR. The rule also revises certain other regulations to conform to the Commission's new ADR policy.

DATES: Effective: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW, Room 1046, Washington, DC 20573–0001, 202–523–5725, E-mail: *secretary@fmc.gov*.

SUPPLEMENTARY INFORMATION: The Administrative Dispute Resolution Act (''ADRA'') was first promulgated in 1990 (Pub. L. 101–552), and subsequently amended in 1996 (Pub. L. 104–320). It defines ADR to mean any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof, 5 U.S.C. 571 (3).

The Federal Maritime Commission intends to expand the ADR services available from the Commission. Accordingly, the Commission published a notice of proposed rulemaking on May 21, 2001, 66 FR 27921, to amend part 502 of the Commission's rules.

The Commission received comments in response to the proposed rule from the National Customs Brokers and Forwarders Association of America, Inc. (''NCBFAA'') and Charles L. Measter, a member of the Society of Maritime Arbitrators Inc. (''SMA'').

NCBFAA states that it supports the policy behind the proposal, as well as most of the proposed provisions. However, NCBFAA makes three suggestions. First, NCBFAA takes issue with proposed § 502.406(a)(1) and suggests it be deleted. Second, NCBFAA does not believe the proposed rule provides for the use of discovery in arbitration proceedings, and believes the availability of discovery in such proceedings should be provided for in the rule. Third, NCBFAA believes it important that the rule provide for the taking of sworn testimony in arbitration proceedings.

NCBFAA appears to read proposed § 502.406(a)(1) as barring the use of ADR procedures whenever a component of the Commission is a party, and urges that the exemption of the Commission and its components as parties in § 502.406(a)(1) be deleted. However, that provision bars the Commission or one of its components from participating as a party only in arbitration proceedings. The Commission concurs with NCBFAA that mediation can be an effective way to resolve disputes, even when a component of the Commission is a party. The proposed rule would allow for the use of mediation or other means of assisted negotiation in such situations. Under the ADRA, however, before the Commission or one of its components, as a party, could agree to arbitrate a matter, the Commission must develop and issue guidance on the appropriate use of binding arbitration, including when an officer or employee of the Commission has authority to settle an issue in controversy through binding arbitration. Such guidance must be issued prior to the use of binding arbitration and after consultation with the Attorney General. See 5 U.S.C. 575(c). The Commission has not sought to obtain approval of such provisions by the Department of Justice. Moreover, the Commission would not be in a position to review an arbitrator's decision, as it is with respect to the initial decision of an Administrative Law Judge in a Commission proceeding. The Commission is not ready at this time to issue a rule providing for Commission components to participate in arbitration. Rather, the Commission encourages its components to engage in mediation or any other of the various forms of assisted negotiation.

The Commission sees no reason why discovery could not be held or sworn testimony be taken within an arbitration proceeding. Proposed § 502.407 would provide authority to the arbitrator to regulate the course of arbitral hearings and administer oaths and affirmations. The intent behind an arbitration proceeding is to resolve an issue in controversy in a more expeditious and less costly manner than would litigation generally. Extensive discovery therefore is discouraged in an arbitration proceeding, even though some discovery may be necessary. Prior to an arbitration, the parties may agree to a discovery process, including limitations therein. To the extent the discovery process is not controlled by an agreement to arbitrate, the Commission anticipates that the arbitrator may make rulings with respect to discovery under his authority to regulate the course of the hearing. Also, the arbitrator would be empowered to require testimony under oath.

Mr. Measter states that he is a member of SMA, the members of which he states have expertise in arbitration and mediation. He states that he believes the proposed rule is workable and within the generally accepted practice in the ADR field. He does not believe that members of the Commission's staff should serve as neutrals. He posits that SMA could provide neutrals and even administer the program, even though he also thinks that Commission staff members could administer the process.

Under the ADRA, 5 U.S.C. 573, and proposed § 502.404(a), a neutral may be a Federal Government officer or employee or any other individual acceptable to the parties, as long as the neutral is without official, financial, or personal conflict of interest or any such conflict of interest has been fully disclosed in writing and is acceptable to all parties. Moreover, the proposed rule provides for appointment of neutrals acceptable to the parties. The parties may select a neutral that is not a Commission employee or official. In such event, under § 502.404(d) the fees and expenses would be borne by the parties as they agree. Accordingly, the proposed rule would not prevent parties from using ADR services of organizations like SMA. Indeed, the Commission encourages parties to seek ADR services to resolve disputes prior to bringing them to the Commission. When such a dispute is before the Commission or its staff, however, the Commission would make personnel available for ADR services should the parties so desire.

The rule contains no additional information collection or record keeping requirements and need not be submitted to OMB for approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking since the rule creates new service options that are voluntary to all ocean shipping entities, including small businesses. The rule benefits small entities by expediting the complaint process, reducing costs, and increasing the Commission's assistance. As no comments refuted this determination, the certification remains unchanged. This regulatory action is not a ''major rule'' under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

Therefore, for the reasons set forth above, 46 CFR part 502 is amended as set forth below:

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation is revised to read:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–596; 5 U.S.C. 571–584; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. app. 817d, 817e, 1114(b), 1705, 1707–1711, 1713–1716; E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1964–1965 Comp. P. 306; 21 U.S.C. 853a; Pub. L. 105–258, 112 Stat. 1902.

2. Section 502.61 is amended by revising paragraph (d) to read as follows:

§ 502.61 Proceedings.

* * * * *

(d) All orders instituting a proceeding or noticing the filing of a complaint will contain language requiring that at an early stage of the proceeding and when practicable the parties shall consider the use of alternative dispute resolution in such manner as the presiding officer shall direct and further requiring that hearings shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents, or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. [Rule 61.]

3. Section 502.62 is amended by redesignating paragraphs (e) through (h) as paragraphs (f) through (i) and adding a new paragraph (e) to read as follows:

§ 502.62 Complaints and fee.

* * * * *

(e) Complainant(s) must state whether informal dispute resolution procedures were used prior to filing the complaint and whether complainant(s) consulted with the Commission Dispute Resolution Specialist about utilizing alternative dispute resolution (ADR) under the Commission's ADR program.

* * * * *

4. Section 502.91 is amended by revising current paragraph (d) and adding new paragraphs (e) and (f) to read as follows:

§ 502.91 Opportunity for informal settlement.

* * * * *

(d) As soon as practicable after the commencement of any proceeding, the presiding judge shall direct the parties or their representatives to consider the use of alternative dispute resolution, including but not limited to mediation, and may direct the parties or their representatives to consult with the Federal Maritime Commission Alternative Dispute Resolution Specialist about the feasibility of alternative dispute resolution.

(e) Any party may request that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will appoint a mediator or other neutral who is acceptable to all parties, coordinating with the Federal Maritime Commission Alternative Dispute Resolution Specialist. The mediator or other neutral shall convene and conduct one or more mediation or other sessions with the parties and shall inform the presiding judge, within the time prescribed by the presiding judge, whether the dispute resolution proceeding resulted in a resolution or not, and may make recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. All such dispute resolution proceedings shall be subject to the provisions of subpart U.

(f) Any party may request that a settlement judge be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will advise the Chief Administrative Law Judge who may appoint a settlement judge who is acceptable to all parties. The settlement judge shall convene and preside over conferences and settlement negotiations and shall report to the presiding judge within the time prescribed by the Chief Administrative Law Judge, on the results of settlement discussions with appropriate recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. [Rule 91].

5. Section 502.94 is amended by revising paragraph (c) to read as follows:

§ 502.94 Prehearing conference.

* * * * *

(c) At any prehearing conference, consideration shall be given to whether the use of alternative dispute resolution would be appropriate or useful for the disposition of the proceeding whether or not there has been previous consideration of such use.

6. Section 502.301 is amended by revising paragraph (b) to read as follows:

§ 502.301 Statement of policy.

* * * * *

(b) With the consent of both parties, claims filed under this subpart in the amount of $50,000 or less will be decided by a Settlement Officer appointed by the Federal Maritime Commission Alternative Dispute Resolution Specialist, without the necessity of formal proceedings under the rules of this part. Authority to issue decisions under this subpart is delegated to the appointed Settlement Officer.

* * * * *

7. Subpart U is revised in its entirety to read as follows:

Subpart U—Alternative Dispute Resolution

Sec.

502.401 Policy.
502.402 Definitions.
502.403 General authority.
502.404 Neutrals.
502.405 Confidentiality.
502.406 Arbitration.
502.407 Authority of the arbitrator.
502.408 Conduct of arbitration proceedings.
502.409 Arbitration awards.
502.410 Representation of parties.
502.411 Mediation and other alternative means of dispute resolution.

Subpart U—Alternative Dispute Resolution

§ 502.401 Policy.

It is the policy of the Federal Maritime Commission to use alternative means of dispute resolution to the fullest extent compatible with the law and the agency's mission and resources. The Commission will consider using ADR in all areas including workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuing and revoking licenses and permits, contract award and administration, litigation brought by or against the Commission, and other interactions with the public and the regulated community. The Commission will provide learning and development opportunities for its employees to develop their ability to use conflict resolution skills, instill knowledge of the theory and practice of ADR, and to facilitate appropriate use of ADR. To this end, all parties to matters under this part are required to consider use of a wide range of alternative means to resolve disputes at an early stage. Parties are encouraged to pursue use of alternative means through the Commission's Bureau of Consumer Complaints and Licensing in lieu of or prior to initiating a Commission proceeding. All employees and persons who interact with the Commission are encouraged to identify opportunities for collaborative, consensual approaches to dispute resolution or rulemaking.

§ 502.402 Definitions.

(a) *Alternative means of dispute resolution* means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(b) *Award* means any decision by an arbitrator resolving the issues in controversy;

(c) *Dispute resolution communication* means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(d) *Dispute resolution proceeding* means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(e) *In confidence* means, with respect to information, that the information is provided—

(1) With the expressed intent of the source that it not be disclosed; or

(2) Under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(f) *Issue in controversy* means an issue which is material to a decision concerning a program of the Commission, and with which there is disagreement—

(1) Between the Commission and persons who would be substantially affected by the decision; or

(2) Between persons who would be substantially affected by the decision;

(g) *Neutral* means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy; and

(h) *Person* has the same meaning as in 5 U.S.C. 551(2).

§ 502.403 General authority.

(a) The Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, if the parties agree to a dispute resolution proceeding.

(b) The Commission will consider not using a dispute resolution proceeding if—

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subpart are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§ 502.404 Neutrals.

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) With consent of the parties, the Federal Maritime Commission Dispute Resolution Specialist will seek to provide a neutral in dispute resolution proceedings through Commission staff, arrangements with other agencies, or on a contractual basis.

(d) Fees. Should the parties choose a neutral other than an official or employee of the Commission, fees and expenses shall be borne by the parties as the parties shall agree.

§ 502.405 Confidentiality.

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) All parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) The dispute resolution communication has already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

(1) The communication was prepared by the party seeking disclosure;

(2) All parties to the dispute resolution proceeding consent in writing;

(3) The dispute resolution communication has already been made public;

(4) The dispute resolution communication is required by statute to be made public;

(5) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) Except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of paragraph (a) or (b) of this section shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree between or amongst themselves to alternative confidential procedures for disclosures by a neutral, and shall inform the neutral before commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding, in accordance with the guidance on confidentiality in federal proceedings published by the Interagency ADR Working Group and adopted by the ADR Council (*http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf*). If the parties do not so inform the neutral, paragraph (a) of this section shall apply.

(2) To qualify for the exemption under paragraph (j) of this section, an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Paragraphs (a) and (b) of this section shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under 5 U.S.C. 552(b)(3).

§ 502.406 Arbitration.

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent, except that arbitration may not be used when the Commission or one of its components is a party. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to—

(i) Submit only certain issues in controversy to arbitration; or

(ii) Arbitration on the condition that the award must be within a range of possible outcomes.

(2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.

(b) With the concurrence of the Federal Maritime Commission Dispute Resolution Specialist, binding arbitration may be used to resolve any and all disputes that could be the subject of a Commission administrative proceeding before an Administrative Law Judge. The Federal Maritime Commission Dispute Resolution Specialist may withhold such concurrence after considering the factors specified in § 502.403, should the Commission's General Counsel object to use of binding arbitration.

(c)(1) The Federal Maritime Commission Dispute Resolution Specialist will appoint an arbitrator of the parties' choosing for an arbitration proceeding.

(2) A Commission officer or employee selected as an arbitrator by the parties and appointed by the Federal Maritime Commission Dispute Resolution Specialist shall have authority to settle an issue in controversy through binding arbitration pursuant to the arbitration agreement; provided, however, that decisions by arbitrators shall not have precedential value with respect to decisions by Administrative Law Judges or the Commission. Administrative Law Judges may be appointed as arbitrators with the concurrence of the Chief Administrative Law Judge.

(d) The arbitrator shall be a neutral who meets the criteria of 5 U.S.C. 573.

§ 502.407 Authority of the arbitrator.

An arbitrator to whom a dispute is referred may—

(a) Regulate the course of and conduct arbitral hearings;

(b) Administer oaths and affirmations;

(c) Compel the attendance of witnesses and production of evidence at the hearing under the provisions of 9 U.S.C. 7 only to the extent the Commission is otherwise authorized by law to do so; and

(d) Make awards.

§ 502.408 Conduct of arbitration proceedings.

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than five days before the hearing.

(b) Any party wishing a record of the hearing shall—

(1) Be responsible for the preparation of such record;

(2) Notify the other parties and the arbitrator of the preparation of such record;

(3) Furnish copies to all identified parties and the arbitrator; and

(4) Pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) The provisions of § 502.11 regarding *ex parte* communications apply to all arbitration proceedings. No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make an award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the parties agree to some other time limit.

§ 502.409 Arbitration awards.

(a)(1) The award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) Exceptions to or an appeal of an arbitrator's decision may not be filed with the Commission.

(b) An award entered in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding.

§ 502.410 Representation of parties.

(a) The provisions of § 502.21 apply to the representation of parties in dispute resolution proceedings, as do the provisions of § 502.27 regarding the representation of parties by nonattorneys.

(b) A neutral in a dispute resolution proceeding may require participants to demonstrate authority to enter into a binding agreement reached by means of a dispute resolution proceeding.

§ 502.411 Mediation and other alternative means of dispute resolution.

(a) Parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings. The Commission also encourages those with disputes to pursue mediation in lieu of, or prior to, the initiation of a Commission proceeding.

(b) Any party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply. For all other matters, alternative dispute resolution services may be requested directly from the Federal Maritime Commission Alternative Dispute Resolution Specialist, who may serve as the neutral if the parties agree or who will arrange for the appointment of a neutral acceptable to all parties.

(c) The neutral shall convene and conduct mediation or other appropriate dispute resolution proceedings with the parties.

(d) *Ex parte Communications.* Except with respect to arbitration, the provisions of § 502.11 do not apply to dispute resolution proceedings, and mediators are expressly authorized to conduct private sessions with parties.

By the Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 01–20755 Filed 8–17–01; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket No. 98–147; FCC 01–204]

Deployment of Wireline Services Offering Advanced Telecommunications Capability

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document reevaluates certain provisions of the Commission's collocation rules on remand from the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Commission amends its rules regarding which equipment is ''necessary for interconnection or access to unbundled network elements'' within the meaning of section 251(c)(6) of the Communications Act of 1934, as amended, (Communications Act or Act) and thus may be collocated without an incumbent local exchange carrier's (incumbent LEC's) approval. The Commission also amends its rules regarding cross-connects between collocators at an incumbent LEC's premises. The Commission further amends its rules addressing how an incumbent LEC may assign and configure physical collocation space.

DATES: Effective September 19, 2001.

FOR FURTHER INFORMATION CONTACT: William Kehoe, Special Counsel, or Kimberly Cook, Attorney Advisor, Policy and Program Planning Division, Common Carrier Bureau, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fourth Report and Order* in CC Docket No. 98–147, released August 8, 2001. The complete text of this Order is available for inspection and copying during regular business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), CY–B400, 445 12th Street, SW., Washington, DC. It is also available on the Commission's website at *http://www.fcc.gov.*

Synopsis of Fourth Report and Order

1. The Commission concludes that equipment is ''necessary for interconnection or access to unbundled network elements'' within the meaning of section 251(c)(6) of the Communications Act of 1934, as amended (Communications Act or Act), and thus may be collocated without an incumbent local exchange carrier's (incumbent LEC's) approval if, an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements as contemplated in sections 251(c)(2) and 251(c)(3) of the Act. The Commission also concludes that section 251(c)(6) allows a requesting carrier to collocate any equipment necessary for obtaining equal interconnection or nondiscriminatory access to unbundled network elements as contemplated in sections 251(c)(2) and 251(c)(3). Applying the statutory standard set forth in section 251(c)(2), the Commission concludes that section 251(c)(6) allows the interconnecting carrier to collocate any equipment necessary for interconnecting with the incumbent LEC at a level equal in quality to that which the incumbent obtains within its own network or the incumbent provides to any affiliate, subsidiary, or other party. Similarly, applying the statutory standard set forth in section 251(c)(3), the Commission further concludes that section 251(c)(6) allows a requesting carrier to collocate any equipment necessary for obtaining ''nondiscriminatory access'' to an unbundled network element, including any of its features, functions, or capabilities.

2. The Commission finds that multifunction equipment meets the ''necessary'' standard only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with ''equal in quality'' interconnection or ''nondiscriminatory access'' to one or more unbundled network elements. The Commission also finds that, for purposes of determining whether a piece of equipment is to be used primarily to obtain ''equal in quality'' interconnection or ''nondiscriminatory access'' to one or more unbundled network elements, there must be a logical nexus between the additional functions the equipment would perform and the telecommunication services the requesting carrier seeks to provide to its customers by means of the interconnection or unbundled network

element. The Commission further finds that any function that would not meet its equipment standard as a stand-alone function must not cause the equipment to significantly increase the burden on the incumbent's property. The Commission concludes, in addition, that switching and routing equipment typically meets its equipment standard because an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude a requesting carrier from obtaining nondiscriminatory access to an unbundled network element, the local loop. As a general matter, an incumbent LEC therefore must allow requesting carriers to collocate switching and routing equipment. An incumbent LEC, however, generally need not allow collocation of traditional circuit switches, which are very large pieces of equipment compared to newer, more advanced switching and routing equipment. The Commission finds, in light of the practical, economic, and operational availability of the relatively small switches and routers, that traditional circuit switches generally do not meet its equipment standard.

3. The Commission eliminates its previous requirement, adopted pursuant to section 251(c)(6), that an incumbent LEC allow competitive LECs to construct and maintain cross-connects outside of their immediate physical collocation space at the incumbent's premises. The Commission finds, however, that sections 201 and 251(c)(6) of the Communications Act authorize it to require that an incumbent LEC provision cross-connects between collocated carriers, and the Commission requires that an incumbent LEC provide such cross-connects upon reasonable request. The Commission finds that, in making available a cross-connect offering, an incumbent LEC must provide the appropriate cross-connect as requested by the collocated competitive local exchange carriers (competitive LECs). The Commission notes that the ''appropriate'' cross-connect facility may constitute a ''lit'' service or a dark fiber service depending upon the requirements of the two collocated competitors. Where a collocator is requesting a cross-connect pursuant to the Commission's action under section 201, it shall provide a certification to the incumbent that more than ten percent of the amount of traffic to be transmitted through the cross-connect will be interstate. The Commission specifies that the incumbent LEC cannot refuse to accept the certification, but instead must provision the cross-connect promptly.

4. The Commission eliminates rules that gave carriers requesting physical collocation the option of picking their physical collocation space from among the unused space in an incumbent LEC's premises, that precluded an incumbent LEC from restricting physical collocation to space separated from space housing the incumbent's equipment, and that precluded an incumbent from requiring the construction and use of a separate entrance to access physical collocation space. In their place, the Commission adopts new rules that establish principles to ensure that the incumbent LEC's policies and practices in assigning and configuring physical collocation space are consistent with the statutory requirement that the incumbent provide for physical collocation ''on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.'' The Commission also adopts presumptions that will apply in evaluating an incumbent LEC's policies and practices in these areas.

Final Regulatory Flexibility Analysis

5. As required by the Regulatory Flexibility Act (RFA), a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) was incorporated in the *Order on Reconsideration and Second Further Notice of Proposed Rulemaking (Second Further NPRM)* in CC Docket 98–147, 65 FR 54527, September 8, 2000. The Commission sought written public comment on the proposals in the *Second Further NPRM*, including comment on the Supplemental IRFA. We received comments from The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) specifically directed toward the Supplemental IRFA. These comments are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

I. Need for, and Objectives of, the Fourth Report and Order

6. This *Fourth Report and Order (Fourth Order)* continues the Commission's efforts to facilitate the development of competition in telecommunications services. In the *Advanced Services First Report and Order*, 64 F.R. 23229, April 30, 1999, the Commission strengthened its collocation rules to reduce the costs and delays faced by carriers that seek to collocate equipment at the premises of incumbent local exchange carriers (incumbent LECs). In *GTE* v. *FCC*, the D.C. Circuit vacated several of those rules and remanded the case to the Commission. In this Fourth Order, we address the remanded issues and take additional steps toward implementing Congress' goals in enacting section 251(c)(6) of the Communications Act. Specifically, we adopt rule amendments that more appropriately implement the balance reflected in the Communications Act, between promoting competition and technological innovation, and establishing limits on the scope of the intrusion allowed into the incumbent LEC's property rights to avoid unnecessary takings of such property. Nonetheless, through these amended rules, we reaffirm our commitment to ensuring that facilities-based competitors, including those that are small entities, have the incentive and ability to invest in alternative infrastructure and innovative technologies, while, at the same time, ensuring that incumbents retain similar incentives and capabilities.

II. Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA

7. In the Supplemental IRFA, we stated that any rule changes would impose minimum burdens on small entities, including both telecommunications carriers that request collocation and the incumbent LECs that, under section 251(c)(6) of the Communications Act, must provide collocation to requesting carriers. We also solicited comments on alternatives to the proposed rules that would minimize the impact that any changes to our rules might have on small entities. In their comments, OPASTCO states that the Supplemental IRFA did not provide ''the flexibility necessary to accommodate the needs of small [incumbent LECs] and their customers.'' OPASTCO also states that the Supplemental IRFA does not specify the specific requirements that might be imposed on small incumbent LECs or the extent to which those requirements might burden small incumbent LECs. Finally, OPASTCO states that the Supplemental IRFA failed ''to describe the 'significant alternatives' for small [incumbent LECs] that [were] presumptively under consideration'' in this rulemaking. As noted above, OPASTCO filed comments specifically directed to the Supplemental IRFA and to issues that were raised in the NPRM but not addressed in this Fourth Order which is limited to issues that the D.C. Circuit remanded. In making the determinations reflected in the Fourth Order, we have considered the impact of our actions on small entities.

III. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that will be affected by the rules. The RFA 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 Small Business Administration (SBA). In this Fourth Order, we take a number of steps that may affect small entities that either provide or obtain collocation pursuant to section 251(c)(6) of the Communications Act. The requirements we adopt will require small incumbent LECs to change their collocation practices. As Congress contemplated in enacting section 251(c)(6), however, our collocation requirements benefit small competitive local exchange carriers (competitive LECs) in their efforts to compete against incumbent LECs in the provision of telecommunications services, including advanced services. We believe that, on balance, the benefits to small competitive LECs of our actions in this Fourth Order far outweigh any burdens these place on small incumbent LECs.

9. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, which encompasses data compiled from FCC Form 499–A Telecommunications Reporting Worksheets. According to data in the most recent report, there are 4,822 service providers. These carriers include, *inter alia,* providers of telephone exchange service, wireline carriers and service providers, LECs, interexchange carriers, competitive access providers, and resellers.

10. We have included small incumbent LECs in this present 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 LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

11. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not ''independently owned and operated.'' For example, a personal communications service (PCS) provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the proposed rules, herein adopted.

12. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone (wireless) company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone (wireless) companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone (wireless) companies that might qualify as small entities or small incumbent LECs. The Commission does not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that fewer than 2,295 small telephone communications companies other than radiotelephone (wireless) companies are small entities or small incumbent LECs that may be affected by the proposed rules, herein adopted.

13. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition for small providers of local exchange service (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent data, there are 1,395 incumbent and other LECs. The Commission does 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 LECs that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that fewer than 1,395 providers of local exchange service are small entities or small incumbent LECs that may be affected by the proposed rules, herein adopted.

14. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent data, there are 204 carriers engaged in the provision of interexchange services. The Commission does 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 IXCs that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are less than 204 small entity IXCs that may be affected by the proposed rules, herein adopted.

15. *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 data, there are 349 CAPs and competitive LECs engaged in the provision of competitive local exchange services. The Commission does 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, the Commission estimates that there are less than 349 small entity CAPs providing competitive local exchange services that may be affected by the proposed rules, herein adopted.

16. *Resellers (including debit card providers).* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies. According to the most recent data, there are 541 local and toll resellers engaged in the resale of telephone service. The Commission does 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 resellers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 541 small local and toll resellers that may be affected by the proposed rules, herein adopted.

17. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. The Commission concludes that the number of geographic area WS licenses affected includes these eight entities.

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

18. The Fourth Order imposes nominal increases in projected reporting, recordkeeping, and other compliance requirements. Both of these changes affect small and large companies equally. First, the Fourth Order requires a competitive LEC that is requesting incumbent-LEC provisioned cross-connects pursuant to section 201 of the Act to provide a short certification that the amount of interstate traffic to be transmitted over the cross-connect constitutes more than ten percent of all traffic transmitted over that cross-connect. This certification requirement stems from jurisdictional considerations. Thus, it is not possible to exempt small entities from compliance with the certification requirement.

19. In the Fourth Order, the Commission requires that an incumbent LEC must allow a requesting carrier to submit physical collocation space preferences prior to assigning that carrier space. This will enable the requesting carrier to request the space that best fits its operational needs. We also amend our existing space report rule to require that, upon request, an incumbent LEC must submit to the requesting carrier a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. Thus, the new rule requires more detailed information within a report that already must be provided. A professional would likely prepare the additional information in a limited period of time. To give the rule any meaning, this report must be generated by small and large entities alike. Otherwise, carriers requesting collocation at a small incumbent LEC's facility would not have the all of the information available to make an educated space preference request.

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

20. 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.

21. In this Fourth Order, the Commission adopts collocation rules in implementation of section 251(c)(6) of the Communications Act. These rules respond to the D.C. Circuit's decision in *GTE* v. *FCC*, remanding certain rules the Commission had adopted to implement that provision. Our actions will affect both telecommunications carriers that request collocation and the incumbent LECs that, under section 251(c)(6), must provide collocation. As indicated above, both groups of carriers include entities that, for purposes of this FRFA, are classified as small entities. Neither section 251(c)(6) nor the D.C. Circuit decision permits the Commission to exempt any incumbent LECs, including those that are small entities, from their collocation obligations. Indeed, section 10(d) of the Communications Act precludes the Commission from forbearing from the application of section 251(c)(6) to any entity prior to that section's full implementation, an event that has not yet occurred.

22. In this Fourth Order, the Commission takes a number of steps that may affect small entities that either provide or obtain collocation pursuant to section 251(c)(6) of the Communications Act. The requirements the Commission adopts will require incumbent LECs to change their collocation practices. As Congress contemplated in enacting section 251(c)(6), our collocation requirements benefit small competitive LECs in their efforts to compete against incumbent LECs, both large and small, in the provision of telecommunications services, including advanced services. The Commission believes that, on balance, the benefits to small competitive LECs of our actions in this Fourth Order far outweigh any burdens the Fourth Order places on small incumbent LECs.

23. As set forth more fully below, the Commission believes that our actions in this Fourth Order are consistent with the RFA. Specifically, as OPASTCO urges, the requirements the Commission adopts provide substantial flexibility to incumbent LECs, including small incumbent LECs, in implementing section 251(c)(6). *See* OPASTCO Comments at 6; para. 3, *supra.* OPASTCO does not address directly any of the issues remanded by the D.C. Circuit and thus does not raise any specific alternatives we might consider in this Fourth Order. The Commission's requirements, however, stop short of

allowing any incumbent LEC to act inconsistent with that statutory provision. Any such action would be inconsistent with the requirements of section 251(c)(6) and would upset the balance reflected in the statute. Such action also would substantially burden competitive LECs, including those that are small entities, in their efforts to compete against incumbent LECs.

24. The record makes clear that, absent the adoption of rules addressing the matters remanded by the D.C. Circuit, incumbent LECs will impede requesting carriers' collocation efforts.

25. The Commission's actions in this Fourth Order should benefit requesting carriers, many of which may be small entities, by reducing barriers they encounter in seeking to compete effectively in the provision of advanced services and other telecommunications services. The Commission's actions seek to balance the property interests of the incumbent LECs, including small incumbent LECs, with the public interest in promoting innovation and competition. It is concluded that rules that are more restrictive or less restrictive would not strike the appropriate balance.

26. In this Fourth Order, the Commission adopts standards that determine which competitive LECs, including small carriers, may collocate equipment at incumbent LEC premises pursuant to section 251(c)(6). These standards provide that equipment is ''*necessary* for interconnection or access to unbundled network elements'' within the meaning of section 251(c)(6) if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements as contemplated in sections 251(c)(2) and 251(c)(3). The Commission also finds that multifunction equipment meets the ''necessary'' standard only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, would be practically, economically, or operationally necessary for that carrier to obtain ''equal in quality'' interconnection or ''nondiscriminatory access'' to one or more unbundled network elements. The Commission rejects incumbent LEC and competitive LEC requests for alternative equipment standards because we believe such standards would be inconsistent with section 251(c)(6). The Commission also finds that standards more favorable to the incumbent LECs would thwart competition without significantly improving the interests of the incumbent LECs, while standards more favorable to competitive LECs would not properly take into consideration the property interests of the incumbent LECs. Therefore, the Commission selects the alternative that best balances the impact on each party, including small entities, and maximizes benefits.

27. The Commission also concludes that switching and routing equipment generally meets our equipment standard because an inability to deploy that equipment would, as a practical, economic, and operational matter, preclude a requesting carrier from accessing all the features, functions, and capabilities of unbundled local loops. An incumbent LEC therefore generally must allow requesting carriers to collocate the relatively small switching and routing equipment that technological advances have enabled manufacturers to develop. An incumbent LEC, however, generally need not allow collocation of traditional circuit switches, which are very large pieces of equipment. The Commission finds, in light of the practical, economic, and operational availability of the relatively small switches and routers and the materially lesser burden collocation of these switches and routers imposes on an incumbent's property interests, that traditional circuit switches generally do not meet our equipment standard. The Commission believes that this approach toward switching and routing equipment furthers the purposes behind the RFA, because it allows small competitive LECs flexibility in configuring their networks while precluding the collocation of switching and routing equipment that would infringe small incumbent LECs' property interests. It is noted that any alternative that might allow a small incumbent LEC to generally preclude the collocation of relatively small switches and routers within its premises would violate the statutory mandate that incumbent LECs, both large and small, provide for the collocation of ''necessary'' equipment.

28. In addition, in this Fourth Order, we eliminate the requirement that, pursuant to section 251(c)(6), an incumbent LEC allow competitive LECs to construct and maintain cross-connects outside of their immediate physical collocation space at the incumbent's premises. The Commission considered maintaining this requirement, but that alternative would be inconsistent with the Communications Act and would not properly take into consideration the property interests of the incumbent LECs. The elimination of this requirement gives small incumbent LECs flexibility that was not available under the Commission's prior collocation rules.

29. The Commission finds that sections 201 and 251 of the Communications Act provide statutory authority to require an incumbent LEC to provision cross-connects between collocated carriers, and we require that an incumbent LEC provide such cross-connects upon reasonable request. The Commission considered not requiring incumbent LECs to provision cross-connects between collocated carriers, but that alternative would allow incumbent LECs to provide collocation to competitive LECs in an unjust, unreasonable, and discriminatory manner. It is noted that all incumbent LECs, including those that are small carriers, cross-connect their own equipment within their premises. Indeed, those premises are, by design, places where a carrier can cross-connect equipment. The benefits to competition from requiring that a small incumbent LEC provision cross-connects between collocators within its premises far outweigh any additional burden such a requirement may impose on that carrier. In addition, allowing a small incumbent LEC to refrain from provisioning cross-connects between collocated carriers would allow the incumbent to impose unreasonable and discriminatory terms and conditions on collocators, in violation of the Communications Act.

30. In this Fourth Order, the Commission eliminates the requirement that incumbent LECs allow the requesting carrier to select its physical collocation space from among the unused space in the incumbent's premises as well as requirements constraining how incumbents LEC may configure physical collocation space. The Commission now allows incumbent LECs, in certain circumstances, to restrict physical collocation to space separated from space housing the incumbent's equipment and to require the construction and use of a separate entrance to access physical collocation space. The Commission rejects the alternative of retaining the prior rules, because they failed to properly balance the congressional goal of promoting competition against the need to protect an incumbent LEC's property interests against unwarranted intrusion. The elimination of these prior rules gives incumbent LECs, including small entities, flexibility that was not previously available.

31. The Commission recognizes, however, that an incumbent LEC has powerful incentives that, left unchecked, may influence it to allocate

space in a manner inconsistent with its statutory duty to provide for physical collocation ''on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.'' Accordingly, the Commission establishes specific principles that each incumbent LEC, including those that are small carriers, must follow in assigning physical collocation space. These rules are designed to ensure that incumbent LECs, both large and small, act as neutral property owners and managers, rather than as direct competitors of the carriers requesting collocation, in assigning physical collocation space to requesting carriers. Alternatives that would give a small incumbent LEC more flexibility in assigning space might enable it to act unreasonably and discriminatorily in violation of section 251(c)(6). Those alternatives also would burden requesting carriers, including those that are small carriers, by increasing the costs they incur in competing against incumbent LECs. Therefore, for both statutory and public policy reasons, the Commission does not adopt a different standard for incumbent LECs that are small entities.

32. The Commission also rejects the alternative of allowing incumbent LECs, including those that are small entities, to restrict physical collocation to space separated from space housing the incumbent's equipment and to require the construction and use of a separate entrance to access physical collocation space in all instances, because we find that such separation measures would be unreasonable and discriminatory in certain circumstances. The Commission concludes, for example, that an incumbent LEC may require such separation measures only where legitimate security concerns, or operational constraints unrelated to the incumbent's or any of its affiliates' or subsidiaries' competitive concerns, warrant them. This is consistent with the D.C. Circuit's recognition that alternatives other than separation are sufficient to address incumbent LECs' security concerns. To the extent small incumbent LECs encounter security concerns or operational constraints that differ from those incumbent LECs encounter, our rules permit small incumbent LECs to take those differences into account in their space assignment and configuration policies and practices.

VI. Report to Congress

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

Ordering Clauses

34. Pursuant to sections 1–4, 201, 202, 251–254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–54, 201, 202, 251–54, 256, 271, and 303(r), that this *Fourth Report and Order* is adopted.

35. Pursuant to sections 1–4, 201, 202, 251–54, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–54, 201, 202, 251–54, 256, 271, and 303(r), that Part 51 of the Commission's rules, 47 CFR part 51, *is amended*, as set forth in Rule Changes, and that those rule amendments *shall become* effective thirty days after publication of the text or summary thereof in the **Federal Register**, unless the FCC publishes a document in the **Federal Register** to delay or withdraw them.

36. The Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Final Paperwork Reduction Analysis

37. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Paperwork Reduction Act of 1995, and will go into effect 30 days after publication in the **Federal Register**, unless the FCC publishes a document in the **Federal Register** to delay or withdraw them.

List of Subjects in 47 CFR Part 51

Communications, Common carriers, Collocation, Interconnection, Unbundled network elements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 51 as follows:

PART 51—INTERCONNECTION

1. The authority for Part 51 continues to read as follows: Sections 1–5, 7, 201–05, 207–09, 218, 225–27, 251–54, 271, 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 225–27, 251–54, 271, 332, unless otherwise noted.

2. Section 51.5 is amended by adding in alphabetical order a definition of ''multi-functional equipment'' to read as follows:

§ 51.5 Terms and definitions.

* * * * *

Multi-functional equipment. Multi-functional equipment is equipment that combines one or more functions that are necessary for interconnection or access to unbundled network elements with one or more functions that would not meet that standard as stand-alone functions.

* * * * *

3. Section 51.321 is amended by revising paragraph (h) to read as follows:

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

* * * * *

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

* * * * *

4. Section 51.323 is amended by revising paragraphs (b), (c), (e), (f) introductory text, (h), (i) introductory text, and (k)(2) and adding paragraphs (f)(7), (i)(4)(i) through (i)(4)(v), (i)(5), and (i)(6)(i) through (i)(6)(iv) to read as follows:

§ 51.323 Standards for physical collocation and virtual collocation.

* * * * *

(b) An incumbent LEC shall permit the collocation and use of any

equipment necessary for interconnection or access to unbundled network elements.

(1) Equipment is necessary for interconnection if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection with the incumbent LEC at a level equal in quality to that which the incumbent obtains within its own network or the incumbent provides to any affiliate, subsidiary, or other party.

(2) Equipment is necessary for access to an unbundled network element if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining nondiscriminatory access to that unbundled network element, including any of its features, functions, or capabilities.

(3) Multi-functional equipment shall be deemed necessary for interconnection or access to an unbundled network element if and only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, meets either or both of the standards set forth in paragraphs (b)(1) and (b)(2) of this section. For a piece of equipment to be utilized primarily to obtain equal in quality interconnection or nondiscriminatory access to one or more unbundled network elements, there also must be a logical nexus between the additional functions the equipment would perform and the telecommunication services the requesting carrier seeks to provide to its customers by means of the interconnection or unbundled network element. The collocation of those functions of the equipment that, as stand-alone functions, do not meet either of the standards set forth in paragraphs (b)(1) and (b)(2) of this section must not cause the equipment to significantly increase the burden on the incumbent's property.

(c) Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements under the standards set forth in paragraph (b) of this section. An incumbent LEC may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment. An incumbent LEC may not object to the collocation of equipment on the ground that the equipment fails to comply with Network Equipment and Building Specifications performance standards or any other performance standards. An incumbent LEC that denies collocation of a competitor's equipment, citing safety standards, must provide to the competitive LEC within five business days of the denial a list of all equipment that the incumbent LEC locates at the premises in question, together with an affidavit attesting that all of that equipment meets or exceeds the safety standard that the incumbent LEC contends the competitor's equipment fails to meet. This affidavit must set forth in detail: the exact safety requirement that the requesting carrier's equipment does not satisfy; the incumbent LEC's basis for concluding that the requesting carrier's equipment does not meet this safety requirement; and the incumbent LEC's basis for concluding why collocation of equipment not meeting this safety requirement would compromise network safety.

* * * * *

(e) When providing virtual collocation, an incumbent LEC shall, at a minimum, install, maintain, and repair collocated equipment meeting the standards set forth in paragraph (b) of this section within the same time periods and with failure rates that are no greater than those that apply to the performance of similar functions for comparable equipment of the incumbent LEC itself.

(f) An incumbent LEC shall provide space for the collocation of equipment meeting the standards set forth in paragraph (b) of this section in accordance with the following requirements:

* * * * *

(7) An incumbent LEC must assign collocation space to requesting carriers in a just, reasonable, and nondiscriminatory manner. An incumbent LEC must allow each carrier requesting physical collocation to submit space preferences prior to assigning physical collocation space to that carrier. At a minimum, an incumbent LEC's space assignment policies and practices must meet the following principles:

(A) An incumbent LEC's space assignment policies and practices must not materially increase a requesting carrier's collocation costs.

(B) An incumbent LEC's space assignment policies and practices must not materially delay a requesting carrier occupation and use of the incumbent LEC's premises.

(C) An incumbent LEC must not assign physical collocation space that will impair the quality of service or impose other limitations on the service a requesting carrier wishes to offer.

(D) An incumbent LEC's space assignment policies and practices must not reduce unreasonably the total space available for physical collocation or preclude unreasonably physical collocation within the incumbent's premises.

* * * * *

(h) As described in paragraphs (1) and (2) of this section, an incumbent LEC shall permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises, provided that the collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC's unbundled network elements.

(1) An incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocated spaces of two or more telecommunications carriers, except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves or a connection is not required under paragraph (h)(2) of this section. Where technically feasible, the incumbent LEC shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating telecommunications carrier.

(2) An incumbent LEC is not required to provide a connection between the equipment in the collocated spaces of two or more telecommunications carriers if the connection is requested pursuant to section 201 of the Act, unless the requesting carrier submits to the incumbent LEC a certification that more than 10 percent of the amount of traffic to be transmitted through the connection will be interstate. The incumbent LEC cannot refuse to accept the certification, but instead must provision the service promptly. Any incumbent LEC may file a section 208 complaint with the Commission challenging the certification if it believes that the certification is deficient. No such certification is required for a request for such connection under section 251 of the Act.

(i) As provided herein, an incumbent LEC may require reasonable security arrangements to protect its equipment and ensure network reliability. An incumbent LEC may only impose security arrangements that are as stringent as the security arrangements that the incumbent LEC maintains at its own premises for its own employees or authorized contractors. An incumbent LEC must allow collocating parties to access their collocated equipment 24 hours a day, seven days a week, without requiring either a security escort of any kind or delaying a competitor's employees' entry into the incumbent LEC's premises. An incumbent LEC may require a collocating carrier to pay only for the least expensive, effective security option that is viable for the physical collocation space assigned. Reasonable security measures that the incumbent LEC may adopt include:

* * * * *

(4) Restricting physical collocation to space separated from space housing the incumbent LEC's equipment, provided that each of the following conditions is met:

(i) Either legitimate security concerns, or operational constraints unrelated to the incumbent's or any of its affiliates' or subsidiaries competitive concerns, warrant such separation;

(ii) Any physical collocation space assigned to an affiliate or subsidiary of the incumbent LEC is separated from space housing the incumbent LEC's equipment;

(iii) The separated space will be available in the same time frame as, or a shorter time frame than, non-separated space;

(iv) The cost of the separated space to the requesting carrier will not be materially higher than the cost of non-separated space; and

(v) The separated space is comparable, from a technical and engineering standpoint, to non-separated space.

(5) Requiring the employees and contractors of collocating carriers to use a central or separate entrance to the incumbent's building, provided, however, that where an incumbent LEC requires that the employees or contractors of collocating carriers access collocated equipment only through a separate entrance, employees and contractors of the incumbent LEC's affiliates and subsidiaries must be subject to the same restriction.

(6) Constructing or requiring the construction of a separate entrance to access physical collocation space, provided that each of the following conditions is met:

(i) Construction of a separate entrance is technically feasible;

(ii) Either legitimate security concerns, or operational constraints unrelated to the incumbent's or any of its affiliates' or subsidiaries competitive concerns, warrant such separation;

(iii) Construction of a separate entrance will not artificially delay collocation provisioning; and

(iv) Construction of a separate entrance will not materially increase the requesting carrier's costs.

* * * * *

(k) * * *

(2) Cageless collocation. Incumbent LECs must allow competitors to collocate without requiring the construction of a cage or similar structure. Incumbent LECs must permit collocating carriers to have direct access to their equipment. An incumbent LEC may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network if technically feasible. An incumbent LEC must make cageless collocation space available in single-bay increments, meaning that a competing carrier can purchase space in increments small enough to collocate a single rack, or bay, of equipment.

* * * * *

[FR Doc. 01–20860 Filed 8–17–01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 192 and 195

[Docket No. RSPA–98–3783; Amts. 192–90; 195–72]

RIN 2137–AB38

Pipeline Safety: Qualification of Pipeline Personnel; Correction

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations on qualification of pipeline personnel, which were published in the **Federal Register** on August 27, 1999 (64 FR 46853). These corrections are minor and do not affect the substance or content of the rule.

DATES: Effective on August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Richard D. Huriaux, (202) 366–366–4565, or by e-mail at richard.huriaux@rspa.dot.gov, regarding the subject matter of this final rule; or the Dockets Unit, (202) 366–4453, for copies of this final rule or other material in the docket. All materials in this docket may be accessed electronically at http://dms.dot.gov. General information about the RSPA Office of Pipeline Safety can be obtained by accessing OPS's Internet home page at http://ops.dot.gov.

SUPPLEMENTARY INFORMATION

Background

The final regulations that are the subject of these corrections established operator personnel qualification requirements for gas and hazardous liquid pipeline operators.

Need for correction

As published, the final regulations omitted titles for the new subparts to the pipeline safety regulations. Therefore, this document amends the regulations to add the title, ''Qualification of Pipeline Personnel'', to subpart N of 49 CFR part 192 and to subpart G of 49 CFR part 195.

In addition, the final regulations contained incorrect numbering for the evaluation methods in § 192.803(b) and § 195.503(b). This document corrects the numbering to clarify that observation of performance on the job, job training, or simulations are all acceptable methods of observation, which is one of the means of individual evaluation allowed by the rule.

List of Subjects

49 CFR Part 192

Pipeline safety, Reporting and recordkeeping requirements.

49 CFR Part 195

Petroleum, Pipeline safety, Reporting and recordkeeping requirements.

Accordingly, 49 CFR parts 192 and 195 are corrected by making the following correcting amendments:

PART 192—[CORRECTED]

1. The authority citation for Part 192 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, and 60118; and 49 CFR 1.53.

2. Add a heading to Subpart N to read as follows:

Subpart N—Qualification of Pipeline Personnel

3. Amend § 192.803 by revising the definition of *Evaluation* to read as follows:

§ 192.803 Definitions.

* * * * *

Evaluation means a process, established and documented by the operator, to determine an individual's ability to perform a covered task by any of the following:

(a) Written examination;
(b) Oral examination;
(c) Work performance history review;
(d) Observation during:
(1) Performance on the job,
(2) On the job training, or
(3) Simulations;
(e) Other forms of assessment.

* * * * *

4. Revise paragraph (c) of § 192.809 to read as follows:

§ 192.809 General.

* * * * *

(c) Work performance history review may be used as a sole evaluation method for individuals who were performing a covered task prior to October 26, 1999.

* * * * *

PART 195—[Corrected]

1. The authority citation for Part 195 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, and 60118; and 49 CFR 1.53.

2. Add a heading to Subpart G to read as follows:

Subpart G–Qualification of Pipeline Personnel

3. Amend § 195.503 by revising the definition of *Evaluation* to read as follows:

§ 195.503 Definitions.

* * * * *

Evaluation means a process, established and documented by the operator, to determine an individual's ability to perform a covered task by any of the following:

(a) Written examination;
(b) Oral examination;
(c) Work performance history review;
(d) Observation during:
(1) performance on the job,
(2) on the job training, or
(3) simulations;
(e) Other forms of assessment.

* * * * *

4. Revise paragraph (c) of § 195.509 to read as follows:

§ 195.509 General.

* * * * *

(c) Work performance history review may be used as a sole evaluation method for individuals who were performing a covered task prior to October 26, 1999.

* * * * *

Issued in Washington, DC on August 8, 2001.

Stacey L. Gerard,

Acting Deputy Administrator.

[FR Doc. 01–20635 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–60–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 001114320–1191–02; I.D. 080400B]

RIN 0648–AN01

Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting Requirements; Alaska Commercial Operator's Annual Report

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to amend portions of the regulations implementing the recordkeeping and reporting requirements for groundfish fisheries in the Exclusive Economic Zone to require groundfish motherships and catcher/processors to submit annually to the State of Alaska, Department of Fish & Game (ADF&G), a Commercial Operator's Annual Report (COAR). This action is necessary to gather information on exvessel and first wholesale values for state-wide finfish and shellfish products from catcher/processors and motherships at sea. These data together with the information already gathered from shoreside processors and stationary floating processors will provide a means to compare value information (in dollars) of different types of species and products from all processors of fish harvested from Alaska State and Federal waters within a year and comparisons of several years through consistent yearly collection of information. This action is intended to further the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) with respect to the collection and analysis of economical data.

DATES: Effective September 19, 2001.

ADDRESSES: Copies of the Regulatory Impact Review (RIR) prepared for this action may be obtained from the Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Gravel, or by calling the Alaska Region, NMFS, at 907–685–7228.

Comments involving the reporting burden estimates or any other aspects of the collection of information requirements contained in this final rule should be sent to both Lori Gravel, at the preceding address, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (Attn: NOAA Desk Officer). Comments sent by e-mail or the Internet will not be accepted.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907–586–7228 or patsy.bearden@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

NMFS manages fishing for groundfish by U.S. vessels in the exclusive economic zone of the Gulf of Alaska and the Bering Sea and Aleutian Islands Management Area under the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs). The Council prepared the FMPs under authority of the Magnuson-Stevens Act. Regulations implementing the FMPs at 50 CFR part 679 and subpart H of 50 CFR part 600 govern fishing by U.S. vessels. Recordkeeping and reporting requirements appear at 50 CFR 679.5.

This final rule implements the following changes to the recordkeeping and reporting requirements: (1) In § 679.2, add a definition of COAR; (2) in § 679.5, add a paragraph (p) that establishes requirements on completing and submitting the COAR; (3) revise Table 14—Ports of landing, Table 15—Gear Codes, descriptions, and use; (4) add Table 16—Area Codes and descriptions for use with ADF&G COAR, Table 17—COAR Process Codes, and Table 18—COAR Buying and Production Forms.

This action results in a substantive regulatory revision, namely, the addition of a requirement that catcher/processors and motherships submit an annual COAR detailing exvessel and first wholesale value data for fish and shellfish products. This action is necessary to gather information on exvessel and first wholesale values for state-wide finfish and shellfish products from catcher/processors and motherships at sea. These data together with the information already gathered

from shoreside processors and stationary floating processors will provide a means to compare value information (in dollars) of different types of species and products from all processors of fish harvested from Alaska State and Federal waters within a year and comparisons of several years through consistent yearly collection of information. The additional requirement will:

(1) Allow NMFS staff to obtain for all processing sectors equivalent annual product value information and a consistent time series of information; in other words, the added data will provide a means to compare value information (in dollars) of different types of species and products from all processors of fish harvested from Alaska State and Federal waters within a year and comparisons of several years through a consistent yearly collection of information.

(2) Provide an enhanced socioeconomic database that NMFS will use to measure economic and socioeconomic impacts more accurately and to prepare economic analyses of proposed or existing management measures in compliance with the mandates of Executive Order (E.O.) 12866, the Magnuson-Stevens Act, including national standards 2, 4, 7 and 8, the American Fisheries Act (to monitor and report to Congress on the effects and efficacy of the new groundfish management programs), and the Regulatory Flexibility Act.

(3) Provide detailed (and consistent) data on production, prices, and product forms that NMFS will use to respond to requests for economic information from Federal and state management agencies, the fishing industry, and the general public.

(4) Provide a database that NMFS will use in the annual NMFS Stock Assessment and Fishery Evaluation (SAFE) documents for the groundfish fisheries of the Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA), in annual Federal publications on the value of U.S. commercial fisheries (e.g., Fisheries of the United States), and in periodic reports to economists that describe the fisheries and that serve as reference documents to management agencies, the industry, and others.

Some negative impacts could be encountered by some processors who would need to restructure their computer accounting systems to allow for the State of Alaska area codes that are distinct to the COAR. Otherwise, the codes are the same as those used on ADF&G fish tickets and in NMFS' recordkeeping and reporting.

NMFS published a proposed rule to implement these revisions in the **Federal Register** on December 14, 2000 (65 FR 78131). The preamble to the proposed rule contains a full description of the revisions and their justification, which is not repeated here. NMFS invited public comment on the changes contained in this action through January 16, 2001.

Comments and Responses

NMFS received one comment on the proposed rule.

Comment. The comment supported the proposed COAR requirement, but cautioned that the methodology for calculating the data points (e.g., standardizing point of first wholesale pricing, shipping factors) needed to be the same across processing sectors of the fisheries. The commentor was concerned that the data computation point(s) are vague and that care should be taken that the data collected under this final rule are comparable to those already collected by the State of Alaska. The commentor added that the terms ''mothership'' and ''catcher/processor'' need to be clearly defined.

Response. The State's existing data collection system will be used by NMFS for both the current shoreside collection and the new at-sea collection. The COAR form will be completed and submitted to ADF&G who will enter the data in the database. For the Federal system, NMFS has precisely defined ''mothership'' and ''catcher/processor'' for purposes of recordkeeping and reporting, and under these definitions the processors are required to submit the COAR. Accordingly, NMFS' COAR is analogous with the State of Alaska COAR.

Although some editorial changes were made to the regulatory text in this final rule, no substantive changes were made from the proposed regulatory text. An explanation of the editorial changes follows:

Table 14 (a). The title of Table 14 (a) is changed to read, ''Port of Landing Codes, including CDQ and IFQ Primary Ports—(a) United States, Alaska.'' The port code for Unalaska (180) is removed, and code 119 is renamed to read Dutch Harbor/Unalaska. Several port codes are added: XIP (124) for Excursion Inlet; FSP for False Pass, KOD (146) for Kodiak; (162) Portage Bay (Petersburg); and (182) West Anchor Cove. The port, ''Other/Unknown'' is revised to read ''Other'' and UNK (499).

Table 14 (b). The title of Table 14 (b) is changed to read, ''Port of Landing Codes, including CDQ and IFQ Primary Ports—(b) United States, non-Alaska.'' A footnote (1) is added to explain how to record a location not assigned a code.

Table 14 (c). The title of Table 14 (c) is changed to read, ''Port of Landing Codes, including CDQ and IFQ Primary Ports—(c) Canada.'' A footnote (1) is added to explain how to record a location not assigned a code.

Classification

The Administrator, Alaska Region, NMFS (Regional Administrator), determined that this final rule is necessary for the conservation and management of the groundfish fisheries off Alaska.

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

This final rule contains collection-of-information requirements subject to the PRA that have been approved by OMB under control no. 0648–0428. The estimated response time to complete a COAR is estimated to range from 0.5 hr to 16 hr, an average of 8 hr per year.

This final rule was developed through a joint effort between the State of Alaska ADF&G and the NMFS Alaska Region. This cooperative endeavor will result in a combined database consisting of exvessel and first wholesale value information (in dollars) as well as production information from all processors of fish species and products harvested from State of Alaska waters and Federal waters off Alaska. This database will be updated annually and will allow historical economic comparisons through a consistent collection of information.

In the late 1980's, NMFS and the State of Alaska ADF&G began to jointly collect COAR data for the shoreside sector. Prior to that, ADF&G collected the COAR data and NMFS collected data for its own survey. The groundfish COAR was collected for 4 years cooperatively by NMFS and ADF&G. The two agencies jointly developed the procedure and proposed Federal regulations for gathering information from motherships and catcher/processors to add the information already collected from shoreside processors and stationary floating processors by the State of Alaska. The procedure is based on using the State of Alaska's 25–year old COAR data collection to the greatest extent to accomplish NMFS' statutory goal of information collection while enhancing the State of Alaska's database and goals.

The two agencies have agreed to use one COAR form for the State of Alaska's and NMFS' requirements. In addition, the agencies agreed that the COAR forms will be sent directly by the processors to ADF&G for data entry, verification, and storage. Since 2000, two staff persons at ADF&G have been funded by a NOAA grant to assist with COAR data entry and to improve the quality and efficiency of the COAR database. This funding is expected to increase to cover the additional costs associated with at-sea processor COAR submittal. State ADF&G staff will contact the processors for verification of information and for any questionable responses on the COAR and to ensure that each processor required to submit a COAR by either State of Alaska or Federal requirements does in fact submit the COAR to ADF&G. NMFS staff will receive copies (paper or electronic) of the database on request to ADF&G.

The combined database will provide a means to compare exvessel and first wholesale value information (in dollars) from all processors of different species and products of fish harvested from State of Alaska waters and Federal waters off Alaska by year and will allow historical comparisons through consistent collections of information through the years.

This final rule has been determined to be not significant for purposes of E.O. 12866.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: August 8, 2001

William T. Hogarth,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. Section 679.2 is amended by adding the definition in alphabetical order for ''Commercial Operator's Annual Report (COAR).''

§ 679.2 Definitions.

* * * * *

Commercial Operator's Annual Report (COAR) means the annual report of information on exvessel and first wholesale values for fish and shellfish required under Title 5 of the Alaska Administrative Code, chapter 39.130 (see § 679.5 (p)).

* * * * *

3. Section 679.5 is amended by adding paragraph (p) to read as follows:

§ 679.5 Recordkeeping and reporting.

* * * * *

(p) *Commercial Operator's Annual Report (COAR)*—(1) *Requirement.* The owner of a mothership or catcher/processor must annually complete and submit to ADF&G the appropriate Forms A through M and COAR certification page for each year in which the mothership or catcher/processor was issued a Federal Fisheries permit. The owner of a mothership must include all fish received and processed during the year, including fish received from an associated buying station. The ADF&G COAR is further described under Alaska Administrative Code (5 AAC 39.130) (see § 679.3 (b)(2)).

(2) *Time limit and submittal of COAR.* The owner of a mothership or catcher/processor must submit to ADF&G the appropriate Forms A through M and COAR certification page by April 1 of the year following the year for which the report is required to the following address:

Alaska Department of Fish & Game, Division of Commercial Fisheries, Attn: COAR, P.O. Box 25526, Juneau, AK 99802–5526

(3) *Information required, certification page.* The owner of a mothership or catcher/processor must:

(i) Enter the company name and address, including street, city, state, and zip code; also seasonal mailing address, if applicable.

(ii) Enter the vessel name and ADF&G processor code.

(iii) Check YES or NO to indicate whether fishing activity was conducted during the appropriate year.

(iv) If response to paragraph (p)(3)(iii) of this section is YES, complete the applicable forms of the COAR (see table 18 to this part) and complete and sign the certification page.

(v) If response to paragraph (p)(3)(iii) of this section is NO, complete and sign only the certification page.

(vi) Sign and enter printed or typed name, e-mail address, title, telephone number, and FAX number of owner.

(vii) Enter printed or typed name, e-mail address, and telephone number of alternate contact.

(4) *Buying information (exvessel), Forms A (1-3), C (1-2), E, G, I (1-2), and K.*—(i) Requirement. The owner of a mothership (if the first purchaser of raw fish) must complete and submit the appropriate COAR buying forms (A (1–3), C (1–2), E, G, I (1–2), and K) for each species purchased from fishermen during the applicable year.

(ii) *Buying information required.* The owner of the mothership must record the following information on the appropriate COAR buying forms:

(A) Species name and code (see table 2 to this part).

(B) Area purchased (see table 16 to this part).

(C) Gear code (see table 15 to this part).

(D) Delivery code (form G only) (see table 1 to this part).

(E) Total weight (to the nearest lb) purchased from fishermen.

(F) Total amount paid to fishermen, including all post- season adjustments and/or bonuses and any credit received by fishermen for gas expenses, ice, delivery premiums, and other miscellaneous expenses.

(G) Price per pound. If additional adjustments may be made after this report has been filed, the owner must check the ''$ not final'' box, and submit Form M when these adjustments are paid. Do not include fish purchased from another processor.

(5) *Production forms, Forms B (1–6), D, F, H, J (1–2), and K).* For purposes of this paragraph, the total wholesale value is the amount that the processor receives for the finished product (free on board pricing mothership or catcher/processor). For products finished but not yet sold (still held in inventory), calculate the estimated value using the average price received to date for that product.

(i) *Requirement*—(A) *Mothership.* The owner of a mothership must record and submit the appropriate COAR production forms (B(1–6), D, F, H, J(1–2), and K) for all production that occurred for each species during the applicable year:

(*1*) That were purchased from fishermen on the grounds and/or dockside, including both processed and unprocessed seafood.

(*2*) That were then either processed on the mothership or exported out of the State of Alaska.

(B) *Catcher/processor.* The owner of a catcher/processor must record and submit the appropriate COAR production forms (B(1–6), D, F, H, J (1–2), and K) for each species harvested during the applicable year that were then either processed on the vessel or exported out of the State of Alaska.

(ii) *Information required, non-canned production*—(A) Enter area of processing (see table 16 to this part).

List production of Canadian-harvested fish separately.

(B) Processed product. Processed product must be described by entering three codes:

(*1*) Process prefix code (see table 17 to this part)

(*2*) Process suffix code (see table 17 to this part)

(*3*) Product code (see table 1 to this part)

(C) Total net weight. Enter total weight (in pounds) of the finished product.

(D) Total value($). Enter the total wholesale value of the finished product.

(E) Enter price per pound of the finished product.

(iii) *Information required, canned production*. Complete an entry for each can size produced:

(A) Enter area of processing (see table 16 to this part).

(B) Process 51 or 52. Enter conventional canned code (51) or smoked, conventional canned code (52).

(C) Total value($). Enter the total wholesale value of the finished product.

(D) Enter can size in ounces, to the hundredth of an ounce.

(E) Enter number of cans per case.

(F) Enter number of cases.

(6) *Custom production forms, Form L (1–2)*—(i) *Requirement*. The owner of a mothership or catcher/processor must record and submit COAR production form L (1–2) for each species in which custom production was done by the mothership or catcher/processor for another processor and for each species in which custom production was done for the mothership or catcher/processor by another processor.

(ii) *Custom-production by mothership or catcher/processor for another processor*. If the mothership or catcher/processor custom-processed fish or shellfish for another processor during the applicable year, the owner of the mothership or catcher/processor must list the processor name and ADF&G processor code (if known) to describe that processor, but must not include any of that production in production form L (1–2).

(iii) *Custom-production by another processor for mothership or catcher/processor*. If a processor custom-processed fish or shellfish for the mothership or catcher/processor during the applicable year, the owner of the mothership or catcher/processor must use a separate page to list each processor and must include the following information.

(A) *Custom fresh/frozen miscellaneous production*. The owner of a mothership or catcher/processor must list the following information to describe production intended for wholesale/retail market and that are not frozen for canning later:

(*1*) Species name and code (see table 2 to this part).

(*2*) Area of processing (see table 16 to this part).

(*3*) Processed product. Processed product must be entered using three codes:

(*i*) Process prefix code (see table 17 to this part).

(*ii*) Process suffix code (see table 17 to this part).

(*iii*) Product code (see table 1 to this part).

(*4*) Total net weight. Enter total weight in pounds of the finished product.

(*5*) Total wholesale value($). Enter the total wholesale value of the finished product.

(B) *Custom canned production*. The owner of a mothership or catcher/processor must list the following information to describe each can size produced in custom canned production:

(*1*) Species name and code (see table 2 to this part).

(*2*) Area of processing (see table 16 to this part).

(*3*) Process 51 or 52. Enter conventional canned code (51) or smoked, conventional canned code (52).

(*4*) Total wholesale value ($). Enter the total wholesale value of the finished product.

(*5*) Can size in ounces, to the hundredth of an ounce.

(*6*) Number of cans per case.

(*7*) Number of cases.

(7) *Fish buying retro payments/post-season adjustments, Form M*—(i) *Requirement*. The owner of a mothership must record and submit COAR production Form M to describe additional adjustments and/or bonuses awarded to a fisherman, including credit received by fishermen for gas expenses, ice, delivery premiums, and other miscellaneous expenses.

(ii) *Information required*—(A) Enter species name and code (see table 2 to this part).

(B) Enter area purchased (see table 16 to this part)

(C) Enter gear code (see table 16 to this part).

(D) Enter total pounds purchased from fisherman.

(E) Enter total amount paid to fishermen (base + adjustment).

4. In part 679, table 14 is removed and tables 14a, 14b, and 14c are added in its place; table 15 is revised; and tables 16, 17, and 18 to part 679 are added to read as follows:

TABLE 14A TO PART 679. PORT OF LANDING CODES, ALASKA, INCLUDING CDQ AND IFQ PRIMARY PORTS

Port Name	NMFS Code	ADF&G Code ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/ IFQ	North Latitude	West Longitude
Adak	186	ADA			
Akutan	101	AKU	X	54°08′05″	165°46′20″
Akutan Bay	102				
Alitak	103	ALI			
Anchor Point	104				
Anchorage	105	ANC			
Angoon	106	ANG			
Aniak		ANI			
Anvik		ANV			
Atka	107	ATK			
Auke Bay	108				.....
Baranof Warm Springs	109				.....
Beaver Inlet	110				.....
Bethel		BET			
Captains Bay	112				.....

TABLE 14A TO PART 679. PORT OF LANDING CODES, ALASKA, INCLUDING CDQ AND IFQ PRIMARY PORTS—Continued

Port Name	NMFS Code	ADF&G Code ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/IFQ	North Latitude	West Longitude
Chignik	113	CHG			
Chinitna Bay	114				.....
Cordova	115	COR	X	60°33′00″	145°45′00″
Craig	116	CRG	X	55°28′30″	133°09′00″
Dillingham	117	DIL			
Douglas	118				.....
Dutch Harbor	119	DUT			
Dutch Harbor/Unalaska			X	53°53′27″	166°32′05″
Edna Bay	121				.....
Egegik	122	EGE			.....
Ekuk		EKU			.....
Elfin Cove	123	ELF			.....
Emmonak		EMM			.....
Fairbanks		FBK	.....		.....
False Pass	125				.....
Galena		GAL		.....	.....
Glacier Bay		GLB		.....	.....
Glennallen		GLN	.....		.....
Gustavus	127	GUS			.....
Haines	128	HNS			.....
Halibut Cove	130	.....			.....
Hollis	131	.....			.....
Homer	132	HOM	X	59°38′40″	151°33′00″
Hoonah	133	HNH			.....
Hydaburg		HYD		.....	.....
Hyder	134	HDR			.....
Ikatan Bay	135	.....			.....
Juneau	136	JNU			.....
Kake	137	KAK			.....
Kaltag		KAL			.....
Kasilof	138	KAS			.....
Kenai	139	KEN			.....
Kenai River	140				.....
Ketchikan	141	KTN	X	55°20′30″	131°38′45″
King Cove	142	KCO	X	55°03′20″	162°19′00″
King Salmon	143	KNG			.....
Kipnuk	144				
Klawock	145	KLA			
Kotzebue		KOT			
La Conner		LAC			
Mekoryuk	147				
Metlakatla	148	MET			
Moser Bay		MOS			
Naknek	149	NAK			
Nenana		NEN			
Nikiski (or Nikishka)	150	NIK			
Ninilchik	151	NIN			
Nome	152	NOM			
Nunivak Island		NUN			
Old Harbor	153	OLD			
Other/Unknown	499	UNK			
Pelican	155	PEL	X	57°57′30″	136°13′30″
Petersburg	156	PBG	X	56°48′10″	132°58′00″
Point Baker	157				
Port Alexander	158	PAL			
Port Armstrong		PTA			
Port Bailey	159	PTB			
Port Graham	160	GRM			
Port Lions		LIO			
Port Moller		MOL			
Port Protection	161				
Resurrection Bay	163				
Sand Point	164	SPT	X	55°20′15″	160°30′00″
Savoonga	165				
Seldovia	166	SEL			
Seward	167	SEW	X	60°06′30″	149°26′30″
Sitka	168	SIT	X	57°03′	135°20′

TABLE 14A TO PART 679. PORT OF LANDING CODES, ALASKA, INCLUDING CDQ AND IFQ PRIMARY PORTS—Continued

Port Name	NMFS Code	ADF&G Code ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/IFQ	North Latitude	West Longitude
Skagway	169	SKG			
Soldotna		SOL			
St. George	170	STG			
St. Lawrence	171				
St. Mary		STM			
St. Paul	172	STP	X	57°07′20″	170°16′30″
Tee Harbor	173				
Tenakee Springs	174	TEN			
Thorne Bay	175				
Togiak	176	TOG			
Toksook Bay	177				
Tununak	178				
Ugadaga Bay	179				
Ugashik		UGA			
Unalakleet		UNA			
Unalaska	180				
Valdez	181	VAL			
Wasilla		WAS			
Whittier	183	WHT			
Wrangell	184	WRN			
Yakutat	185	YAK	X	59°33′	139°44′

TABLE 14B TO PART 679. PORT OF LANDING CODES: CALIFORNIA, OREGON, CANADA, INCLUDING CDQ AND IFQ PRIMARY PORTS

Port Name	NMFS Code	ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/IFQ	North Latitude	West Longitude
California					
Eureka	500	EUR			.....
Fort Bragg	501				
Other	599				
Oregon					
Astoria	600	AST			.....
Lincoln City	602				
Newport	603	NPT			.....
Olympia		OLY			.....
Portland		POR			.....
Warrenton	604				
Other	699				
Canada					
Port Edward	800	.....			.....
Port Hardy	801				
Prince Rupert	802	PRU			.....
Other	899	.....			.....

TABLE 14C TO PART 679. WASHINGTON PORT OF LANDING CODES: INCLUDING CDQ AND IFQ PRIMARY PORTS

Port Name	NMFS Code	ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/IFQ	North Latitude	West Longitude
Anacortes	700	ANA			.....
Bellevue	701				.....
Bellingham	702		X	48°45′04″	122°30′02″
Blaine		BLA			
Edmonds	703				

TABLE 14C TO PART 679. WASHINGTON PORT OF LANDING CODES: INCLUDING CDQ AND IFQ PRIMARY PORTS—Continued

Port Name	NMFS Code	ADF&G Code	CDQ/IFQ Primary Ports for Vessel Clearance (X indicates an authorized IFQ port; see § 679.5 (l)(5)(vi))		
			CDQ/IFQ	North Latitude	West Longitude
Everett	704				
Fox Island	706				
Ilwaco	707				
La Conner	708	LAC			
Mercer Island	709				
Nagai Island	710				
Port Angeles	711				
Port Orchard	712				
Port Townsend	713				
Rainier	714				
Seattle	715	SEA			
Tacoma		TAC			
Other	799				

TABLE 15 TO PART 679—GEAR CODES, DESCRIPTIONS, AND USE (X INDICATES WHERE THIS CODE IS USED)

Name of Gear	NMFS Logbooks and Forms	Electronic WPR & Check-in/out Code	Gear Code, Numeric	Use Numeric Code to Complete the Following:		
				Shoreside Electronic Logbook	IFQ Terminal and Forms	COAR Report
Diving		OTH	11	X		X
Dredge		OTH	22	X		X
Dredge, hydro/mechanical		OTH	23	X		X
Fish wheel		OTH	08	X		X
Gillnet, drift		OTH	03	X		X
Gillnet, herring	.....	OTH	34	X		X
Gillnet, set		OTH	04	X		X
Gillnet, sunken		OTH	41	X		X
Hand line/jig/troll		(1)	05	X	IFQ name: hand troll	X
Handpicked		OTH	12	X		X
Hatchery		n/a	77	X		X
Hook-and-line	X	HAL	61	X	X	X
Jig,mechanical		(1)	26	X		X
Jig/Troll	X	JIG	(1)	(1)		
Net,dip		OTH	13	X		X
Net,ring		OTH	10	X		X
Other/specify	X	OTH	99	X		X
Pot	X	POT	91	X	X	X
Pound	.....	OTH	21	X		X
Seine,beach	.....	OTH	02	X		X
Seine,purse		OTH	01	X		X
Shovel		OTH	18	X		X
Trap		OTH	90	X		X
Trawl, beam		(2)	17	X		X
Trawl, double otter		(2)	27	X		X
Trawl, nonpelagic/bottom	X	NPT	07	X		X
Trawl, pelagic/midwater	X	PTR	47	X		X
Troll,dinglebar		OTH	25	X	IFQ name: dinglebar troll	X
Troll, power gurdy		(1)	15	X		X
Weir		OTH	14	X		X

NOTES:
(1)Federal Authorized Gear JIG/TROLL. No numeric code is available because both jig and troll have a separate code number
(2)For logbooks, forms, electronic WPR, electroniccheck-in/out reports: all trawl gear must be reported as either nonpelagic or pelagic trawl

TABLE 16 TO PART 679—AREA CODES AND DESCRIPTIONS FOR USE WITH STATE OF ALASKA ADF&G COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)

COAR: Name (Code)	Species	ADF&G Fisheries Management Areas	Area Description in ADF&G Regulations
Alaska Peninsula	King Crab:	M	5 AAC 34.500
South Peninsula (MS)	AK Peninsula/Aleutian Islands Salmon	M	5 AAC 12.100
North Peninsula (MN)		M	(Aleutians) 5 AAC 09.100 (AK Peninsula)
	Herring	M	5 AAC 27.600
Atka-Amlia Islands (FB) (FG)	Salmon	n/a	5 AAC 11.1010
Bering Sea:	Bering Sea King Crab	Q	5 AAC 34.900
Pribilof Island (Q1)	Bering Sea/Kotzebue	Q	5 AAC 27.900
St. Matthew Island Q2)			
St. Lawrence Island (Q4)			
Bristol Bay (T)	King Crab	T	5 AAC 34.800
	Salmon	T	5 AAC 06.100
	Herring	T	5 AAC 27.800
Chignik (L)	Groundfish	L	5 AAC 28.500
	Herring	L	5 AAC 27.550
	Salmon	L	5 AAC 15.100
Cook Inlet:	Groundfish	H	5 AAC 28.300
Lower Cook Inlet (HL)	Herring	H	5 AA 27.400
Upper Cook Inlet (HU)	Cook Inlet Shrimp	H	5 AAC 31.300
	Outer Cook Inlet Shrimp	H	5 AA 31.400
	Dungeness Crab	H	5 AA 32.300
	King Crab	H	5 AA 34.300
	Tanner Crab	H	5 AA 35.400
	Miscellaneous Shellfish	H	5 AA 38.300
	Salmon	H	5 AA 21.100
Dutch Harbor (O)	Aleutian Islands King Crab	O	5 AA 34.600
EEZ (Federal waters of BSAI and GOA) (FB) (FG)	Groundfish	n/a	n/a
Kodiak (western GOA) (K)	Groundfish	K	5 AAC 28.400
	Herring	K	5 AAC 27.500
	King Crab	K	5 AAC 34.400
	Salmon	K	5 AAC 18.100
	Shrimp	J	5 AAC 31.500
	Dungeness Crab	J	5 AAC 32.400
	Tanner Crab	J	5 AAC 35.500
	Miscellaneous Shellfish	J	5 AAC 38.400
Kotzebue (X)	Salmon	W	5 AAC 03.100
Kuskokwim:	Salmon	W	5 AAC 07.100
Kuskokwim River/Bay (W1)	Herring	W	5AAC 27.870
Security Cove (W2)			
Goodnews Bay (W3)			
Nelson Island (W4)			
Ninivak Island (W5)			
Cape Avinof (W6)			
Norton Sound (Z)	Norton Sound-Port Clarence Salmon	Z	5 AAC 04.100
	Norton Sound-Port Clarence King Crab		
Prince William Sound (E)	Groundfish	E	5 AAC 28.200
	Herring	E	5 AAC 27.300
	Shrimp	E	5 AAC 31.200
	Dungeness Crab	E	5 AAC 32.200
	King Crab	E	5 AAC 34.200
	Tanner Crab	E	5 AAC 35.300
	Miscellaneous Shellfish	E	5 AAC 38.200
	Salmon		5 AAC 24.100

TABLE 16 TO PART 679—AREA CODES AND DESCRIPTIONS FOR USE WITH STATE OF ALASKA ADF&G COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)—Continued

COAR: Name (Code)	Species	ADF&G Fisheries Management Areas	Area Description in ADF&G Regulations
Southeast:	Groundfish	A	5 AAC 28.100
Juneau/Haines (A1)	Southeast (w/o Yakutat) Herring	A	5 AAC 27.100
Yakutat (A2)	Yakutat Herring	D	5 AAC 27.200
Ketchikan/Craig (B)	Southeast (w/o Yakutat) Dungeness Shrimp	A	5 AAC 31.100
Petersburg/Wrangell (C)	Yakutat Shrimp	D	5 AAC 31.150
Sitka/Pelican (D)	Southeast (w/o Yakutat) Crab	A	5 AAC 32.100
	Yakutat Dungeness Crab	D	5 AAC 32.155
	Southeast (w/o Yakutat) King Crab	A	5 AAC 34.100
	Yakutat King Crab	D	5 AAC 34.160
	Southeast (w/o Yakutat) Tanner Crab	A	5 AAC 35.100
	Southeast (w/o Yakutat) Miscellaneous Shellfish	D	5 AAC 35.160
	Yakutat Miscellaneous Shellfish	A	5 AAC 38.100
	Southeast (w/o Yakutat) Salmon	D	5 AAC 38.160
	Yakutat Salmon	A	5 AAC 33.100
		D	5 AAC 29.010
			5 AAC 30.100
Yukon River:	Yukon-Northern Salmon	Y	5 AAC 05.100
Lower Yukon (YL)			
Upper Yukon (YU)			

TABLE 17 TO PART 679. PROCESS CODES FOR USE WITH STATE OF ALASKA COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)

Codes	Process Codes and Description
Prefix Codes	1–Fresh
	2–Frozen
	3–Salted/brined
	4–Smoked
	5–Canned
	6–Cooked
	7–Live
	8–Dry
	9–Pickled
	11–Minced
Suffix Codes	0–General
	1–Canned Conv.
	2–Canned smoked
	8–Vacuum packed
	B–Block
	I–Individual quick frozen (IQF) pack
	S–Shatter pack

TABLE 18 TO PART 679. REQUIRED BUYING AND PRODUCTION FORMS FOR USE WITH STATE OF ALASKA COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)

Fishery	Required Form Number and Name
Salmon	*Salmon Buying*: (A)(1) Seine gear (A)(1) Gillnet gear (A)(2) Troll gear (A)(3) Miscellaneous gear *King Salmon Production*: (B)(1) Production (B)(1) Canned Production *Sockeye Salmon Production*: (B)(2) (i) Production (ii) Canned Production *Coho Salmon Production*: (B)(3) (i) Production (ii) Canned Production *Pink Salmon Production*: (B)(4) (i) Production (ii) Canned Production *Chum Salmon Production*: (B)(5) (i) Production (ii) Canned Production *Salmon Roe & Byproduct Production*: (B)(6) (i) Roe (B)(6) (ii) Byproduct Production

TABLE 18 TO PART 679. REQUIRED BUYING AND PRODUCTION FORMS FOR USE WITH STATE OF ALASKA COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)—Continued

Fishery	Required Form Number and Name
Herring	Herring Buying: (C)(1) (i) Seine gear (ii) Gillnet gear (C)(2) (i) Gillnet gear (contd) (ii) Pound gear (iii)Hand-pick gear Herring Production: (D) (i) Production (ii) Byproduct Production
Crab	(E)*Crab Buying*: (F) Crab Production
Shrimp/Miscellaneous Shellfish	(G)*Shrimp/Misc.Shellfish Buying*: (i) Trawl gear (ii) Pot gear (iii) Diving/picked gear (iv) Other gear (specify) (H) Shrimp/Misc. Shellfish Production
Groundfish	(I)(1) Groundfish Buying (I)(2) Groundfish Buying (J)(1) Groundfish Production (J)(2) Groundfish Production

TABLE 18 TO PART 679. REQUIRED BUYING AND PRODUCTION FORMS FOR USE WITH STATE OF ALASKA COMMERCIAL OPERATOR'S ANNUAL REPORT (COAR)—Continued

Fishery	Required Form Number and Name
Halibut	(K) Halibut Buying & Production
Custom Production	*Custom Production*: (L)(1) Associated Processors (i) Custom Fresh/Frozen (ii) Misc. production (iii) Custom Canned Production (L)(2) (additional sheet)
PRICES NOT FINAL	(M)(1) Fish Buying Retro Payments (M)(2) Post-season Adjustment

[FR Doc. 01–20648 Filed 8–17–01: 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 66, No. 161
Monday, August 20, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Docket No. FV01–993–3 PR]

Dried Prunes Produced in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate from $2.00 to $2.80 per ton of salable dried prunes established for the Prune Marketing Committee (Committee) under Marketing Order No. 993 for the 2001–02 and subsequent crop years. The Committee locally administers the marketing order which regulates the handling of dried prunes grown in California. Authorization to assess dried prune handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The crop year begins August 1 and ends July 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by September 19, 2001.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; Fax: (202) 720–8938; or E-mail: moab.docketclerk@usda.gov. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Assistant or Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901; Fax (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California dried prune handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable dried prunes beginning on August 1, 2001, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established for the Committee for the 2001–02 and subsequent crop years from $2.00 per ton to $2.80 per ton of salable dried prunes.

The California dried prune marketing order provides authority for the Committee, with the approval of the Department, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California dried prunes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 1999–2000 and subsequent crop years, the Committee recommended, and the Department approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the Committee or other information available to the Secretary.

The Committee met on June 28, 2001, and unanimously recommended 2001–02 expenditures of $403,200 and an assessment rate of $2.80 per ton of salable dried prunes. In comparison, last year's budgeted expenditures were $388,000. The recommended assessment rate of $2.80 per ton is $.80 higher than the rate currently in effect. The $0.80 per ton increase in the assessment rate would allow the Committee to meet its 2001–02 expenses. The primary reason for the

increased assessment rate is an estimated reduction in 2001–02 crop year production. The Committee estimates a 150,000 ton crop during the 2001–02 crop year. A total of 6,000 tons are not expected to be salable because of size or quality, leaving a balance of 144,000 salable tons. This is a 28 percent decrease in salable tonnage from last year and caused the Committee to recommend increasing its assessment rate to meet expenses.

The following table compares major budget expenditures recommended by the Committee on June 28, 2001, and major budget expenditures in the revised 2000–01 budget recommended on April 5, 2001.

Budget expense categories	2000–01 (revised)	2001–02
Salaries, Wages & Benefits	$225,850	$226,315
Research & Development	30,000	30,000
Office Rent	28,000	23,300
Travel	21,000	20,000
Reserve (Contingencies)	28,550	53,185
Equipment Rental	8,000	9,000
Data Processing	5,000	4,000
Stationery & Printing	5,500	4,500
Office Supplies	5,000	4,500
Postage & Messenger	7,000	6,000

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by the estimated salable tons of California dried prunes. Production of dried prunes for the year is estimated at 144,000 salable tons which should provide $403,200 in assessment income. Income derived from handler assessments would be adequate to cover budgeted expenses. Interest income also would be available if assessment income is reduced for some reason. The Committee is authorized to use excess assessment funds from the 2000–01 crop year (currently estimated at $51,005) for up to 5 months beyond the end of the crop year to meet 2001–02 crop year expenses. At the end of the 5 months, the Committee refunds or credits excess funds to handlers (§ 993.81(c)).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2001–02 budget and those for subsequent crop years would be reviewed and, as appropriate, approved by the Department.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 1,250 producers of dried prunes in the production area and approximately 22 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

An updated prune industry profile shows that 9 of the 22 handlers (41 percent) shipped over $5,000,000 of dried prunes and could be considered large handlers by the Small Business Administration. Thirteen of the 22 handlers (59 percent) shipped under $5,000,000 of dried prunes and could be considered small handlers. An estimated 109 producers, or about 9 percent of the 1,250 total producers, would be considered large growers with annual income over $500,000. The majority of handlers and producers of California dried prunes may be classified as small entities.

This rule would increase the current assessment rate established for the Committee and collected from handlers for the 2001–2002 and subsequent crop years from $2.00 per ton to $2.80 per ton of salable dried prunes. The Committee unanimously recommended 2001–2002 expenditures of $403,200 and an assessment rate of $2.80 per ton of salable dried prunes. The proposed assessment rate of $2.80 is $0.80 higher than the assessment rate (64 FR 50426, September 17, 1999) that has been in effect since the 1999–2000 crop year. The quantity of assessable dried prunes for the 2001–02 crop year is now estimated at 144,000 salable tons. Thus, the $2.80 rate should provide $403,200 in assessment income and be adequate to meet this year's expenses. Interest income also would be available to cover budgeted expenses if the 2001–02 expected assessment income falls short.

The following table compares major budget expenditures recommended by the Committee on June 28, 2001, with major budget expenditures in the revised 2000–01 budget recommended on April 5, 2001.

Budget expense categories	2000–01 (revised)	2001–02
Salaries, Wages & Benefits	$225,850	$226,315
Research & Development	30,000	30,000

Budget expense categories	2000–01 (revised)	2001–02
Office Rent	28,000	23,300
Travel	21,000	20,000
Reserve (Contingencies)	28,550	53,185
Equipment Rental	8,000	9,000
Data Processing	5,000	4,000
Stationery & Printing	5,500	4,500
Office Supplies	5,000	4,500
Postage & Messenger	7,000	6,000

The Committee reviewed and unanimously recommended 2001–02 expenditures of $403,200. Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Executive Subcommittee. An alternative to this action would be to continue with the $2.00 per ton assessment rate, but the reduced anticipated crop size would not be sufficient to generate monies to fund all the budget items. The assessment rate of $2.80 per ton of salable dried prunes was determined by dividing the total recommended budget by the estimated salable dried prunes. The Committee is authorized to use excess assessment funds from the 2000–01 crop year (currently estimated at $51,005) for up to 5 months beyond the end of the crop year to fund 2001–02 crop year expenses. At the end of the 5 months, the Committee refunds or credits excess funds to handlers (§ 993.81(c)). Anticipated assessment income and interest income during 2001–02 would be adequate to cover authorized expenses.

Recent price information indicates that the grower price for the 2001–02 season should average above $850 per salable ton of dried prunes. Based on estimated shipments of 144,000 salable tons, assessment revenue during the 2001–02 crop year is expected to be less than 1 percent of the total expected grower revenue.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on all handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the California dried prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 28, 2001, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab/html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2001–02 crop year begins on August 1, 2001, and the marketing order requires that the rate of assessment for each crop year apply to all assessable dried prunes handled during such crop year; (2) the proposed rule would increase the assessment rate for assessable prunes beginning with the 2001–02 crop year; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 993

Plums, Prunes, Marketing agreements, Reporting and Recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 993 is proposed to be amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 993.347 is revised to read as follows:

§ 993.347 Assessment rate.

On and after August 1, 2001, an assessment rate of $2.80 per ton is established for California dried prunes.

Dated: August 14, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 01–20847 Filed 8–17–01; 8:45 am]

BILLING CODE 3410–02–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 611 and 614

RIN 3052–AB86

Organization; Loan Policies and Operations; Termination of Farm Credit Status

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: This current proposal would amend our regulations to allow a Farm Credit System (FCS, Farm Credit or System) institution to terminate its FCS charter and become a financial institution under another Federal or State chartering authority. Our purpose is to amend the existing regulations so they apply to all System banks and associations and to make other changes. In our current proposal, we generally value equity held by dissenters (i.e., dissenting stockholders and System institutions that choose not to hold equity in the successor institution) after the exit fee is deducted from a terminating institution's capital and assets.

DATES: Please send your comments to us by October 19, 2001.

ADDRESSES: You may send comments by electronic mail to ''reg-comm@fca.gov'' or through the Pending Regulations section of our Web site at ''www.fca.gov.'' You may also send comments to Thomas G. McKenzie, Director, Regulation and Policy Division, Office of Policy and Analysis,

Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090 or by fax to (703) 734–5784. You may review copies of all comments we receive in the Office of Policy and Analysis, FCA.

FOR FURTHER INFORMATION CONTACT:

Alan Markowitz, Senior Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4479;
or
Rebecca S. Orlich, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TDD (703) 883–4444.

SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of our current proposal are to:

- Provide a termination procedure for Farm Credit associations and banks under section 7.10 of the Farm Credit Act of 1971, as amended (1971 Act);
- Ensure that remaining FCS institutions can continue fulfilling their congressional mandate of serving the credit needs of farmers, ranchers, and cooperatives;
- Ensure that remaining FCS institutions are able to operate safely and soundly;
- Ensure that all equity holders of a terminating institution are treated fairly and equitably; and
- Ensure that stockholder disclosure materials are informative and easy to understand.

II. Introduction

We proposed amendments to our existing termination rule on November 5, 1999. *See* 64 FR 60370 for a full discussion of the 1999 proposal. We also published a sample exit fee calculation for a hypothetical FCS bank and association choosing to terminate their Farm Credit status under the 1999 proposal. (*See* 65 FR 5286, Feb. 3, 2000.)

After further deliberations, including discussions with the Farm Credit System Insurance Corporation (FCSIC), we believe the 1999 proposal needs revision, primarily to the method for calculating dissenters' equity. For purposes of this preamble discussion, we will use the term ''dissenters'' to refer generally to equity holders of a terminating institution that choose not to receive equity in the successor institution. Dissenters include System institutions, as well as ''dissenting stockholders,'' who are defined in the regulation as equity holders other than System institutions that choose not to hold stock in the successor institution. ''Dissenting stockholders'' are primarily retail borrowers of the associations and CoBank.

The 1999 proposal required a terminating institution to retire the equities of dissenters, in cash or in exchange for other debt or equity in the successor institution (if the dissenter agreed), before the exit fee was calculated. We noted in the preamble to the 1999 proposal that such a calculation would enable dissenters to receive approximately the same payment for their equities that they would receive if the institution were liquidated.

On reconsideration, we have decided to calculate the value of dissenters' equities after payment of the exit fee. Congress required System institutions to make a payment to the Farm Credit Insurance Fund (Insurance Fund) as a prerequisite to the exercise of the authority to terminate Farm Credit status. Section 7.10(a)(4) of the statute provides for the terminating institution to pay ''the amount by which total capital exceeds 6 percent of assets.'' The 1971 Act also provides that the terminating institution must meet ''such other conditions as the Farm Credit Administration Board by regulation considers appropriate'' (section 7.10(a)(7)).

Calculating and deducting the exit fee before other payments maximizes the payment to the Insurance Fund. It also means that stockholders of a terminating institution will receive approximately the same proportionate value for their equities, whether they dissent or choose to be stockholders of the successor institution. Dissenters will not receive a ''windfall'' at the expense of the continuing stockholders, and vice versa. We believe the consequence is that stockholders will base their decision to support or dissent from termination on other aspects of the proposal, such as whether giving up Farm Credit status will benefit borrowers.

Our current proposal, described in more detail below, treats dissenters' equity similarly to the existing regulation. In the existing regulation, the calculation and deduction of the exit fee occurs before dissenters' equity is valued. System institutions' investments are retired for cash, and dissenting stockholders receive a combination of cash and subordinated debt in the successor institution. In the current proposal, we would continue to require the terminating institution to retire other System institutions' investments for cash. For dissenting stockholders' equity, we expressly mandate cash payments only on purchased equities to enable the terminating institution to retain a larger amount of capital and capital-like instruments. The terminating institution has the choice of paying cash or issuing subordinated debt, or doing both, for a dissenting stockholder's remaining equity. We note that when dissenting stockholders receive subordinated debt rather than cash, the repayment of that debt will depend on the continued financial health of the successor institution.

Our 1999 proposal would have required the terminating institution to escrow all funds that would be paid to dissenting stockholders. In our current proposal, we have retained the escrow requirement, but only the cash portion of the payment to dissenting stockholders must be escrowed.

We propose to calculate the equity of dissenters as follows:

- First, the terminating institution's exit fee would be calculated as the capital in excess of 6 percent of (adjusted) assets. The exit fee would then be deducted from the institution's capital and assets.
- Second, the value of stockholders' equity would be computed.

Dissenting stockholders would receive cash payment equal to par or face value (less any impairment) for equities they purchased from the institution. For equity other than purchased equities—such as allocated equities, stock distributions, and a pro-rata share of unallocated surplus—dissenting stockholders would receive, at the option of the terminating institution, cash or subordinated debt with a term of up to 7 years, at a rate of interest tied to U.S. Treasury debt. System institutions that dissent would receive cash for their equity (both purchased equities and other forms of equity).

We propose a different method of calculating dissenters' equity in the case of a non-terminating association. A non-terminating association is one that chooses to reaffiliate with another System bank when its funding bank decides to terminate. If the reaffiliating association transfers all its equity, including its pro-rata share of unallocated surplus, to its newly affiliated FCS bank, all such equity will be valued and deducted from the terminating bank's assets and capital before the bank's exit fee is calculated. However, if the reaffiliating association decides *not* to transfer some of its capital to its new bank, such equity will be valued after the exit fee is deducted from the terminating bank's assets and capital.

Although allowing non-terminating associations to transfer equity to another System bank before the exit fee

calculation will reduce the payment to the Insurance Fund, we believe such a treatment effectively protects System banks and Systemwide bondholders. Capital transferred to another System bank will serve two purposes. First, the transferred capital contributes to the financial strength of both the bank and the non-terminating association, thus making a claim by that bank and association against the Insurance Fund less likely. Second, because System banks are jointly and severally liable on Systemwide obligations in the event the Insurance Fund is ever exhausted, capital at the reaffiliated association's bank remains available to repay the obligations.

Our current proposal would make the following additional changes to the existing rule:

- The current proposal applies to all FCS banks and associations;
- An institution's exit fee is calculated on the date of termination;
- Terminating institutions must escrow 110 percent of both the estimated exit fee and cash stock retirements to dissenters pending a final audit;
- A terminating association may repay its direct loan on a schedule agreed to by its bank;
- If a bank and a terminating association are unable to agree on when and how the bank will retire the association's investment in the bank, the bank must retire the investment on or before the date the association's direct loan is repaid;
- System institutions may exchange their investments in a terminating institution for equity in the successor, to the extent permitted by law; and
- A terminating bank's payment to the Farm Credit System Financial Assistance Corporation (FAC) is based on its retail loan volume, the loan volume of associations terminating with the bank, and the loan volume of associations maintaining their direct loan with the bank after termination.

We received comments on our 1999 proposal from the Farm Credit Council (Council) on behalf of its member banks and associations and from an employee of the AgFirst Farm Credit Bank. The bank employee commented generally that an institution would be more likely to liquidate than to terminate under the 1999 proposal. We also met with representatives from the Treasury Department's Office of Government-Sponsored Enterprise Policy. Treasury's and the Council's comments and our responses are described below in our section-by-section analysis.

III. Section-by-Section Analysis

Section 611.1205—Definitions That Apply in Subpart P

We revise our previously proposed definition of ''assets'' by removing the phrase ''(less appropriate valuation adjustments).'' We agree with the Council's comment that the phrase is unnecessary because the definition states that assets must be in conformity with generally accepted accounting principles (GAAP).

The Council asked us to clarify our definition of ''successor institution'' to indicate whether an ''other financial institution'' referred to in section 7.10(a)(3) of the 1971 Act can include ''finance companies that are unregulated financial institutions.'' We understand that an ''unregulated'' finance company is a financial institution that is not supervised or examined by a Federal or State banking agency. We believe that the 1971 Act allows a terminating institution to become a financial institution that is not supervised and examined by a Federal or State banking agency.

Section 611.1210—Commencement Resolution and Advance Notice

At the Council's request, we propose revising § 611.1210(b)(1) to add the FAC to the entities that receive a certified copy of a bank's resolution commencing termination. Accordingly, our current proposal requires a certified copy of the commencement resolution to be sent to the FCA, FCSIC, FAC, and the Federal Farm Credit Banks Funding Corporation (Funding Corporation), as well as certain other Farm Credit institutions.

We clarify that under the first sentence of proposed § 611.1210(e), a terminating bank can continue to issue consolidated and Systemwide debt through the close of business on the termination date. The Council requested that we clarify whether a terminating bank can issue consolidated and Systemwide debt on the termination date.

Section 611.1230—FCA Review and Approval

Section 611.1230(b) provides that we may disapprove a termination if we determine that it would have a material adverse impact on the ability of the remaining System institutions to fulfill their statutory purpose. The Council stated that, in their view, such a determination would not be fair to an institution seeking to terminate. While we understand the Council's concerns, we believe Congress intended FCA to have flexibility to condition a termination on the ability of the System to continue to fulfill its congressional mandate of serving the credit needs of farmers, ranchers, and their cooperatives. (*See* section 7.10(a)(7) of the 1971 Act.) Therefore, § 611.1230(b) remains unchanged from our 1999 proposal.

We revise § 611.1230(c)(3) of our 1999 proposal by adding the phrase ''including contingent liabilities'' after ''payments of debts.'' The Council requested that we insert a phrase to clarify that a terminating institution's obligation to satisfy contingencies does not end at termination.

Section 611.1245—Stockholder Reconsideration

The Council suggested that we specify in § 611.1245(a) how much time we will take to review a stockholder petition for a reconsideration vote to determine if the petition complies with section 7.9 of the 1971 Act. The 1971 Act requires a reconsideration vote to occur within 60 days of the notice to stockholders informing them of the results of a favorable vote to terminate. In the first 35 days of the 60-day period, stockholders have the right to petition us to require the institution to hold another vote on the termination. The Council raised a concern that there will be too little time for stockholders to hold a reconsideration vote if we take more than a few days to review the petition.

We are mindful that the 1971 Act gives an institution limited time to hold a reconsideration vote. While we understand the Council's concern whether there will be enough time for scheduling and holding a vote to reconsider the termination, we do not believe it is necessary to set specific timeframes for us to act. We anticipate that we will expedite our review of any petition we receive so that the reconsideration vote can be held within the 60 days specified by Congress.

Section 611.1250—Preliminary Exit Fee Estimate

We rearrange provisions of previously proposed § 611.1250(a) to clarify that the average daily balance is based on the 12-month period as of the quarterend before submission of the termination application. Section 611.1250(a)(3) is moved to § 611.1250(a)(1), and part of that provision is redesignated as § 611.1250(a)(2). Previously proposed § 611.1250(a)(2) is redesignated as § 611.1250(a)(3). We have made these same changes to the preliminary exit fee estimate and final exit fee calculations in §§ 611.1250(b), 611.1255(a), and 611.1255(b). We also revise redesignated § 611.1250(a)(3) to clarify that the audit

requirements for the financial statements apply to the account balances as of a specific date. The Council questioned whether our 1999 proposal required an audit of the average daily balances that are used to calculate the preliminary exit fee estimate. We intend the audited financial statements to be dollar amount balances, not average daily balances.

We revise previously proposed § 611.1250(a)(4)(ii)(A) to include a reference to § 611.1260(d). The Council requested that we add this reference because § 611.1260(d) describes our requirements for satisfying an association's FAC obligations to its affiliated bank when it terminates.

The Council asked us to confirm that previously proposed § 611.1250(b)(3), redesignated in the current proposal as § 611.1250(b)(4), applies to bank-only financial statements. The Council's interpretation is correct. The Council also asked if that provision requires different financial reporting for a terminating bank from the reporting required of a continuing bank. The reporting requirements of the bank-only information for a terminating bank and a continuing bank are the same.

The Council asked us to clarify the meaning of the *pro rata* portion of a terminating bank's general allowance for loan losses as described in previously proposed § 611.1250(b)(5)(i)(B). By *pro rata* we mean the proportion of the general allowance that is equal to the amount of direct loans of affiliated associations that the terminating bank expects to be paid off on or before the termination date, divided by the bank's total loans and related assets.

We revise previously proposed § 611.1250(b)(5)(iii)(A) to require a terminating bank to subtract from its assets only equity investments held by non-terminating associations that the bank expects to transfer to another System bank at or before termination. This reflects the change in our current proposal that any equity held in a terminating bank by a non-terminating association will be calculated after the exit fee is deducted unless that equity is transferred to the association's new funding bank. The Council asked us to specify in § 611.1250(b)(5)(iii)(A) how to calculate a *pro rata* share of a bank's unallocated surplus for a non-terminating association, since different methods can be used. We revise our 1999 proposal to specify that a terminating bank must generally calculate a non-terminating association's share of unallocated surplus according to the bank's liquidation bylaws. However, we may require a terminating bank to use a different calculation method if we determine that using the bank's liquidation bylaws would be inequitable. This change will result in an unallocated surplus calculation that is more consistent with the calculation of other dissenters' equity. The change would permit calculations of unallocated surplus based on memo accounting or based on other factors, provided that the resulting calculation is equitable.

We revise previously proposed § 611.1250(b)(5)(iii)(B) to include a reference to § 611.1270(d). The Council requested that we add this reference because § 611.1270(d) describes our requirements for satisfying a bank's FAC obligations when terminating.

The Council asked us to revise previously proposed § 611.1250(c) to provide greater detail about when we would consider it necessary to adjust an institution's exit fee estimate under our 3-year look-back provision. This requirement is very similar to the existing requirement for terminating associations, found at § 611.1240(e), which we adopted in 1991. (For a further discussion of the 3-year look-back, *see* 55 FR 28644–46 (July 12, 1990.)) Our objective is to adjust any account balance of a terminating institution if it does not reflect true value or if a transaction outside the normal course of business has had the effect of raising or lowering the exit fee. We believe our 1999 proposal adequately describes the transactions that we would most likely review to determine if adjustments to a terminating institution's business transactions are necessary. Therefore, § 611.1250(c) remains as previously proposed.

Section 611.1255—Exit Fee Calculation

We revise previously proposed §§ 611.1255(a)(2) and 611.1255(b)(3) (redesignated in our current proposal as §§ 611.1255(a)(3) and 611.1255(b)(4), respectively) to clarify that the audit requirements for these sections apply to the dollar amount account balances as of the termination date. The regulation does not require an audit of the average daily balances that are used to calculate the final exit fee.

We are deleting previously proposed § 611.1255(a)(4)(C) and (b)(5)(D). Our 1999 proposal authorized terminating institutions to add back to assets payments to retire the equity of dissenters and Farm Credit institutions at termination. As we explained above in the Introduction, we now propose deducting the exit fee before calculating dissenters' equity (except for equity transferred by a non-terminating association to another System bank).

We are adding a paragraph to clarify that a terminating bank must add back the specific allowance, and a *pro rata* share of its general allowance, related to the direct loans that are deducted in the calculation. In the current proposal, the new paragraph is at § 611.1255(b)(5)(i)(B).

We revise previously proposed § 611.1255(b)(5)(iii)(A) to require a terminating bank to subtract from its assets an amount equal to any equity investments held in it by non-terminating associations that the bank expects to transfer to another System bank at or before termination. This reflects the change in our current proposal that any equity held by a non-terminating association will be valued after the exit fee calculation if the equity is not transferred to another bank.

We revise previously proposed § 611.1255(a)(4)(ii)(A) to add a reference to § 611.1260(d). The Council requested that we add this reference because § 611.1260(d) describes our requirements for satisfying an association's FAC obligations to its affiliated bank when the association terminates.

The Council asked whether § 611.1255(c) requires a terminating institution to maintain separate escrow accounts for the preliminary exit fee estimate and the estimate of equity payments to dissenting stockholders and other Farm Credit institutions. Neither our 1999 proposal nor this current proposal specifically requires two separate escrow accounts, and we will not automatically require separate accounts. However, we may require separate accounts in a situation where we believe a single account would cause confusion or raise other problems. We would inform a terminating institution whether it must maintain one or two escrow accounts when we approve its termination request.

The Council asked whether the reference to ''account balances'' in § 611.1255(d) refers to average daily balances or dollar amounts. The reference is to dollar amounts.

Section 611.1260—Payment of Debts and Assessments—Terminating Association

We revise previously proposed § 611.1260(d) to clarify how a terminating association must calculate its FAC-related payment to its affiliated bank. The Council requested that we insert the phrase ''the estimated present value of'' in the first sentence to more closely track the statutory language. We have done so. The Council also stated

that the System endorsed the idea of requiring terminating associations to pay their affiliated bank a portion of the capital preservation agreement payments under section 6.9 of the 1971 Act. We have decided not to require such a payment. The 1992 amendments to the 1971 Act contain specific repayment provisions when an institution terminates but do not require a terminating association to contribute to its bank's share of capital preservation agreement payments.

Section 611.1265—Retirement of Terminating Association's Investment in Its Affiliated Bank

We have revised previously proposed § 611.1265 to limit its application to treatment of a terminating association's investment in its affiliated bank. We have moved the provisions regarding other System institutions' investments in a terminating association to § 611.1275, as we discuss below under that section.

Section 611.1270—Repayment of Obligations—Terminating Bank

The Council asked that we revise previously proposed § 611.1270(a) by adding a provision addressing derivatives contracts. We do not believe this change is necessary because § 611.1270(a) includes all debt obligations, which includes derivatives contracts.

The Council also pointed out that the statute provides the authority for banks to issue individual debt. The primary liability of individual debt obligations that a terminating bank may have under section 4.2(b) of the 1971 Act is governed by the general rule stated in § 611.1270(a).

In response to the Council's request, we revise previously proposed § 611.1270(c)(1) to clarify that any payment obligation under joint and several liability will occur only when there is a call for payment. Also at the Council's request, we revise this section to require successor institutions to periodically report to the Funding Corporation so that it can fulfill its disclosure responsibilities for the System.

The Council noted that in proposed § 611.1270(c)(3) we inappropriately ''mixed'' obligations described in section 4.2(b) of the 1971 Act, which are individually issued obligations, with the consolidated obligations described in section 4.2(c). The previous proposal stated that a successor institution would have contingent joint and several liability not only for consolidated obligations, but also for the interest on any individual obligations issued and outstanding on the termination date by other banks operating under the same title of the 1971 Act. In response, we have deleted references to contingent joint and several liability with respect to interest on individual obligations, because such liability is not described in those terms under section 4.4(a)(1) of the 1971 Act.

The Council correctly observed that previously proposed § 611.1270(d) does not include future interest payments on FAC debt obligations funded by the Farm Credit banks. Repayment of interest on FAC debt obligations funded by the Farm Credit banks is not covered by section 6.9(e)(3)(C)(ii) or by subparagraphs (c)(5)(E)(i) and (d)(1)(C)(iv) of section 6.26 of the 1971 Act. The 1992 amendments to the 1971 Act expressly provided for terminating institutions to make certain payments related to the FAC debt repayment, including payment of Treasury-paid interest. However, the 1992 amendments did not require payments related to future bank-paid interest. The repayment of these obligations by a terminating bank does not appear to be consistent with the FAC repayment provisions of the 1971 Act. Moreover, such payments would have the effect of reducing the exit fee, and we believe it is more appropriate for the funds to go to the Insurance Fund, to provide protection for System institutions and investors.

In response to the Council's comment, we revise previously proposed § 611.1270(d)(1) to clarify that the loan volume of reaffiliating associations remaining in the System is not included in the FAC repayment calculation by a terminating bank. The loan volume of associations that reaffiliate with another System bank will result in an increase in that bank's future FAC payments to the extent such payments are based on the association's average accruing retail loan volume. The terminating bank's FAC payment will be based on the retail loan volume that is leaving the System.

In response to the Council's comment, we revise previously proposed § 611.1270(d)(2) to provide that comparable securities used to make the present value estimation must be securities that mature no later than the due date of the terminating bank's FAC obligations. The Council also requested that we require a bank that has redeemed FAC preferred stock, but for which the underlying debt remains outstanding, to provide for this contingent liability. Our current proposal contains this change.

Section 611.1275—Retirement of Equities Held by Other System Institutions

We revise previously proposed § 611.1275, which had covered only a terminating bank's equity retirements, to apply instead to terminating bank and association equity held by other System institutions. (Terminating association equity was covered under previously proposed § 611.1265, which in our current proposal applies only to a terminating association's investment in its affiliated bank.) The current proposal provides that a System institution's share of the terminating institution's unallocated surplus must be valued according to the liquidation provisions of the institution's bylaws, or by another distribution method if we deem the bylaws inequitable to stockholders. We make this change in response to the Council's comment that our proposal to determine a non-terminating association's share of unallocated surplus on a pro rata basis could be inappropriate when the bank's stockholders have previously agreed to a different distribution (such as a distribution based on patronage). We agree and have revised the method of calculating the value of unallocated surplus, for both non-terminating associations and other System institutions with equity in a terminating institution. We have also revised our 1999 proposal to clarify what adjustments must be made to stockholder equity. Deductions must be made for FAC payments, taxes, and the exit fee. There may be other adjustments as we deem appropriate.

We have also clarified that a non-terminating association may reaffiliate with another Farm Credit bank either before or on the termination date. We believe that associations wishing to reaffiliate should not be required to wait to reaffiliate until the date of their bank's termination. If the transfer occurs before the termination date, the association's share of bank equities must be valued as of the monthend preceding the date of reaffiliation (and before deduction of the exit fee).

We have also added a new paragraph (d) to prohibit continuing investments by System institutions in a successor institution if the relationship is otherwise prohibited by law. In this section as well as in previously proposed § 611.1265, we had allowed System institutions with investments in a terminating institution to exchange that investment for stock in the successor institution. We retain the provision in the current proposal but we have clarified that these investments in

the successor institution must be otherwise permissible under law. We made this modification in response to comments made by Treasury, to recognize that the Federal Credit Union Act[1] and the Federal Deposit Insurance Act[2] prohibit certain affiliations and relationships between Government-sponsored enterprises, such as System institutions, and depository institutions. Depository institutions include commercial banks, savings banks and savings associations, and credit unions. If a System institution were to exchange its investment in a terminating institution for voting stock in a successor depository institution, the investment could be deemed to be an affiliation or financial support and would be a prohibited relationship. We have revised our 1999 proposal to clarify that the rule does not sanction investments that are otherwise prohibited by law.

Section 611.1280—Dissenting Stockholders' Rights

We revise previously proposed § 611.1280 (d) and (e) regarding how terminating institutions must calculate the value of equities held by dissenting stockholders, as well as the form of payment. (*See* our discussion of this issue under the Introduction.) Our current proposal would require payment in cash and subordinated debt, as provided by the existing rule. However, the terminating institution would also have the option to pay cash for non-purchased equities. We believe this form of payment would permit dissenting stockholders to be treated fairly and not force them to own equity in the terminating institution. This method also provides a means for the successor institution to retain capital should the terminating institution choose to seek a charter from a Federal or State chartering authority.

List of Subjects

12 CFR Part 611

Agriculture, Banks, banking, Organization and functions (Government agencies), Rural areas.

12 CFR Part 614

Agriculture, Banks, banking, Flood insurance, Foreign trade, Reporting and recordkeeping, Rural areas.

For the reasons stated in the preamble, parts 611 and 614 of chapter VI, title 12 of the Code of Federal Regulations are proposed to be amended to read as follows:

[1] 12 U.S.C. 1781(e).

[2] 12 U.S.C. 1828(s).

PART 611—ORGANIZATION

1. The authority citation for part 611 is revised to read as follows:

Authority: Secs. 1.3, 1.13, 2.0, 2.10, 3.0, 3.21, 4.12, 4.15, 4.20, 4.21, 5.9, 5.10, 5.17, 6.9, 6.26, 7.0–7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2011, 2021, 2071, 2091, 2121, 2142, 2183, 2203, 2208, 2209, 2243, 2244, 2252, 2278a–9, 2278b–6, 2279a—2279f–1, 2279aa–5(e)); secs. 411 and 412 of Pub. L. 100–233, 101 Stat. 1568, 1638; secs. 409 and 414 of Pub. L. 100–399, 102 Stat. 989, 1003, and 1004.

2. Revise subpart P to read as follows:

Subpart P—Termination of System Institution Status

Sec.

611.1200 Applicability of this subpart.
611.1205 Definitions that apply in this subpart.
611.1210 Commencement resolution and advance notice.
611.1215 Prohibited acts.
611.1220 Filing of termination application.
611.1221 Filing of termination application—timing.
611.1222 Plan of termination—contents.
611.1223 Information statement—contents.
611.1230 FCA review and approval.
611.1240 Voting record date and stockholder approval.
611.1245 Stockholder reconsideration.
611.1250 Preliminary exit fee estimate.
611.1255 Exit fee calculation.
611.1260 Payment of debts and assessments—terminating association.
611.1265 Retirement of a terminating association's investment in its affiliated bank.
611.1270 Repayment of obligations—terminating bank.
611.1275 Retirement of equities held by other System institutions.
611.1280 Dissenting stockholders' rights.
611.1285 Loan refinancing by borrowers.
611.1290 Continuation of borrower rights.

Subpart P—Termination of System Institution Status

§ 611.1200 Applicability of this subpart.

The regulations in this subpart apply to each bank and association that desires to terminate its System institution status and become chartered as a bank, savings association or other financial institution.

§ 611.1205 Definitions that apply in this subpart.

Assets means all assets determined in conformity with GAAP, except as otherwise required in this subpart.

GAAP means ''generally accepted accounting principles'' as that term is defined in § 621.2(c) of this chapter.

OFI means an ''other financing institution'' that has a funding and discount agreement with a Farm Credit bank under section 1.7(b)(1) of the Act.

Successor institution means the bank, savings association, or other financial institution that the terminating bank or association will become when we revoke its Farm Credit charter.

§ 611.1210 Commencement resolution and advance notice.

(a) *Adoption of commencement resolution.* Your board of directors must begin the termination process by adopting a commencement resolution stating your intention to terminate Farm Credit status under section 7.10 of the Act.

(b) *Advance notice.* Within 5 days after adopting the commencement resolution, you must:

(1) Send a certified copy of the commencement resolution to us and the Farm Credit System Insurance Corporation (FCSIC). If you are an association, also send a copy to your affiliated bank. If you are a bank, also send a copy to your affiliated associations, the other Farm Credit banks, the Federal Farm Credit Banks Funding Corporation (Funding Corporation), and the Farm Credit System Financial Assistance Corporation (FAC);

(2) Mail an announcement to all equity holders stating you are taking steps to terminate Farm Credit status and describing the following:

(i) The process of termination;

(ii) The expected effect of termination on equity holders, including the effect on borrower rights and the consequences of any stock retirements before termination;

(iii) The type of charter the successor institution will have; and

(iv) Any bylaw creating a special class of borrower stock and participation certificates under paragraph (f) of this section.

(c) *Bank negotiations on joint and several liability.* If you are a terminating bank, within 10 days of adopting the commencement resolution you and the other Farm Credit banks must begin negotiations to provide for your satisfaction of liabilities (other than your primary liability) under section 4.4 of the Act. The Funding Corporation may, at its option, be a party to the negotiations to the extent necessary to fulfill its duties with respect to financing and disclosure. The agreement must comply with the requirements in § 611.1270(c).

(d) *Disclosure to customers after commencement resolution.* Between the date of the commencement resolution and the termination date, you must give the following information to your customers:

(1) For each applicant who is not a current stockholder, describe at the time of loan application:

(i) The effect of the proposed termination on the borrower's loan; and

(ii) Whether the borrower will continue to have any of the borrower rights provided under the Act and regulations.

(2) For any equity holders who ask to have their equities retired, explain that the retirement would extinguish the holder's right to exchange those equities for an interest in the successor institution. In addition, inform holders of equities entitled to your residual assets in liquidation that retirement before termination would extinguish their right to dissent from the termination and have their equities retired.

(e) *Terminating bank's right to continue issuing debt.* Through the termination date, a terminating bank may continue to participate in the issuance of consolidated and Systemwide obligations to the same extent it would be able to participate if it were not terminating.

(f) *Special class of stock.* Notwithstanding any requirements to the contrary in § 615.5230(b) of this chapter, you may adopt bylaws providing for the issuance of a special class of stock and participation certificates between the date of adoption of a commencement resolution and the termination date. Your stockholders must approve the special class before you adopt the commencement resolution. The equities must comply with section 4.3A of the Act and be identical in all respects to existing classes of equities that are entitled to the residual assets of the institution in a liquidation, except for the value a holder will receive in a termination. In a termination, the holder of the special class of stock receives value equal to the lower of either par (or face) value, or the value calculated under § 611.1280 (c) and (d). A holder must have the same right to vote (if the equity is held on the voting record date) and to dissent as holders of similar equities issued before the commencement resolution. If the termination does not occur, the special classes of stock and participation certificates must automatically convert into shares of the otherwise identical equities.

§ 611.1215 Prohibited acts.

(a) *Statements about termination.* Neither the institution nor any director, officer, employee or agent may make any untrue or misleading statement of a material fact, or fail to disclose any material fact, about the termination to a current or prospective equity holder.

(b) *Representations regarding FCA approval.* Neither the institution nor any director, officer, employee or agent may make an oral or written representation to anyone that a preliminary or final approval of the termination by us is, directly or indirectly, either a recommendation on the merits of the proposal or an assurance that the information you give to your equity holders is adequate or accurate.

§ 611.1220 Filing of termination application.

(a) *Adoption of termination resolution.* Your board must adopt a termination resolution authorizing the application for termination and for a new charter.

(b) *Contents of termination application.* Send us an original and five copies of the termination application for review and preliminary approval. If you send us the application in electronic form, you must send us at least one hard copy application with original signatures. The application must contain:

(1) A certified copy of the termination resolution;

(2) A copy of the plan of termination required under § 611.1222;

(3) An information statement that complies with § 611.1223;

(4) All other information that you give to current or prospective equity holders in connection with the termination; and

(5) Any additional information that either we request or your board of directors wishes to submit in support of the application.

(c) *Requirement to update application.* You must immediately send us any material changes to information in the plan of termination, including financial information, that occur between the date you file the application and the termination date. In addition, send us copies of any additional written information on the termination that you give to current or prospective equity holders before termination.

§ 611.1221 Filing of termination application—timing.

If we receive the termination application required in § 611.1220 less than 30 days after receiving the advance notice, we may in our discretion disapprove the application.

§ 611.1222 Plan of termination—contents.

The plan of termination must include:

(a) Copies of all contracts, agreements, and other documents on the proposed termination and organization of the successor institution.

(b) A statement of how you will transfer assets to, and have your liabilities assumed by, the successor institution.

(c) Your plan to retire outstanding equities or convert them to equities of the successor institution.

(d) A copy of the charter application for the successor institution, with any exhibits or other supporting information.

(e) A statement, if applicable, whether the successor institution will continue to borrow from a Farm Credit bank and how such a relationship will affect your provision for payment of debts. The plan of termination must include evidence of any agreement and plan for satisfaction of outstanding debts (including amounts you owe to the (FAC) because of the termination).

§ 611.1223 Information statement—contents.

(a) *Plain language requirements.* (1) Present the contents of the information statement in a clear, concise and understandable manner.

(2) Use short, explanatory sentences, bullet lists or charts where helpful, and descriptive headings and subheadings.

(3) Minimize the use of glossaries or defined terms.

(4) Write in the active voice when possible.

(5) Avoid legal and highly technical business terminology.

(b) *Disclaimer.* Place the following statement in boldface type in the material sent to equity holders, either on the notice of meeting or the first page of the information statement:

The Farm Credit Administration has not determined if this information is accurate or complete. You should not rely on any statement to the contrary.

(c) *Summary.* The first part of the information statement must be a summary that concisely explains:

(1) Which stockholders have a right to vote on termination;

(2) The material changes the termination will cause to the rights of stockholders, borrowers, and other equity holders;

(3) The effect of those changes;

(4) The potential benefits and disadvantages of the termination;

(5) The right of certain stockholders to dissent and receive payment for their existing equities; and

(6) The proposed termination date.

(d) *Remaining requirements.* The rest of the information statement must contain the following:

(1) *Plan of termination.* Describe the plan of termination.

(2) *Benefits and disadvantages.* Provide the following information:

(i) An enumerated statement of the anticipated benefits and potential disadvantages of the termination;

(ii) An explanation of the preliminary exit fee estimate, with any adjustments we require, and estimated expenses of termination and organization of the successor institution; and

(iii) An explanation of the board's basis for recommending the termination.

(3) *Initial board of directors.* List the initial board of directors and senior officers for the successor institution, with a brief description of the business experience of each person, including principal occupation and employment during the past 5 years.

(4) *Bylaws and charter.* Summarize the provisions of the bylaws and charter of the successor institution that differ materially from your bylaws and charter. The summary must state:

(i) Whether the successor institution will require a borrower to hold an equity interest as a condition for having a loan; and

(ii) Whether the successor institution will require stockholders to do business with the institution.

(5) *Changes to equity.* Explain any changes in the nature of equity investments in the successor institution, such as changes in dividends, patronage, voting rights, preferences, retirement of equities, and liquidation priority. If equities protected under section 4.9A of the Act are outstanding, the information statement must state that the Act's protections will be extinguished on termination.

(6) *Effect of termination on statutory and regulatory rights.* Explain the effect of termination on rights granted by the Act and FCA regulations. You must explain the effect termination will have on borrower rights granted in the Act and subparts K, L, and N of part 614 of this chapter.

(7) *Loan refinancing by borrowers.* (i) State, as applicable, that borrowers may seek to refinance their loans with the System institutions that already serve, or will be permitted to serve, your territory. State that no System institution is obligated to refinance your loans.

(ii) If we have assigned your territory to another System institution before the information statement is mailed to equity holders, or if another System institution is already chartered to make the same type of loans you make in your territory, identify such institution(s) and provide the following information:

(A) The name, address, and telephone number of the institution; and

(B) An explanation of the institution's procedures for borrowers to apply for refinancing.

(iii) If we have not assigned the territory before you mail the information statement, give the name, address and telephone number of the System institution specified by us and state that borrowers may contact the institution for information about loan refinancing.

(8) *Equity exchanges.* Explain the formula and procedure to exchange equity in your institution for equity in the successor institution.

(9) *Employment, retirement, and severance agreements.* Describe any employment agreement or arrangement between the successor institution and any of your senior officers (as defined in § 620.1 of this chapter) or directors. Describe any severance and retirement plans that cover your employees or directors and state the costs you expect to incur under the plans in connection with the termination.

(10) *Exit fee calculation.* Explain how the exit fee will be calculated.

(11) *New charter.* Describe the nature and type of financial institution the successor institution will be and any conditions of approval of the new chartering authority or regulator.

(12) *Differences in successor institution's programs and policies.* Summarize any differences between you and the successor institution on:

(i) Interest rates and fees;

(ii) Collection policies;

(iii) Services provided; and

(iv) Any other item that would affect a borrower's lending relationship with the successor institution, including whether a stockholder's ability to borrow from the institution will be restricted.

(13) *Capitalization.* Discuss expected capital requirements of the successor institution, and the amount and method of capitalization.

(14) *Sources of funding.* Explain the sources and manner of funding the successor institution's operations.

(15) *Contingent liabilities.* Describe how the successor institution will address any contingent liability it will assume from you.

(16) *Tax status.* Summarize the differences in tax status between your institution and the successor institution, and explain how the differences will affect stockholders.

(17) *Regulatory environment.* Describe briefly how the regulatory environment for the successor institution will differ from your current regulatory environment, and any effect on the cost of doing business or the value of stockholders' equity.

(18) *Dissenters' rights.* Explain which equity holders are entitled to dissenters' rights and what those rights are. The explanation must include the estimated liquidation value of the stock, procedures for exercising dissenters' rights, and a statement of when the rights may be exercised.

(19) *Financial information.* (i) Present the following financial data:

(A) A balance sheet and income statement for each of the 3 preceding fiscal years;

(B) A balance sheet as of a date within 90 days of the date you mail the termination application to us, presented on a comparative basis with the corresponding period of the previous 2 fiscal years;

(C) An income statement for the interim period between the end of the last fiscal year and the date of the balance sheet required by paragraph (d)(19)(i)(B) of this section, presented on a comparative basis with the corresponding period of the previous 2 fiscal years;

(D) A pro forma balance sheet of the successor institution presented as if termination had occurred as of the date of the most recent balance sheet presented in the statement; and

(E) A pro forma summary of earnings for the successor institution presented as if the termination had been effective at the beginning of the interim period between the end of the last fiscal year and the date of the balance sheet presented under paragraph (d)(19)(i)(D) of this section.

(ii) The format for the balance sheet and income statement must be the same as the format in your annual report and must contain appropriate footnote disclosures, including data on high-risk assets, other property owned, and allowance for losses.

(iii) The financial statements must include either:

(A) A statement signed by the chief executive officer and each board member that the various financial statements are unaudited but have been prepared in all material respects in conformity with GAAP (except as otherwise disclosed) and are, to the best of each signer's knowledge, a fair and accurate presentation of the financial condition of the institution; or

(B) A signed opinion by an independent certified public accountant that the various financial statements have been examined in conformity with generally accepted auditing standards and included such tests of the accounting records and other such auditing procedures as were considered necessary in the circumstances, and, as of the date of the statements, present fairly the financial position of the institution in conformity with GAAP

applied on a consistent basis, except as otherwise disclosed.

(20) *Subsequent financial events.* Describe any event after the date of the financial statements, but before the date you send the termination application to us, that would have a material impact on your financial condition or the condition of the successor institution.

(21) *Other subsequent events.* Describe any event after you send the termination application to us that could have a material impact on any information in the termination application.

(22) *Other material disclosures.* Describe any other material fact or circumstance that a stockholder would need to know to make an informed decision on the termination, or that is necessary to make the disclosures not misleading.

(23) *Ballot and proxy.* Include a ballot and proxy, with instructions on the purpose and authority for their use, and the proper method for the stockholder to sign the proxy.

(24) *Board of directors certification.* Include a certification signed by the entire board of directors as to the truth, accuracy, and completeness of the information contained in the information statement. If any director refuses to sign the certification, the director must inform us of the reasons for refusing.

§ 611.1230 FCA review and approval.

(a) *FCA review period.* We will review a termination application and either give preliminary approval or disapprove the application no later than 60 days after we receive the application.

(b) *Reservation of right to disapprove termination.* In addition to any other reason for disapproval, we may disapprove a termination if we determine that the termination would have a material adverse effect on the ability of the remaining System institutions to fulfill their statutory purpose.

(c) *Conditions of final FCA approval.* We will give final approval to your termination application only if:

(1) Your stockholders vote in favor of termination in the termination vote and in any reconsideration vote;

(2) You give us executed copies of all contracts, agreements, and other documents submitted under § 611.1222;

(3) You have paid or made adequate provision for payment of debts, including responsibility for any contingent liabilities, and for retirement of equities;

(4) A Federal or State chartering authority has granted a new charter to the successor institution;

(5) You deposit into escrow an amount equal to 110 percent of the estimated exit fee plus 110 percent of the estimated amount you must pay to retire equities of dissenting stockholders and Farm Credit institutions, as described in § 611.1255(c); and

(6) You have fulfilled any other condition of termination we have imposed.

(d) *Effective date of termination.* If we grant final approval, we will revoke your charter, and the termination will be effective on the last to occur of—

(1) Fulfillment of all conditions listed in paragraph (c) of this section;

(2) Your proposed termination date;

(3) Ninety (90) days after we receive the notice described in § 611.1240(e); and

(4) Fifteen (15) days after any reconsideration vote.

§ 611.1240 Voting record date and stockholder approval.

(a) *Stockholder meeting.* You must call the meeting by written notice in compliance with your bylaws. The stockholder meeting to vote on the termination must occur within 60 days of our preliminary approval (or, if we take no action, within 60 days of the end of our approval period).

(b) *Voting record date.* The voting record date may not be more than 70 days before the stockholders' meeting.

(c) *Information statement.* You must provide all equity holders with a notice of meeting and the information statement required by § 611.1223 at least 30 days before the stockholder vote.

(d) *Voting procedures.* The voting procedures must comply with § 611.330. You must have an independent third party count the ballots. If a voting stockholder notifies you of the stockholder's intent to exercise dissenters' rights, the tabulator must be able to verify to you that the stockholder voted against the termination. Otherwise, the votes of stockholders must remain confidential.

(e) *Notice to FCA and equity holders of voting results.* Within 10 days of the termination vote, you must send us a certified record of the results of the vote. You must notify all equity holders of the results within 30 days after the stockholder meeting. If the stockholders approve the termination, you must give the following information to equity holders:

(1) Stockholders who voted against termination and equity holders who were not entitled to vote have a right to dissent as provided in § 611.1280; and

(2) Voting stockholders have a right, under § 611.1245, to file a petition with the FCA for reconsideration within 35 days after the date you mail to them the notice of the results of the termination vote.

(f) *Requirement to notify new equity holders.* You must provide the information described in paragraph (e)(1) of this section to each person that becomes an equity holder after the termination vote and before termination.

§ 611.1245 Stockholder reconsideration.

(a) *Right to reconsider termination.* Voting stockholders have the right to reconsider their approval of the termination if a petition signed by 15 percent of the stockholders is filed with us within 35 days after you mail notices to stockholders that the termination was approved. If we determine that the petition complies with the requirements of section 7.9 of the Act, you must call a special stockholders' meeting to reconsider the vote. The meeting must occur within 60 days after the date on which you mailed to stockholders the results of the termination vote. If a majority of the stockholders voting, in person or by proxy, vote against the termination, the termination may not take place.

(b) *Stockholder list and expenses.* You must, at your expense, timely give stockholders who request it a list of the names and addresses of stockholders eligible to vote in the reconsideration vote. The petitioners must pay all other expenses for the petition. You must pay expenses that you incur for the reconsideration vote.

§ 611.1250 Preliminary exit fee estimate.

(a) *Preliminary exit fee estimate-terminating association.* You must provide a preliminary exit fee estimate to us when you submit the termination application. Calculate the preliminary exit fee estimate in the following order:

(1) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period as of the quarterend immediately before the date you send us your termination application.

(2) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as ''dollar amount.''

(3) Compute the average daily balances based on financial statements that comply with GAAP. The financial statements, as of the quarterend immediately before the date you send us your termination application, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter. We may, in our discretion, waive the audit

requirement if an independent audit was performed as of a date less than 6 months before you submit the termination application.

(4) Make adjustments to assets as follows:

(i) Add back expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, auditing, business planning, and application fees for the termination and reorganization.

(ii) Subtract the following:

(A) The dollar amount of your estimated payment (to your affiliated bank) related to FAC obligations as described in § 611.1260(d); and

(B) The dollar amount of your estimated taxes due to the termination.

(iii) Adjust for the dollar amount of significant transactions you reasonably expect to occur between the quarterend before you file your termination application and termination. Examples of these transactions include, but are not limited to, gains or losses on the sale of assets, retirements of equity, loan repayments, and patronage distributions. Do not make adjustments for future expenses related to termination, such as severance or special retirement payments, or stock retirements to dissenting stockholders and Farm Credit institutions.

(5) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(6) Make any adjustments we require under paragraph (c) of this section.

(7) After making these adjustments to assets and liabilities, subtract liabilities from assets. This is your preliminary total capital for purposes of termination.

(8) Multiply assets as adjusted above by 6 percent, and subtract this amount from preliminary total capital. This is your preliminary exit fee estimate.

(b) *Preliminary exit fee estimate—terminating bank.* (1) Affiliated associations that are terminating with you must calculate their individual preliminary exit fee estimates as described in paragraph (a) of this section.

(2) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period as of the quarterend immediately before the date you send us your termination application.

(3) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as ''dollar amount.''

(4) Compute the average daily balances based on bank-only financial statements that comply with GAAP. The financial statements, as of the quarterend immediately before the date you send us your termination application, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter. We may, in our discretion, waive this requirement if an independent audit was performed as of a date less than 6 months before you submit the termination application.

(5) Make adjustments to assets and liabilities as follows:

(i) Add back to assets the following:

(A) Expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, auditing, business planning, and application fees for the termination and reorganization; and

(B) Any specific allowance for losses, and a *pro rata* portion of any general allowance for loan losses, on direct loans to associations that you do not expect to incur before or at termination.

(ii) Subtract from your assets and liabilities an amount equal to your direct loans to your affiliated associations that are not terminating.

(iii) Subtract the following from assets:

(A) Equity investments in you that are held by non-terminating associations and that you expect to transfer to another System bank before or at termination. A non-terminating association's investment consists of purchased equities, allocated equities, and a share of the bank's unallocated surplus calculated in accordance with the bank's bylaw provisions on liquidation. We may require a different calculation method for the unallocated surplus if we determine that using the liquidation provision would be inequitable to stockholders;

(B) The dollar amount of your estimated termination payment to the FAC, as described in § 611.1270(d); and

(C) The dollar amount of estimated taxes due to the termination.

(iv) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(v) Adjust for the dollar amount of significant transactions you reasonably expect to occur between the quarterend before you file your termination application and termination. Examples of these transactions include, but are not limited to, retirements of equity, loan repayments, and patronage distributions. Do not make adjustments for future expenses related to termination, such as severance or special retirement payments, or stock retirements to dissenting stockholders and Farm Credit institutions.

(6) Add to assets the dollar amount of estimated termination payments of the terminating associations related to FAC obligations.

(7) Make any adjustments we require under paragraph (c) of this section.

(8) After the above adjustments, combine your balance sheet with the balance sheets of your terminating associations after they have made the adjustments required in paragraph (a) of this section. Subtract liabilities from assets. This is your preliminary total capital estimate for purposes of termination.

(9) Multiply the assets of the combined balance sheet after the above adjustments by 6 percent. Subtract this amount from the preliminary total capital estimate of the combined balance sheet. The remainder is the preliminary exit fee estimate of the bank and terminating affiliated associations.

(10) Your preliminary exit fee estimate is the amount by which the preliminary exit fee estimate for the combined entity exceeds the total of the individual preliminary exit fee estimates of your affiliated terminating associations.

(c) *Three-year look-back.* (1) We will review your transactions over the 3 years before the date of the termination resolution under § 611.1220. Our review will include, but not be limited to, the following:

(i) Additions to or subtractions from any allowance for losses;

(ii) Additions to assets or liabilities, or subtractions from assets or liabilities, due to transactions that are outside your ordinary course of business;

(iii) Dividends or patronage refunds exceeding your usual practices;

(iv) Changes in the institution's capital plan, or in implementing the plan, that increased or decreased the level of borrower investment;

(v) Contingent liabilities, such as loss-sharing obligations, that can be reasonably quantified; and

(vi) Assets that may be overvalued, undervalued or not recorded on your books.

(2) If we determine the account balances do not accurately show the value of your assets and liabilities (whether the assets and liabilities were booked before or during the 3-year look-back period), we will make any adjustments we deem necessary.

(3) We may require you to reverse the effect of a transaction if we determine that:

(i) You have retired capital outside the ordinary course of business,

(ii) You have taken any other actions unrelated to core business that have the effect of changing the exit fee, or

(iii) You incurred expenses related to termination prior to the 12-month average daily balance period on which the exit fee calculation is based.

(4) We may require you to make these adjustments to the preliminary exit fee estimate that is disclosed in the information statement, the final exit fee calculation, and the calculations of the value of equities held by dissenting stockholders, Farm Credit institutions that choose to have their equities retired at termination, and reaffiliating associations.

§ 611.1255 Exit fee calculation.

(a) *Final exit fee calculation—terminating association.* Calculate the final exit fee in the following order:

(1) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period preceding the termination date. Assume for this calculation that you have not paid or accrued the items described in paragraph (a)(4)(ii) of this section.

(2) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as ''dollar amount.''

(3) Compute the average daily balances based on financial statements that comply with GAAP. The financial statements, as of the termination date, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter.

(4) Make adjustments to assets and liabilities as follows:

(i) Add back expenses related to termination incurred in the 12 months before termination. Related expenses include, but are not limited to, legal services, accounting services, auditing, business planning, payments of severance and special retirements, and application fees for the termination and reorganization.

(ii) Subtract from assets the following:

(A) The dollar amount of your termination payment (to your affiliated bank) related to FAC obligations as described in § 611.1260(d); and

(B) The dollar amount of taxes you will have to pay due to the termination;

(iii) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(iv) Make the adjustments that we require under § 611.1250(c). For the final exit fee, we will review and may require additional adjustments for transactions between the date you adopted the termination resolution and the termination date.

(5) After making these adjustments to assets and liabilities, subtract liabilities from assets. This is your total capital for purposes of termination.

(6) Multiply assets by 6 percent, and subtract this amount from total capital. This is your final exit fee.

(b) *Final exit fee calculation—terminating bank.* (1) The individual exit fees of affiliated associations that are terminating with you must be calculated as described in paragraph (a) of this section.

(2) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period preceding the termination date. Assume for this calculation that you have not paid or accrued the items described in paragraph (b)(5)(iii)(B), (C), and (D) of this section.

(3) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as ''dollar amount.''

(4) Compute the average daily balances based on bank-only financial statements that comply with GAAP. The financial statements, as of the termination date, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter.

(5) Make adjustments to assets and liabilities as follows:

(i) Add back the following to your assets:

(A) Expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, auditing, business planning, payments of severance and special retirements, and application fees for the termination and reorganization.

(B) The dollar amount of the termination payments to you by the terminating associations related to FAC obligations.

(C) Any specific allowance for losses, and a pro rata share of any general allowance for losses, on direct loans to associations that are paid off or transferred before or at termination.

(ii) Subtract from your assets and liabilities your direct loans to affiliated associations that were paid off or transferred in the 12-month period before termination or at termination.

(iii) Subtract from your assets the following:

(A) Equity investments held in you by affiliated associations that you transferred at termination or during the 12 months before termination;

(B) The dollar amount of your termination payment to the FAC; and

(C) The dollar amount of taxes paid or accrued due to the termination;

(iv) Subtract from liabilities any liability that we treat as regulatory capital (or that we do not treat as a liability) under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(v) Make the adjustments that we require under § 611.1250(c). For the final exit fee, we will review and may require additional adjustments for transactions between the date you adopted the termination resolution and the termination date.

(6) After the above adjustments, combine your balance sheet with the balance sheets of terminating associations after making the adjustments required in paragraph (a) of this section.

(7) Subtract combined liabilities from combined assets. This is the total capital of the combined balance sheet.

(8) Multiply the assets of the combined balance sheet after the above adjustments by 6 percent. Subtract this amount from the total capital of the combined balance sheet. This amount is the combined final exit fee for you and the terminating affiliated associations.

(9) Your final exit fee is the amount by which the combined final exit fee exceeds the total of the individual final exit fees of your affiliated terminating associations.

(c) *Payment of exit fee.* On the termination date, you must:

(1) Deposit into an escrow account acceptable to us and the FCSIC an amount equal to 110 percent of the preliminary exit fee estimate, adjusted to account for stock retirements to dissenting stockholders and Farm Credit institutions, and any other adjustments we require.

(2) Deposit into an escrow account acceptable to us an amount equal to 110 percent of the equity you must retire for dissenting stockholders and System institutions holding stock that would be entitled to a share of the remaining assets in a liquidation.

(d) *Pay-out of escrow.* Following the independent audit of the institution's account balances as of the termination date, we will determine the amount of the final exit fee and the amounts owed to stockholders to retire their equities. We will then direct the escrow agent to:

(1) Pay the exit fee to the Farm Credit Insurance Fund;

(2) Pay the amounts owed to dissenting stockholders and Farm Credit institutions; and

(3) Return any remaining amounts to the successor institution.

(e) *Additional payment.* If the amount held in escrow is not enough to pay the amounts under paragraph (d)(1) and (2) of this section, the successor institution must pay any remaining liability to the escrow agent for distribution to the appropriate parties. The termination application must include evidence that, after termination, the successor institution will pay any remaining amounts owed.

§ 611.1260 Payment of debts and assessments—terminating association.

(a) *General rule.* If you are a terminating association, you must pay or make adequate provision for the payment of all outstanding debt obligations and assessments.

(b) *No OFI relationship.* If the successor institution will not become an OFI, you must either:

(1) Pay debts and assessments owed to your affiliated Farm Credit bank at termination; or

(2) With your affiliated Farm Credit bank's concurrence, arrange to pay any obligations or assessments to the bank after termination.

(c) *Obligations to other Farm Credit institutions.* You must pay or make adequate provision for payment of obligations to any Farm Credit institution (other than your affiliated bank) under any loss-sharing or other agreement.

(d) *FAC payments.* Before termination, you must pay the estimated present value of future assessments and payment obligations to your affiliated Farm Credit bank to the extent required by subparagraphs (c)(5)(F) and (d)(1)(C)(v) of section 6.26 of the Act. The FAC must make the present value estimations, subject to our approval, based on an appropriate discount rate. The appropriate discount rate is the non-interest bearing U.S. Treasury security rate for securities with a maturity as near as possible to the period remaining until the terminating association's obligations under this paragraph would be due (but before the due date).

§ 611.1265 Retirement of a terminating association's investment in its affiliated bank.

(a) *Safety and soundness restrictions.* Notwithstanding anything in this subpart to the contrary, we may prohibit a bank from retiring the equities you hold in the bank if the retirement would cause the bank to fall below its regulatory capital requirements after retirement, or if we determine that the bank would be in an unsafe or unsound condition after retirement.

(b) *Retirement agreement.* Your affiliated bank may retire the purchased and allocated equities held by you in the bank according to the terms of the bank's capital revolvement plan or an agreement between you and the bank.

(c) *Retirement in absence of agreement.* Your affiliated bank must retire any equities not subject to an agreement or revolvement plan no later than when you or the successor institution pays off your loan from the bank.

(d) *No retirement of unallocated surplus.* When your bank retires equities you own in the bank, the bank must pay par or face value for purchased and allocated equities, less any impairment. The bank may not pay you any portion of its unallocated surplus.

(e) *Exclusion of equities from capital ratios.* If another Farm Credit institution makes an agreement to retire equities you hold in that institution after termination, we may require that institution to exclude part or all of those equities from assets and capital when the institution calculates its capital and net collateral ratios under subparts H and K of part 615 of this chapter.

§ 611.1270 Repayment of obligations—terminating bank.

(a) *General rule.* If you are a terminating bank, you must pay or make adequate provision for the payment of all outstanding debt obligations, and provide for your responsibility for any probable contingent liabilities identified.

(b) *Satisfaction of primary liability on consolidated or Systemwide obligations.* After consulting with the other Farm Credit banks, the Funding Corporation, and the FCSIC, you must pay or make adequate provision for payment of your primary liability on consolidated or Systemwide obligations in a method that we deem acceptable. Before we make a final decision on your proposal and as we deem necessary, we may consult with the other Farm Credit banks, the Funding Corporation, and the FCSIC.

(c) *Satisfaction of joint and several liability and liability for interest on individual obligations.* (1) You and the other Farm Credit banks must enter into an agreement, which is subject to our approval, covering obligations issued under section 4.2 of the Act and outstanding on the termination date. The agreement must specify how you and your successor institution will make adequate provision for the payment of your joint and several liability to holders of obligations other than those obligations on which you are primarily liable, in the event we make calls for payment under section 4.4 of the Act. You and your successor institution must also provide for your liability under section 4.4(a)(1) of the Act to pay interest on the individual obligations issued by other System banks. As a part of the agreement, you must also agree that your successor institution will provide ongoing information to the Funding Corporation to enable it to fulfill its funding and disclosure duties. The Funding Corporation may, at its option, be a party to the agreement to the extent necessary to fulfill its duties with respect to financing and disclosure.

(2) If you and the other Farm Credit banks are unable to reach agreement within 90 days before the proposed termination date, we will specify the manner in which you will make adequate provision for the payment of the liabilities in question and how we will make joint and several calls for those obligations outstanding on the termination date.

(3) Notwithstanding any other provision in these regulations, the successor institution will be jointly and severally liable for consolidated and Systemwide debt outstanding on the termination date (other than the obligations on which you are primarily liable). The successor institution will also be liable for interest on other banks' individual obligations as described in section 4.4(a)(1) of the Act and outstanding on the termination date. The termination application must include evidence that the successor institution will continue to be liable for consolidated and Systemwide debt and for interest on other banks' individual obligations.

(d) *Payment to the FAC.* (1) Before termination, you must pay to the FAC the amounts required by section 6.9(e)(3)(C)(ii) of the Act and by subparagraphs (c)(5)(E)(i) and (d)(1)(C)(iv) of section 6.26 of the Act. To make the calculations for section 6.26, you must include your retail loan volume, the retail loan volume of the associations that are terminating with you, and the retail loan volume of the affiliated associations that continue their direct lending relationships with the successor institution, but you must not include the retail loan volume of associations that reaffiliate with another bank and transfer or repay their direct loan on or before termination.

(2) The FAC must make the present value estimation, subject to our approval, based on an appropriate

discount rate. The appropriate discount rate is the non-interest bearing U.S. Treasury security rate for securities with a maturity as near as possible to the period remaining until your obligations under this paragraph would be due (but before the due date).

(3) If you or your predecessor bank has redeemed early any preferred stock issued to the FAC, we may require you to confirm in writing that your successor institution will assume responsibility for any and all of your contingent liabilities under any FAC preferred stock redemption agreement and indemnification agreement.

§ 611.1275 Retirement of equities held by other System institutions.

(a) *Retirement at option of equity holder.* If you are a terminating institution, System institutions that own your equities have the right to require you to retire the equities on the termination date.

(b) *Value of equity holders' interests.* You must retire the equities in accordance with the liquidation provisions in your bylaws unless we determine that the liquidation provisions would result in an inequitable distribution to stockholders. If we make such a determination, we will require you to distribute the equity in accordance with another method that we deem equitable to stockholders. Before you retire any equity, you must make the following adjustments to the amount of stockholder equity as stated in the financial statements on the termination date:

(1) Make deductions for any FAC obligations and taxes due to the termination that you have not yet recorded;

(2) Deduct the amount of the exit fee; and

(3) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(c) *Transfer of affiliated association's investment.* As an alternative to equity retirement, an affiliated association that reaffiliates with another Farm Credit bank instead of terminating with its bank has the right to require the terminating bank to transfer its investment to its new affiliated bank when it reaffiliates. If you are a terminating bank, at the time of reaffiliation you must transfer the purchased and allocated equities held by the association, as well as its share of unallocated surplus, to the new affiliated bank. Calculate the association's share before deduction of the exit fee as of the monthend preceding the reaffiliation date (or the termination date if it is the same as the reaffiliation date) in accordance with the liquidation provisions of your bylaws, unless we determine that the liquidation provisions would result in an inequitable distribution. If we make such a determination, we will require you to distribute the association's share of your unallocated surplus in accordance with another method that we deem equitable to stockholders. Before you distribute any unallocated surplus, you must make the following adjustments to stockholder equity as stated in the financial statements as of the monthend preceding the reaffiliation date (or the termination date if it is the same as the reaffiliation date):

(1) Add back any deductions of FAC obligations due to the termination, taxes due to the termination, and the exit fee; and

(2) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(d) *Prohibition on certain affiliations.* No Farm Credit institution may retain an equity interest otherwise prohibited by law in a successor institution.

§ 611.1280 Dissenting stockholders' rights.

(a) *Definition.* A dissenting stockholder is an equity holder (other than a System institution) in a terminating institution on the termination date who either:

(1) Was eligible to vote on the termination resolution and voted against termination;

(2) Was an equity holder on the voting record date but was not eligible to vote; or

(3) Became an equity holder after the voting record date.

(b) *Retirement at option of dissenting stockholder.* A dissenting stockholder may require a terminating institution to retire the stockholder's equity interest in the terminating institution.

(c) *Value of a dissenting stockholder's interest.* You must pay a dissenting stockholder according to the liquidation provision in your bylaws, except that you must pay at least par or face value for eligible borrower stock (as defined in section 4.9A(d)(2) of the Act). If we determine that the liquidation provision is inequitable to stockholders, we will require you to calculate their share in accordance with another formula that we deem equitable.

(d) *Calculation of interest of a dissenting stockholder.* Before you retire any equity, you must make the following adjustments to the amount of stockholder equity as stated in the financial statements on the termination date:

(1) Deduct any FAC obligations and taxes due to the termination that you have not yet recorded;

(2) Deduct the amount of the exit fee; and

(3) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(e) *Form of payment to a dissenting stockholder.* You must pay a dissenting stockholder for his equities as follows:

(1) Pay cash for the par or face value of purchased stock, less any impairment;

(2) For equities other than purchased equities, you may:

(i) Pay cash;

(ii) Cause or otherwise provide for the successor institution to issue, on the date of termination, subordinated debt to the stockholder with a face value equal to the value of the remaining equities. This subordinated debt must have a maturity date of 7 years or less, must have priority in liquidation ahead of all equity, and must carry a rate of interest not less than the rate (at the time of termination) for debt of comparable maturity issued by the U.S. Treasury plus 1 percent; or

(iii) Provide for a combination of cash and subordinated debt as described above.

(f) *Payment to holders of special class of stock.* If you have adopted bylaws under § 611.1210(f), you must pay a dissenting stockholder who own shares of the special class of stock an amount equal to the lower of the par (or face) value or the value of such stock as determined under § 611.1280(c) and (d).

(g) *Notice to equity holders.* The notice to equity holders required in § 611.1240(e) must include a form for stockholders to send back to you, stating their intention to exercise dissenters' rights. The notice must contain the following information:

(1) A description of the rights of dissenting stockholders set forth in this section, and the approximate value per share that a dissenting stockholder can expect to receive. State whether the successor institution will require borrowers to be stockholders or whether it will require stockholders to be borrowers.

(2) A description of the current book and par value per share of each class of equities, and the expected book and market value of the stockholder's interest in the successor institution.

(3) A statement that that a stockholder must return the enclosed form to you within 30 days if the stockholder chooses to exercise dissenters' rights.

(h) *Notice to subsequent equity holders.* Equity holders that acquire their equities after the termination vote

must also receive the notice described in paragraph (g) of this section. You must give them at least 5 business days to decide whether to request retirement of their stock.

(i) *Reconsideration.* If a reconsideration vote is held and the termination is disapproved, the right of stockholders to exercise dissenters' rights is rescinded. If a reconsideration vote is held and the termination is approved, you must retire the equities of dissenting stockholders as if there had been no reconsideration vote.

§ 611.1285 Loan refinancing by borrowers.

(a) *Disclosure of credit and loan information.* At the request of a borrower seeking refinancing with another System institution before you terminate, you must give credit and loan information about the borrower to such institution.

(b) *No reassignment of territory.* If, at the termination date, we have not assigned your territory to another System institution, any System institution may lend in your territory, to the extent otherwise permitted by the Act and the regulations in this chapter.

§ 611.1290 Continuation of borrower rights.

You may not require a waiver of contractual borrower rights provisions as a condition of borrowing from and owning equity in the successor institution. Institutions that become other financing institutions on termination must comply with the applicable borrower rights provisions in the Act and subparts K, L, and N of part 614 of this chapter.

PART 614—LOAN POLICIES AND OPERATIONS

1. The authority citation for part 614 continues to read as follows:

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5, of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2199, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a-2, 2279b, 2279c-1, 2279f, 2279f-1, 2279aa, 2279aa-5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart C—Bank/Association Lending Relationship

§ 614.4130 [Amended]

2. Amend § 614.4130 by removing the reference ''§ 611.1205(c)'' and adding in its place the reference ''§ 611.1205'' in paragraph (a).

Dated: August 15, 2001.

Jeanette C. Brinkley,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. 01–20907 Filed 8–17–01; 8:45 am]

BILLING CODE 6705–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 207–0277b; FRL–7026–4]

Revision to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This revision concerns volatile organic compound (VOC) emissions from Phase I gasoline transfer into stationary storage tanks and Phase II gasoline transfer into vehicle fuel tanks. We are proposing to approve a local rule to regulate this emission source under the Clean Air Act as amended in 1990 (CAA or the Act).

DATE: Any comments on this proposal must arrive by September 19, 2001.

ADDRESSES: Mail comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

You can inspect a copy of the submitted rule revision and EPA's technical support document (TSD) at our Region IX office during normal business hours. You may also see a copy of the submitted rule revision at the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

South Coast Air Quality Management District, 21865 East Copley Drive, Diamond Bar, CA 91765.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX; (415) 744–1135.

SUPPLEMENTARY INFORMATION: This proposal addresses the approval of the local SCAQMD Rule 461. In the Rules and Regulations section of this **Federal Register**, we are approving this local rule in a direct final action without prior proposal because we believe this SIP revision is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: July 27, 2001.

Jane Diamond,

Acting Regional Administrator, Region IX.

[FR Doc. 01–20781 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD064/122/123–3069b; FRL–7021–4]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Administrative Revisions of General Provisions Related to Definitions of Terms and Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing approval of revisions to the Maryland State Implementation Plan (SIP). In this action, EPA is proposing approval of revisions which reorganize the structure of the general administrative provisions describing definitions of terms used throughout Maryland's air pollution control regulations, amend the definition of the term ''source;'' and reorganize the provisions governing ambient air quality standards. EPA is approving these revisions in accordance with the requirements of the Clean Air Act. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittals as a direct final rule without prior proposal because the Agency views them as noncontroversial submittals and anticipates no adverse

comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of the direct final rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Comments must be received in writing by September 19, 2001.

ADDRESSES: Written comments should be addressed to Harold A. Frankford, Office of Air Programs, Mailcode 3AP20, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland, 21224.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford, (215) 814–2108, at the EPA Region III address above, or by e-mail at frankford.harold@epa.gov.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: July 20, 2001.

Thomas C. Voltaggio,

Acting Regional Administrator, Region III.

[FR Doc. 01–20783 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY130–200117(b); FRL–7036–7]

Approval and Promulgation of Implementation Plans, Commonwealth of Kentucky: Approval of Revisions to the 1-Hour Ozone Maintenance State Implementation Plan (SIP) for Marshall and a Portion of Livingston Counties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the 1-hour ozone maintenance state implementation plan for Marshall and a portion of Livingston Counties, Kentucky (i.e., the Paducah area), submitted on June 14, 2001, by the Commonwealth of Kentucky through the Natural Resources and Environmental Protection Cabinet to correct/revise the original motor vehicle emissions budgets approved by EPA effective April 10, 1995 (60 FR 7124). In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no significant, material, and adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before September 19, 2001.

ADDRESSES: All comments should be addressed to: Mr. Richard A. Schutt, Chief, Regulatory Planning Section, EPA, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

Copies of the State submittal(s) are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Contact: Mr. Richard A. Schutt, (404) 562–9033, schutt.dick@epa.gov.

Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Department for Environmental Protection, Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601, (502) 573–3382.

FOR FURTHER INFORMATION CONTACT: Mr. Richard A. Schutt, (404) 562–9033, *schutt.dick@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules section of this **Federal Register**.

Dated: August 3, 2001.

Russell Wright,

Acting Regional Administrator, Region 4.

[FR Doc. 01–20785 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4142b; FRL–7037–6]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Eight Individual Sources in the Pittsburgh-Beaver Valley Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revisions submitted by the Commonwealth of Pennsylvania for the purpose of establishing and requiring reasonably available control technology (RACT) for eight major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Pittsburgh-Beaver Valley ozone nonattainment area. In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP revisions as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. The rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if adverse comment is received for

a specific source or subset of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

DATES: Comments must be received in writing by September 19, 2001.

ADDRESSES: Written comments should be addressed to David L. Arnold, Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Catherine Magliocchetti at (215) 814–2174 or Ellen Wentworth (215) 814–2034 at the EPA Region III address above or by e-mail at *magliocchetti.catherine@epa.gov* or *wentworth.ellen@epa.gov.* Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: August 10, 2001.

Judith Katz,

Acting Regional Administrator, Region III.

[FR Doc. 01–20880 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4128b; FRL–7038–2]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Five Individual Sources in the Pittsburgh-Beaver Valley Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revisions submitted by the Commonwealth of Pennsylvania for the purpose of establishing and requiring reasonably available control technology (RACT) for five major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Pittsburgh-Beaver Valley ozone nonattainment area. In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP revisions as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. The rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if adverse comment is received for a specific source or subset of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

DATES: Comments must be received in writing by September 19, 2001.

ADDRESSES: Written comments should be addressed to David L. Arnold, Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; Allegheny County Health Department, Bureau of Environmental Quality, Division of Air Quality, 301 39th Street, Pittsburgh, Pennsylvania 15201 and the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Rose Quinto at (215) 814–2182, the EPA Region III address above or by e-mail at *quinto.rose@epa.gov.* Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: August 10, 2001.

Judith Katz,

Acting Regional Administrator, Region III.

[FR Doc. 01–20884 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA 4116b; FRL–7037–3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO_X RACT Determinations for Eighteen Individual Sources in the Philadelphia-Wilmington-Trenton Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revisions submitted by the Commonwealth of Pennsylvania for the purpose of establishing and requiring reasonably available control technology (RACT) for 18 major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X). These sources are located in the Philadelphia-Wilmington-Trenton ozone nonattainment area. In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP revisions as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. The rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if adverse comment is received for a specific source or subset

of sources covered by an amendment, section or paragraph of this rule, only that amendment, section, or paragraph for that source or subset of sources will be withdrawn.

DATES: Comments must be received in writing by September 19, 2001.

ADDRESSES: Written comments should be addressed to David L. Arnold, Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Melik Spain at (215) 814–2299, the EPA Region III address above or by e-mail at spain.melik@epa.gov. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: August 10, 2001

Judith Katz,

Acting Regional Administrator, Region III.

[FR Doc. 01–20882 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[PA118–4120b; FRL–7038–7]

Approval and Promulgation of Air Quality Implementation Plans for Designated Facilities and Pollutants; Pennsylvania; Conversion of the Conditional Approval of the Pennsylvania Large Municipal Waste Combustor (MWC) Plan to Full Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to convert its conditional approval of the Commonwealth of Pennsylvania's large municipal waste combustor (MWC) plan submitted by the Pennsylvania Department of Environmental Protection (PADEP) to a full approval. In the Final Rules section of this **Federal Register**, EPA is converting its conditional approval of the Commonwealth's MWC plan as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by September 19, 2001.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and Pennsylvania Department of Environmental Protection, Bureau of Air Quality, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania 17105–8465.

FOR FURTHER INFORMATION CONTACT: James B. Topsale (215) 814–2190 at the EPA Region III address above, or by e-mail at topsale.jim@epa.gov. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted, in writing, as indicated in the **ADDRESSES** section of this document.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulation'' section of this **Federal Register** publication.

Dated: August 10, 2001.

Judith Katz,

Acting Regional Administrator, Region III.

[FR Doc. 01–20893 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[OPP–300370C; FRL–6799–4]

RIN 2070–AC02

Plant-Incorporated Protectants (Formerly Plant-Pesticides), Supplemental Proposal; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental proposal; Extension of comment period.

SUMMARY: EPA in response to request from the public is extending an existing comment period for a supplemental proposal appearing in the **Federal Register** on July 19, 2001. EPA issued the July 19, 2001 supplemental proposal to solicit additional comment on the exemptions it proposed in 1994 for plant-incorporated protectants. Specifically, EPA solicits comment on two alternative regulatory approaches to plant-incorporated protectants derived from plants sexually compatible with the recipient plant and on proposed exemptions for plant-incorporated protectants that act by primarily affecting the plant or are based on viral coat proteins. EPA is also providing notice that it has placed the report issued by the National Academy of Sciences (NAS) entitled *Genetically Modified Plants: Science and Regulation* in the dockets for the rulemakings relating to certain proposals on plant-incorporated protectants under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). The Agency anticipates this extension will result in more in-depth, detailed and thus more constructive comment.

DATES: Comments, identified by the docket control number OPP–300370C, must be received on or before September 19, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number

OPP–300370C in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Phillip Hutton, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8260; fax number: (703) 308–7026; e-mail address: hutton.phil@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a person or company involved with agricultural biotechnology that may develop and market plant-incorporated protectants. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Pesticide manufacturers	32532	Establishments primarily engaged in the formulation and preparation of agricultural and household pest control chemicals
Seed companies	111	Establishments primarily engaged in growing crops, plants, vines, or trees and their seeds
Colleges, universities, and professional schools	611310	Establishment of higher learning which are engaged in development and marketing of plant-incorporated protectants
Establishments involved in research and development in the life sciences	54171	Establishments primarily engaged in conducting research in the physical, engineering, or life sciences, such as agriculture and biotechnology

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this table could also be affected. The North American Industrial Classification System (NAICS) codes are provided to assist you and others in determining whether or not this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the provisions in 40 CFR part 174. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. On the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' and then look up the entry for this document under the ''**Federal Register**—Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

To access information about plant-incorporated protectants and the supplemental proposal, go directly to the Home Page for the Office of Science Policy and Coordination at http://www.epa.gov/scipoly/ and select ''What's New.''

2. *In person*. The Agency has established an official record for this action under docket control number OPP–300370C. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

As described in Unit I. of the supplemental proposal published in the **Federal Register** of July 19, 2001 (66 FR 37855) (FRL–6760–4), you may submit your comments through the mail, in person, or electronically. Please follow the instructions that are provided in the supplemental proposal. Do not submit any information electronically that you consider to be CBI. To ensure proper receipt by EPA, be sure to identify docket control number OPP–300370C in the subject line on the first page of your response.

II. Background

A. What Action is EPA Taking?

EPA in response to public comment is extending the comment period for a supplemental proposal appearing in the **Federal Register** on July 19, 2001. EPA issued the July 19, 2001 supplemental proposal to solicit additional comment on the exemptions it proposed in 1994 for plant-incorporated protectants. EPA solicits comment on two alternative regulatory approaches to plant-incorporated protectants derived from plants sexually compatible with the recipient plant and on proposed exemptions for plant-incorporated protectants that act by primarily affecting the plant or are based on viral coat proteins. EPA is also providing notice that it has placed the NAS report in the dockets for the rulemakings relating to certain proposals on plant-incorporated protectants under FIFRA and FFDCA. With the July 19, 2001 supplemental proposal, EPA reopened the comment period for these particular 1994 proposals to allow the public an opportunity to comment on the information, analyses, and conclusions in the NAS report.

B. What is the Agency's Authority for Taking this Action?

EPA takes this action under the authority of FIFRA section 3 and section 25(a) and (b) (7 U.S.C. 136a and 136w(a) and (b)) and FFDCA section 346a and 371.

III. Do Any Regulatory Assessment Requirements Apply to this Action?

No. This action is not a rulemaking, it merely extends the date by which public comments must be submitted to EPA on a supplemental proposal that previously published in the **Federal Register** of July 19, 2001 (66 FR 37855) (FRL–6760–4). For information about the applicability of the regulatory assessment requirements to that supplemental proposal, which published in the **Federal Register**, please refer to the discussion in Unit VIII. of that document.

List of Subjects in 40 CFR Part 174

Environmental protection, Agricultural commodities, Pesticides and pests, Plants.

Dated: August 13, 2001.

Stephen L. Johnson,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 01–20774 Filed 8–14–01; 2:26 pm]

BILLING CODE 6560–50–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 14

RIN 1018–AH75

Conferring Designated Port Status on Anchorage, AK

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to make Anchorage, Alaska, a designated port under section 9(f) of the Endangered Species Act of 1973. This action would allow the direct importation and exportation of wildlife through this growing international port. We are proposing to amend the regulations in 50 CFR Part 14 to reflect this designation. We will hold a public hearing to collect comments on this change. We also seek written comments from the public.

DATES: Submit comments on or before September 19, 2001. A public hearing will be held at 6 PM, September 17, 2001. Submit requests to present oral testimony at this hearing on or before August 30, 2001. See Supplementary Information section for more information on the public hearing.

ADDRESSES: Comments and materials concerning this proposal should be sent to: SAC-Branch of Investigations, U.S. Fish and Wildlife Service, Office of Law Enforcement, 4401 North Fairfax Drive, Room 500, Arlington, Virginia 22203. Comments and materials may be hand-delivered to the U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 500, Arlington, Virginia, between the hours of 8 A.M. and 4 P.M., Monday through Friday. For public hearing comments or testimony, see **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Special Agent Steve Oberholtzer (703) 358–1949, or Special Agent Stanley Pruszenski, Assistant Regional Director for Law Enforcement, U.S. Fish and Wildlife Service, Anchorage, Alaska (907) 786–3311.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act requires that all fish and wildlife, with only limited exceptions, be imported and exported through designated ports. Designated ports facilitate U.S. efforts to monitor wildlife trade and enforce wildlife protection laws and regulations by funneling wildlife shipments through a limited number of locations. The Secretary of the Interior, with approval of the Secretary of the Treasury, designates ports for wildlife trade by regulation after holding a public hearing and collecting and considering public comments. The Service presently has 13 designated ports of entry for the importation and exportation of wildlife: Los Angeles, California; San Francisco, California; Miami, Florida; Honolulu, Hawaii; Chicago, Illinois; New Orleans, Louisiana; New York, New York; Seattle, Washington; Dallas/Fort Worth, Texas; Portland, Oregon; Baltimore, Maryland; Boston, Massachusetts; and Atlanta, Georgia. The Service maintains a staff of wildlife inspectors at each designated port to inspect and clear wildlife shipments.

Regulatory exceptions allow certain types of wildlife shipments to enter or leave the country through ports which are not designated. Under certain conditions, importers and exporters can obtain a permit from the Service authorizing their use of non-designated ports. The importer or exporter will accrue additional fees associated with the inspection and permit authorizing use of a non-designated port.

Need for Proposed Rulemaking

The proximity of Anchorage to the Asian continent has prompted the State of Alaska, the City of Anchorage, and private groups such as international express carriers, the Alaskan tourism industry, and the outdoor recreational industry to target foreign trade markets as a way to bring increased economic growth to Anchorage. Stevens International Airport is expanding and a 100,000 sq. ft. warehouse is being constructed to accommodate both the growth in airline passengers and the 20 million tons of air freight that already pass through Anchorage each year. This volume is one of the highest for any airport in the United States, and future increases of 11.1 percent per year are projected. International cargo off loaded in Anchorage has been estimated at 341 million pounds for the year 2000.

Two large Anchorage international express carriers have regional hubs in Anchorage. The volume of international shipments handled by these facilities has increased from 18 to 22 percent each year over the last five years. Parallel growth has occurred in the number of wildlife shipments. Since the Service charges higher fees for inspecting and clearing shipments at Anchorage and other non-designated ports, wildlife importers using these facilities have asked that over 70 percent of their shipments be cleared at designated ports of entry in the lower 48 states. Making Anchorage a designated port will facilitate clearance of these shipments and reduce costs for all importers and exporters bringing wildlife through this city.

Increases in international visitors to Alaska have also affected the number of wildlife shipments requiring clearance. The number of U.S. and foreign hunters requesting clearance of wildlife trophies in Anchorage has increased by nearly 300 percent in the last five years. The number of foreign hunters exporting Alaskan big game trophies has jumped by 73 percent, adding substantially to the total number of wildlife shipments cleared in Anchorage.

The Service's data for fiscal year 2000 show that the port of Anchorage handled a total of 3,555 wildlife shipments with a declared value of $9.3 million. Anchorage has the highest number of declared wildlife shipments per wildlife inspector of any port in the Nation. The Service projects that the number of wildlife shipments will triple over the next three to five years following the establishment of Anchorage as a designated port. This projection is based on trends associated with the designation of the ports of Dallas-Fort Worth, Portland, and Atlanta.

Existing and projected increases in air and express cargo along with substantial growth in the number of airline passengers, international visitors, and hunters seeking clearance of wildlife

imports and exports justify the proposed designation of the port of Anchorage. This change will improve service to international mail carriers, small businesses, and the public while maintaining effective regulation of U.S. wildlife trade.

Notice of Public Hearing

Section 9(f) of the Endangered Species Act, 16 U.S.C. 1538(f)(1), requires that the public be given an opportunity to comment at a public hearing before the Secretary of the Interior confers designated port status on any port. Accordingly, the Service has scheduled a public hearing for September 17, 2001, from 6 PM to 8 PM. The hearing will be held at the U.S. Fish and Wildlife Service conference room located at 1011 East Tudor Road, Room 157, Anchorage, Alaska, 99503, (907) 786–3311. All interested persons wishing to present oral or written comments at this hearing should request approval in writing by August 30, 2001. The address for requesting approval is: Assistant Regional Director for Law Enforcement, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Room 155, Anchorage, Alaska 99503. If they desire, persons requesting approval may submit a written copy of their proposed oral comments.

Required Determinations

This rule has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action.

The Department of the Interior (Department) has determined that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Service anticipates that the addition of the port of Anchorage to the list of Service designated ports for the importation and exportation of wildlife will have no adverse effect upon individual industries and cause no demographic changes in populations. In addition, the Service anticipates that this proposal will not increase direct costs for small entities and will have no effect upon information collection and record keeping requirements. In light of this analysis, the Service has determined that the proposed rule will not have a significant economic effect on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

This proposed rule has no private property takings implications as defined in Executive Order 12630. The only effect of this rule will be to make it easier for businesses to import and export wildlife directly through Anchorage, Alaska.

This action does not contain any federalism impacts as described in Executive Order 13132.

This proposed rule does not contain any information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

The proposed changes in the regulations in part 14 are regulatory and enforcement actions covered by a categorical exclusion from National Environmental Policy Act procedures under 516 Department Manual, Chapter 2, Appendix 1.10.

The proposed changes have no environmental justice implications under Executive Order 12988.

A determination has been made under Section 7 of the Endangered Species Act that the proposed revision of Part 14 will not affect federally listed species.

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), this rule, as proposed, will not ''significantly or uniquely'' affect small governments.

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

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects. Individual tribal members are subject to the same regulatory requirements as other individuals who engage in the import and export of wildlife.

Author

The originator of this proposed rule is Special Agent Steve Oberholtzer, Division of Law Enforcement , U.S. Fish and Wildlife Service, Washington, DC.

List of Subjects in 50 CFR Part 14

Animal welfare, Exports, Fish, Imports, Labeling, Reporting and record keeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons set out in the preamble, the Service proposes to amend Chapter I, subchapter B of Title 50 of the Code of Federal Regulations as set forth below.

PART 14—IMPORTATION, EXPORTATION, AND TRANSPORTATION OF WILDLIFE

1. The authority citation for Part 14 continues to read as follows:

Authority: 16 U.S.C. 668, 704, 712, 1382, 1538(d)–(f), 1540(f), 3371–3378, 4223–4244, and 4901–4916; 18 U.S.C. 42; 31 U.S.C. 9701.

2. Amend § 14.12 by adding paragraph (n) to read as follows:

§ 14.12 Designated ports.

* * * * *

(n) Anchorage, Alaska.

Dated: July 20, 2001.

Joseph E. Doddridge,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–20870 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 84

RIN 10l8–AF51

National Coastal Wetlands Conservation Grant Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule establishes the requirements for participation in the National Coastal Wetlands Conservation Grant Program authorized by the Coastal Wetlands Planning, Protection and Restoration Act and provides guidance for the program's administration by the U.S. Fish and Wildlife Service (referred to as ''Service'' and ''us'' within this rule). It replaces interim procedures and clarifies guidance for preparation, submission, and evaluation of proposed projects and administration of funded projects.

DATES: Comments on this proposed rule must be submitted on or before October 4, 2001.

ADDRESSES: If you wish to comment, you may submit your comments by mail, hand delivery, fax, or email. To submit comments on the proposed rule for the grant Program:

(1) *Mail*: You may mail comments on the proposed rule to Sally Valdes-Cogliano, Division of Fish and Wildlife Management Assistance and Habitat Restoration, Fish and Wildlife Service, U.S. Department of the Interior, Room 840, 4401 North Fairfax Drive, Arlington, Virginia 22203.

(2) *Hand delivery*: You may hand-deliver comments to us at the above address.

(3) *Fax*: Fax comments to Sally Valdes-Cogliano, Division of Fish and Wildlife Management Assistance and Habitat Restoration, (703) 358–2232.

(4) *Email*: Please submit email comments to <*sally__valdescogliano@fws.gov.*> Please include your name and return address in your email message. If you do not receive confirmation that we have received your email message, contact us directly at (703) 358–2201.

If you wish to comment on the information collection aspects of this proposed rule, please send your comments to the attention: Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. A copy of these comments should also be sent to the Service.

FOR FURTHER INFORMATION CONTACT: Gary Reinitz, Division of Federal Aid, by telephone (703) 358–2159; fax (703) 358–1837; email gary__reinitz@fws.gov or Sally Valdes-Cogliano, Division of Fish and Wildlife Management Assistance and Habitat Restoration, by telephone (703) 358–2201; fax (703) 358–2232; email sally__valdescogliano@fws.gov.

SUPPLEMENTARY INFORMATION:

Background

What Is the National Coastal Wetlands Conservation Grant Program?

The Coastal Wetlands Planning, Protection and Restoration Act (16 U.S.C. 3951–3956) authorizes the Director of the U.S. Fish and Wildlife Service to make matching grants to coastal States for acquisition, restoration, enhancement, management, and preservation of coastal wetlands. Grants are available annually on a competitive basis to coastal States. Funding for this program comes from the Sport Fish Restoration Account, which is supported by excise taxes on fishing equipment and motorboat and small engine fuels.

Why Protect Coastal Wetlands?

Coastal wetlands provide essential fish and wildlife habitat. Coastal ecosystems comprise less than 10 percent of the Nation's land area, but support a much higher proportion of our living resources. Specifically, coastal areas support a high percentage of our threatened and endangered species, fishery resources, migratory songbirds, and migrating and wintering waterfowl.

In addition to wildlife benefits, wetlands provide substantial flood and storm control values and can reduce the need to construct expensive flood control structures. They make an important contribution to water quality by recharging groundwater, filtering surface runoff, and treating waste, and they provide natural areas important for recreational and aesthetic purposes. Uplands associated with wetlands provide food and cover to wildlife and buffer wetlands from soil erosion and contaminants. In the coterminous United States, more than half of the estimated original 221 million acres of American wetlands have been destroyed since European settlement. The concentration of the U.S. population in coastal areas is a continuing source of development pressure on the remaining coastal wetlands.

What Has the Program Accomplished?

Since the Service began awarding grants in 1992, we have awarded about $90 million to 25 States and 1 U.S. territory to protect and/or restore about 105,000 acres of coastal wetland ecosystems. The program's emphasis on encouraging partnerships, supporting watershed planning, and leveraging ongoing projects has helped stretch program funds. The resource benefits of this program have included habitat protection and restoration for migratory birds, shorebirds, waterfowl, endangered and threatened species, and fish and shellfish.

Why Do We Need This Rule?

The National Coastal Wetlands Conservation Grant Program is currently being administered using internal interim program guidance and the standard grant administration policies of our Federal Aid Program. We believe administration of the program could be improved through regulations specifically tailored to meet the needs of the program. Accordingly, the proposed rule uses a plain English style, provides examples to illustrate concepts, and combines current guidance in one place. It should result in a stream-lined proposal preparation and review and grant administration process.

Currently, grant requests received from the State agencies are evaluated on an annual schedule. In the last few years the number of proposals received annually by the National Office has ranged from 29 to 36. A review panel consisting of Service personnel representing the coastal Regions of the Service and specific program areas (for example, the Fish and Wildlife Management Assistance and Habitat Restoration, Endangered Species, and Refuges Programs) review and rank all proposals. Based on the rankings of the panel, recommendations are sent to the Director of the Service. The basic schedule and procedures will not change significantly with the proposed rule.

The criteria for selecting proposals in this proposed rule have been modified from the interim guidance. For example, a new criterion has been added to give credit to projects that provide benefits to migratory birds. Also, we have expanded the discussion of each criterion to clarify project scoring. These proposed changes are based on comments provided by Service personnel who have reviewed National Coastal Wetlands Conservation Grant proposals. These criteria can be found in the rule portion of this document.

What Are the Environmental Effects of This Regulation?

This proposed rule is a regulation of an administrative and financial nature. Therefore, the action is categorically excluded under 516 DM 2, Appendix 1.10 from any environmental documentation pursuant to the National Environmental Policy Act (NEPA). However, subsequent actions involved with acquisition, restoration, or enhancement will require further compliance with NEPA on a case-by-case basis.

Compliance with NEPA and other environmental laws and Executive Orders such as the Endangered Species Act, Coastal Barrier Resources Act, Coastal Barrier Improvement Act, Coastal Zone Management Act, Executive Orders on Floodplains (E.O. 11988) and Wetlands (E.O. 11990), other applicable executive orders on historic/cultural resources, prime and unique farmlands, and the Clean Water Act will be satisfied before we approve grant agreements for any project.

Does This Rule Have Any Information Collection Requirements?

This rule's information collection requirements include those necessary to fulfill applicable requirements of 43 CFR part 12, and these have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*). This section of the Code of Federal Regulations provides the uniform administrative requirements for grants and cooperative agreements to States and local governments. The required forms include an application for Federal Assistance (Standard Form 424); assurances of compliance with Federal laws, regulations and policies (SF 424B or SF424D); a grant agreement

form, USFWS Form 3–1552 (OMB approval 1018–0049); an amendment to the grant agreement form, USFWS Form 1591 (OMB approval 1018–0049); a Federal Aid Grant Application Booklet (OMB approval 1018–0109), which was submitted to OMB for review and approval December 6, 2000 (see 65 FR 53737, September 15, 2000); and the NEPA Compliance Checklist, USFWS Form 3–2185 (OMB approval 1018–0110, 65 FR 55032, September 12, 2000).

This proposed rule also contains new information collection, and we have submitted the information collection requirements to OMB for review and approval under the Paperwork Reduction Act. This new information collection is a form titled: Summary Information for Ranking National Coastal Wetlands Grant Program Proposals (USFWS Form 3–2179). The purpose of this form is to summarize information contained in the grant proposal in a way that allows a fair comparison and ranking of different grant proposals.

If you have any comments on the information collection requirements, please send these comments to OMB at the address indicated in the **ADDRESSES** section of the preamble. Please also send a copy of your comments to the Service.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of burden of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and, (4) ways to minimize the burden of collection of information on respondents, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. The form may be viewed at the National Coastal Wetlands Conservation Grant Program web site at: *http://www.fws.gov/cep/cwgcover.html* or you may request a copy of the form using the contact information in the **ADDRESSES** section of this notice.

Frequency: The form will generally be used once a year.

Description of respondents: States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and American Samoa will use the form if they wish to apply for grants under this program.

Completion time and annual response and burden estimate:

Form name	Completion time per form	Annual response	Annual burden
Summary Information for Ranking National Coastal Wetlands Conservation Grant Program Proposals	½ Hour	34 Forms	17 Hours

While the summary form is five pages long, the ½ hour burden is accurate. Agencies applying for grants will have all of the information readily available in the proposals they have prepared.

A notice of this information collection and request for comments was previously published in the **Federal Register**, Vol. 65, No. 180, Friday, September 15, 2000. No comments were received.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action. OMB makes the final determination under Executive Order 12866.

This proposed rule will not have an annual effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required. The entities affected by this proposed rule are State natural resource agencies. The primary intended effect is to augment State efforts to conserve their coastal wetland resources. The program is completely voluntary; States choose whether to submit proposals for matching grants. New funds available each year are determined as a percentage of monies received by the Sport Fish Restoration Fund.

However, the total receipts for a given year for this program are limited by the Coastal Wetlands Planning, Protection and Restoration Act to $15 million. Receipts for the last few years have been in the $10 million to $12 million range. This last grant cycle included $11 million in new money and $4.1 million available as carryover from previous years.

This proposed rule will not create inconsistencies with other agencies' actions. The Service is charged with administering the National Coastal Wetlands Conservation Program by the Coastal Wetlands Planning, Protection and Restoration Act. This program supports and augments State efforts to conserve their resources. States voluntarily choose to participate, and no other Federal agencies have responsibilities associated with this grant program. Some Federal agencies have participated voluntarily on specific projects as cooperators with the State agencies.

This proposed rule will not affect entitlements, user fees, loan programs, or the rights and obligations of their recipients. It will have a limited effect on this specific grant program. The Service has been giving out matching grants to States under the National Coastal Wetlands Conservation Grant Program since 1992. If we continue to operate with interim procedures and general Federal Aid grant administration, the same amount of grant assistance will be given to coastal States. The main effect that we expect from this rulemaking is a streamlined proposal preparation and review and grant administration process.

This proposed rule will not raise novel legal or policy issues. As stated above, the Service has been awarding grants to States and administering this program under the authority of the Coastal Wetlands Planning, Protection and Restoration Act since 1992. The purpose of this rule is to improve the process.

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). By law, the only eligible recipients of this grant program are coastal State and territory government agencies. Operating with interim guidance, we have given out grants since 1992. This proposed rule should not result in a major change to the Program. The Coastal Wetlands Planning, Protection and Restoration Act specifies an annual cap of $15 million that can be allocated to this

program. An initial Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is also not required.

Small Business Regulatory Enforcement Fairness Act

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

As stated above, the maximum amount, by law, that can be directed to this grant program is $15 million per year. This program is directed exclusively at State governments. This proposed rule might provide some contracting work at a local level for restoration projects, creating a minor positive effect on the local economy. All land purchased under this program is paid at fair market value from willing sellers. The land involved is a relatively small amount spread over the 10 to 15 States and Territories that typically receive grants in a given year. All lands acquired will be put under long-term conservation protection by the States. Some of the grants are for restoration work on lands already owned by the States.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), this proposed rule will not significantly or uniquely affect small governments and will not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a ''significant regulatory action'' under the Act. A Small Government Agency Plan is not required. As stated above, this proposed rule pertains to a grant program directed at State governments. In a few cases, local governments have chosen to partner in a grant program proposed by the State. Participation in the program is entirely voluntary. The program income is limited to $15 million per year by the Coastal Wetlands Planning, Protection and Restoration Act.

Takings

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required. The proposed rule specifies that all acquisitions under this program are from willing sellers. No private property will be taken from unwilling owners for the furtherance of this program, and just compensation will be provided to willing owners.

Federalism

In accordance with Executive Order 13132, the proposed rule does not have significant Federalism effects. The rule allows eligible coastal States to make decisions regarding the selection of properties for acquisition, plan restoration projects, and take protective measures.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. To the extent of our knowledge, no legal cases have ever been associated with this grant program. The proposed rule should actually serve to reduce the possibility of litigation by establishing specific requirements for participation in the National Coastal Wetlands Conservation Grant Program and guidance for its administration by the Service. The proposed rule will establish a clear legal standard for affected conduct.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and Part 512, Chapter 2 of the Department of the Interior Manual, we have evaluated potential effects on federally recognized Indian tribes and have determined that the effects are minimal. The Coastal Wetlands Planning, Protection and Restoration Act specifies the States that can participate in this grant program. The Act does not provide for grants directly to Indian tribes. Tribes have, in a few cases, participated as cooperators on projects.

How Does the Intergovernmental Review of Federal Programs Work?

This National Coastal Wetlands Conservation Grant Program is covered under Executive Order (Order) 12372 ''Intergovernmental Review of Federal Programs'' and 43 CFR Part 9 ''Intergovernmental Review of Department of the Interior Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

Coastal States and Territories that have chosen to participate in the Executive Order process have established Single Points of Contact (SPOCs). Applicants from jurisdictions that do not participate do not need to take any action regarding E.O. 12372. All other applicants should alert their SPOCs early in the application process. This step will insure that applicants find out about any SPOC requirements. If you as an applicant are required to submit materials to the SPOC, indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424.

Clarity of this Regulation

Executive Order 12866 requires that each agency write regulations that are easy to understand. We invite your comments on how to make this regulation easier to understand, including answers to questions like the following:

(a) Are the requirements in the regulation clearly stated?

(b) Does the regulation contain technical language or jargon that interferes with its clarity?

(c) Does the format of the regulation (e.g., grouping and order of sections, use of headings, and paragraphing) make it easier or harder to understand?

(d) Would the regulation be easier to understand if we divided it into more (but shorter) sections?

(e) Does the description of the regulation in the ''Summary'' section of the preamble do a good job of explaining the regulation? and,

(f) What else could we do to make the regulation easier to understand?

We will take into consideration public comments and any additional information received during the 45-day comment period. When completed, this regulation will be incorporated into Title 50 of the Code of Federal Regulations (50 CFR), Part 84.

Our practice is to make comments, including in most cases names and addresses of respondents, available for public review during regular business hours. Individual commenters may ask that we withhold their home address from the rule-making record, which we will honor to the extent allowable by law. If you wish for us to withhold your name and address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We

will make all submissions from organizations or businesses available for public inspection.

List of Subjects in 50 CFR Part 84

Coastal zone—wetlands, Environmental protection—natural resources, Fisheries, Grant administration, Grant programs—natural resources, Intergovernmental relations, Marine resources, Natural resources, Reporting and record keeping requirements, and Wildlife.

For the reasons discussed in the supplementary information, we propose to amend Subchapter F of Chapter I, Title 50 of the Code of Federal Regulations, by adding a new Part 84, to read as follows:

PART 84—NATIONAL COASTAL WETLANDS CONSERVATION GRANT PROGRAM

Subpart A—General Background

§ 84.10 What is the purpose and scope of this rule?
§ 84.11 How does the Service define the terms used in this rule?
§ 84.12 What are the information collection, record keeping, and reporting requirements?

Subpart B—Applying for Grants

§ 84.20 What are the grant eligibility requirements?
§ 84.21 How do I apply for a National Coastal Wetlands Conservation Grant?
§ 84.22 What needs to be included in grant proposals?

Subpart C—Project Selection

§ 84.30 How are projects selected for grants?
§ 84.31 An overview of the ranking criteria
§ 84.32 What are the ranking criteria?

Subpart D—Conditions on Acceptance/Use of Funds

§ 84.40 What conditions must I follow to accept Federal funds?
§ 84.41 Who prepares a grant agreement? What needs to be included?
§ 84.42 What if a grant agreement is not signed?
§ 84.43 How do States get the grant monies?
§ 84.44 What is the timetable for use of grant funds?
§ 84.45 How do I amend a proposal?
§ 84.46 What are the cost-sharing requirements?
§ 84.47 What are allowable costs?
§ 84.48 What are the procedures for acquiring, maintaining and disposing of real property?
§ 84.49 What if the project costs more or less than originally expected?
§ 84.50 How does a State certify compliance with Federal laws, regulations, and policies?

Authority: 16 U.S.C. 3951–3956.

Subpart A—General Background

§ 84.10 What is the purpose and scope of this rule?

The regulations in this part establish the requirements for coastal State participation in the National Coastal Wetlands Conservation Grant Program authorized by Section 305 of the Coastal Wetlands Planning, Protection and Restoration Act (Pub L. 101–646, title III, 16 U.S.C. 3954).

§ 84.11 How does the Service define the terms used in this rule?

Terms used have the following meaning:

Coastal barrier. A depositional geologic feature that is subject to wave, tidal, and wind energies; protects landward aquatic habitats from direct wave attack; and includes all associated aquatic habitats such as adjacent wetlands, marshes, estuaries, inlets, and nearshore waters. These can include: islands; spits of land connected to a mainland at one end; sand bars that connect two headlands and enclose aquatic habitat; broad sandy, dune beaches; or fringing mangroves. Coastal barriers are found on coastlines including major embayments and the Great Lakes of the United States and its territories.

Coastal Barrier Resources System. A defined set of undeveloped coastal areas, designated by the Coastal Barrier Resources Act of 1982 (Pub. L. 97–348) and the Coastal Barrier Improvement Act of 1990 (Pub. L. 101–591). Within these defined units of the System, Federal expenditures are restricted to discourage development of coastal barriers.

Coastal States. States bordering the Great Lakes (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin); States bordering the Atlantic, Gulf (except Louisiana), and Pacific coasts (Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Virginia, and Washington); and American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the Virgin Islands. Louisiana is not included because it has its own wetlands conservation program authorized by the Coastal Wetlands Planning, Protection and Restoration Act and implemented by the Corps of Engineers with assistance from the State of Louisiana, the Environmental Protection Agency, and the Departments of the Interior, Agriculture, and Commerce.

Coastal wetland ecosystems. Ecosystems that consist of multiple, interrelated coastal land features. They include wetlands in drainage basins of estuaries or coastal waters that contain: saline, brackish, and nearshore waters; coastlines and adjacent lands; adjacent freshwater and intermediate wetlands that interact as an ecological unit; river mouths and those portions of major river systems affected by tidal influence—all of which interact as an integrated ecological unit. Shorelands, dunes, nearshore islands, barrier islands and associated headlands, and freshwater wetlands within estuarine drainages are included in the definition since these interrelated features are critical to coastal fish, wildlife, and their habitats.

The definition of a coastal wetland ecosystem also applies to the Great Lakes and their watersheds, where freshwater plays a similar hydrologic role. The Great Lakes coastal wetland ecosystem is made up of multiple interrelated coastal landscape features along the Great Lakes. The Great Lakes coastal wetland ecosystem includes wetlands located adjacent to any of the Great Lakes including Lake St. Clair and connecting waters, and mouths of river or stream systems draining directly into the Great Lakes. Shorelands, dunes, offshore islands, and barrier islands and associated headlands are included in the definition since these interrelated features are critical to Great Lakes fish, wildlife, and their habitats.

Coastal Wetlands Act or Act. The Coastal Wetlands Planning, Protection and Restoration Act of 1990 (16 U.S.C. 3951–56).

Eligible applicant. Any agency of a coastal State designated by the Governor. It is usually a State natural resource or fish and wildlife agency.

Enhancement. The manipulation of the physical, chemical, or biological characteristics of a wetland (undisturbed or degraded) site to heighten, intensify, or improve specific function(s) or to change the growth stage or composition of the vegetation present.

Fund. A fund established and used by a coastal State for acquiring coastal wetlands, other natural areas, or open spaces. The fund can be a trust fund from which the principal is not spent, or a fund derived from a dedicated recurring source of monies including, but not limited to, real estate transfer fees or taxes, cigarette taxes, tax checkoffs, or motor vehicle license plate fees.

Grant. An award of financial assistance by the Federal Government to an eligible applicant.

Long-term conservation. Protecting and restoring terrestrial and aquatic environments for at least 20 years. This includes the hydrology, water quality, and fish and wildlife that depend on these environments.

Maintenance. (These activities are ineligible under the program; the definition is included to distinguish these activities from acquisition, restoration, enhancement, and management.) Maintenance includes those activities necessary for upkeep of a facility or habitat. These activities include routine recurring custodial maintenance such as housekeeping and minor repairs as well as the supplies, materials, and tools necessary to carry out the work. Also included is nonroutine cyclical maintenance to keep facilities or habitat improvements fully functional. Cyclical maintenance is major maintenance or renovation activities conducted at intervals normally greater than 1 year.

Management. (Includes habitat management only.) Habitat management includes vegetation manipulation and restoration of habitat to support fish and wildlife populations. Creation of wetlands where they did not previously exist is not included in the definition of management.

Maritime forest. Maritime forests are defined, for the purposes of this regulation, as broad-leaved forests that occur on barrier islands and along the mainland coast from Delaware to Texas. Examples are primarily characterized by a closed canopy of various combinations of live oak *(Quercus virginiana)*, upland laurel oak *(Quercus hemisphaerica)*, pignut hickory *(Carya glabra)*, southern magnolia *(Magnolia grandiflora)*, sugarberry *(Celtis laevigata)*, and cabbage palm *(Sabal palmetto)*. Shrubs and smaller trees typical of the understory include live oak, upland laurel oak, pignut hickory, red mulberry *(Morus rubra)*, wild olive *(Osmanthus americanus)*, American holly *(Ilex opaca)*, yaupon *(Ilex vomitoria)*, beautyberry *(Callicarpa americana)*, bumelia *(Sideraxylon spp.)*, and small-flowered pawpaw *(Asimina parviflora)*. The herb layer is generally rich and diverse, typically including partridgeberry *(Mitchella repens)*, coralbean *(Erythrina herbacea)*, small-leaved milk pea *(Galactia microphylla)*, tick trefoils *(Desmodium spp.)*, and spikegrass *(Chasmanthium sessiliflorum)*. Vines are represented by muscadine grape *(Vitis rotundifolia)*, Virginia creeper *(Parrhenocissus quinquefolia)*, and various briers *(Smilax spp.)*.

This natural community type becomes established on old coastal dunes that have been stabilized long enough to sustain forests. In time, the accumulation of humus contributes to moisture retention of soils, while the canopy minimizes temperature fluctuations by reducing soil warming during the day and heat loss at night. Because of the underlying deep sands, maritime forests are generally well-drained.

Maritime forests have become prime resort and residential property because of their relatively protected locations along the coast. Although this community type originally occurred in virtually continuous strips along the Atlantic and Gulf Coasts, residential developments and infrastructure encroachments have severely fragmented most occurrences.

National Wetlands Inventory. A Service program that produces information on the characteristics, extent, and status of the Nation's wetlands and deepwater habitat. The program's strongest mandates come from the Emergency Wetlands Resources Act of 1986, which directs the Service to map wetlands, conduct wetlands status and trends studies, and disseminate the information produced.

National Wetlands Priority Conservation Plan. A plan developed by the Fish and Wildlife Service for the U.S. Department of the Interior at the direction of Congress through the Emergency Wetlands Resources Act of 1986 (16 U.S.C. 3901). The plan provides the criteria and guidance for identifying wetlands that warrant attention for Federal and State acquisition using Land and Water Conservation Fund appropriations.

Operations. (These activities are ineligible under the program; the definition is included to distinguish these activities from acquisition, restoration, enhancement, and management.) Operations include activities necessary for the functioning of a facility or habitat to produce desired results. These include public use management and facility management.

Program. The National Coastal Wetlands Conservation Grant Program. A program administered by the Service that awards Federal grants through a competitive process to State agencies for projects to acquire, restore, manage, or enhance coastal wetlands.

Project. One or more related activities necessary to fulfill a stated objective to provide for the long-term conservation of coastal wetlands including the lands and waters, hydrology, water quality, and wetland-dependent wildlife. These activities can include acquisition, restoration, enhancement, or management of coastal wetlands.

Restoration. The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded wetland.

§ 84.12 What are the information collection, record keeping, and reporting requirements?

(a) Information collection requirements include:

(1) An Application for Federal Assistance (Standard Form 424);

(2) A proposal, following the guidance of OMB Circular A–102, that includes statements of need and objective(s), description of expected results or benefits, approach to be used, such as procedures, schedules, key personnel and cooperators, location of the proposed action, estimated costs to accomplish the objective(s), identification of any other actions that may relate to the grant, and a description of public involvement and interagency coordination;

(3) Discussion of ranking criteria, including a completed summary information form (USFWS Form 3–2179);

(4) Assurances (SF 424B or SF 424D);

(5) Documents, as appropriate, supporting the proposal; for example, environmental assessments (including the NEPA compliance checklist, USFWS 3–2185) and evaluations of effects on threatened and endangered species;

(6) A grant agreement form if the proposal is funded (USFWS Form 3–1552); and

(7) A grant amendment form if the agreement is modified (USFWS Form 1591).

(b) Record keeping requirements include the tracking of costs and accomplishments related to the grant as required by 43 CFR 12.60, monitoring and reporting program performance (43 CFR 12.80), and financial reporting (43 CFR 12.81). The project report should include information about the acres conserved, with a breakdown by conservation method (for example, acquired, restored, or both) and type of habitat (list habitat types and include the acreage of each). Are the results of the project being monitored? Is there evidence that the resources targeted in the proposal (for example, anadromous fish, threatened and endangered species, and migratory birds) have benefitted?

(c) Reporting requirements include retention and access requirements as specified in 43 CFR 12.82.

Subpart B—Applying for Grants

§ 84.20 What are the grant eligibility requirements?

(a) Eligible grant activities include:

(1) Obtaining a real property interest in coastal lands or waters (coastal wetlands ecosystems), providing that the terms and conditions will ensure the real property will be administered for long-term conservation.

(2) The restoration, enhancement, or management of coastal wetlands ecosystems, providing restoration, enhancement, or management will be administered for long-term conservation.

(b) Ineligible activities include but are not limited to:

(1) Projects that primarily benefit navigation, irrigation, flood control, or mariculture;

(2) Acquisition, restoration, enhancement, or management of lands to mitigate recent or pending habitat losses resulting from the actions of agencies, organizations, companies, or individuals;

(3) Creation of wetlands by humans where wetlands did not previously exist;

(4) Enforcement of fish and wildlife laws and regulations, except when necessary for the accomplishment of approved project purposes;

(5) Research or planning;

(6) Operations and maintenance;

(7) Acquiring and/or restoring upper portions of watersheds where benefits to the coastal wetlands ecosystem are not significant and direct; and

(8) Projects providing less than 20 years of benefits.

§ 84.21 How do I apply for a National Coastal Wetlands Conservation Grant?

(a) Eligible applicants should submit their proposals to the appropriate Regional Director of the U.S. Fish and Wildlife Service. Proposals must be complete upon submission, and must include the information outlined in § 84.22 to be complete. Regional Federal Aid Offices' responsibilities for administration of this grant program include: notifying the States of the program, its requirements, and any changes that occur; determining the State agencies designated by the Governor as eligible applicants; ensuring that only eligible applicants apply for grant funds; coordinating with various Service programs to ensure that sound and consistent guidance is communicated to the States; determining proposal eligibility and substantiality; and determining 75 percent match eligibility and notifying the States of approved and disapproved proposals. Ecological Services in the Regions and Field and Fisheries and Habitat Conservation in the National Office provide technical assistance and work with Federal Aid to encourage State participation in this process. Send your proposals to the appropriate Regional Offices, as follows:

Coastal States by service regions	Regional contact information
American Samoa, California, Commonwealth of the Northern Mariana Islands, Guam, Hawaii, Oregon, Washington (Region 1).	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 NE 11th Avenue, Portland, Oregon 97232–4181, (503) 231–6128.
Texas (Region 2)	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, P.O. Box 1306, 500 Gold Avenue, SW, Albuquerque, New Mexico 87103, (505) 248–7450.
Illinois, Indiana, Michigan, Minnesota, Ohio, and Regional Wisconsin (Region 3).	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056, (612) 713–5130.
Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, and the Virgin Islands. Louisiana is not eligible to participate under Section 305 of 16 U.S.C. 3954, because Louisiana has its own separate program. (Region 4).	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 240, Atlanta, Georgia 30345, (404) 679–4159.
Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia (Region 5).	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, Massachusetts 01035–9589, (413) 253–8200.
Alaska (Region 7)	Regional Director (Attention: Federal Aid), U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503, (907) 786–3435.

(b) This grant program operates on an annual cycle. Regional Federal Aid Offices request proposals from the States in early April. Proposals must be received by the Regional Director on or before a due date set in early June in order to be considered for funding in the following fiscal year. Check with your Regional Office each year for the exact due dates. Regions review proposals for eligibility and substantiality. Regions may rank eligible and substantial proposals and submit them to the national office of the Service in Washington, D.C., by a date set in late June. A Review Panel coordinated by the Service's National Office of Fisheries and Habitat Conservation reviews and ranks proposals in early August using the criteria established in this rule. The Director selects the proposals and announces the grant recipients at the beginning of the new fiscal year (October 1).

(c) Proposals from more than one State agency may be submitted to the Service if the Governor determines that more than one agency has responsibility for coastal wetlands.

(d) A project proposal that includes several separate and distinct phases may be submitted in phases, but any succeeding phases must compete against other proposals in the year submitted. Funding for one phase of a project will not be contingent upon acquiring funding for another phase of that same project.

(e) The Federal (Program) share will not exceed $1 million per project.

(f) The percentage of non-Federal match (cash or in-kind) must not be less than 25 percent of the total costs if the State has a designated Fund or not less than 50 percent without a Fund.

§ 84.22 What needs to be included in grant proposals?

Proposals must include the following:

(a) Application for Federal Assistance (Standard Form 424);

(b) A Statement of Assurances (either Standard Form 424B or 424D); and

(c) A project statement that identifies and describes:

(1) The need within the purposes of the Act;

(2) Discrete, quantifiable, or verifiable objective(s) to be accomplished during a specified time period;

(3) Expected results or benefits, in terms of coastal lands and waters, and the hydrology, water quality, and fish and wildlife dependent on the wetlands;

(4) The approach to be used in meeting the objectives, including specific procedures, schedules, key personnel, and cooperators;

(5) A project location, including two maps: a map of the State showing the general location of the proposal, and a map of the project site;

(6) Estimated costs to attain the objective(s) (the various activities or components of each project should be broken down by cost and by cooperator);

(7) If the request is more than $100,000 (Federal share), the applicant must submit a Form DI–2010, certifying that the funds will not be used for lobbying activities;

(8) A concise statement, with documentation, of how the proposal addresses each of the 13 numeric criteria (see § 84.32);

(9) A description of the State trust fund that supports a request for a 75 percent Federal share in sufficient detail for the Service to make an eligibility determination, or a statement that eligibility has been previously approved and no change has occurred in the fund;

(10) A list of other current coastal acquisition, restoration, enhancement, and management actions; agency(ies) involved; relationship to the proposed grant; and how the proposal fits into comprehensive natural resource plans for the area, if any; and

(11) Public involvement or interagency coordination on coastal wetlands conservation projects that has occurred or is planned that relates to this proposal (Specify the publics or agencies involved and dates of involvement.).

Subpart C—Project Selection

§ 84.30 How are projects selected for grants?

Project selection is a three-step process: proposal acceptance, proposal ranking, and proposal selection.

(a) *Proposal acceptance.*

(1) The Regional Federal Aid Offices decide whether a proposal should be accepted for consideration by determining if the proposal is complete, substantial, and contains activities that are eligible. Proposals that do not qualify are immediately returned to the State. Revision and resubmission of returned proposals is allowable during this period, which is in June (check with your Regional Office for the exact dates each year). If any of the factors of completeness, substantiality, or eligibility are not met, the Regions should not forward the proposal to the Washington Office.

(2) To be considered for acceptance, the proposal must be substantial in character and design. A substantial proposal is one that:

(i) Identifies and describes a need within the purposes of the Act;

(ii) Identifies the objective to be accomplished based on the stated need;

(iii) Uses accepted principles, sound design, and appropriate procedures;

(iv) Provides public benefits that are cost effective and long-term, i.e., at least 20 years; and

(v) Identifies obtainable, quantified performance measures that help achieve the management goals and objectives of the National Coastal Wetlands Conservation Grant Program and the Service's Long-Term and Annual Performance Goals.

(3) The grant limit is $1 million. Proposals requesting Program funds that exceed $1 million will be returned to the appropriate State. Similarly, individual projects that have clearly been divided into multiple proposals for submission in one grant cycle to avoid this limit will be returned to the appropriate State. The State can revise and resubmit the proposal so that the request does not exceed the $1 million limit.

(b) *Proposal ranking.* Once a proposal is accepted by the Region, the Regional Federal Aid Office sends the proposal to the National Federal Aid Office, which works with the National Office of Fish and Wildlife Management Assistance and Habitat Restoration Program for distribution to a Review Panel. The Review Panel includes representation from our coastal Regions and from our Programs, for example, the Endangered Species Program. The Fish and Wildlife Management Assistance and Habitat Restoration Program is responsible for coordinating the review and ranking of proposals according to the established criteria, a process that usually involves a national meeting.

(c) *Proposal selection.* The Review Panel's recommendations are forwarded to the Director of the Service for a final review and project selection. The Director announces the selection by October 1.

§ 84.31 An overview of the ranking criteria.

(a) The primary objective of the proposal will be to acquire, restore, enhance, or manage coastal wetlands to benefit coastal wetlands and the hydrology, water quality, and fish and wildlife dependent upon them. The Program will not fund, for example, construction or repair of boat ramps or docks for recreational purposes and construction or support of research facilities or activities. The purpose of the ranking criteria is to provide a means for selecting the best projects—those that produce the maximum benefits to coastal wetlands and the fish and wildlife that depend on them.

(b) Proposal ranking factors.

(1) Ranking criteria. As explained in § 84.32, we will evaluate proposals according to 13 ranking criteria. These criteria have varying point values. Proposals must address each of these 13 criteria.

(2) Additional considerations. Even though the criteria provide the primary evaluation of proposals, additional considerations may be factored into the ranking decision at the national level. In case of a tie, these additional considerations will be used to rank proposals having identical scores.

(c) The criteria in § 84.32 are not listed in priority order.

(d) Points are assigned on the basis of a completed project, rather than current conditions, e.g., count 50 acres of estuarine emergent wetlands if 50 acres of that habitat type will be restored when the project is completed.

(e) A range of points rather than a set point value allows the reviewer to distinguish between, for example, a proposal that provides some foraging habitat for a threatened species versus one that provides critical nesting habitat of several endangered species. Scoring guidance is included with the individual criteria.

(f) If a grant proposal is not selected for funding, it may be resubmitted for reconsideration in subsequent fiscal years. Resubmission of a grant proposal is the responsibility of the applicant.

§ 84.32 What are the ranking criteria?

(a) The U.S. Fish and Wildlife Service will rank proposals using the 13 criteria listed below. In the following list, a description of each criterion is followed by examples and the points they would receive for that criterion.

(1) *Wetlands conservation.* Will the project reverse coastal wetland loss or habitat degradation in decreasing or stable coastal wetland types? Will it conserve wetlands to prevent losses of decreasing or stable wetland types? (Maximum: 7 points)

(i) The majority of the project area (over 50 percent) is nationally decreasing coastal wetland types[1] or the majority is regionally decreasing wetlands types in which the case for regionally decreasing is well-documented (Up to 7 points). The nationally decreasing types are: estuarine intertidal emergent; estuarine

intertidal forested; estuarine intertidal scrub-shrub; marine intertidal; palustrine emergent; palustrine forested; and palustrine scrub-shrub. Describe the wetlands using terms listed above. Include a breakdown showing the percentage of the proposal's total and wetland acreage in decreasing types. Provide National Wetlands Inventory codes/information if available. Information about these can be found on the National Wetland Inventory's web site at http://wetlands.fws.gov.

(ii) The majority of the project area (over 50 percent) is nationally stable coastal wetlands types [1] (Up to 5 points). The nationally stable types are: estuarine intertidal non-vegetated and estuarine subtidal. Describe the wetlands using the terms listed above. Include a breakdown showing the percentage of the proposal's total and wetland acreage in stable types. Provide National Wetlands Inventory codes/information if available.

(iii) Wetlands benefitted are less than 50 percent of the project area. (Up to 3 points)

(iv) If the project would benefit wetlands in the upper portion of the coastal watershed, but does not demonstrate significant and direct benefits to coastal wetlands, the proposal will not receive any points. (0 points)

(v) A full 7 points would be awarded to proposals that document that over 50 percent of their project area would be, upon project completion, decreasing coastal wetland types. A combination of decreasing and stable types that is over 50 percent of the project area could receive an intermediate score of 4, 5, or 6 points depending on the balance between decreasing and stable types. If wetlands are 50 percent or less of the project area, use the following guide for allocating points: 25 to 50 percent of the project area is decreasing or stable wetlands, 2, 3, or 4 points; 5 to 24 percent, 1 or 2 points; and less than 5 percent, 0 points.

(2) *Maritime forests on coastal barriers.* Will the proposal significantly benefit maritime forests on coastal barriers? The coastal barrier does not need to be a unit of the Coastal Barrier Resources System. (Maximum: 7 points)

(i) The proposal documents significant benefit to maritime forests on a coastal barrier. Describe the forest in sufficient detail so reviewers can determine whether it meets the definition of ''maritime forest.'' (Up to 7 points)

(ii) The proposal does not benefit maritime forests on a coastal barrier. (0 points)

(iii) For this criterion most scores should be either 0 or 7. If there are questions about the significance of the benefit or whether the forests meet the strict definition, an intermediate score could be given.

(3) *Long-term conservation.* Does the project ensure long-term conservation of coastal wetland functions? The project must provide at least 20 years of benefits to be eligible. (Maximum: 7 points)

(i) Once the project is complete, the project will provide continuing coastal wetlands benefits in perpetuity (100 years or longer). (7 points)

(ii) Once the project is complete, the project will provide continuing coastal wetland benefits for 50–99 years. (3 to 6 points)

(iii) Once the project is complete, the proposal will provide continuing coastal wetlands benefits for 20–49 years. (1 to 3 points)

(iv) The proposal should show how the project will be maintained and the benefits sustained over time. Proposals must include adequate documentation of long-term conservation of coastal wetland values, such as a 25-year easement, to receive points for this criterion. If part of the project's benefits will be perpetual (owned in fee title, for example) and part is estimated to last 20 years, reviewers should weigh the different elements of the project and give an intermediate score.

(4) *Coastal watershed management.* Would the completed project help accomplish the natural resource goals and objectives of one or more formal, ongoing coastal ecosystem or coastal watershed management plan(s) or effort(s)? Describe the management plan or effort(s). (Maximum: 3 points)

(i) The project supports the natural resource goals of identified formal, ongoing coastal ecosystem or coastal watershed management plans or efforts. Describe the management plan(s) and/or effort(s) and explain how this project relates to its objectives. A plan that very specifically identifies the site should receive more points than many generic references. (Up to 3 points)

(ii) The project does not support the natural resource goals and objectives of a formal, ongoing coastal ecosystem or coastal watershed management effort. If the proposal benefits the upper portions of coastal watersheds, but provides no significant and direct benefits to the coastal wetlands ecosystems, the proposal will not receive points. (0 points)

(5) *Conservation of threatened and endangered species.* Will the project benefit any federally listed endangered or threatened species, species proposed for Federal listing, recently delisted species, or designated/proposed critical habitat in coastal wetlands? Will it benefit State-listed threatened and endangered species? (Maximum: 5 points)

(i) The project will provide, restore, or enhance important habitat (e.g., nesting, breeding, feeding, nursery areas) for federally listed or proposed endangered or threatened species that use the coastal area project site for at least part of their life cycle. The project will benefit recently delisted species and habitat conservation plans developed under the auspices of the Endangered Species Act. List the species, their status (e.g., threatened or endangered) and provide documentation (e.g., cite recovery plan, attach letter from species expert) of current or recent species occurrence in the coastal area project site. Describe the importance of the habitat. (0 to 5 points)

(ii) The project will provide, restore, or enhance important habitat for State-listed threatened and endangered species. (0–2 points)

(iii) The project will not provide, restore, or enhance important habitat for federally or State-listed or proposed endangered or threatened species in the coastal area project site for any part of their life cycle. If the proposal provides benefits to threatened and endangered species in the upper portion of the coastal watershed, but provides no significant and direct benefits to threatened and endangered species using coastal wetlands ecosystem habitat, the proposal will not receive any points. (0 points)

(iv) The combined scores of subparagraphs (a)(5)(i) and (a)(5)(ii) of this section cannot exceed the 5-point maximum.

(6) *Benefits to fish.* Will the project provide, restore, or enhance important fish habitat? (Maximum: 5 points)

(i) The project will provide, restore, or enhance important habitat (i.e., spawning, nursery, juvenile, or foraging habitat) for specific species that use the coastal area project site for at least part of their life cycle. These species may include anadromous, interjurisdictional, or other important species. List species, habitat types, and benefits to each species. (Up to 5 points)

(ii) The project does not document current or future benefits to fish species and their habitat. (0 points)

[1] These designations are based on the National Wetlands Priority Conservation Plan. For more information about the plan, or to receive a copy of the document, refer to the contact information provided in § 84.21.

(iii) The more specific the information is on the use of the area and the importance of the habitat, the greater the points. An area specifically identified as critical for conservation in a fisheries management plan should, for example, receive more points than one which is not.

(7) *Benefits to coastal-dependent or migratory birds.* Will the project provide, restore, or enhance important habitat for coastal-dependent or migratory birds?

(i) The project will provide, restore, or enhance important habitat (i.e., breeding, staging, foraging, wintering/summering habitat) benefits for at least part of the life cycle of coastal dependent or migratory birds. List the species and habitat types, and describe the benefits to each. (Up to 5 points)

(ii) The project will not significantly benefit coastal-dependent or migratory birds. (0 points)

(iii) We will give maximum points to critical migratory pathways or wintering or summering grounds specifically identified in a management effort. Proposals should also include information about the size of populations and the diversity of species; proposals that fail to do so will not receive maximum points. Indicate if the proposed area has been specifically identified by any program or agency for its migratory bird values.

(8) *Prevent or reduce contamination.* Will the project prevent or reduce input of contaminants to the coastal wetlands and associated coastal waters, or restore coastal wetlands and other associated coastal waters that are already contaminated? (Maximum: 5 points)

(i) The project will prevent significant inputs of contaminants or will provide significant improvements to the quality of the coastal wetland and associated waters through protection from contaminants or restoration, including assimilation of nutrients and nonpersistent toxic substances. Describe the types and sources of possible or current impairment to the coastal wetland and other associated coastal waters (e.g., to water quality, sediments, flora, or fauna). Describe how contaminant inputs or residues will be prevented, reduced, or eliminated. Preventing contaminants by precluding residential development through acquisition will not normally warrant full points unless it can be shown that significant contamination would have occurred otherwise. (Up to 5 points)

(ii) The proposal will not significantly prevent impairment or improve the quality of the coastal wetland and associated coastal waters. If the proposal provides positive water quality benefits in the upper portions of watersheds, but provides no significant and direct positive water quality benefits to coastal wetland ecosystems, the proposal will not receive points. (0 points)

(iii) Show direct links between contamination and wildlife and aquatic habitats. To receive full points, you should provide documentation of the linkage. Reviewers may consider the extent of contaminants prevention/reduction when assigning points. Proposals having the potential to produce an attractive nuisance (e.g., acquiring and/or restoring a wetland that will be attractive to wildlife and that also has the potential to accumulate high levels of persistent toxic metals or hydrocarbon compounds) will not receive points.

(9) *Catalyst for future conservation.* Is the project proposal designed to leverage other ongoing coastal wetlands protection projects in the area, such as acquisition of areas to add to already acquired coastal lands, or provide impetus for additional restoration? (Maximum: 4 points)

(i) The project will be essential (e.g., key to completion or implementation of a greater conservation plan) to further advance or promote other coastal projects under way. Explain why. (Up to 4 points)

(ii) The project proposal does not demonstrate a positive impact on other coastal projects. (0 points)

(iii) To receive the maximum number of points, the proposal should be essential to the initiation or completion of a larger project. Examples may include acquisition of key in-holdings within a larger protected area, funds necessary to acquire fee simple interest in properties where a conservation easement has already been secured, and funds necessary to complete restoration activities on an otherwise protected area.

(10) *Partners in conservation.* Will the proposal receive financial support, including in-kind match, from private, local, or other Federal interests? (Maximum: 4 points)

(i) The proposal includes the State applicant plus one or more non-State financial partners. (Up to 4 points)

(ii) The proposal includes only financial support from the State applicant. (0 points)

(iii) A written description of commitment of funds or in-kind match from the partners must accompany the proposal. (This is in addition to signing the Assurances Form.) The purpose of this criterion is to promote partnerships with private, local, or other Federal agencies rather than to increase the dollar amount of the matching share. Therefore, no specific minimum amount is indicated here. At least two partners, in addition to the State applicant, should have committed funds to the project to receive maximum points.

(11) *Federal share reduced.* Does the proposal significantly reduce the Federal share by providing more than the required match amount? In the case of a Territory or Commonwealth that does not require match funds, does the proposal include financial support from sources other than the Territory or Commonwealth? (Maximum: 5 points)

(i) The State, Territory, or Commonwealth applicant must have a *non-Federal funding source* (in-kind match does not count for this criterion) that reduces the Federal share. (Up to 5 points)

(ii) The maximum Federal share is requested by the proposal. (0 points)

(iii) The purpose of this criterion is to increase the amount of dollars from non-Federal sources. This increase decreases the need for Federal match dollars, so that Federal dollars can help more projects. Documentation of each partner's financial commitment must accompany the proposal to receive points. If the State itself provides the excess match, the State should receive credit for reducing the Federal share. Each 5 percent above the required State match would be approximately equal to 1 point. The following two examples, using both a 50 and 75 percent Federal match share, define a 10 percent increase in a State's match amount.

(A) Example 1.—50 Percent Federal Match

If the total project costs are: $100,000,
Then the required State match share is: $50,000.
If the State or a partner provides an additional cash contribution equal to 10 percent of the $50,000: $5,000.
This is defined as a 10 percent increase in the State match.[2]

(B) Example 2.—75 Percent Federal Match

If the total project costs are: $100,000,
Then the required State match share is: $25,000.
If the State or a partner provides an additional cash contribution equal to 10 percent of the $25,000: $2,500.
This is defined as a 10 percent increase in the State match.[2]

(12) *Education/outreach program or wildlife-oriented recreation.* Is the project designed to increase environmental awareness and develop support for coastal wetlands

[2] From sources other than Federal agencies. Natural Resource Damage Assessment funds may in some cases be defined as ''non-Federal.'' See discussion under § 84.46 on *What are the cost-sharing requirements?*

conservation? Does it provide recreational opportunities that are consistent with the conservation goals of the site? (Maximum: 3 points)

(i) The proposal includes a site-specific, substantive education/outreach or wildlife-oriented recreation program. (Up to 3 points)

(ii) The proposal does not include a substantive education/outreach or wildlife-oriented recreation program. (0 points)

(iii) The proposal must describe what makes this program substantive and link it closely with the specific site to receive full points. Programs supported by activities or funds from partners should be encouraged over use of project funds. Project proposals may include substantive education/outreach components necessary for the completion of the project. However, these should be activities that complement or support the primary goal of the project.

(13) *Other factors.* Do any other factors, not covered in the previous criteria, make this project or site particularly unique and valuable? Does the project offer important benefits that are not reflected in the other criteria? The following list includes examples of projects that provide benefits not reflected in other criteria. (Maximum: 4 points)

(i) The project might provide significant benefits to, for example: rare or threatened habitat types; biodiverse habitats; rare and declining species; and the local community.

(ii) The project would be particularly cost-effective, providing very significant resource benefits for the cost.

(iii) The project would assist in the prevention or control of invasive species.

(iv) The project would provide important cultural or historical resource benefits.

(v) The project would provide other benefits.

(vi) Reviewers should not assign points to resource values covered by other criteria. The proposal should provide a short narrative to support claims to *Other Factors* points.

(b) *Additional considerations.* The following considerations will be factored into the ranking process if two or more proposals have the same point totals. The tie-breaking factors are as follows:

(1) The project would prevent the destruction or degradation of habitat from pending sale of property, from adverse effects of current activities such as draining of wetlands, or from natural processes such as erosion at excessive rates;

(2) The project would protect unique and significant biological diversity;

(3) The project has lower costs per acre conserved; and

(4) In the project proposal the State or third party provides lands as opposed to using lands already owned by the State or third party as part of the State matching share.

(5) All proposals must include this information. If a tie occurs between two or more proposals, the reviewers need to have this information available immediately to decide which proposal or proposals should be recommended for funding.

Subpart D—Conditions on Acceptance/Use of Funds

§ 84.40 What conditions must I follow to accept Federal funds?

(a) The audit requirements for State and local governments (43 CFR 12), and

(b) The uniform administrative requirements for grants and cooperative agreements with State and local governments (43 CFR 12).

§ 84.41 Who prepares a grant agreement? What needs to be included?

The coastal State and the Fish and Wildlife Service work together to develop a Grant Agreement (Form 3–1552) upon completion of the review by the Regional Director to determine compliance with applicable Federal laws and regulations. The Grant Agreement includes the grant title, the grant cost distribution, the agreement period, other grant provisions, and special grant conditions. If a Coastal Barrier Unit is affected, the Service must conduct internal consultations pursuant to Section 6 of the Coastal Barrier Resources Act, as amended by the Coastal Barrier Improvement Act, prior to providing any grant monies to that State.

§ 84.42 What if a grant agreement is not signed?

Funds that have been allocated for a grant will be held until December 31. If a grant agreement has not been signed by the State and the Service and thus the funds have not been obligated for the approved grant by that date, the funds automatically are returned to the Program fund in Washington.

§ 84.43 How do States get the grant monies?

Funding to States is provided on a reimbursable basis. The Service may reimburse the State for projects completed, or make payments as the project progresses. For construction work and labor, the Service and the State may jointly determine, on a case-by-case basis, that payments may be made in advance. The time elapsing between the transfer to the State and the State's need for the funds will be minimized and be subject to a specific determined need for the funds in advance. Except for extenuating circumstances, a reasonable time period to advance funds to a State is up to 3 days. OMB Circular A–102, Parts II and III, 43 CFR Part 12, and 31 CFR Part 205 should all be reviewed for specific information on methods and procedures for transferring funds.

§ 84.44 What is the timetable for the use of grant funds?

Once funds are granted to the coastal States, the funds are available to those States for the time designated in the grant agreement. If a State needs more time, that State must apply for an extension of time by amending the grant agreement. If the Service does not extend the time, the unobligated funds return to the Service for expenditure on future grants. Also, if a State cannot spend the funds on the approved project, that State must notify the appropriate Regional Director as soon as possible so that the funds can revert back to the Service for future grants.

§ 84.45 How do I amend a proposal?

Following procedures in 43 CFR 12.70, you must submit a signed original and two copies of the revised SF–424, the revised portion of the project statement if appropriate, and an explanation of the reason for the revision to the Regional Director (Federal Aid).

§ 84.46 What are the cost-sharing requirements?

(a) Except for certain insular areas, the Federal share of an approved grant will not exceed 50 percent of approved costs incurred. However, the Federal share may be increased to 75 percent for coastal States that have established and are using, for the purpose of acquiring coastal wetlands, other natural areas, or open spaces, either a trust fund from which the principal is not spent, or a fund derived from a dedicated recurring source of monies including, but not limited to, real estate transfer fees, or taxes, cigarette taxes, tax checkoffs, or motor vehicle license plate fees. The Regions must certify the eligibility of the fund in order for the State to qualify for the 75 percent matching share.

(b) The following insular areas: American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, have been exempted from the matching share, as provided in Pub. L. 95–134,

amended by Pub. L. 95–348, Pub. L. 96–205, Pub. L. 98–213, and Pub. L. 98–454 (48 U.S.C. 1469a). Puerto Rico is not exempt from the match requirements of this program.

(c) The State may provide materials (e.g., heavy equipment) or other services as noncash match for portions of the State's matching share. The State may also provide the value of land, including the land proposed for restoration, enhancement, or management as a non-cash match, provided that the land is necessary and reasonable for completing the project. For example, if a State proposes to manage a contiguous wetland of 100 acres, and already owns 10 of the 100 acres, the State can apply the current value of the 10 acres, provided that the 10 acres are necessary to manage the entire 100 acres. If the 10-acre wetland were not contiguous and no connection could be made that the 10 acres were needed to manage the proposed wetland, the State could not use the 10 acres as a noncash match. Review 43 CFR 12.64 for determining the value of in-kind contributions.

(d) The requirements in 43 CFR 12.64 and Service Manual Part 522 FW 1.13 [3] apply to in-kind matches or cost-sharing involving third parties. Third party in-kind contributions must represent the current market value of noncash contributions furnished as part of the grant by another public agency, private organization, or individual. In-kind matches must be necessary and reasonable to accomplish grant objectives.

(e) Coastal States must commit to their matching share of the total costs by signing the Application for Federal Assistance (SF 424), the Assurances (SF424B or SF424D), and the Grant Agreement (USFWS Form 3–1552).

(f) No Federal funds, non-Federal funds, in-kind contributions, or National Fish and Wildlife Foundation grant program funds that will be or have been previously used to satisfy the matching requirement of another Federal grant can be used as part of the coastal State's matching share.

(g) The coastal State is responsible for ensuring the full amount of that State's matching requirement, either with State funds or from contributions toward the proposal from other agencies, groups, or individuals. Sources other than State applicant funds must be documented and approved as eligible.

(h) Total Federal funding (including all Federal sources outside of the Program) may not exceed the maximum eligible Federal share under the Program. This includes monies provided to the State by other Federal programs. If the amount of Federal funds available to the project is more than the maximum allowed, we will reduce the Program funds by the amount in excess.

(i) Natural Resource Damage Assessment funds that are managed by a non-Federal trustee are considered to be non-Federal, even if these damages were once deposited in the Department of the Interior's Natural Resource Damage Assessment and Restoration Fund, provided the following criteria are met:

(1) The monies were deposited pursuant to a joint and indivisible recovery by the Department of the Interior and non-Federal trustees under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Oil Pollution Act (OPA);

(2) The non-Federal trustee has joint and binding control over the funds;

(3) The co-trustees agree that monies from the fund should be available to the non-Federal trustee and can be used as a non-Federal match to support a project consistent with the settlement agreement, CERCLA, and OPA; and

(4) The monies have been transferred to the non-Federal trustee.

§ 84.47 What are allowable costs?

(a) Allowable grant costs are limited to costs necessary and reasonable to achieve approved grant objectives and meet the applicable Federal cost principles in 43 CFR 12.62 (b).

(b) If a project or facility is designed to include purposes other than those eligible under the Act, the costs must be prorated among the various purposes.

(c) If you incur costs before the effective date of the grant, they cannot be reimbursed with the exception that preliminary costs can be allowed, but only with the approval of the appropriate Regional Director. Preliminary costs may include costs necessary for preparing the grant proposal, such as feasibility surveys, engineering design, biological reconnaissance, appraisals, or preparation of grant documents such as environmental assessments for compliance with the National Environmental Policy Act.

§ 84.48 What are the procedures for acquiring, maintaining, and disposing of real property?

(a) Acquisition, maintenance, and disposal of real property must follow the rules established in 43 CFR 12.71.

(1) Title to real property acquired under a grant or subgrant must be vested in the State or subgrantee, including local governments and nonprofit organizations. Appraisals and review appraisals must be submitted and approved by the Regional Director before the State becomes legally obligated for the purchase. Title vesting evidence and summary of land costs will be provided upon completion of the acquisition. The State or subgrantee may not dispose of or encumber its title or other interest in real property without prior approval of the appropriate Regional Director. Appropriate language in the grant agreement and any deed to third parties (e.g., conservation easement or other lien on a third-party property) must be included to ensure that the lands and/or interests would revert back to the State or Federal Government if the conditions of the grant were no longer being implemented.

(2) In cases where the interest obtained is less than fee simple title, the interest must be sufficient for long-term conservation of the specified wetlands resources.

(3) If acquired property is used for reasons inconsistent with the purpose(s) for which acquired, such activities must cease and any adverse effects on the property must be corrected with non-Federal funds.

(4) Coastal wetland property must continue to serve the purposes for which it was acquired. If property that is acquired as a coastal wetland is no longer needed or useful for the intended purpose, the coastal State will request disposition instructions from the appropriate Regional Director.

(5) If rights or interests obtained with the acquisition of coastal wetlands generate revenue, the revenue will be treated as program income and used to manage the acquired properties. If real property is sold or leased, the proceeds must be treated as program income and returned to the Federal Aid program regardless of the grant period.

(b) A coastal State is responsible for design, supervision, and inspection of all major construction projects in accordance with accepted engineering standards.

(1) The coastal State must have adequate rights to lands or waters where restoration or enhancement projects are planned to ensure protection and use of the facilities or structures throughout their useful life.

(2) The construction, enlargement, or rehabilitation of dams are subject to Federal standards for dam design. If requested, written certification that the proposed dam meets Federal standards will be provided to the Regional Office by the coastal State.

[3] From the Fish and Wildlife Service Manual, available on-line at http://www.fws.gov/directives/index.html.

(3) The coastal State must operate and maintain facilities, structures, or related assets to ensure their use for the stated project purpose and that they are adequately protected.

(c) Acquisition, property records, maintenance, and disposal of equipment must be made following the regulations in 43 CFR 12.72.

§ 84.49 What if the project costs more or less than originally expected?

All requests for additional funding for approved coastal wetland grants will be subject to the entire review process along with new grants. Any funds left over after the project is complete, or if the project is not completed, should be returned to the Washington Office for use in following years. If a State has lands it wishes to acquire, restore, or enhance in close proximity to the original project, and the Region deems that spending project funds in these areas would provide similar benefits, the Region may use unspent balances to fund these projects with prior approval from the Washington Office. States must provide adequate justification and documentation to the Regions that the lands acquired, restored, or enhanced are similar to those in the original proposal and provide similar benefits to fish and wildlife.

§ 84.50 How should the States certify compliance with Federal laws, regulations, and policies?

(a) In accepting Federal funds, coastal State representatives must agree to and certify compliance with all applicable Federal laws, regulations, and policies. The applicant will need to submit a Statement of Assurances (SF424B or SF424D) signed and dated by an authorized agency representative as part of the proposal.

(b) Compliance with environmental and other laws, as defined in the Service Manual 523 FW Chapter 1,[4] may require additional documentation. Consult with Regional Offices for how this applies to a specific project.

Dated: February 23, 2001.

Joseph E. Doddridge,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–20908 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–55–P

[4] The Fish and Wildlife Service Manual, see footnote 3 for availability.

Notices

Federal Register

Vol. 66, No. 161

Monday, August 20, 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.

AFRICAN DEVELOPMENT FOUNDATION

Sunshine Act Meeting

BOARD OF DIRECTORS MEETING.

TIME: 10:00 a.m.–2:30 p.m.

PLACE: ADF Headquarters.

DATE: Friday, August 31, 2001.

STATUS: Open.

Agenda

10:00 a.m.–10:30 a.m.—Chairman's Report
10:30 a.m.–12:00 pm.—President's Report
12:00 p.m.–1:00 p.m.—Lunch
1:00 p.m.–2:30 p.m.—Executive Session (Closed)
2:30 p.m.—Adjournment

If you have any questions or comments, please direct them to Doris Martin, General Counsel, who can be reached at (202) 673–3916.

Nathaniel Fields,

President.

[FR Doc. 01–20996 Filed 8–16–01; 11:35 am]

BILLING CODE 6117–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. TB–01–03]

Burley Tobacco Advisory Committee; Meeting

In accordance with the Federal Advisory Committee Act (5 U.S.C. App.) announcement is made of the following committee meeting:

Name: Burley Tobacco Advisory Committee.

Date: September 13, 2001.

Time: 9:00 a.m.

Place: Campbell House Inn, South Colonial Hall, 1375 Harrodsburg Road, Lexington, Kentucky 40504.

Purpose: To elect officers, establish submarketing areas, recommend opening dates for auctions, discuss selling schedules, and review the operational policies and procedures for the 2001–2002 burley tobacco marketing season.

The meeting is open to the public. Persons, other than members, who wish to address the Committee at the meeting should contact John P. Duncan III, Deputy Administrator, Tobacco Programs, AMS, U.S. Department of Agriculture, Stop 0280, 1400 Independence Avenue, SW., Room 502 Annex Building, Washington, DC 20250–0280, (202) 205–0567, prior to the meeting. Written statements may be submitted to the Committee before, at, or after the meeting. If you need any accommodations to participate in the meeting, please contact the Tobacco Programs at (202) 205–0567 by September 7, 2001, and inform us of your needs.

Dated: August 14, 2001.

Barry L. Carpenter,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 01–20848 Filed 8–17–01; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Exodus Timber Sale Project, Umpqua National Forest, Douglas County, OR

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service, will prepare an Environmental Impact Statement (EIS) for a timber sale and connected actions within the Black Creek watershed planning area of the North Umpqua Ranger District. These actions include timber sales, the construction of temporary roads, site preparation, tree planting, fuels hazard reductions, road decommissioning, road repair, precommercial thinning, instream wood placement, and soil restoration. The planning area is located approximately 38 miles east of Roseburg, Oregon. The project is expected to be implemented 2003 through 2005. The agency gives notice of the full environmental analysis and decision-making process that will occur on the proposal so that interested and affected people may become aware of how they can participate in the process and contribute to the final decision.

DATES: Comments concerning the scope of the analysis should be received in writing, by November 16, 2001.

ADDRESSES: Send written comments and suggestions concerning this proposal to Carol Cushing, District Ranger, North Umpqua Ranger District, 18782 North Umpqua Highway, Glide, Oregon 97443

FOR FURTHER INFORMATION CONTACT: Direct questions about the proposed action or EIS to Debbie Anderson, ID Team Leader, North Umpqua Ranger District, 18782 North Umpqua Highway, Glide, Oregon 97443 or (541) 496–3532.

SUPPLEMENTARY INFORMATION: The area being analyzed in the Exodus Timber Sale Project EIS encompasses approximately 6,750 acres of National Forest System land on the North Umpqua Ranger District. The planning area is bounded to the North by the Dutch Creek Ridge, to the South by the Little River/South Umpqua Divide, to the East by Black Butte and Clover Ridge, and to the West by Red Butte and Peter Paul Prairie. The planning area includes all or portions of sections 20, 21, 28, 29, 32 through 34, T26S, R3E; sections 1 through 5, 8 through 17, 20 through 29, and 32 through 36, T27S, R3E; section 7, 17 through 23 and 25 through 36, T27S, R4E; sections 30 and 31, T27S, R5E; sections 1 through 4, 10 through 15, 23 through 26, 35 and 36, T28S, R3E; sections 1 through 24 and 26 through 30, T28S, R4E; sections 18 and 19, T28S, R5E, Willamette Meridian, Douglas County, Oregon.

The Exodus Timber Sale Project proposed action is based on the need to achieve the desired conditions for the planning area recommended in the 1995 Little River Watershed Analysis. Timber harvest proposals are based on the need to maintain a high level of vegetative diversity in both structure and pattern within the watershed over time, by approximating large and small scale natural disturbance processes and patterns through even and uneven aged silvicultural treatments. Proposed natural fuels prescriptions are based on the need to move the planning area from a high severity fire regime towards a moderate severity fire regime. Rehabilitation of soils through subsoiling is based on the need to improve the long term site productivity and water infiltration within managed stands that have been adversely affected by past management practices. Instream wood placement is based on the need to improve aquatic habitat where large woody debris has been removed or is otherwise absent or deficient. Pre-

commercial thinning is based the need to increase stand growth and vigor of overstocked managed stands. Road repair/maintenance and decommissioning is based on the need to reduce the risk to the aquatic resources from road related erosional processes.

Timber sale related activities include: uneven-aged harvest on approximately 1,019 acres of late-seral forest in 16 units, using proportional thinning, thinning from below, and small group openings, and prescribing leave trees in the largest diameter classes; regeneration harvest in one unit on approximately 42 acres of late-seral forest, with 15% green-tree retention in the form of leave groups and dispersed mature trees; an intermediate harvest in the form of commercial thinning in 11 units on 354 acres; reforestation and seedling protection in one unit on 42 acres; site preparation/fuels reduction on 882 acres in 28 units; repair/maintenance of approximately 25 miles of existing roads; construction of 0.4 miles of temporary roads with subsequent obliteration; and use of existing rock pits. The acreage proposed for harvest is estimated to yield about 19 million board feet of timber. This volume estimate is likely to decrease as a result of implementing protection buffers where required for Survey and Manage species. The areas prescribed for harvest will require a combination of helicopter, skyline and ground-based harvesting equipment.

Alternatives to be considered include the No Action Alternative, the Proposed Action, an alternative that responds to concerns over economic efficiency, an alternative that maintains high canopy closures in order to maintain wildlife habitat components and hydrologic recovery percentages, and an alternative that focuses on commercial thinning and does not harvest in late successional forests.

Restoration related activities include approximately: 12 miles of road decommissioning and 4 miles of road closure; recruitment of large woody material within eleven second growth timber sale harvest units; 8 acres of site productivity restoration; 7 miles of instream log placement in Upper Black and Dutch Creeks; 480 acres of precommercial thinning in 23 units; and fuels hazard reduction on 135 acres in one stand.

Preliminary issues, as identified by the Umpqua National Forest and by scoping that has been conducted to date, include the following:

- Will the timber sale activity in the proposed action be economically efficient and viable?
- How will the proposed action affect the late successional habitat and species within the Black Creek Watershed?
- How will the proposed action affect water quality and aquatic conditions for aquatic and riparian dependant species?
- How will the public respond to reduced vehicular access within the watershed?

The scoping effort is intended to identify issues, which may lead to the development of alternatives to the proposed action. Scoping will also contribute to an important aspect of Roads Analysis, which is incorporated into this EIS. One of the purposes of this notice of intent is to solicit input from the public as part of the overall scoping effort. In addition to this notice, the public has been notified of the EIS through the Umpqua National Forest's April 2001 Schedule of Proposed Actions. Scoping for this project will also include an open house in Roseburg, Oregon, on October 24, 2001.

Comments received in response to this notice and through scoping, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR parts 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the requests for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

Public comments are appreciated throughout the analysis process. The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and be available for public review by June 2002. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register**. The final EIS is scheduled to be available in September of 2002.

The Forest Serviced believes it is important to give reviewers notice of this early stage of public participation and of several court rulings related to public participation in the environmental review process. First, reviewers of a draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could have been raised at the draft stage may be waived or dismissed by the court if not raised until after completion of the final EIS. *City of Angoon* v. *Hodel*, 803 f.2d 1016, 1022 (9th Cir, 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or th merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act of 40 CFR 1503.3 in addressing these points.)

In the final EIS, the Forest Service is required to respond to substantive comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considering in making a decision regarding the proposal. The Responsible Official is Carol Cushing, District Ranger for the North Umpqua Ranger District, Umpqua National Forest. The Responsible Official will document the decision and rationale for the decision in a Record of Decision. The decision will be subject to review under Forest Service Appeal Regulations.

Dated: August 10, 2001.

Don Ostby,

Forest Supervisor.

[FR Doc. 01–20872 Filed 8–17–01; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

John Day/Snake Resource Advisory Council, Hells Canyon Subgroup

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hells Canyon Subgroup of the John Day/Snake Resource Advisory Council will meet on September 14 and 15, 2001 at the Forest Service Administrative Site, Pittsburgh Landing. The meeting will begin at 9 a.m. and continue until 5 p.m. the first day and will begin at 8 a.m. on the second day and adjourn by 2 p.m. the final day. Agenda items to be covered include: (1) Fee Demo, (2) Adopt-A-Beach (3) Open public forum. All meetings are open to the public. Public comments will be received September 14, 2001 at 10 a.m. at the Pittsburgh Administrative Site.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Kendall Clark, Area Ranger, USDA, Hells Canyon National Recreation Area, 88401 Highway 82, Enterprise, OR 97828, 541–426–5501.

Dated: August 14, 2000.

Karyn L. Wood,

Forest Supervisor.

[FR Doc. 01–20871 Filed 8–17–01; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews and requests for revocation in part.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with July anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department also received requests to revoke four antidumping duty orders in part.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Holly A. Kuga, Office of AD/CVD Enforcement , Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone: (202) 482–4737.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2000), for administrative reviews of various antidumping and countervailing duty orders and findings with July anniversary dates. The Department also received timely requests to revoke in part the antidumping duty orders on Silicon Metal from Brazil, Fresh Atlantic Salmon from Chile, and Certain Pasta from Italy and Turkey.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than July 31, 2002.

	Period to be reviewed
Antidumping Duty Proceedings	
Brazil—Silicon Metal, A–351–806:	
Companhia Brasileira Carbureto De Calcio	7/1/00–6/30/01
Companhia Ferroligas Minas Gerais-Minasligas	
RIMA Industrial S/A	
Chile—Fresh Atlantic Salmon, A–337–803:	
Acuicultura de Aquas Australes	7/1/00–6/30/01
Agromar Ltda.	
Aguas Claras S.A.	
Antarfish S.A.	
Aquachile S.A.	
Aquasur Fisheries Ltda.	
Asesoria Acuicola S.A.	
Australis S.A.	
Best Salmon	
Cenculmavique	
Centro de Cultivo de Moluscos	
Cerro Farrellon Ltda.	
Chile Cultivos S.A.	
Chisal S.A.	
Comercializadora Smoltech Ltda.	
Complejo Piscicola Coyhaique	
Cultivadora de Salmones Linao Ltda.	
Cultivos Marinos Chiloe Ltda.	
Cultivos San Juan	
Cultivos Yardan S.A.	
Empresa Nichiro Chile Ltda.	
Fiordo Blanco S.A.	
Fisher Farms	
Fitz Roy S.A.	
Friosur S.A.	
Ganadera Del Mar	
G.M. Tornagaleones S.A.	
Hiuto Salmones S.A.	

	Period to be reviewed
Huitosal Mares Australes Salmo Pac.	
Instituto Tecnologico Del Salmon S.A.	
Inversiones Pacific Star Ltda.	
Invertec Pesquera Mar de Chiloe Ltda.	
Manao Bay Fishery S.A.	
Mardim Ltda.	
Marine Harvest Chile S.A.	
Ocean Horizons Chile S.A.	
Pacific Mariculture	
Patagonia Fish Farming S.A.	
Patagonia Salmon Farming S.A.	
Pesca Chile S.A.	
Pesquera Antares S.A.	
Pesquera Chiloe S.A.	
Pesquera Eicosal Ltda.	
Pesquera Friosur S.A.	
Pesquera Los Fiordos Ltda.	
Pesquera Mares Australes Ltda.	
Pesquera Mares de Chile S.A.	
Pesquera Pacific Star	
Pesquera Quellon Ltda.	
Pesquera Y Comercial Rio Peulla S.A.	
Piscicola Entre Rios S.A.	
Piscicultura Iculpe	
Piscicultura La Cascada	
Piscultura Santa Margarita	
Productos Del Mar Ventisqueros S.A.	
Prosmolt S.A.	
Quetro S.A.	
River Salmon S.A.	
Robinson Crusoe Y Cia. Ltda.	
Salmoamerica	
Salmones Andes S.A.	
Salmones Antarctica S.A.	
Salmones Aucar Ltda.	
Salmones Caicaen S.A.	
Salmones Calbuco S.A.	
Salmones Chiloe S.A.	
Salmones Friosur S.A.	
Salmones Huillinco S.A.	
Salmones Ice Val Ltda.	
Salmones Llanquihue	
Salmones Mainstream S.A.	
Salmones Multiexport Ltda.	
Salmones Pacific Star Ltda.	
Salmones Pacifico Sur S.A.	
Salmones Quellon	
Salmones Ranco Sur Ltda.	
Salmones Skyring S.A.	
Salmones Tecmar S.A.	
Salmones Tierra Del Fuego Ltda.	
Salmones Unimarc S.A.	
Salmosan	
Seafine Salmon S.A.	
Soc. Alimentos Maritimos Avalon Ltda.	
Soc. Aquacultivos Ltda.	
Truchas Aguas Blancas Ltda.	
Trusal S.A.	
Ventisqueros S.A.	
Germany—Stainless Steel Sheet and Strip in Coils, A–427–825: Krupp Thyssen Nirosta GmbH	7/1/00–6/30/01
Iran—Certain In-Shell Raw Pistachios, A–507–502: Rafsanjan Pistachio Producers Cooperative	7/1/00–6/30/01
Italy—Certain Pasta, A–475–818:	
CO.R.EX. S.p.A	7/1/00–6/30/01
Italian American Pasta Company S.r.l.	
La Molisana Industrie Alimentari S.p.A.	
N. Puglisi & F. Industria Paste Alimentari S.p.A./Rienzi & Sons, Inc.	
Pastificio Fratelli Pagani S.p.A.	
Pastificio Garofalo S.p.A.	
Pastificio Guido Ferrara S.r.l.	
Italy—Stainless Steel Sheet and Strip in Coils, A–475–824: Acciai Speciali Terni S.p.A.	7/1/00–6/30/01
Mexico—Stainless Steel Sheet and Strip in Coils, A–201–822: Mexinox S.A. de C.V	7/1/00–6/30/01
Republic of Korea—Stainless Steel Sheet and Strip in Coils, A–580–834:	
Dai Yang Metal Co., Ltd	7/1/00–6/30/01

	Period to be reviewed
Pohang Iron & Steel Co., Ltd.	
Samwon Precision Metals Co., Ltd.	
Thailand—Canned Pineapple, A–549–813:	
Dole (Thailand) Ltd	7/1/00–6/30/01
Kuiburi Fruit Canning Company Limited	
Malee Sampran Factory Public Co., Ltd.	
Prachuab Fruit Canning Company	
Siam Food Products Company Limited	
Siam Fruit Canning (1988) Co., Ltd.	
Thai Pineapple Canning Industry Corp., Ltd.	
Thai Pineapple Public Co., Ltd.	
Vita Food Factory (1989) Ltd.	
Thailand—Furfuryl Alcohol, A–549–812: Indorama Chemicals Thailand Ltd	7/1/00–6/30/01
The People's Republic of China—Bulk Aspirin,[1] A–570–853:	
Shandong Xinhua Pharmaceutical Co., Ltd	7/6/00–6/30/01
Shandong Xinhua Pharmaceutical Import & Export Co., Ltd.	
Shandong Xinhua Pharmaceutical Factory	
Nanjing Pharmaceutical Co., Ltd.	
Lianjunyang City Foreign Trading Co.	
Tianjin Chemical Import & Export Co.	
Rich Shipping Co., Ltd.	
Jilin Pharmaceutical Co., Ltd.	
Jilin Pharmaceutical Import & Export Corporation	
China Jiangsu International Economic-Technical Cooperation Co.	
Heilongjiang Guangyuan Medicine Co., Ltd.	
Xiamen Maike Chemistry Imports & Exports Co., Ltd.	
Qiqihaer Import & Export Co.	
China Chemical Jiangsu Suzhou Import & Export Co., Ltd.	
Oceanic Bridge International, Inc.	
Jilin Medical & Health Products Import & Export Co.	
The People's Republic of China—Persulfates,[2] A–570–847:	
Sinochem Jiangsu Wuxi Import & Export Corp	7/1/00–6/30/01
Shanghai Ai-Jian Import & Export Corp.	
The People's Republic of China—Sebacic Acid,[3] A–570–825:	
Guandong Chemicals Import & Export Corp	7/1/00–6/30/01
Sinochem International Chemicals Corporation	
Sinochem Tianjin Import & Export Corp.	
Turkey—Certain Pasta, A–489–805: Filiz Gida Sanayi ve Ticaret A.S	7/1/00–6/30/01
United Kingdom—Industrial Nitrocellulose, A–412–803: Imperial Chemical Industries PLC	7/1/00–6/30/01
Countervailing Duty Proceedings	
Italy—Certain Pasta, C–475–819:	
Delverde, SpA	1/1/00–12/31/00
F.lli De Cecco di Filippo Fara S. Martino S.p.A.	
Italian American Pasta Company, S.r.L.	
Labor S.r.L.	
N. Puglisi & F. Industria Paste Alimentari S.p.A./Rienzi & Sons, Inc.	
Thailand—Certain Carbon Steel Butt-Weld Pipe Fittings, C–549–807: Thai Benkan Company, Ltd	1/1/00–12/31/00
Suspension Agreements	
Brazil—Hot-Rolled Flat-Rolled Carbon-Quality Steel Products, A–351–828:	
Companhia Siderurgica Paulista	7/1/00–6/30/01
Companhia Siderurgica Nacional	
Usinas Siderurgica de Minas Gerais	

[1] If one of the above named companies does not qualify for a separate rate, all other exporters of bulk aspirin from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[2] If one of the above named companies does not qualify for a separate rate, all other exporters of persulfates from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[3] If one of the above named companies does not qualify for a separate rate, all other exporters of sebacic acid from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under section 351.211 or a determination under section 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the

name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: August 10, 2001.

Holly A. Kuga,

Senior Office Director, Group II, Office 4, AD/CVD Enforcement.

[FR Doc. 01–20913 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–860)

Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bar from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Constance Handley, Office of AD/CVD Enforcement 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–4162 or (202) 482–0631, respectively.

Amendment of Final Determination

The Department of Commerce (the Department) is amending the final determination in the antidumping investigation of steel concrete reinforcing bar from the People's Republic of China (rebar) to reflect the correction of a ministerial error. This amended final determination results in revised antidumping rates.

Background

On June 22, 2001, the Department issued its affirmative final determination in this proceeding. *See Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From the People's Republic of China*, 66 FR 33522 (June 22, 2001) (*Final Determination*). On June 25, 2001, the Department received timely allegations from Laiwu Steel Group, Ltd. (Laiwu) of ministerial errors in connection with the final determination.

In its allegations, Laiwu stated that the Department made ministerial errors with regard to the inflator used in the valuation of the factors of production for anthracite coal, iron ore concentrate, slag water, and iron skin. *See* letter from Laiwu to the Department of Commerce alleging ministerial errors in the final determination (June 25, 2001).

On June 27, 2001, the petitioner[1] objected to Laiwu's allegation, stating that the Department's decision to use the Indian inflator is methodological in nature, not a ministerial error. Therefore, the petitioner stated that Laiwu's allegation is misplaced, and submits that the Department's use of Indian inflation rates was a reasonable approach.

Amended Determination

The Department has reviewed its final calculations and determined that unintentional ministerial errors have been made within the meaning of Section 735(e) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (the Act) and 19 CFR 351.224(f). We agree with Laiwu that the Department erred in using incorrect inflators to adjust for inflation the values for anthracite coal, iron ore concentrate, slag water, and iron skin. For a detailed analysis of these allegations, relevant comments, and the Department's determinations, see the June xx, 2001, Memorandum to Bernard T. Carreau from Magd Zalok and Constance Handley, regarding Ministerial Error Allegations on file in room B–099 of the Main Commerce building. As a result of our analysis of Laiwu's allegations, we are amending our final determination to revise the antidumping rate for Laiwu, in accordance with 19 CFR 351.224(e). Suspension of liquidation will be revised accordingly and parties shall be notified of this determination, in accordance with sections 735(e) of the Tariff Act of 1930, as amended.

The following weighted-average dumping margins apply:

Exporter/manufacturer	Weighted-average margin percentage
Laiwu Steel Group	132.53
PRC-Wide Rate	132.53

[1] The petitioner in this investigation is the Rebar Trade Action Coalition (RTAC), and its individual members, AmeriSteel, Auburn Steel Co., Inc., Birmingham Steel Corp., Border Steel, Inc., Marion Steel Company, Riverview Steel, and Nucor Steel and CMC Steel Group.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: August 13, 2001.

Bernard T. Carreau,

Acting Assistant Secretary for Import Administration.

[FR Doc. 01–20912 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Visiting Committee on Advanced Technology

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

ACTION: Request for nomination of members to serve on the Visiting Committee on Advanced Technology.

SUMMARY: NIST invites and requests nomination of individuals for appointment to the Visiting Committee on Advanced Technology (VCAT). The terms of some of the members of the VCAT will soon expire. NIST will consider nominations received in response to this notice for appointment to the Committee, in addition to nominations already received.

DATES: Please submit nominations on or before September 4, 2001.

ADDRESSES: Please submit nominations to Janet Russell, Administrative Coordinator, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1004, Gaithersburg, MD 20899–1004. Nominations may also be submitted via FAX to 301–948–1224.

Additional information regarding the Committee, including its charter, current membership list, and executive summary may be found on its electronic home page at: http://www.nist.gov/director/vcat/vcat.htm.

FOR FURTHER INFORMATION CONTACT: Janet R. Russell, Administrative Coordinator, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1004, Gaithersburg, MD 20899–1004, telephone 301–975–2107, fax 301–948–1224, or via email at janet.russell@nist.gov.

SUPPLEMENTARY INFORMATION

VCAT Information

The VCAT was established in accordance with 15 U.S.C. 278 and the

Federal Advisory Committee Act (5 U.S.C. app. 2).

Objectives and Duties

1. The Committee shall review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs, within the framework of applicable national policies as set forth by the President and the Congress.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall provide a written annual report, through the Director of NIST, to the Secretary of Commerce for submission to the Congress on or before January 31 each year. Such report shall deal essentially, though not necessarily exclusively, with policy issues or matters which affect the Institute, or with which the Committee in its official role as the private sector policy adviser of the Institute is concerned. Each such report shall identify areas of research and research techniques of the Institute of potential importance to the long-term competitiveness of United States industry, which could be used to assist United States enterprises and United States industrial joint research and development ventures. The Committee shall submit to the Secretary and the Congress such additional reports on specific policy matters as it deems appropriate.

Membership

1. The Committee is composed of fifteen members that provide representation of a cross-section of traditional and emerging United States industries. Members shall be selected solely on the basis of established records of distinguished service and shall be eminent in one or more field such as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. No employee of the Federal Government shall serve as a member of the Committee.

2. The Director of the National Institute of Standards and Technology shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

Miscellaneous

1. Members of the VCAT are not paid for their service, but will, upon request, be allowed travel expenses in accordance with 5 U.S.C. 5701 et seq., while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

2. Meetings of the VCAT take place in the Washington, DC metropolitan area, usually at the NIST headquarters in Gaithersburg, Maryland, and once each year at the NIST headquarters in Boulder, Colorado. Meetings are one or two days in duration and are held quarterly.

3. Committee meetings are open to the public except for approximately one hour, usually at the beginning of the meeting, a closed session is held in accordance with 5 U.S.C. 552b(c)(6), because divulging information discussed in those portions of the meetings is likely to reveal information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. All other portions of the meetings are open to the public.

Nomination Information

1. Nominations are sought from all fields described above.

2. Nominees should have established records of distinguished service and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment and international relations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on federal advisory boards and federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledge the responsibilities of serving on the VCAT, and will actively participate in good faith in the tasks of the VCAT. Besides participation at meetings, it is desired that members be able to devote the equivalent of two days between meetings to either developing or researching topics of potential interest, and so forth in furtherance of their Committee duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse VCAT membership.

Dated: August 13, 2001.

Karen H. Brown,

Acting Director.

[FR Doc. 01–20920 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–30–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081001F]

North Pacific Fishery Management Council; Public Meetings

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

ACTION: Meetings of the North Pacific Fishery Management Council (Council) and its advisory committees.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will hold public meetings.

DATES: The meetings will be held on September 5–9, 2001. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: All meetings will be held at the Harrigan Centennial Hall, 330 Harbor Drive, Sitka, AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Council staff, telephone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The Council's Scientific and Statistical Committee (SSC) will begin at 8 a.m. on Wednesday, September 5, and continue through Thursday, September 6. The Advisory Panel (AP) will begin at 8 a.m., Thursday, September 6, and continue through Saturday, September 8, 2001. The Council will begin its plenary session at 8 a.m. on Friday, September 7, continuing through Sunday, September 9, 2001. All meetings are open to the public except executive sessions which may be held during the week at which the Council may discuss personnel issues and/or current litigation.

Council: The sole purpose of these meetings is to review the Draft Supplemental Environmental Impact Statement (DSEIS) and associated Draft Biological Opinion (BiOp) for Steller sea lion protection measures in the Federal groundfish fisheries off Alaska, and send them out for public review. The agenda for the SSC, AP, and Council will consist of staff reports on Steller sea

lion issues and initial review of Reasonable and Prudent Alternatives for management of the 2002 Gulf of Alaska and Bering Sea/Aleutian Islands groundfish fisheries. Final action will be taken at the Council's October 3–8, 2001 meeting in Seattle, Washington.

Newly-appointed Council members will also be sworn in at the meeting and the Council will elect a Chair and Vice-chair for the next year.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Helen Allen at 907–271–2809 at least 7 working days prior to the meeting date.

Dated: August 10, 2001.

Richard W. Surdi,

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

[FR Doc. 01–20919 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Commission On Ocean Policy Inaugural Public Meeting

AGENCY: National Ocean Service, National Oceanic and Atmospheric Administration, DOC, on behalf of Council on Environmental Quality and the Commission on Ocean Policy.

ACTION: Notice of Inaugural Public Meeting.

SUMMARY: On behalf of the recently appointed Commission on Ocean Policy, the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, is hereby announcing the Commission's first public meeting. The first meeting will be on Monday and Tuesday, September 17 and 18, 2001. The meeting will begin at 10 a.m. on September 17, and conclude at 5 p.m. The Commission will reconvene at 9 a.m. on September 18 and meet until 5p.m. The meeting will be held in the U.S. Department of Commerce auditorium, Herbert C. Hoover Building, 14th Street and Constitution Ave., NW., Washington, DC.

The Commission on Ocean Policy is holding this public meeting pursuant to requirements under the Oceans Act of 2000 (Public Law 106–256, Section 3(e)(1)(E)). This is the first meeting of the Commission on Ocean Policy. The agenda will include welcoming remarks, an overview of the Oceans Act, discussion of the Commission's responsibilities, and organizing the efforts of the Commission. Further information is available at the following preliminary Web site, *http://oceancommission.gov,* which will be available on or before Friday, September 7, 2001.

The National Oceanic and Atmospheric Administration, U.S. Department of Commerce, is providing this notice at the request of the Council on Environmental Quality and under legislation providing FY1998 appropriations for NOAA, H.R. 2267 (Public Law 105–119), and the accompanying conference report (105–405). The report specifies that funding has been appropriated to NOAA's National Ocean Service ''to provide support for the Commission on Ocean Policy, a commission which will examine both Federal and non-Federal ocean and coastal activities, and report to the Congress and the President.''

FOR FURTHER INFORMATION CONTACT: Glen Boledovich, National Oceanic and Atmospheric Administration, 1305 East-West Highway, SSMC 4, Room 13313, Silver Spring, MD 20910, 301–713–3070 ext. 193, *Glenn.Boledovich@noaa.gov.*

Jamison S. Hawkins,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 01–20877 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–JE–M

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. 010731195–1195–01]

RIN 0651–AB25

Notice of Hearing and Request for Comments on Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of Hearing and Request for Comments.

SUMMARY: The Hague Conference on Private International Law is negotiating a Convention designed to create common jurisdiction rules for international civil and commercial cases and to provide for international recognition and enforcement of judgments issued under these rules. The United States Patent and Trademark Office (USPTO) is seeking views of the public on recent developments on this effort. Interested members of the public are invited to testify at a hearing to be held September 11, 2001, and to present written comments on any of the topics outlined in the supplementary information section of this notice or otherwise related to the proposed Convention.

DATES: A public hearing will be held on September 11, 2001, starting at 9:30 a.m. and ending no later than 5:00 p.m. Those wishing to testify must request an opportunity to do so no later than August 31, 2001. Speakers may provide a written copy of their testimony for inclusion in the record. Written comments should be submitted on or before October 19, 2001.

ADDRESSES: The September 11 hearing will be held in the Patent Theater located on the Second Floor of Crystal Park 2, 2121 Crystal Drive, Arlington, Virginia. Persons interested in testifying should send their request to Director of the United States Patent and Trademark Office, Box 4, United States Patent and Trademark Office, Washington, DC 20231, marked to the attention of Anggie Reilly. Requests may also be submitted by facsimile transmission to (703) 305–8885 or by electronic mail through the Internet to anggie.reilly@uspto.gov.

Persons interested in submitting written comments should send their comments to Director of the United States Patent and Trademark Office, Box 4, United States Patent and Trademark Office, Washington, DC 20231, marked to the attention of Velica Steadman. Comments may also be submitted by facsimile transmission to (703) 305–8885 or by electronic mail through the Internet to velica.steadman@uspto.gov. All comments will be maintained for public inspection in Room 902 of Crystal Park 2, 2121 Crystal Drive, Arlington, Virginia. Written comments in electronic form will be made available via the USPTO's World Wide Web site at http://www.uspto.gov.

FOR FURTHER INFORMATION CONTACT: Jennifer Lucas by telephone at (703) 305–9300, by facsimile at (703) 305–

8885; by electronic mail at jennifer.lucas@uspto.gov; or by mail marked to the attention of Jennifer Lucas, Attorney-Advisor, addressed to Director of the United States Patent and Trademark Office, Box 4, Washington, DC 20231.

SUPPLEMENTARY INFORMATION

Background

The Hague Conference on Private International Law is negotiating a Convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters. The proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters would create jurisdictional rules governing international lawsuits and provide for recognition and enforcement of judgments by the courts of Contracting States. Contracting States would be required to recognize and enforce judgments covered by the Convention if the jurisdiction in the court rendering the judgment was founded on one of the bases of jurisdiction required by the Convention. In addition, some existing domestic bases of jurisdiction would be prohibited by the Convention for cases covered thereby.

The negotiations began in 1992, based on a proposal made by the United States. The impetus behind the request was to gain recognition and enforcement of U.S. judgments in other countries. While U.S. Federal courts generally will recognize and enforce judgments from other countries under state law (*see Hilton* v. *Guyot*, 159 U.S. 113 (1895)), U.S. judgments do not always receive the same treatment abroad. In October 1999, the Hague Conference published a draft Convention that was to be finalized at a Diplomatic Conference scheduled for October 2000, but in May 2000 that Diplomatic Conference was postponed to give member countries more time to discuss unsettled issues.

Two particular topics that the Hague Conference has singled out for further discussion are intellectual property and electronic commerce. Recognizing the importance of concerns that had been raised about the impact of the Convention on these matters, in 1999 the Conference agreed to hold informal meetings of international experts to examine the relevant issues in those categories. Two meetings of experts on electronic commerce were held to discuss the effect that electronic commerce might have on traditional jurisdictional rules. In addition, a meeting of intellectual property experts was held in February 2001 in Geneva, Switzerland.

On October 17, 2000, the USPTO published a Request for Comments seeking views on the impact that the October 1999 draft of the proposed Convention would have on intellectual property-related litigation (65 FR 61306 (2000)). The responses to the Request for Comments are available at the USPTO's Web site at http://www.uspto.gov.

The responses indicated that, while uniform rules on jurisdiction and enforcement of judgments might be welcome in the abstract, the problems with the jurisdictional provisions in the October 1999 draft outweighed any benefits that the enforcement provisions would offer. One of the primary flaws asserted about the October 1999 draft was that international developments such as the advent of the Internet and e-commerce have called into question some of the jurisdictional rules that serve as the basis for the proposed Convention.

After postponing the October 2000 Diplomatic Conference, the Hague Conference scheduled a two-part Diplomatic Conference, with meetings to be held in June 2001 and early 2002.

The first session was held June 6–22, 2001, in The Hague, Netherlands. The goal of the Diplomatic Conference was to draft a new, consensus-based text to replace the October 1999 draft. The result was a long compilation text that captures consensus where it exists, and presents proposals, variants, and options on issues where there was no consensus. The text also is heavily footnoted to illuminate additional points. This text is lengthy and makes it clear that there are a considerable number of large and small issues, including those involving intellectual property, on which Members are not in agreement and on which much work is still necessary. The text of the proposed Convention and other documents relating to the proposal are available via the Hague Conference's Web site at *http://www.hcch.net/e/workprog/jdgm.html*.

At the end of the Diplomatic Conference, the delegates were unable to decide how to move the negotiations forward. They agreed to reconvene, probably in late January 2002, to decide the scope of future negotiations—whether to continue the full project, refocus or scale it back in some way, or suspend it—and the schedule for any future negotiations based on the decision made.

Brief Summary of Draft Convention

As it stands, the draft Convention would create three categories of jurisdiction for cases covered by the Convention: (1) Required bases for jurisdiction, or, as they are referred to by the Hague Conference, the ''white list''; (2) prohibited bases for jurisdiction, or the ''black list''; and (3) everything else not covered by the white or black lists, or the ''gray list.'' The draft Convention would, with some exceptions, apply whenever any one party to litigation is not habitually resident in the country where the litigation is brought (see Article 2 of the draft).

The ''white list'' sets out jurisdictional rules for specific types of actions, such as contract and tort actions or disputes filed in the court of the defendant's ''habitual residence.'' If a court exercises jurisdiction in accordance with the rules set out in the white list, courts in other Contracting States must recognize and enforce the resulting judgment, with limited exceptions.

Another example of a white list ground of jurisdiction is found in proposed Article 12, which would create exclusive jurisdiction over specified patent and trademark disputes. The draft presents two options for how to treat patents, trademarks, and potentially other types of industrial property. The main difference between the two is the fact that the first option provides for exclusive jurisdiction over patent and trademark infringement actions while the second option does not.

The first option creates exclusive jurisdiction for disputes over the grant, registration, validity, abandonment, revocation, or infringement of a patent or trademark in the country of registration or, for unregistered marks, the country in which the rights arose. The second option would create exclusive jurisdiction for disputes over the grant, registration, validity, abandonment, or revocation of a patent or trademark; however, it would allow courts referred to in any of the other white list provisions also to exercise jurisdiction over patent or trademark infringement actions.

Three additional provisions in Article 12 related to patent or trademark disputes are in brackets with footnotes for further consideration. First, the draft provides for an exception to exclusive jurisdiction for incidental questions, which are defined as when ''the court is not requested to give a judgment on that matter, even if a ruling on it is a necessary step in the reasoning that leads to the judgment.'' For example, in some court proceedings, such as a breach of contract or a legal malpractice proceeding, the grant, registration, validity, abandonment, revocation or infringement of a patent or mark might

arise as an incidental question to the main complaint. Proposed Article 12(6) would allow a court that otherwise would have no jurisdiction over an industrial property question to decide that question as a factual determination in the underlying case. Such a ruling would have no binding effect in subsequent proceedings regarding the subject patent or trademark, even between the same parties.

Second, it has been suggested in proposed Article 12(7) that other intellectual property rights, such as plant breeders rights and industrial designs but excluding copyrights or neighboring rights, be covered. Finally, as seen in proposed Article 12(8), the draft questions whether the term ''court'' should include a Patent Office or similar agency for the purpose of recognizing their judgments.

Proceedings related to copyrights could fall under any of the white list grounds of jurisdiction. For instance, copyright infringement proceedings could be covered by the jurisdiction rules for tort actions found in Article 10. Article 10 provides for jurisdiction either in the State in which the act or omission occurred, or the State in which the injury arose so long as the injury in that State was reasonably foreseeable. A proposal, however, was made at the Diplomatic Conference that would have included copyright infringement in the exclusive jurisdiction provision. That issue is still open for discussion.

Proposed Article 13 consists of two alternatives that would create a white list ground of jurisdiction for provisional and protective measure orders under enumerated circumstances. It has been proposed, however, that provisional and protective measures either be excluded from the scope of the proposal (Article 1) or be included in the gray area (Article 17).

Other areas of particular interest to intellectual property holders and users are proposed provisions that would create white list jurisdiction for choice of court clauses in contracts (Article 4), contracts (Article 6), consumer contracts (Article 7) and employment contracts (Article 8).

The ''black list,'' currently Article 18, defines grounds of jurisdiction that are prohibited in Contracting States for cases covered by the Convention. Article 18(1) would place a general limitation on the exercise of jurisdiction based on the absence of a ''substantial connection between that State and the dispute.'' Article 18(2)(e) is of particular interest to U.S. litigants. It states that jurisdiction cannot be based solely on the fact that a defendant carries on commercial or other activities in that State, except where the dispute is directly related to those activities. This provision would prohibit the exercise of general ''doing business'' jurisdiction as currently recognized under U.S. law. Article 18(2) also would prohibit the exercise of ''tag'' jurisdiction in a court based on service upon the defendant in the State.

Everything that does not fall under either of these categories is included in the ''gray area'' as defined in Article 17. Countries can continue to act as they normally do under their respective national laws; however, judgments resulting from actions covered by this provision would not get the benefits of recognition and enforcement under the Convention.

The second half of the Convention provides rules governing the recognition and enforcement of judgments based on a ground of jurisdiction provided for in the white list (Articles 3–16). This includes provisions on topics such as dismissal in favor of a previously filed action in another court (known as ''lis pendens'') (Article 21), forum non conveniens (Article 22), types of judgments to be recognized or enforced (Article 25), grounds for refusal of recognition (Article 28), and damages (Article 33).

Issues for Public Comment

The USPTO wants to assess support for or opposition to the effort to negotiate a convention on jurisdiction and enforcement of judgments and to obtain comments and suggestions on the proposed Convention as it relates to intellectual property. Interested members of the public are invited to present oral or written comments on any issues they believe to be relevant to protection of intellectual property or any aspect of the proposed Convention as it relates to intellectual property. The USPTO reserves the right to limit the number of oral comments presented if necessary due to time constraints at the hearing, but will accept and consider all written comments submitted. Comments also are welcome on the following specific issues:

1. What are your experiences in having judgments involving intellectual property from one jurisdiction recognized in a foreign court? Have you had different experiences in having those judgments recognized in U.S. courts? In your response, please identify whether you generally represent intellectual property owners, licensees, users, or others.

2. Are uniform rules for international enforcement of judgments desirable?

3. Would the elimination of ''tag'' or general ''doing business'' jurisdiction have any impact on intellectual property owners' ability to protect their rights either domestically or internationally?

4. What effect, if any, could this Convention have on an owner's ability to enforce its intellectual property rights for uses over the Internet?

5. Is exclusive white list jurisdiction needed for infringement actions involving patents, trademarks, and/or copyrights?

6. Should non-exclusive white list jurisdiction apply, per proposed Article 12(6), to matters that otherwise would be covered by Article 12 when they arise as incidental questions in proceedings that do not have as their object the grant, registration, abandonment, revocation or infringement of a patent or trademark?

7. If you responded yes to Question 6, should the court's decision regarding the incidental question have preclusive effect in a court of other Contracting States? What about courts in the same Contracting State?

8. What other registered intellectual property, if any, should be subject to the exclusive jurisdiction provisions?

9. What other unregistered intellectual property, if any, should be subject to the exclusive jurisdiction provisions?

10. How should other intellectual property or related actions, such as passing off, unfair competition, cybersquatting and dilution complaints, be treated under the Convention?

11. Should provisional and protective measures be covered by the Convention, specifically excluded from the Convention, or left to current national law?

12. Does the draft Convention affect in any way the substantive law that applies to an activity of any party with respect to intellectual property?

13. How will the draft Convention provisions affect traditional contractual freedom for parties to enter into agreements that typically designate choice of forum and law?

14. Should jurisdiction over actions involving intellectual property be included within the scope of the Convention? If no, please explain which types of intellectual property should be excluded and why.

15. Please identify any other potential concerns or advantages raised by the draft Convention and ways it might be modified to achieve an identified objective.

In your response, please include the following: (1) Clearly identify the matter being addressed; (2) Provide examples, where appropriate, of the matter being addressed; (3) Identify any relevant legal

authorities applicable to the matter being addressed; and (4) Provide suggestions regarding how the matter should be addressed by the United States.

Dated: August 14, 2001.

Nicholas P. Godici,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. 01–20916 Filed 8–17–01; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 19, 2001.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: August 14, 2001.

John Tressler,

Leader, Regulatory Information Management, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: Reinstatement.

Title: Consolidated State Performance Report and State Self-Review.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 52.

Burden Hours: 134,768.

Abstract: This information collection package contains two related parts: The Consolidated State Performance Report (CSPR) and the State Self-Review (SSR). The Elementary and Secondary Education Act (ESEA), in general, and its provision for submission of consolidated plans, in particular (see section 14301 of the ESEA), emphasize the importance of cross-program coordination and integration of federal programs into educational activities carried out with State and local funds. States would use both instruments for reporting on activities that occur during the 2000–2001 school year and, if the ESEA, when reauthorized, does not become effective for the 2001–2002 school year, for that year as well. The proposed CSPR requests most of the same information as in 1999–2000, with a few modifications to cover new programs and new emphases. The proposed SSR deletes several questions from the previous version and has no new information requests. When the ESEA is reauthorized, the Department intends to work actively with the public to revise the content of these documents and develop an integrated information collection system that responds to the new law, uses new technologies, and better reflects how federal programs help to promote State and local reform efforts.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO_IMG_Issues@ed.gov or faxed to 202–708–9346.

Please specify the complete title of the information collection when making your request. (540) 776–7742 or via her internet address Kathy.Axt@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 01–20863 Filed 8–17–01; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–247 and EA–248]

Application To Export Electric Energy; AES NewEnergy, Inc.

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of Application.

SUMMARY: Under two separate applications, AES NewEnergy, Inc. (AES NewEnergy) has applied for authority to transmit electric energy from the United States to Mexico and from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before September 19, 2001.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–6667.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. § 824a(e)).

On July 13, 2001, the Office of Fossil Energy (FE) of the Department of Energy (DOE) received two separate applications from AES NewEnergy for authorization to transmit electric energy from the United States to Mexico and from the United States to Canada. AES NewEnergy, a Delaware corporation and wholly-subsidiary of the AES Corporation, a public utility holding company, is a power marketer that does not own or control any electric generation or transmission facilities nor

does it have any franchised service territory in the United States

In FE Docket No. EA–247, AES NewEnergy proposes to export electric energy to Mexico and to arrange for the delivery of those exports to Mexico over the international transmission facilities owned by San Diego Gas and Electric Company, El Paso Electric Company, Central Power and Light Company, and Comision Federal de Electricidad, the national utility of Mexico. In FE Docket No. EA–248, AES NewEnergy proposes to export electric energy to Canada and to arrange for the delivery of those exports to Canada over the international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Citizens Utilities, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power, Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company.

The construction of each of the international transmission facilities to be utilized by AES NewEnergy, as more fully described in the applications, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters: Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to these applications should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the date listed above.

Comments on the AES NewEnergy applications to export electric energy to Mexico and/or Canada should be clearly marked with Docket EA–247 and/or Docket EA–248, respectively. Additional copies are to be filed directly with Cathy Barron, AES NewEnergy, Inc., 535 Boylston Street, Top Floor, Boston, Massachusetts 02116 *and* R. Michael Sweeney, Jr., Troutman Sanders LLP, 401 9th Street, NW., Ste. 1000, Washington, DC 20004.

A final decision will be made on these applications after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of these applications will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://www.fe.doe.gov.* Upon reaching the Fossil Energy Home page, select ''Regulatory'' Programs,'' then ''Electricity Regulation,'' and then ''Pending Proceedings'' from the options menus.

Issued in Washington, DC, on August 9, 2001.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 01–20900 Filed 8–17–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Availability of the Draft Environmental Impact Statement for the Proposed Relocation of Technical Area 18 Capabilities and Materials

AGENCY: Department of Energy, National Nuclear Security Administration.

ACTION: Notice of availability and public hearings.

SUMMARY: The National Nuclear Security Administration, a separately organized agency within the Department of Energy (DOE), announces the availability of the Draft Environmental Impact Statement (EIS) for the Proposed Relocation of Technical Area 18 Capabilities and Materials (hereafter referred to as the TA–18 Relocation Draft EIS), and the dates and locations for public hearings to receive comments on the TA–18 Relocation Draft EIS. The principal activities at TA–18 involve research, design, development, construction, and application of experiments on nuclear criticality. The TA–18 Relocation Draft EIS evaluates the environmental impacts associated with relocating the TA–18 capabilities and materials to the following alternative locations: (1) A different site at Los Alamos National Laboratory (LANL) (the preferred alternative) at Los Alamos, New Mexico; (2) the Nevada Test Site (NTS) near Las Vegas, Nevada; (3) the Sandia National Laboratory (SNL) at Albuquerque, New Mexico; and (4) the Argonne National Laboratory-West (ANL–W) near Idaho Falls, Idaho. The TA–18 Relocation Draft EIS also evaluates the alternative of upgrading the existing facilities at TA–18, and the no-action alternative of maintaining the missions in the existing TA–18 facilities without upgrades.

DATES: Comments on the TA–18 Relocation Draft EIS are invited from the public. To ensure consideration in the preparation of the TA–18 Relocation Final EIS, comments must be received or postmarked by October 5, 2001. Late comments will be considered to the extent practicable. Public hearings to discuss issues and receive comments on the TA–18 Relocation Draft EIS will be held in the vicinity of sites that may be affected by the proposed action. The public hearings, to be held September 11–19, 2001, will provide the public with an opportunity to present comments, ask questions, and discuss concerns with DOE/NNSA officials regarding the TA–18 Relocation Draft EIS. The locations, dates, and times for these public hearings are identified in the Supplementary Information.

ADDRESSES: A copy of the TA–18 Relocation Draft EIS or its Summary may be obtained upon request in writing (U.S. Department of Energy, TA–18 Relocation Draft EIS, Attn: Mr. Jay Rose, DP–42, 1000 Independence Avenue, SW., Washington, DC 20585), by fax (202–586–0467), by toll-free telephone (1–866–357–4345), or by E-mail (James.Rose@ns.doe.gov). Specific information regarding the public hearings can also be obtained by the means described above. Comments concerning the TA–18 Relocation Draft EIS can also be submitted by the means described above. Please mark envelopes, faxes, and E-mail: ''TA–18 Relocation Draft EIS Comments.''

FOR FURTHER INFORMATION CONTACT: For general information on the NNSA NEPA process, please contact: Mr. Henry Garson, NEPA Compliance Officer for Defense Programs, U.S. DOE/NNSA, 1000 Independence Avenue, SW., Washington, DC 20585; or telephone 1–800–832–0885, ext. 30470. For general information on the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U.S. DOE, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202–586–4600, or leave a message at 1–800–472–2756.

SUPPLEMENTARY INFORMATION: The NNSA is responsible for providing the Nation with nuclear weapons, ensuring the safety and reliability of those nuclear weapons, and supporting programs that reduce global nuclear proliferation. These missions are accomplished through the use of a core

team of highly trained nuclear experts. One of the major training facilities for these experts is located at TA–18 at LANL. The principal TA–18 activities are the design, construction, research, development, and applications of experiments on nuclear criticality.

The TA–18 buildings and infrastructure are near the end of their useful life, and action is required to assess alternatives for continuing these activities for the next 25 years. The TA–18 Relocation Draft EIS identifies siting options to assist the NNSA in determining a long-range strategy for maintaining nuclear criticality missions, infrastructure, and expertise currently residing at TA–18.

The TA–18 Relocation Draft EIS evaluates the potential direct, indirect, and cumulative environmental impacts associated with relocating the TA–18 mission to the following DOE sites: (1) A different site at LANL (the preferred alternative); (2) NTS; (3) SNL; and (4) ANL–W. The TA–18 Relocation Draft EIS also analyzes upgrading the TA–18 facilities at LANL and the no-action alternative of maintaining the operations at the current TA–18 location without upgrades.

The NNSA is inviting members of Congress, American Indian Tribal Governments, state and local governments, other Federal agencies, and the general public to provide comments on the TA–18 Relocation Draft EIS. The comment period runs until October 5, 2001. The Department will consider all comments received or postmarked by October 5, 2001, in preparing the TA–18 Relocation Final EIS. Comments postmarked after that date will be considered to the extent practicable. As part of the public comment period on the TA–18 Relocation Draft EIS, public hearings will be held as follows:

Argonne National Laboratory— West—September 11, 2001, 7:00 p.m.–10:00 p.m., The Shilo Inn, 780 Lindsay Blvd., Idaho Falls, ID 83402.

Nevada Test Site—September 13, 2001, 7:00 p.m.–10:00 p.m., U.S. DOE Nevada Operations Office Auditorium, 232 Energy Way, North Las Vegas, NV 89030.

Los Alamos National Laboratory—September 18, 2001, 7:00 p.m.–10:00 p.m., Fuller Lodge, 2132 Central Avenue, Los Alamos, NM 87544.

Sandia National Laboratory—September 19, 2001, 7:00 p.m.–10:00 p.m., Albuquerque Convention Center, 401 Second Street, NW., Albuquerque, NM 87102.

The TA–18 Relocation Final EIS is expected to be completed by December 31, 2001. A Record of Decision would be completed no sooner than 30 days after the TA–18 Relocation Final EIS is issued.

Signed in Washington, D.C. this 14th day of August, 2001.

Kathleen A Carlson,

Acting Deputy Administrator for Defense Programs, National Nuclear Security Administration, Department of Energy.

[FR Doc. 01–20899 Filed 8–17–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy

[FE Docket No. 01–35–NG, 01–32–LNG and 01–36–NG]

Mexicana de Cobre, S.A. de C.V., Williams Energy Marketing Trading Company, TX Energy Trading Company; Orders Granting and Amending Authority To Import and Export Natural Gas, Including Liquefied Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of Orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during June 2001, it issued Orders granting authority to import and export natural gas, including liquefied natural gas. These Orders are summarized in the attached appendix and may be found on the FE web site at http://www.fe.doe.gov (select gas regulation), or on the electronic bulletin board at (202) 586–7853. They are also available for inspection and copying in the Office of Natural Gas & Petroleum Import & Export Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on August 10, 2001.

Clifford P. Tomaszewski,

Manager, Natural Gas Regulation, Office of Natural Gas & Petroleum Import & Export Activities, Office of Fossil Energy.

Attachment

APPENDIX—ORDERS GRANTING IMPORT/EXPORT AUTHORIZATIONS

Order No.	Date Issued	Importer/Export FE Docket No.	Import volume	Exporter Volume	Comments
1697	07–02–01	Mexicana De Cobre, S.A. DE C.V., 01–35–NG.		17.2 Bcf	Export to Mexico beginning on April 27, 2001, and extending through April 26, 2003.
1698	07–02–01	Williams Energy Marketing & Trade Company, 01–32–LNG.	160 Bcf		Import LNG from Nigeria, Algeria, Abu Dhabi, Qatar, and Trinidad, over a two-year term beginning on the date of first delivery.
1699	07–13–01	TXU Energy Trading Company, 01–36–NG.	20 Bcf		Import and export a combined total from and to Canada and Mexico, beginning on July 27, 2001, and extending through July 26, 2003.

[FR Doc. 01–20901 Filed 8–17–01; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency Information Collection Activities: Proposed Collection; Comment Request.

SUMMARY: The EIA is soliciting comments on the proposed three-year extension to the Form FE–746R, ''Import and Export of Natural Gas.''

DATES: Comments must be filed on or before October 19, 2001. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Yvonne Caudillo, Office of Fossil Energy, FE–34, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Yvonne Caudillo may be contacted by telephone at (202) 586–4587, FAX at (202) 586–4062, or e-mail at yvonne.caudillo@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions should be directed to Yvonne Caudillo at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. No. 93–275, 15 U.S.C. 761 et seq.) and the DOE Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7101 et seq.) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demand.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Any comments received help the EIA to prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, the EIA will later seek approval by the Office of Management and Budget (OMB) of the collections under section 3507(a) of the Paperwork Reduction Act of 1995.

The Office of Fossil Energy (FE) of the Department of Energy is delegated the authority to regulate natural gas imports and exports under section 3 of the Natural Gas Act of 1938, 15 U.S.C. 717b.

In order to carry out its delegated responsibility, FE requires those persons seeking to import or export natural gas to file an application containing basic information about the scope and nature of the proposed import/export activity. FE collects, on a quarterly basis, certain information regarding import and export transactions. The information obtained quarterly from authorization holders is used to ensure compliance with any terms and conditions of authorization. In addition, the data are used to monitor North American natural gas trade, which in turn enables the Federal Government to perform market and regulatory analyses; improve the capability of industry and the Government to respond to any future energy-related supply problems; and keep the general public informed of international natural gas trade.

II. Current Actions

FE is proposing a three-year extension, without change, of the currently approved Form FE–746R.

III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments.

General Issues

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility? Practical utility is defined as the actual usefulness of information to or for an agency, taking into account its accuracy, adequacy, reliability, timeliness, and the agency's ability to process the information it collects.

B. What enhancements can be made to the quality, utility, and clarity of the information to be collected?

As a Potential Respondent to the Request for Information

A. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

B. Can the information be submitted by the due date?

C. Public reporting burden for this collection is estimated to average between 8 hours (for short-term authorizations of up to two years) to 24 hours for long-term authorizations (over 2 years). The public reporting burden for the quarterly reports after authorization is estimated to range from 0.25 of an hour to 8 hours per response, with an average burden of 2 hours. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

D. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

E. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

F. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

As a Potential User of the Information to be Collected

A. Is the information useful at the levels of detail to be collected?

B. For what purpose(s) would the information be used? Be specific.

C. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13, 44 U.S.C. Chapter 35).

Issued in Washington, DC, August 13, 2001
.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 01–20902 Filed 8–17–01; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER01–1701–000 and ER01–1701–001]

Callaway Golf Company; Notice of Issuance of Order

August 14, 2001.

Callaway Golf Company (Callaway) submitted for filing a rate schedule under which Callaway will engage in wholesale electric power and energy transactions at market-based rates. Callaway also requested waiver of various Commission regulations. In particular, Callaway requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Callaway.

On June 26, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Callaway should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., 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).

Absent a request to be heard in opposition within this period, Callaway is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Callaway and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Callaway's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is September 13, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the on the web at *http://www.ferc.gov* using the 'RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–20852 Filed 8–17–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER01–1916–000]

RAMCO, Inc; Notice of Issuance of Order

August 14, 2001.

RAMCO, Inc. (RAMCO) submitted for filing a rate schedule under which RAMCO will engage in wholesale electric power and energy transactions at market-based rates. RAMCO also requested waiver of various Commission regulations. In particular, RAMCO requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by RAMCO.

On June 26, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by RAMCO 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).

Absent a request to be heard in opposition within this period, RAMCO is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of RAMCO and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of RAMCO's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is September 13, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–20854 Filed 8–17–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER01–2234–000]

Travis Energy and Environment, Inc.; Notice of Issuance of Order

August 14, 2001

Travis Energy and Environment, Inc. (Travis) submitted for filing a rate schedule under which Travis will engage in wholesale electric power and energy transactions at market-based rates. Travis also requested waiver of various Commission regulations. In particular, Travis requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Travis.

On June 26, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Travis 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).

Absent a request to be heard in opposition within this period, Travis is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Travis and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Travis' issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is September 13, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–20853 Filed 8–17–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–28–005]

Wyoming Interstate Company, Ltd.; Notice of Compliance Filing

August 13, 2001.

Take notice that on July 30, 2001, Wyoming Interstate Company, Ltd (WIC) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 2, the following tariff sheets to become effective August 17, 2001:

Original Sheet Nos. 108–114

WIC states that the above tariff sheets are being filed to implement seven new negotiated rate contracts related to the Medicine Bow Loop Lateral currently under construction.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket #'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–20851 Filed 8–17–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG01–209–000, *et al.*]

Indian River Power, LLC, et al.; Electric Rate and Corporate Regulation Filings

August 14, 2001.

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

1. Indian River Power, LLC

[Docket No. EG01–209–000]

On August 9, 2001, Indian River Power, LLC (Indian River) submitted an amendment to its application for determination of exempt wholesale generator status, concerning certain licenses associated with the Indian River facilities.

Comment date: September 4, 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.

2. South Houston Green Power, L.P.

[Docket No. EG01–231–000]

On August 9, 2001, South Houston Green Power, L.P. (the Applicant), with its principal office at 139 East Fourth Street, Cincinnati, Ohio 45202, filed with the Commission an amendment to its application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Applicant states that it is a Delaware limited partnership engaged directly and exclusively in the business of holding ownership and license interests in several gas-fired cogeneration facilities located in the Texas City, Texas, with an aggregate capacity of approximately 248MW. Electric energy produced by the facility will be sold at wholesale or at retail exclusively to foreign consumers.

Comment date: September 4, 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. Pacific Gas and Electric Company

[Docket No. ER01–833–000]

Take notice that on August 8, 2001, Pacific Gas and Electric Company (PG&E) tendered for filing a Further Request for Deferral of Consideration of the unexecuted Wholesale Distribution Tariff Service Agreement and Interconnection Agreement between Pacific Gas and Electric Company and Modesto Irrigation District (MID) filed in FERC Docket No. ER01–833–000 on December 29, 2000. PG&E and Modesto are still discussing the final terms of these Agreements and PG&E therefore is notifying the Commission that the executed WDT and IA will not be filed by August 14, 2001, the requested deferral date. PG&E requests that the Commission defer consideration of the WDT Service Agreement and IA filed in ER01-833-000 to October 14, 2001 or 60 days beyond the last request for Deferral in order that the parties may finalize the Agreements.

Copies of this filing have been served upon MID, the California Independent System Operator Corporation, and the California Public Utilities Commission.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Southwest Power Pool, Inc.

[Docket No. ER01–1989–003]

Take notice that on August 8, 2001, Southwest Power Pool, Inc. (SPP) submitted the compliance filing required by the Commission's order of July 9, 2001 in the referenced proceeding. SPP requests an effective date of June 1, 2001 for the changes reflected in this filing.

Copies of this filing were served on all parties on the Commission's official service list in this proceeding, on all SPP transmission customers and on all affected state commissions.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. South Carolina Electric & Gas Company

[Docket Nos. ER01–2030–001, ER01–2109–001, ER01–2110–001, ER01–2177–001]

Take notice that on August 9, 2001 South Carolina Electric & Gas Company (SCE&G) submitted for filing in compliance with the requirements of the Commission's July 10 Letter Order in Docket Nos. ER01–2030–000 et al. its Negotiated Market Sales Tariff, designated as South Carolina Electric & Gas Company FERC Electric Tariff, Third Revised Volume No. 2, and the service agreements with Central Electric Power Cooperative, Inc., Florida Power Corporation, Mirant Americas Energy Marketing, LP and the City of Orangeburg, South Carolina which have been revised to incorporate the designation information required by Order No. 614.

SCE&G states that a copy of this filing has been served on each person designated on the official service list in Docket Nos. ER01–2030–000, ER01–2109–000, ER01–2110–000 and ER01–2177–000 and on Central Electric Power Cooperative, Inc., Florida Power Corporation, Mirant Americas Energy Marketing, LP and the City of Orangeburg, South Carolina.

Comment date: August 30, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Central Maine Power Company

[Docket No. ER01–2032–001]

Take notice that Central Maine Power Company (CMP), on August 8, 2001, tendered for filing in compliance with the Federal Energy Regulatory Commission's (FERC or Commission) order issued July 12, 2001 in Docket No. ER01–2032–000, a ''First Amendment Agreement'' (the Amendment) between CMP and Calpine Construction Finance, L.P. (Calpine). In accordance with Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000), CMP also tendered for filing a First Revised Interconnection Agreement (the First Revised Agreement), revised pursuant to the Amendment.

CMP respectfully requests that the Commission accept the Amendment and the First Revised Agreement effective as of July 12, 2001, without modification or condition, and grant waiver of any and all requirements, including the Commission's notice requirements for good cause, for these agreements to become effective. Copies of this filing have been served on Calpine and the State of Maine Public Utilities Commission.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. New England Power Pool

[Docket Nos. ER01–2144–002]

Take notice that on August 8, 2001, the New England Power Pool (NEPOOL) Participants Committee submitted a report of compliance in response to requirements of the Commission's July 24, 2001 order in Docket No. ER01–2144–000. New England Power Pool, 96 FERC 61,098 (2001).

The NEPOOL Participants Committee states that copies of these materials were sent to all persons identified on the service lists in the captioned proceedings, the NEPOOL Participants and the six New England state governors and regulatory commissions.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. PacifiCorp

[Docket No. ER01–2501–002]

Take notice that on July 31, 2001, PacifiCorp tendered for filing signature pages evidencing the execution of Amendatory Agreement No. 5, to the Pacific Northwest Coordination Agreement dated September 15, 1964.

Comment date: August 24, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Combined Locks Energy Center, L.L.C.

[Docket No. ER01–2659–001]

Take notice that on August 8, 2001, Combined Locks Energy Center, L.L.C., filed a request to change the requested effective date for the above-captioned market-based rate application from September 22, 2001 to September 4, 2001.

Copies of the filing were served upon the Public Service Commission of Wisconsin.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Southern Company Services, Inc.

[Docket No. ER01–2798–000]

Take notice that on August 8, 2001, Southern Company Services, Inc. (SCS), acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively referred to as Southern Company), filed three (3) service agreements for firm point-to-point transmission service under the Open Access Transmission Tariff (Tariff) of Southern Company (FERC Electric Tariff, Fourth Revised Volume No. 5) between SCS, as agent for Southern Company, and the following Transmission Customers (i) East Kentucky Power Cooperative, Inc. (East Kentucky); (ii) FPL Energy Power Marketing, Inc. (FPL Energy); and (iii) Exelon Generation Company, LLC (Exelon). Additionally, the SCS, on behalf of Southern Company, filed three (3) non-firm point-to-point transmission service agreements under the Tariff with (i) East Kentucky; (ii) FPL Energy; and (iii) Exelon.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. American Electric Power Service Corporation

[Docket No. ER01–2801–000]

Take notice that on August 8, 2001, the American Electric Power Corporation (AEPSC) tendered for filing executed Facilities Agreement between Ohio Power Company and Jackson County Power, LLC. The agreement is pursuant to the AEP Companies' Open Access Transmission Service tariff (OATT) that has been designated as the Operating Companies of the American Electric Power System FERC Electric Tariff Revised Volume No. 6, effective June 15, 2000. A copy of the filing was served upon the Ohio Public Utilities Commission.

AEP requests an effective date of October 7, 2001.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. New England Power Company

[Docket No. ER01–2802–000]

Take notice that on August 8, 2001, New England Power Company (NEP) submitted twenty-two revised Service Agreements for Network Integration Transmission Service (Service Agreements) between NEP and its municipal customers. The Service Agreements are under NEP's open access transmission tariff—New England Power Company, FERC Electric Tariff, Second Revised Volume No. 9.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Niagara Mohawk Power Corporation

[Docket No. ER01–2803–000]

Take notice that on August 6, 2001, Niagara Mohawk Power Corporation (Niagara Mohawk) tendered for filing with the Federal Energy Regulatory

Commission an executed Transmission Service Agreement between Niagara Mohawk and PG&E Energy Trading B Power, L.P. (PGET). This Transmission Service Agreement specifies that PGET has signed on to and has agreed to extend its existing transmission service under the terms and conditions of Niagara Mohawk's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. Niagara Mohawk has served copies of the filing upon the New York State Public Service Commission, PGET, The New York Independent System Operator, and the New York State Electric & Gas Corporation.

Niagara Mohawk requests an effective date of September 1, 2001.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. Sunrise Power Company, LLC

[Docket No. ER01–2804–000]

Take notice that on August 7, 2001, Sunrise Power, LLC tendered for filing under its market-based rate tariff a long-term Confirmation Agreement (Tolling) and a long-term Master Power Purchase and Sale Agreement entered into with the State of California Department of Water Resources, and requested waiver of the Commission's notice requirement.

Comment date: August 28, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. Duke Energy Corporation

[Docket No. ER01–2805–000]

Take notice that on August 8, 2001, Duke Energy Corporation (Duke) tendered for filing a Service Agreement with Exelon Generation Company, LLC for Non-Firm Transmission Service under Duke's Open Access Transmission Tariff. Duke requests that the proposed Service Agreement be permitted to become effective on September 1, 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: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. Duke Energy Corporation

[Docket No. ER01–2806–000]

Take notice that on August 8, 2001, Duke Energy Corporation (Duke) tendered for filing a Service Agreement with Exelon Generation Company, LLC for Firm Transmission Service under Duke's Open Access Transmission Tariff. Duke requests that the proposed Service Agreement be permitted to become effective on September 1, 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: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. Duke Energy Corporation

[Docket No. ER01–2807–000]

Take notice that on August 8, 2001, Duke Energy Corporation (Duke) tendered for filing a Service Agreement with Duke Power, a division of Duke Energy Corporation for Firm Transmission Service under Duke's Open Access Transmission Tariff. 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.

Duke requests that the proposed Service Agreement be permitted to become effective on September 1, 2001.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Duke Energy Corporation

[Docket No. ER01–2808–000]

Take notice that on August 8, 2001, Duke Energy Corporation (Duke) tendered for filing a Service Agreement with Carolina Power & Light Company for Firm Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on July 17, 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: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. Southwestern Electric Power Company

[Docket No. ER01–2809–000]

Take notice that on August 8, 2001 Southwestern Electric Power Company (SWEPCO) submitted for filing the following revised rate sheets for the Restated and Amended Power Supply Agreement Between Southwestern Electric Power Company and East Texas Electric Cooperative, Inc. (SWEPCO First Revised Rate Schedule No. 113): First Revised Sheet No. 32, First Revised Sheet No. 36 and First Revised Sheet No. 64

SWEPCO states that a copy of the filing has been served on East Texas Electric Cooperative, Inc., all parties to this docket and the Public Utilities Commission of Texas.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. Southern Power Company

[Docket No. ER01–2822–000]

Take notice that on August 8, 2001, Southern Power Company (Southern Power), tendered for filing a market-based Power Purchase Agreement with Georgia Power Company. Southern Power requests an effective date of October 1, 2001 for this agreement.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. Southern Power Company

[Docket No. ER01–2824–000]

Take notice that on August 8, 2001, Southern Power Company (Southern Power), tendered for filing a market-based Power Purchase Agreement with Georgia Power Company. Southern Power requests an effective date of October 1, 2001 for this agreement.

Comment date: August 29, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

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 this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the

instructions on the Commission's web site under the ''e-Filing'' link.

David P. Boergers,

Secretary.

[FR Doc. 01–20878 Filed 8–17–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11730–000]

Black River Limited Partnership; Notice of Availability of Final Environmental Assessment

August 14, 2001.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR Part 380 (Order No. 486, 52 F.R. 47897), the Office of Energy Projects has reviewed the application for an original license for the existing and operating Alverno Hydroelectric Project, located on the Black River in the townships of Aloha, Benton, and Grant in Michigan (Cheboygan County) and has prepared an Environmental Assessment (EA) for the project. In the EA, the Commission's staff has concluded that approval of the proposed project, with appropriate mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 2–A, of the Commission's offices at 888 First Street, NE., Washington, DC 20426. The EA may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 01–20850 Filed 8–17–01; 8:45 am]

BILLING CODE 6560–50–P

COUNCIL ON ENVIRONMENTAL QUALITY

Energy Task Force

AGENCY: Council on Environmental Quality.

ACTION: Notice and request for comments.

SUMMARY: On May 18, 2001, the President signed Executive Order 13212 recognizing the importance of environmentally sound production and transmission of energy to all American people. The Order established a federal interagency task force (''Task Force''), chaired by the Chairman of the Council on Environmental Quality (''CEQ''), to work with and monitor federal agencies' efforts to expedite their review of permits or take other actions necessary to accelerate the completion of energy-related projects, while maintaining safety, public health, and environmental protections. This task force is also charged with helping agencies create mechanisms to coordinate Federal, State, tribal and local permitting in geographic areas where increased permitting activity is expected. CEQ announces the formation of this Task Force and invites comments on the proposed nature and scope of Task Force activities, specific suggestions, and examples of permitting or other decision making processes which should be improved or streamlined.

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

ADDRESSES: Direct electronic written comments to Chair, Council on Environmental Quality, through the CEQ web site at *www.whitehouse.gov/ceq*. Written comments may also be submitted to the Chair, Council on Environmental Quality, Executive Office of the President, 17th and G Streets, NW, Washington, DC 20503. Attention: Task Force. Written comments may also be faxed to the Task Force at (202) 456–6546.

FOR FURTHER INFORMATION CONTACT: Requests for copies the ''National Energy Policy Report of the National Energy Policy Development Group'' may be directed to CEQ at the above address. The report is available on the White House web site (*http://www.whitehouse.gov/energy/National-Energy-Policy.pdf*) and on the Department of Energy web site (*http://www.energy.gov/HQPress/releases01/maypr/energy_policy.htm*). Copies of the report (ISBN 0–16–050814–2) can also be purchased from the Superintendent of Documents, U.S. Government Printing Office, by calling (202) 512–1800 or mailing your request to U.S. GPO, Mail Stop SSOP, Washington, DC 20402–0001.

SUPPLEMENTARY INFORMATION:

I. Abstract

A. The Task Force will work through an operational approach that addresses impediments to federal agencies' completion of decisions about energy-related projects in a way that will increase the production, transmission, and conservation of energy. The Executive Order requires federal agencies to expedite their review of permits or take other actions as necessary to accelerate the completion of energy-related projects, while maintaining safety, public health, and environmental protections. The Executive Order creates a federal interagency task force, chaired by CEQ, to work with and monitor federal agencies in expediting their review of permits, and to help agencies create mechanisms to coordinate Federal, State, tribal and local permitting in geographic areas where increased permitting activity is expected.

B. Executive Order No. 13212, signed by the President in Washington, DC, on May 18, 2001, Actions to Expedite Energy-Related Projects, reads:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to take additional steps to expedite the increased supply and availability of energy to our Nation, it is hereby ordered as follows:

Section 1. Policy

The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.

Section 2. Actions To Expedite Energy-Related Projects

For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

Section 3. Interagency Task Force

There is established an interagency task force (Task Force) to monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy. The Task Force also shall monitor and assist agencies in setting up appropriate mechanisms to coordinate Federal, State, tribal, and local permitting in geographic areas where increased

permitting activity is expected. The Task Force shall be composed of representatives from the Departments of State, the Treasury, Defense, Agriculture, Housing and Urban Development, Justice, Commerce, Transportation, the Interior, Labor, Education, Health and Human Services, Energy, Veterans Affairs, the Environmental Protection Agency, Central Intelligence Agency, General Services Administration, Office of Management and Budget, Council of Economic Advisers, Domestic Policy Council, National Economic Council, and such other representatives as may be determined by the Chairman of the Council on Environmental Quality. The Task Force shall be chaired by the Chairman of the Council on Environmental Quality and housed at the Department of Energy for administrative purposes.

Section 4. Judicial Review

Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

C. The Task Force will work through an operational approach that facilitates interagency coordination and addresses impediments to federal agencies' completion of decisions about energy-related projects by functional categories (e.g., pipelines, conservation, electricity transmission). The Task Force will help manage the federal agency decision-making process for setting priorities, scheduling activities in accordance with those priorities, identifying staffing and resource needs, facilitating issue resolution, and measuring the achievements of federal agencies in implementing Executive Order 13212. The Task Force will address coordination issues regionally, reaching out to states, local communities, tribes, businesses, and non-governmental organizations. The Task Force will use the experience gained in streamlining decisions about energy-related projects and resolving coordination issues to identify opportunities for systemic improvement and, where appropriate, regulatory or legislative change.

CEQ is currently working with the relevant federal agencies to obtain background information and designate agency Task Force contacts. CEQ is drafting a charter for this Task Force that will be available on the CEQ web site, and intends to use the CEQ Management Fund to create a working group of approximately eight expert agency representatives responsible for the day-to-day management and coordination of Task Force activities. CEQ intends to organize the Task Force work and staff according to the following functional categories: pipelines; refineries; electricity generation; nuclear; electricity transmission; hydropower; renewable sources; and conservation. The Task Force will identify regional federal personnel responsible for prioritizing and implementing expedited permitting, designate federal lands for each region, and establish cross-agency regional teams.

D. The Task Force expects to receive information from many interested persons (e.g., public interest groups, government, academia, industry) about particular energy projects and opportunities to improve agency decisionmaking. Of immediate need, CEQ seeks basic information about major pending projects or major projects under development that may be relevant to the Task Force efforts to streamline energy permitting decisions.

II. Request for Information and Comments

Please submit basic information about major energy projects in the following format:

1. Name of the project
2. Entity proposing the project
3. Category of the project—Pipeline, Electricity Transmission, Electricity Generation, Nuclear, Hydropower, Refinery, Renewable, Conservation, or Other
4. Brief description of the project
5. Agency or agencies that must be consulted and agencies from which approval is needed. Please list by the following categories: Federal, State, Tribal, Local, Other

In order to further the work of this Task Force, CEQ believes that it would be beneficial to have public input on federal agency activities to implement Executive Order 13212. Such input may include recommendations for improving agency activities, consistent with the purposes and policies of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, (1) To accelerate the completion of energy-related projects; (2) to increase energy production and conservation; (3) to improve transmission of energy; and (4) to coordinate permitting in geographic areas where increased permitting activity is expected.

Public comments are requested by October 1, 2001.

Dated: August 10, 2001.

James L. Connaughton,

Chairman, Council on Environmental Quality.

[FR Doc. 01–20914 Filed 8–17–01; 8:45 am]

BILLING CODE 3125–01–M

FEDERAL COMMUNICATIONS COMMISSION

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

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

DATES: Written comments should be submitted on or before September 19, 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 Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, DC 20554 or via the Internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judy Boley at 202–418–0214 or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION

OMB Control No.: 3060–0313.

Title: Section 76.1701 Political File.
Form No.: N/A.
Type of Review: Extension of currently approved collection.
Respondents: Business or other for-profit.
Number of Respondents: 5,375.
Estimated Time Per Response: 1 hour.
Frequency of Response: Recordkeeping reporting requirement.
Total Annual Burden: 5,375 hours.
Total Annual Cost: $0.
Needs and Uses: Section 76.1701 (formerly section 76.207) requires every cable television system to keep and permit public inspection of a complete record (political file) of all requests for cablecast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. The data are used by the public to assess the amount of money expended and time allotted to a political candidate to ensure that equal access was afforded to other legally qualified candidates for public office.
OMB Control No.: 3060–0500.
Title: Section 76.1713 Resolution of complaints.
Form No.: N/A.
Type of Review: Extension of currently approved collection.
Respondents: Business or other for-profit.
Number of Respondents: 10,400.
Estimated Time Per Response: 18 hours.
Frequency of Response: Recordkeeping and Third Party Disclosure reporting requirements.
Total Annual Burden: 187,200 hours (includes 176,800 recordkeeping requirement).
Total Annual Cost: $0.
Needs and Uses: Section 76.1713, formerly section 76.607, of the Commission's rules requires cable system operators to advise subscribers at least once each calendar year of the production for resolution of complaints about the quality of television signals delivered. Section 76.1713 also requires that records be maintained by cable system operators on all such subscriber complaints and resolution of complaints for at least a one-year period. The data are used by local franchising authorities to assess the technical performance of cable television systems and to ensure that quality service is being provided to subscribers.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–20861 Filed 8–17–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 4, 2001.

A. Federal Reserve Bank of San Francisco (Maria Villanueva, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105–1579:

1. Ronald C. LaFranchi, Coquille, Oregon; to acquire additional voting shares of Independent Financial Network, Coos Bay, Oregon, and thereby indirectly acquire additional voting shares of Independent Financial Network Bank, Coos Bay, Oregon; McKenzie State Bank, Springfield, Oregon; Lincoln Security Bank, Newport, Oregon; Oregon State Bank, Corvallis, Oregon; Family Security Bank, Brookings, Oregon; and Pacific State Bank, Reedsport, Oregon.

Board of Governors of the Federal Reserve System, August 14, 2001.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 01–20844 Filed 8–17–00; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 11, 2001.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. The Royal Bank of Scotland Group plc, Edinburgh, Scotland, The Royal Bank of Scotland plc, Edinburgh, Scotland, RBSG International Holdings Ltd, Edinburgh, Scotland, and Citizens Financial Group, Inc., Providence, Rhode Island; to acquire 100 percent of the voting shares of Citizens Bank of Pennsylvania (in formation), Philadelphia, Pennsylvania, and thereby indirectly acquire 100 percent of the voting shares of Citizens Bank (in formation), Wilmington, Delaware. These banks are being formed to acquire and operate most of the retail branch network of subsidiary banks of Mellon Bank, N.A., Pittsburgh, Pennsylvania, and Mellon Bank (DE), National Association, Wilmington, Delaware, and certain other businesses of Mellon.

B. Federal Reserve Bank of Atlanta (Cynthia C. Goodwin, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309–4470:

1. United Community Banks, Inc., Blairsville, Georgia; to merge with Peoples Bancorp, Inc., Carrollton, Georgia, and thereby indirectly acquire Peoples Bank of West Georgia, Carrollton, Georgia.

C. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Mid-Iowa Bancshares, Co., Algona, Iowa; to acquire in excess of 5 percent but not to exceed 10 percent of the voting shares of Horizon Bank (in organization), Encino, California.

D. Federal Reserve Bank of Minneapolis (JoAnne F. Lewellen, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Citizens Bank Holding Company, Finley, North Dakota; to merge with First Sharon Holding Company, Inc., Aneta, North Dakota, and thereby indirectly acquire First State Bank of Sharon, Sharon, North Dakota.

E. Federal Reserve Bank of Kansas City (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Howard County Land and Cattle Company, Grand Island, Nebraska; to acquire 80 percent of the voting shares of Citizens National Bank in Loup City, Loup City, Nebraska (in formation).

F. Federal Reserve Bank of San Francisco (Maria Villanueva, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105–1579:

1. National Mercantile Bancorp, Los Angeles, California; to acquire 100 percent of the voting shares of South Bay Bank, N.A., Torrance, California.

Board of Governors of the Federal Reserve System, August 14, 2001.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 01–20845 Filed 8–17–01; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 01-20056) published on page 42229 of the issue for Friday, August 10, 2001.

Under the Federal Reserve Bank of Kansas City heading, the entry for Team Financial Acquisition Subsidiary, Inc., Paola, Kansas, was published twice. The correct end of the comment period for this application was August 1, 2001.

Board of Governors of the Federal Reserve System, August 14, 2001.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 01–20846 Filed 8–17–00; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Injury Research Grant Review Committee: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Injury Research Grant Review Committee, Centers for Disease Control and Prevention of the Department of Health and Human Services, has been renewed for a 2-year period extending through August 20, 2003.

FOR FURTHER INFORMATION CONTACT: Richard W. Sattin, M.D., Executive Secretary, Injury Research Grant Review Committee, Centers for Disease Control and Prevention of the Department of Health and Human Services, 1600 Clifton Road, NE, M/S K58, Atlanta, Georgia 30333, telephone 770/488–4821.

The Director, Management and Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: August 14, 2001.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 01–20874 Filed 8–17–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Controlling Asthma in American Cities Project (CAACP), Program Announcement 01117

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Controlling Asthma in American Cities Project (CAACP), Program Announcement 01117.

Times and Dates: 9 a.m.–9:45 a.m., Sep 5, 2001 (Open); 10 a.m.–5 p.m., Sep 5, 2001 (Closed); 9 a.m.–5 p.m., Sep 6, 2001 (Closed).

Place: Crowne Plaza Airport, 1325 Virginia Avenue, Atlanta, Georgia 30344.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Deputy Director for Program Management, CDC, pursuant to Pub. L. 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to PA# 01117.

Contact Person for More Information: Michael Friedman, MD, Centers for Disease Control and Prevention, National Center for Environmental Health, 1600 Clifton Road, MS E–17, Atlanta, Georgia 30333, (404) 498–1028, E-mail: *MFF7@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for the both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: August 13, 2001.

John C. Burckhardt,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 01–20873 Filed 8–17–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Fernald Health Effects Subcommittee

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub.L. 92–463), the Agency for Toxic Substances and Disease Registry (ATSDR) and the Centers for Disease Control and Prevention (CDC) announce the following meeting.

Name: Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Fernald Health Effects Subcommittee.

Action: Time Change.

Old Time and Date: 9 a.m.–4 p.m., August 22, 2001.

New Time and Date: 1 p.m.–8 p.m., August 22, 2001.

Published on: **Federal Register**: July 27, 2001 (Volume 66, Number 145) (Notices) (Page 39178) from the **Federal Register** online via GPO access (*wais.access.gpo.gov*) (DOCID:fr27jy01–84) (Page 39178)

Place: The Plantation Conference Center, 9660 Dry Fork Road, Harrison, Ohio 45030, telephone, 513/367–5610.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Mike Donnelly, Deputy Chief, Radiation Studies Branch, Division of Environmental Hazards and Health Effects, NCEH, CDC, 1600 Clifton Road, NE. (E–39), Atlanta, GA 30333, telephone 404/498–1800, fax 404/498–1811.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and ATSDR.

Dated: August 14, 2001.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 01–20875 Filed 8–17–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Loan Repayment and Scholarship; Proposed Collection; Comment Request; National Institutes of Health Loan Repayment Programs

SUMMARY: In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of Loan Repayment and Scholarship, 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 and approval.

Proposed Collection: Title: National Institutes of Health Loan Repayment Programs. *Type of Information Collection Request:* Revision of currently approved collection (OMB No. 0925–0361, expiration date 11/30/01). *Form Numbers:* NIH 2674–1, NIH 2674–2, and NIH 2674–3, NIH 2674–4 and NIH 2674–5. *Need and Use of Information Collection:* The NIH makes available financial assistance, in the form of educational loan repayment, to M.D., Ph.D., Pharm.D., D.D.S., D.M.D., D.P.M., D.C., and N.D. degree holders, or the equivalent, who perform biomedical or biobehavioral research in NIH intramural laboratories or as extramural grantees for a minimum of 2 years (3 years for General Research LRP) in research areas supporting the mission and priorities of the NIH. The AIDS Research Loan Repayment Program (AIDS–LRP) is authorized by section 487A of the Public Health Service Act (42 U.S.C. 288–1); the General Research Loan Repayment Program (GR–LRP) is authorized by section 487C of the Public Health Service Act (42 U.S.C. 288–3); the Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds (CR–LRP) is authorized by section 487E (42 U.S.C. 288–5); the Clinical Research Loan Repayment Program for Extramural Investigators is authorized by section 487F (42 U.S.C. 288–5a); and the Pediatric Research Loan Repayment Program (PR–LRP) is authorized by section 487F (42 U.S.C. 288–6). The loan repayment programs provide for the repayment of up to $35,000 a year of the principal and interest of the educational loan debt of qualified health professionals who agree to conduct qualifying research for each year of obligated service. Applicants must have qualifying educational debt in excess of 20 percent of their annual compensation on the expected date of program eligibility. The information proposed for collection will be used to determine an applicant's eligibility for participation in the program. *Frequency of Response:* Initial application and annual renewal application. *Affected Public:* Applicants, financial institutions, research institutions, recommenders. *Type of Respondents:* Physicians, other scientific or medical personnel, and institutional representatives. The annual reporting burden is as follows:

Type of respondents	Number of respondents	Estimated number of responses per respondent	Average burden hours per responses	Annual burden hours requested
Intramural LRPs:				
Applicants	75	1	10.0	750
Recommenders	225	1	0.50	113
Financial Institutions	375	1	0.33	124
Subtotal	675			987
Extramural LRPs:				
Applicants	400	1	10.0	4,000
Recommenders	1,200	1	0.50	600
Institutional Representatives	400	1	1.50	600
Financial Institutions	2,000	1	0.33	660
Subtotal	4,000			5,860
Total	4,675			6,847

The annualized cost to respondents is estimated at $175,166.63. There are no capital costs, operating costs, or maintenance costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION: Information on the proposed project or a copy of the data collection plans and instruments may be obtained by calling or writing: Marc S. Horowitz, J.D., Director, Office of Loan Repayment and Scholarship, National Institutes of Health, 2 Center Drive, Room 2E30, Bethesda, Maryland 20892–0230 or call non-toll-free (301) 402–5666 or e-mail your request,

including your address, to <lrp@nih.gov>.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received on or before October 19, 2001.

Dated: August 8, 2001.

Yvonne T. Maddox,

Acting Deputy Director, National Institutes of Health.

[FR Doc. 01–20865 Filed 8–17–01; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Use for artificial nueral network as a risk-assessment tool for preventing child abuse.

Date: August 15, 2001.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: 6100 Executive Blvd., Room 5E01, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Norman Chang, PhD., Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, National Institutes of Health, 6100 Executive Blvd., Room 5E03, Bethesda, MD 20892, (301) 496–1485.

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. 93.209, Contraception and Infertility Loan Repayment Program; 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research, National Institutes of Health, HHS)

Dated: August 13, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–20864 Filed 8–17–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Education Facilities Replacement Construction

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Extension of application deadline; change of address for filing applications.

SUMMARY: This Notice extends the deadline published in the **Federal Register** on June 11, 2001 for filing applications for Bureau-funded education facilities replacement construction projects. The Notice also changes the address to which applicants must submit their applications.

DATES: New applications must be received by the Bureau of Indian Affairs (BIA) on or before October 22, 2001. Applications will be accepted beginning August 1, 2001.

ADDRESSES: All applications must be submitted to the BIA Office of Facilities Management and Construction, Attention: Andy Acoya, 201 Third St. NW., PO Box 1248, Suite 500, Albuquerque, New Mexico, 87103.

FOR FURTHER INFORMATION CONTACT: Questions regarding the application deadline and change of address may be submitted to the attention of Andy Acoya, Office of Facilities Management and Construction, 201 Third St. NW., PO Box 1248, Suite 500, Albuquerque, New Mexico 87103, (505) 346–6508, Fax (505) 346–6542.

SUPPLEMENTARY INFORMATION: The BIA is extending the deadline for filing applications for replacement school construction projects in response to the requests of tribal organizations and school boards expressed through the tribal consultation process and other communications. The tribes and school boards asked the BIA to extend the deadline for filing applications so they may have more time to complete their applications, to obtain the required tribal resolutions supporting submission of the applications, and to receive training from the BIA on application completion. In addition, the BIA has changed the address for filing applications to the Office of Facilities Management and Construction because that office is now responsible for coordinating the receipt of applications.

Applications will be accepted beginning August 1, 2001, until October 22, 2001. As stated in the **Federal Register** notice of June 11, 2001 (66 FR 31248), we will use the criteria in the 2001 instructions to review and evaluate all applications that we receive on or before the deadline.

This Notice is published under authority delegated by the Secretary of the Interior to the Assistant Secretary for Indian Affairs in the Departmental Manual at 209 DM 8.1. 25 U.S.C. 2005(c) directed BIA to publish, in the **Federal Register**, the system used to determine priorities for school construction projects, and to submit a current priority ranking for school construction projects at the time any budget request is presented to Congress.

Dated: August 9, 2001.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–20869 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–068–01–1820–DG–241E]

Notice of Availability of Las Cienegas Draft Resource Management Plan and Draft Environmental Impact Statement (DRMP/DEIS)

AGENCY: Tucson Field Office, Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan (DRMP) and associated Draft Environmental Impact Statement (DEIS) for the Las Cienegas National Conservation Area (NCA) and Sonoita Valley Acquisition Planning District located in Pima and Santa Cruz Counties, Arizona. The DRMP and DEIS have been prepared pursuant to the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the act establishing the Las Cienegas National Conservation Area (H.R. 2941), and BLM management policies. The DRMP was developed with broad public participation through a five-year collaborative planning process. Both land use planning and activity-level planning for the NCA and Acquisition Planning District are included in the DRMP. The DRMP provides a range of alternatives for management direction for the Las Cienegas National

Conservation Area and Sonoita Valley Acquisition Planning District. The DRMP addresses management on approximately 49,000 acres of public land. Issues addressed in the DRMP/DEIS include watershed management, fish and wildlife habitat management, visual resource management, cultural resource management, economics, mineral development, rights-of-way, off-highway vehicles, recreation, livestock grazing management, and designation of areas of critical environmental concern. The action alternatives were prepared in accordance with applicable planning procedures and are designed to conserve, protect, and enhance the unique and nationally important resources and values of the public lands within the NCA.

DATES: Public comments on the Las Cienegas DRMP/DEIS must be received by the Bureau of Land Management on or before November 19, 2001.

BLM will discuss the various management alternatives and answer questions pertaining to the Draft Las Cienegas Resource Management Plan in three public open house meetings:

1. Sonoita-Elgin Open House, September 25, 2001, 4:00 to 7:00 p.m.
2. Mesa Open House, September 26, 2001, 3:30 to 7:30 p.m.
3. Tucson Open House, September 27, 2001, 3:30 to 7:30 p.m.

ADDRESSES: The open house meeting locations are:

1. Sonoita-Elgin—Santa Cruz County Fairgrounds, South Highway 83, Sonoita Arizona (520) 455–5553.
2. Mesa—Mesa Centennial Center, Rendevous Center, Apache Room, 263 North Center Street, Mesa, Arizona (480) 644–3311.
3. Tucson—Pima Community College EAST Campus, Community Room, 8181 E. Irvington, Tucson, Arizona (520) 206–7000.

Written comments should be sent to Dave McIlnay, Acting Field Manager, Tucson Field Office, Bureau of Land Management, 12661 E. Broadway, Tucson, Arizona 85748.

FOR FURTHER INFORMATION CONTACT: Karen Simms, Ecosystem Planner, Tucson Field Office, Bureau of Land Management, 12661 E. Broadway, Tucson, Arizona 85748, telephone 520–258–7200.

SUPPLEMENTARY INFORMATION: Single copies of the DRMP/DEIS will be available at the start of the 90 day comment period at the BLM Tucson Field Office, 12661 E. Broadway, Tucson, Arizona 85748. The DRMP/DEIS may be reviewed via the internet at *http://www.az.blm.gov.* Interested persons not already on the mailing list may request a hard copy or a CDROM of the DRMP/DEIS from the BLM Tucson Field Office.

Comments on the DEIS

Public comments may be submitted during the public open house meetings or in writing to the address provided above. Written comments on the Las Cienegas DRMP/DEIS will be considered in preparing the Final Resource Management Plan and Final Environmental Impact Statement. Comments on the contents of this document are being solicited, particularly comments that address one or more of the following: (1) New information that would affect the analysis; (2) possible improvements in the analysis; and (3) suggestions for improving or clarifying the proposed management direction. Specific comments are most useful. Please note that comments, including names and street addresses of respondents, are available for public review and/or release under the Freedom of Information Act (FOIA). Individual respondents may request confidentiality. If you wish to withhold your name and/or street address from public review or from disclosure under FOIA, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, will be made available for public inspection in their entirety.

Background

The Las Cienegas National Conservation Area (NCA) and the Sonoita Valley Acquisition Planning District were created by act of Congress (HR 2941) on December 6, 2000. The NCA consists of 42,000 acres of federal land located in southern Pima and northeastern Santa Cruz counties, Arizona. The Sonoita Valley Acquisition Planning District includes another 7,000 acres of scattered federal lands surrounding the NCA. These federal lands are managed by the Bureau of Land Management's Tucson Field Office. The Act establishing the Las Cienegas National Conservation Area requires BLM to prepare a management plan for the NCA within 2 years of the area's designation.

The Las Cienegas NCA and Sonoita Valley Acquisition Planning District encompass much of the upper Cienega Creek watershed, which is important to Tucson for flood control and aquifer recharge. The area also has the following attributes: five of the rarest plant communities in the American Southwest; habitat for several endangered, proposed, and candidate species; significant cultural sites including a site on the National Register of Historic Places; two proposed wild and scenic river segments; and scenic open space.

Dated: May 23, 2001.

Dave McIlnay,

Acting Field Manager.

[FR Doc. 01–20898 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Glen Canyon Dam Adaptive Management Work Group (AMWG);, and Glen Canyon Technical Work Group (TWG); Notice of Meeting

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Public Meetings.

SUMMARY: The Adaptive Management Program (AMP) was implemented as a result of the Record of Decision on the Operation of Glen Canyon Dam Final Environmental Impact Statement to comply with consultation requirements of the Grand Canyon Protection Act (Pub. L. 102–575) of 1992. The AMP provides an organization and process to ensure the use of scientific information in decision making concerning Glen Canyon Dam operations and protection of the affected resources consistent with the Grand Canyon Protection Act. The AMP has been organized and includes a federal advisory committee (the AMWG), a technical work group (the TWG), a monitoring and research center, and independent review panels. The TWG is a subcommittee of the AMWG and provides technical advice and information for the AMWG to act upon.

DATES AND LOCATION: The Glen Canyon Dam Adaptive Management Work Group will conduct the following public meeting.

Phoenix, Arizona—September 24–25, 2001. The meeting will begin at 9:30 a.m. and conclude at 5 p.m. on the first day and will begin at 8 a.m. and conclude at 12 noon on the second day. The meeting will be held at the Bureau of Indian Affairs, Western Regional Office, 2 Arizona Center, Conference Rooms A and B (12th floor), 400 North 5th Street, Phoenix, Arizona.

Agenda: The purpose of the meeting will be to approve the Strategic Plan, and discuss the following: FY 2003

budget, basin hydrology, Protocol Evaluation Panel (PEP) recommendations, environmental compliance, and other administrative and resource issues pertaining to the AMP.

DATES AND LOCATION: The Glen Canyon Dam Technical Work Group will conduct the following public meeting.

Phoenix, Arizona—September 6–7, 2001. The meeting will begin at 9:30 a.m. and conclude at 5 p.m. on the first day and will begin at 8 a.m. and conclude at 12 noon on the second day. The meeting will be held at the Bureau of Indian Affairs, Western Regional Office, 2 Arizona Center, Conference Rooms A and B (12th floor), 400 North 5th Street, Phoenix, Arizona.

Agenda: The purpose of the meeting will be to discuss the following: FY 2003 work plans, the Automated Generation Control (AGC) Report, results from the Information Needs Workshop, experimental flows, basin hydrology, LIDAR plans, Protocol Evaluation panel (PEP) recommendations, environmental compliance, appraisal of California power situation, nomination of new TWG Chairperson, and other administrative and resource issues pertaining to the AMP.

Agenda items may be revised prior to any of the meetings. Final agendas will be posted 15 days in advance of each meeting and can be found on the Bureau of Reclamation website under Environmental Programs at: *http://www.uc.usbr.gov.* Time will be allowed on each agenda for any individual or organization wishing to make formal oral comments (limited to 10 minutes) at the meetings.

ADDRESSES: To allow full consideration of information by the AMWG and TWG members, written notice must be provided to Randall Peterson, Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138; E-mail at *rpeterson@uc.usbr.gov* at least FIVE (5) days prior to the meeting. Any written comments received will be provided to the AMWG and TWG members at the meetings.

FOR FURTHER INFORMATION CONTACT: Randall Peterson, telephone (801) 524–3758; faxogram (801) 524–3858; *rpeterson@uc.usbr.gov.*

Dated: July 31, 2001.

Rick L. Gold,

Regional Director.

[FR Doc. 01–20876 Filed 8–17–01; 8:45 am]

BILLING CODE 4310–MN–M

INTERNATIONAL TRADE COMMISSION

[USITC SE–01–030]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: International Trade Commission.

TIME AND DATE: August 22, 2001 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–894 (Final) (Certain Ammonium Nitrate from Ukraine)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on August 31, 2001.)
5. Inv. No. NAFTA–312–1 (Certain Steel Wire Rod)—briefing and vote. (The Commission is currently scheduled to transmit its findings to the President on August 23, 2001; Commissioners' opinions are currently scheduled to be transmitted to the President on September 7, 2001.)
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: August 14, 2001.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–21090 Filed 8–16–01; 3:33 pm]

BILLING CODE 7020–02–M

DEPARTMENT OF LABOR

Office of the Secretary

Senior Executive Service; Appointment of Members to the Performance Review Board

Title 5 U.S.C. 4314(c)(4) provides that Notice of the appointment of an individual to serve as a member of the Performance Review Board of the Senior Executive Service shall be published in the **Federal Register**.

The following individuals are hereby appointed to a three-year term on the Department's Performance Review Board: D. Cameron Findlay, Chairperson, James Benages, David Dye, Robert Elam, Richard Fiore, Joe Kennedy, Patrick Pizzella, Paula White.

FOR FURTHER INFORMATION CONTACT: Ms. Tali R. Stepp, Director of Human Resources, Room C–5526, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone: (202) 693–7600.

Signed at Washington, D.C., this 13th day of August, 2001.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 01–20923 Filed 8–17–01; 8:45 am]

BILLING CODE 4510–23–M

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE (NCLIS)

Sunshine Act Meeting

AGENCY: National Commission on Libraries and Information Science.

ACTION: Notice of meeting.

SUMMARY: The U.S. National Commission on Libraries and Information Science is holding an open business meeting to discuss administrative and other matters, including development of a program and strategy related to library and information services for individuals with disabilities.

DATE AND TIME: NCLIS Business Meeting—September 12, 2001, 2:00 p.m. to 5:00 p.m.

ADDRESSES: Meeting location—Board Room, Fuller Conference Center, Old. Sturbridge Village, One Sturbridge Village Road, Sturbridge, Massachusetts 01566.

STATUS: Open meeting.

FOR FURTHER INFORMATION CONTACT: Rosalie Vlach, Director, Legislative and Public Affairs, U.S. National Commission on Libraries and Information Science, 1110 Vermont Avenue, NW., Suite 820, Washington, DC 20005, e-mail *rvlach@nclis.gov.* fax 202–606–9203 or telephone 202–606–9200.

SUPPLEMENTARY INFORMATION: The meeting is open to the public, subject to space availability. To make special arrangements for physically challenged persons, contact Rosalie Vlach, Director, Legislative and Public Affairs, 1110 Vermont Avenue, NW., Suite 820, Washington, DC 20005, e-mail *rvlach@nclis,gov.* fax 202–606–9203 or telephone 202–606–9200.

Dated: August 13, 2001.

Judith C. Russell,

NCLIS Deputy Director.

[FR Doc. 01–21025 Filed 8–16–01; 12:28 pm]

BILLING CODE 7527–$$–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–423]

Dominion Nuclear Connecticut, Inc., Millstone Nuclear Power Station, Unit No. 3; Exemption

1.0 Background

The Dominion Nuclear Connecticut, Inc., (the licensee) is the holder of Facility Operating License No. NPF–49 which authorizes operation of the Millstone Nuclear Power Station, Unit No.3 (MP3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

The facility consists of a pressurized water reactor located in New London County, Connecticut.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, Appendix G, requires that pressure-temperature (P-T) limits be established for reactor pressure vessels (RPVs) during normal operating and hydrostatic or leak rate testing conditions. Specifically, 10 CFR Part 50, Appendix G states that ''[t]he appropriate requirements on * * * the pressure-temperature limits and minimum permissible temperature must be met for all conditions.'' Appendix G of 10 CFR Part 50 specifies that the requirements for these limits are the American Society of Mechanical Engineers (ASME) Code, Section XI, Appendix G Limits.

To address provisions of amendments to the technical specifications (TSs) P–T limits in the submittal dated April 23, 2001, the licensee requested that the staff exempt MP3 from application of specific requirements of 10 CFR Part 50, Section 50.60(a) and Appendix G, and substitute use of ASME Code Case N–640. Code Case N–640 permits the use of an alternate reference fracture toughness (K_{Ic} fracture toughness curve instead of K_{Ia}. fracture toughness curve) for reactor vessel materials in determining the P–T limits. Since the K_{Ic} fracture toughness curve shown in ASME Section XI, Appendix A, Figure A–2200–1 provides greater allowable fracture toughness than the corresponding K_{Ia} fracture toughness curve of ASME Section XI, Appendix G, Figure G–2210–1, using the K_{Ic} fracture toughness, as permitted by Code Case N–640, in establishing the P–T limits would be less conservative than the methodology currently endorsed by 10 CFR Part 50, Appendix G. Considering this, an exemption to apply the Code Case would be required by 10 CFR 50.60.

The licensee proposed to revise the P–T limits in the TSs for MP3 using the K_{Ic} fracture toughness curve, in lieu of the K_{Ia} fracture toughness curve, as the lower bound for fracture toughness.

Use of the K_{Ic} curve in determining the lower bound fracture toughness in the development of P–T operating limits curve is more technically correct than the K_{Ia} curve since the rate of loading during a heatup or cooldown is slow and is more representative of a static condition than a dynamic condition. The K_{Ic} curve appropriately implements the use of static initiation fracture toughness behavior to evaluate the controlled heatup and cooldown process of a reactor vessel. The staff has required use of the initial conservatism of the K_{Ia} curve since 1974 when the curve was codified. This initial conservatism was necessary due to the limited knowledge of RPV materials. Since 1974, additional knowledge has been gained about RPV materials, which demonstrates that the lower bound on fracture toughness provided by the K_{Ia} curve is well beyond the margin of safety required to protect the public health and safety from potential RPV failure. In addition, P–T curves based on the K_{Ic} curve will enhance overall plant safety by opening the P–T operating window with the greatest safety benefit in the region of low temperature operations.

In summary, the ASME Section XI, Appendix G, procedure was conservatively developed based on the level of knowledge existing in 1974 concerning RPV materials and the estimated effects of operation. Since 1974, the level of knowledge about these topics has been greatly expanded. The Commission concurs that this increased knowledge permits relaxation of the ASME Section XI, Appendix G requirements by applying the K_{Ic} fracture toughness, as permitted by Code Case N–640, while maintaining, pursuant to 10 CFR 50.12(a)(2)(ii), the underlying purpose of the ASME Code and the NRC regulations to ensure an acceptable margin of safety.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50, when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. The staff considers that pursuant to 10 CFR 50.12(a)(2)(ii) special circumstances are present and that an exemption may be granted to allow use of the methodology of Code Case N–640 to revise the P–T limits for MP3 because it would provide an adequate margin of safety against brittle fracture. See the safety evaluation supporting these findings dated August 14, 2001.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not endanger life or property or common defense and security, and is, otherwise, in the public interest. Also, special circumstances are present. Therefore, the Commission hereby grants Dominion Nuclear Connecticut, Inc., an exemption from the requirements of 10 CFR 50.60(a) and 10 CFR Part 50, Appendix G, for MP3. Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (66 FR 42567).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 14th day of August.

For the Nuclear Regulatory Commission.

John A. Zwolinski,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–20886 Filed 8–17–01; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–445 AND 50–446]

TXU Electric, Comanche Peak Steam Electric Station, Units 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the transfer of Facility Operating License Nos. NPF–87 and NPF–89 for Comanche Peak Steam Electric Station (CPSES),

Units 1 and 2, respectively, currently held by TXU Electric, as owner and licensed operator of CPSES, Units 1 and 2. The transfer would be to an as yet unnamed new company, herein identified as TXU Genco, TLP. TXU Electric proposes to provide NRC with the actual name of this entity no later than seven days prior to issuance of any conforming amendments. The Commission is further considering amending the licenses for administrative purposes to reflect the proposed transfer, including replacing TXU Electric on the licenses with the new company name. TXU Electric also proposes a license amendment to delete the Antitrust Conditions in Appendix C of the CPSES, Units 1 and 2, Facility Operating Licenses, which is the subject of a separate **Federal Register** notice. CPSES, Units 1 and 2, are located in Somervell and Hood counties, Texas.

According to an application for approval filed by TXU Electric, TXU Genco, TLP would assume title to the facility following approval of the proposed license transfer, and would be responsible for the operation, maintenance, and eventual decommissioning of CPSES, Units 1 and 2. No physical changes to CPSES, Units 1 and 2, or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission gives its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility which does no more than conform the license to reflect the transfer action, involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

By September 10, 2001, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart M, ''Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.1306, and should address the considerations contained in 10 CFR 2.1308(a). Untimely requests and petitions may be denied, as provided in 10 CFR 2.1308(b), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.1308(b)(1)–(2).

Requests for a hearing and petitions for leave to intervene should be served upon: George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (e-mail address for filings regarding license transfer cases only: OGCLT@NRC.gov); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.1313.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held, and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, by September 19, 2001, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated June 19, 2001, a nonproprietary version of which is available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically through the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room link at the NRC Web site http://www.nrc.gov/ADAMS/index.htm. If you do not have access to ADAMS or if there are problems accessing the document located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or send an email to pdr@nrc.gov.

Dated at Rockville, Maryland this 14th day of August, 2001.

For the Nuclear Regulatory Commission.

David H. Jaffe,

Senior Project Manager, Section I, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–20887 Filed 8–17–01; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–445 and 50–446]

TXU Electric; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an amendments to Facility Operating License (FOL) Nos. NPF–87 and NPF–89 issued to TXU Electric (the licensee) for operation of the Comanche Peak Steam Electric Station, Units 1 and 2 (CPSES), located in Somervell and Hood Counties, Texas.

The proposed amendments would delete the anti-trust conditions contained in Appendix C to the FOLs for CPSES. The licensee requested the proposed amendments in the context of its application for the Commission's

consent to transfer the FOLs to an affiliated generation company. The transfer aspect of the licensee's application is the subject of a separate **Federal Register** notice. According to the application, the antitrust license conditions attached to the CPSES FOLs relate generally to transmission access, market power protection, or unique case-specific matters. In its application, the licensee states primarily that the antitrust license conditions relating to transmission access and market power are no longer necessary because of Texas's adoption of a comprehensive electric restructuring system that guards against anticompetitive practices in the transmission market as well as abuses in generation market power. The licensee also indicates that the changes in the electric industry render unnecessary the application of these antitrust conditions to entities, such as the proposed affiliated generation company transferee, that will sell power only in the deregulated wholesale market. The licensee maintains that in addition to being unnecessary, the existing antitrust conditions could operate to thwart the intent and purpose of the Texas restructuring legislation. In addition, the licensee requests deletion of antitrust conditions that it maintains have expired by their own terms or were unique to a particular case-specific issue and are now no longer necessary.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) *Will the change involve a significant increase in the probability or consequences of an accident previously evaluated?*

Response: No.

This Request involves administrative changes only. No actual plant equipment o[r] accident analyses will be affected by the proposed changes. Therefore, this Request will have no impact on the possibility of any type of accident: new, different, or previously evaluated.

(2) *Will the change create the possibility of a new or different kind of accident from any accident previously evaluated?*

Response: No.

This Request involves administrative changes only. No actual plant equipment o[r] accident analyses will be affected by the proposed changes and no failure modes not bounded by previously evaluated accidents will be created. Therefore, this Request will have no impact on the possibility of any type of accident: new, different, or previously evaluated.

(3) *Will the change involve a significant reduction in a margin of safety?*

Response: No.

Margin of safety is associated with confidence in the ability of the fission product barriers (i.e., fuel and fuel cladding, Reactor Coolant System pressure boundary, and containment structure) to limit the level of radiation dose to the public. This Request involves administrative changes only.

No actual plant equipment or accident analyses will be affected by the proposed changes. Additionally, the proposed changes will not relax any criteria used to establish safety limits, will not relax any safety systems settings, or will not relax the bases for any limiting conditions of operation. Therefore, the proposed changes will not impact the margin of safety.

The NRC staff has reviewed the licensee's analysis and notes that it does not agree that the requested amendments can properly be characterized as involving only ''administrative changes.'' Nevertheless, based on the NRC staff's review, it appears that the three standards of 10 CFR 50.92(c) are satisfied notwithstanding its view that the requested amendments do not involve only administrative changes. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. 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.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By September 19, 2001, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or electronically on the Internet at the NRC Web site *http://www.nrc.gov/NRC/CFR/index.html.* If there are problems in accessing the document, contact the Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to pdr@nrc.gov. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set

forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036–5869, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions, and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer, or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 10 CFR 2.714(d).

For further details with respect to this action, see the application for amendments dated June 19, 2001, which is available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to pdr@nrc.gov.

Dated at Rockville, Maryland, this 14th day of August, 2001.

For the Nuclear Regulatory Commission.

David H. Jaffe,

Senior Project Manager, Section I, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–20888 Filed 8–17–01; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Withdrawal of Proposed Voluntary Industry Initiative Program

The U.S. Nuclear Regulatory Commission has issued this notice to inform stakeholders that the Commission has approved the withdrawal of the proposed (Voluntary) Industry Initiative Program and related guidelines.

The decision to develop guidelines for use of industry initiatives in the regulatory process is an outgrowth of the Commission's Direction Setting Initiative (DSI) 13, '' 'The Role of Industry (DSI–13)' and Use of Industry Initiatives'' (SECY–97–303), dated December 31, 1997, and the associated SRM issued on April 16, 1998. SECY–99–063, ''The Use by Industry of Voluntary Initiatives in the Regulatory Process,'' forwarded to the Commission on March 2, 1999, proposed the development of NRC guidelines for crediting industry initiatives in lieu of taking regulatory action. On May 27, 1999, the Commission issued an SRM approving the staff's recommendations in SECY–99–063, and agreed that the current regulatory framework does not preclude voluntary industry initiatives. The Commission also agreed that existing regulatory processes can be used to support implementation of voluntary industry initiatives as long as such initiatives will not be used in lieu of regulatory action where a question of adequate protection exists. The SRM directed the staff to move forward, working with the industry and other stakeholders, in developing the guidelines for using voluntary industry initiatives.

In response to the staff requirements memorandum (SRM) issued on June 28, 2000 to SECY–00–0116, ''Industry Initiatives in the Regulatory Process,'' the staff revised the proposed guidelines to read as directed. These revised ''Proposed Guidelines for Including Industry Initiatives in the Regulatory Process'' were published in the **Federal**

Register on August 31, 2000. The Commission also directed that the staff should provide the final version of the guidelines to the Commission for review in the event significant negative public comments were received on the proposed guidelines.

On July 5, 2001, the staff issued SECY–01–0121, ''Industry Initiatives in the Regulatory Process'' *http://www.nrc.gov/NRC/COMMISSION/SECYS/2001–0121scy.pdf* to inform the Commission of the public comments received in response to the publication of the proposed guidelines in the **Federal Register** and the Staff's resulting reevaluation of the need for those guidelines. Nearly all the comments that were received from stakeholder in response to the publication of the proposed guidelines in the **Federal Register** were negative. The general comments were to the effect that the formal process described in the proposed guideline should not be implemented. The specific comments provided suggestions for improving the proposed guideline, assuming it was implemented. To address the specific comments, the staff revised the guidelines to incorporate some of the suggested improvements within the previous structure and framework. The staff also evaluated whether a different approach would be more effective in resolving stakeholder comments and achieving NRC goals. After carefully considering both industry and public stakeholder comments, and taking into account the processes described in SECY–99–143, ''Revisions to Generic Communication Program,'' the staff recommended to the Commission that the proposed guidelines and the formal process described therein are not needed and that the existing regulatory process, with some minor revisions, is sufficient.

On August 2, 2001, the Commission issued an SRM *http://www.nrc.gov/NRC/COMMISSION/SRM/2001–0121srm.html* approving the staff's plan to withdraw the proposal for implementation of a new industry initiative program and the related guidelines, and to notify stakeholders of this action.

Dated at Rockville, Maryland, this 10th day of August, 2001.

For the Nuclear Regulatory Commission.

Patrick M. Madden,

Acting Chief, Operational Experience and Non-Power Reactors Branch, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 01–20889 Filed 8–17–01; 8:45 am]

BILLING CODE 7590–01–P

PEACE CORPS

Proposed Information Collection Requests

AGENCY: Peace Corps.

ACTION: Notice of public use form review request to the Office of Management and Budget (Renewal of OMB Control Number 0420–0005).

SUMMARY: Pursuant to the paperwork Reduction Act of 1981 (44 USC, Chapter 35), the Peace Corps has submitted to the Office of Management and Budget a request for approval of information collection, OMB Control Number 0420–0005, the Peace Corps Volunteer Application. This is a renewal of an active OMB Control Number. The purpose of this notice is to allow for public comments on whether the proposed collection of information is necessary for the proper performance of the functions of the Peace Corps, including whether the information will have practical use; the accuracy of the agency's estimate of the burden of the proposed collections information, including the validity of the methodology and assumptions used; ways to enhance the quality, utility and the clarity of the information to be collected; and, ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

A copy of the proposed information collection form may be obtained from Ms. DeDe Dunevant, Office of Communications, Peace Corps, 1111 20th Street, NW, Room 8407, Washington, DC 20526. Ms. Dunevant can be contacted by telephone at 202–692–2205 or 800–424–8580 ext 2205. Comments on the form should also be addressed to the attention of Ms. Dunevant and should be received on or before October 19, 2001.

Information Collection Abstract

Title: Peace Corps Volunteer Application Form.

Need for and Use of This Information: This form is completed voluntarily by potential Peace Corps Volunteers in order to identify prospective applicants and process the applicants for Volunteer service. This information, which is gathered by paper copy and electronic on-line version, is used to determine qualifications and potential for placement of applicants, in fulfillment of the first goal of the Peace Corps as required by Congressional legislation and to enhance the Peace Corps Volunteer process.

Respondents: Potential Peace Corps Volunteers.

Respondent's Obligation to Reply: Voluntary.

Burden on the Public

a. Annual reporting burden: 240,000 hours.

b. Annual record keeping burden: 0 hours.

c. Estimated average burden per response: 8 hours.

d. Frequency of response: One time.

e. Estimated number of likely respondents: 30,000.

f. Estimated cost to respondents: $102.72.

This notice is issued in Washington, DC on August 10, 2001.

Doug Warnecke,

Acting, Chief Information Officer and Associate Director for Management.

[FR Doc. 01–20915 Filed 8–17–01; 8:45 am]

BILLING CODE 6051–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44694; File No. S7–24–89]

Joint Industry Plan; Solicitation of Comments and Order Approving Request to Extend Temporary Effectiveness of Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealers, Inc., the Pacific Exchange, Inc., and the Boston, Chicago, Philadelphia, and Cincinnati Stock Exchanges

August 14, 2001.

I. Introduction

On August 14, 2001, the Cincinnati Stock Exchange, Inc. (''CSE'') on behalf of itself and the National Association of Securities Dealers, Inc. (''NASD''), the Boston Stock Exchange, Inc. (''BSE''), the Chicago Stock Exchange, Inc. (''CHX''), Pacific Exchange, Inc. (''PCX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') (hereinafter referred to as the ''Participants'') [1] submitted to the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposal to extend the

[1] The CSE was elected as chair of the Operating Committee for 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 and for Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''Plan'') by the Participants.

operation of the Plan [2] for Nasdaq/National Market (''Nasdaq/NM'') securities traded on an exchange on an unlisted or listed basis.[3] The August 2001 Extension Request would extend the effectiveness of the Plan through September 19, 2001 and also would extend certain exemptive relief as described below. The August 2001 Extension Request does not seek permanent approval of the Plan because the Participants currently are negotiating certain amendments to the Plan for which they will seek approval in the future.[4]

II. Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[5] The Commission originally approved the Plan on a pilot basis on June 26, 1990.[6] The parties did not begin trading until July 12, 1993, accordingly, the pilot period commenced on July 12, 1993. The Plan has since been in operation on an extended pilot basis.[7]

III. Description of the Plan

The Plan provides for the collection from Plan Participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in ''eligible securities.'' [8] The Plan contains various provisions concerning its operation, including: Implementation of the Plan; Manner of Collecting, Processing, Sequencing, Making Available, and Disseminating Last Sale Information; Reporting Requirements (including hours of operation); Standards and Methods of Ensuring Promptness, Accuracy and Completeness of Transaction Reports; Terms and Conditions of Access; Description of Operation of Facility Contemplated by the Plan; Method and Frequency of Processor Evaluation; Written Understandings of Agreements Relating to Interpretation of, or Participation in, the Plan; Calculation of the Best Bid and Offer (''BBO''); Dispute Resolution; and Method of Determination and Imposition, and Amount of Fees and Charges.[9]

IV. Exemptive Relief

In conjunction with the Plan, on a temporary basis, the Commission granted an exemption to vendors from Rule 11Ac1–2 [10] under the Act regarding the calculation of the BBO [11] and granted the BSE an exemption from the provision of Rule 11Aa3–1 [12] under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. In the August 2001 Extension Request, the Participants ask that the Commission grant an extension of the exemptive relief described above to vendors until the BBO calculation issue is fully resolved. In addition, in the August 2001 Extension Request, the Participants request that the Commission grant an extension of the exemptive relief described above to the BSE until September 19, 2001.

V. Solicitation of Comment

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether it is consistent with the Act. The Commission continues to solicit comment regarding the BBO calculation, the trade-through rule and any issues presented by changes occurring in the market place. 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 proposal that are filed with the Commission, and all written communications relating to the proposal 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. All submissions should refer to File No. S7–24–89 and should be submitted by September 10, 2001.

VI. Discussion

The Commission finds that an extension of temporary approval of the operation of the Plan, as amended, through September 19, 2001, is appropriate and in furtherance of

[2] *See* letter from Jeffrey T. Brown, Vice President Regulation and General Counsel, CSE, to Jonathan G. Katz, Secretary, Commission, dated August 9, 2001 (''August 2001 Extension Request''). The signatories to the Plan are the Participants for purposes of this release; however, the BSE joined the plan as a ''limited participant'' and reports quotation information and transaction reports only in Nasdaq/National Market securities listed on the BSE. Originally, the American Stock Exchange Inc. (''Amex'') was a Participant but withdrew its participation from the Plan in August 1994.

[3] Section 12 of the Securities Exchange Act of 1934 (''Act'') generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits unlisted trading privileges (''UTP'') under certain circumstances. For example, Section 12(f) of the Act, among other things, permits exchanges to trade certain securities that are traded over-the-counter (''OTC/UTP''), but only pursuant to a Commission order or rule. The present order fulfills this Section 12(f) requirement. For a more complete discussion of the Section 12(f) requirement, *see* November 1995 Extension Order, *infra* note 7.

[4] In accordance with the Commission's statements in its order approving the establishment of the Nasdaq Order Display Facility and Order Collector Facility (''SuperMontage''), the Participants represent that they are revising the Plan. *See* Securities Exchange Act Release No. 43863 (January 19, 2001) 66 FR 8020 (January 26, 2001). The Participants submitted the 12th amendment to the Plan (''Interim Plan'') on August 3, 2001.

[5] *See* Section 12(f)(2) of the Act, 15 U.S.C. 78*l*(f)(2).

[6] *See* Securities Exchange Act Release No. 28146, 55 FR 27917 (July 6, 1990) (''1990 Plan Approval Order'').

[7] *See* Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); 35221 (January 11, 1195), 60 FR 3886 (January 19, 1995); 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) (''November 1995 Extension Order''); 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997); 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998; 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); 41392 (May 12, 1999), 64 FR 27839 (May 21, 1999) (''May 1999 Approval Order''); 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000); 44099 (March 23, 2001), 66 FR 17457 (March 30, 2001); and 44348 (May 24, 2001), 66 FR 29610 (May 31, 2001); 44552 (July 13, 2001), 66 FR 37712 (July 19, 2001).

[8] The Plan defines ''eligible security'' as any Nasdaq/NM security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Act or that is listed on a national securities exchange. On May 12, 1999, in response to a request from the CHX, the Commission expanded the number of eligible Nasdaq/NM securities that may be traded by the CHX pursuant to the Plan from 500 to 1000. *See* May 1999 Approval Order, *supra* note 7. On November 9, 2000, the Commission noticed and requested comment on a proposal by the PCX to expand the maximum number of securities eligible to trade to include all Nasdaq/NM securities. *See* Securities Exchange Act Release No. 43454, 65 FR 69581 (November 17, 2000).

[9] The full text of the Plan, as well as a ''Concept Paper'' describing the requirements of the Plan, are contained in the original filing, which is available for inspection and copying in the Commission's public reference room.

[10] 17 CFR 240.11Ac1–2.

[11] Rule 11Ac1–2 under the Act requires that the best bid or best offer be computed on a price/size/time algorithm in certain circumstances. Specifically, Rule 11Ac1–2 under the Act provides that ''in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or offers * * * shall be computed by ranking all such identical bids or offers * * * first by size * * * first by size * * * then by time.'' The exemption permits vendors to display the BBO for Nasdaq securities subject to the Plan on a price/time/size basis.

[12] 17 CFR 240.11Aa3–1.

Section 11A[13] of the Act.[14] The Commission had previously stated that a revised Plan must be filed with the Commission by July 19, 2001, or the Commission will amend the Plan directly.[15] The Participants submitted an Interim Plan to the Commission on August 3, 2001, which, among other things, includes a process for selecting an alternative securities information processor. Therefore, to enable the Commission to consider and to solicit comment on the Interim Plan, the Commission believes that it is appropriate to extend the current Plan.

The Commission notes that the revised final Plan must provide for either (1) a fully viable alternative exclusive securities information processor (''SIP'') for all Nasdaq securities, or (2) 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, 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: (1) The Plan processor is chosen on the basis of bona fide competitive bidding and the Participant submits the successful bid; and (2) 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 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 qualify, and to disseminate transaction information and individually identified quotation information for these members through the SIP.

Furthermore, the revised final Plan should be open to all SROs, and the Plan should share governance of all matters subject to the Plan equitably among the SRO Participants. The Plan also should provide for sharing of market data revenues among SRO Participants. Finally, the Plan should provide for sharing of market data revenues among SRO Participants. Finally, 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 the NASD. The Commission expects the parties to continue to negotiate in good faith on the above matters [16] as well as any other issues that arise during Plan negotiations.

The Commission also finds that it is appropriate to extend the exemptive relief from Rule 11Ac1–2[17] under the Act until the earlier of September 19, 2001, or until such time as the calculation methodology of the BBO is based on a mutual agreement among the Participants approved by the Commission. The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Aa3–1[18] under the Act to BSE through September 19, 2001. The Commission believes that the temporary extensions of the exemptive relief provided to vendors and the BSE, respectively, are consistent with the Act, the Rules thereunder, and specifically with the objectives set forth in Sections 12(f)[19] and 11A[20] of the Act and in Rules 11Aa3–1[21] and 11Aa3–2[22] thereunder.

VII. Conclusion

It is therefore ordered, pursuant to Sections 12(f)[23] and 11A[24] of the Act and paragraph (c)(2) of Rule 11Aa3–2[25] thereunder, that Participants' request to extend the effectiveness of the Plan, as amended, for Nasdaq/NM securities traded on as exchange on an unlisted or listed basis through September 19, 2001, and certain exemptive relief through September 19, 2001, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–20856 Filed 8–17–01; 8:45 am]

BILLING CODE 8010–01–M

[13] 15 U.S.C. 78k–1.

[14] In approving this extension, the Commission has considered the extension's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

[15] *See supra* note 4. The Commission notes that the SuperMontage order stated the Participants were directed to produce a revised plan by July 19, 2001. The Commission, however, provided for a 3-month extension of the July 19, 2001 deadline if requested by the Participants for good cause. The Commission recognizes that the Participants have been meeting to discuss the alternatives for a new plan.

[16] *See also* discussion in the SuperMontage order, *supra* note 4.

[17] 17 CFR 240.11Ac1–2.

[18] 17 CFR 240.11Aa3–1.

[19] 15 U.S.C. 78l(f).

[20] 15 U.S.C. 78k–1.

[21] 17 CFR 240.11Aa3–1.

[22] 17 CFR 240.11Aa3–2.

[23] 15 U.S.C. 78l(f).

[24] 15 U.S.C. 78k–1.

[25] 17 CFR 240.11Aa3–2(c)(2).

[26] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44688; File No. SR–PCX–2001–31]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to a One-Year Extension of the AOR Pilot Program

August 13, 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 August 8, 2001, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items, I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to extend its Automated Opening Rotations (''AOR'') pilot program for one year. The text of the proposed rule change follows. Deleted text is bracketed. New text is italicized.

¶5073 Trading Rotations

Rule 6.64(a)–(g)—No change.

Commentary

.01—No Change

.02 Pilot Program. The Automated Opening Rotation System is subject to a [one year] pilot program, which is set to expire on [September 28, 2001] *September 30, 2002.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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. PCX 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

On September 30, 1999, the Commission approved a one-year pilot program for the operation of the Exchange's AOR System.[3] On August 21, 2000, the Commission granted a one-year extension to the pilot program.[4] The extension program is currently set to expire on September 28, 2001.[5] AOR provides a procedure to facilitate the execution of options orders at the opening by providing an electronic means of establishing a single price opening. In its order approving the pilot program, the Commission stated that it expects the Exchange to study the issues related to the Commission's concerns during the pilot period and to report back to the Commission at least sixty days prior to seeking permanent approval of AOR.

The Exchange is requesting an additional extension of the pilot program until the Commission grants permanent approval or one year, whichever occurs first. The added time permits the Exchange an opportunity to continue reviewing and evaluating the program in order to properly address the Commission's concerns before seeking permanent approval. The Exchange believes that this program is operating successfully and without any problems, and on that basis, the Exchange believes that a one-year extension of the program is warranted. At this time, the Exchange is not seeking to modify the pilot program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[6] of the Act, in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to promote just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6)[9] thereunder because the proposal: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making 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 PCX. All submissions should refer to File No. SR–PCX–2001–31 and should be submitted by September 10, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–20858 Filed 8–17–01; 8:45 am]

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[3] *See* Securities Exchange Act Release No. 41970 (September 30, 1999), 64 FR 54713 (October 7, 1999).

[4] *See* Securities Exchange Act Release No. 43187 (August 21, 2000), 64 FR 52464 (August 29, 2000).

[5] *Id.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44682; File No. SR–Phlx–2001–54]

Self Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to the Elimination of the Requirement That the Three Core Members of the Equity and Options Allocation, Evaluation, and Securities Committees Who Conduct a Securities Business be the Same People for Both Committees

August 10, 2001.

On May 16, 2001, the Philadelphia Stock Exchange, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to eliminate the requirement that the three core members of the Equity and Options Allocation, Evaluation, and Securities Committees who conduct a securities business be the same people for both committees.

The proposed rule change was published for comment in the **Federal Register** on July 11, 2001.[3] The Commission received no comments on the proposal.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 44505 (July 11, 2001), 66 FR 36355.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of Section 6 of the Act[5] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act[6] because it is designed 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.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[7], that the proposed rule change (File No. SR–Phlx–2001–54) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–20857 Filed 8–17–01; 8:45 am]

BILLING CODE 8010–01–M

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3354]

Commonwealth of Virginia; Amendment #2

In accordance with a notice received from the Federal Emergency Management Agency, dated August 9, 2001, the above numbered declaration is hereby amended to include Lee County as a disaster area due to damages caused by Severe Storms and Flooding occurring on July 8, 2001 and continuing.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the previously designated location: Bell County in Kentucky; and Claiborne County in Tennessee. All other contiguous counties have been previously declared.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is September 10, 2001, and for loans for economic injury the deadline is April 12, 2002.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: August 14, 2001.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 01–20868 Filed 8–17–01; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3339]

State of Wisconsin; Amendment #7]

In accordance with a notice received from the Federal Emergency Management Agency, dated July 6, 2001, the above-numbered Declaration is hereby amended to establish the incident period for this disaster as occurring between April 10, 2001 and continuing through July 6, 2001. All other information remains the same, i.e., the deadline for filing applications for physical damage is August 10, 2001 and for economic injury the deadline is February 11, 2002.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: August 14, 2001.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 01–20867 Filed 8–17–01; 8:45 am]

BILLING CODE 8025–01–P

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Tennessee Valley Authority (Meeting No. 1533).

TIME AND DATE: 9 a.m. (CDT), August 22, 2001.

PLACE: Cedar Ridge Middle School Auditorium, 2715 Danville Road, SW., Decatur, Alabama.

STATUS: Open.

Agenda

Approval of minutes of meeting held on July 18, 2001.

New Business

B—Purchase Awards

B1. Contract with Allied Welding & Safety, LLC, for welding supplies and equipment.

B2. Supplement to contract with Shook and Fletcher Insulation Company to increase the total contract spending ceiling to $19.5 million for insulation materials and related products and authorize an additional two years to the contract term.

C—Energy

C1. Supplement to Contract No. 99999906 with Holtec International, Inc., for an independent spent fuel storage installation and dry cask storage system for Browns Ferry Nuclear Plant and delegation of authority to the Senior Vice President, Procurement, or a designee, to further supplement the contract by adding construction and other activities to the scope of the work.

E—Real Property Transaction

E1. Grant of 30-year easement for a natural gas pipeline to BAMAGAS Company and modification of existing term easements affecting Tract Nos. XPR–463P, XPR–178P, XPR–179P, XPR–180P, XPR–181P, XPR–334P, XPR–335P, XPR–336P, XPR–337P, XPR–442P, XPR–443P, XPR–444P, XWR–338P, XWR–389P, XWR–390P, XWR–392P, XWR–395P, XWR–510P, XWR–570P located on Pickwick and Wheeler Reservoirs in Colbert, Lawrence, Morgan, and Limestone Counties, Alabama.

F—Other

F1. Approval to file a condemnation case to acquire a transmission line easement and right-of-way, affecting Tract No. MRFS–116, the Murfreesboro-Smyrna No. 2 line in Rutherford County, Tennessee.

Information Items

1. Concurrence by the individual members of the Board of Directors for the issuance of TVA Power Bonds and the execution of a currency swap agreement with Morgan Stanley Capital Services, Inc.

2. Approval for sale and leaseback or lease and leaseback of eight combustion turbines being purchased for the Lagoon Creek Combustion Turbine Plant.

3. Approval of Wilshire Associates Incorporated as a new investment manager for the TVA Retirement System and approval of the Investment Management Agreement between the Retirement System and this new investment manager.

For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 898–2999. People who plan to attend the meeting and have special needs should call (865) 632–6000.

Dated: August 15, 2001.

Maureen H. Dunn,

General Counsel and Secretary.

[FR Doc. 01–20997 Filed 8–16–01; 11:35 am]

BILLING CODE 8120–02–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Revisions to Advisory Circular 25–7A, Flight Test Guide for Certification of Transport Category Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed advisory circular and request for comments.

SUMMARY: This notice requests comments regarding proposed revisions to Advisory Circular (AC) 25–7A, ''Flight Test Guide for Certification of Transport Category Airplanes.'' AC 25–7A provides guidance on acceptance means, but not the only means, of demonstrating compliance with the airworthiness standards for transport category airplanes. The proposed revisions harmonize, expand, and clarify existing advisory material concerning certain airplane performance requirements to address inconsistencies in the means of compliance with the existing airworthiness standard and to reflect increased knowledge of airplane and propulsion system performance modeling and test verification practices since the standard was established. This notice provides interested persons an opportunity to comment on the proposed revisions to AC 25–7A.

DATES: Your comments must be received on or before October 19, 2001.

ADDRESSES: You should send your comments on the proposed AC revisions to the Federal Aviation Administration, Attention: Don Stimson, Airplane & Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Ave SW., Renton, WA 98055–4056. You may examine comments at this address between 7:30 a.m. and 4:00 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Don Stimson, Airplane & Flight Crew Interface Branch, ANM–111, at the above address, telephone 425–227–1129, or facsimile 425–227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Your are invited to comment on the proposed revisions to AC 25–7A by submitting such written data, views, or arguments as you may desire. You should identify the title of the AC and submit your comments in duplicate to the address specified above. The Transport Airplane Directorate will consider comments received on or before the closing date for comments before issuing the revision to AC 25–7A. You may view the complete text of AC 25–7A at the following Internet address: *http://www.faa.gov/avr/air/airhome.htm* at the link titled ''Advisory Circulars'' under the ''Available Information'' drop-down menu.

Discussion

Harmonization of Standards and Guidance

The following proposed revisions to AC 25–7A are based on a recommendation that the Aviation Rulemaking Advisory Committee (ARAC) submitted to the FAA. The FAA tasked ARAC (63 FR 50954, September 23, 1998) to provide advice and recommendations on ''harmonizing'' certain sections of part 25 (including 25.101(c)) with the counterpart standards contained in Joint Aviation Requirements (JAR) 25. The goal of ''harmonization tasks'' such as this is to ensure that:

- Where possible, standards and guidance do not require domestic and foreign parties to manufacture or operate to different standards for each county involved; and
- The standards and guidance adopted are mutually acceptable to the FAA and the foreign aviation authorities.

What Are the Differences in the FAA and JAA Standards or Policy and What Do These differences Result In?

In the case of § 25.101(c), the FAA and JAA standards are the same. The differences are in the policies and certification approval practices relative to altitude/temperature extrapolation of takeoff performance data.

In general, both FAA and JAA policy is to limit the unrestricted extrapolation of takeoff data to 6,000 feet above the altitude at which the takeoff performance data are obtained. For further extrapolations, a takeoff distance penalty of 2 percent must be applied for each 1,000 feet of extrapolation beyond the 6,000-foot limit. For the FAA, a further constraint is that engine data may only be extrapolated 3,000 feet above the altitude at which specific engine data have been obtained to verify takeoff thrust models.

For the JAA, a 2 percent takeoff distance penalty must also be applied for every 5°C of temperature extrapolation beyond a temperature that exceeds either:

- A temperature 15°C higher than the maximum temperature tested; or
- The amount by which the maximum temperature tested exceeds the minimum temperature tested.

The FAA does not apply extrapolation limits for temperature. Instead, the FAA policy is to require engine limits compliance to be demonstrated by airplane testing at a sea level ambient temperature near the highest temperature for which the engine is flat-rated. In addition, to allow higher altitude data extrapolation, the use of engine power setting overboost will generally provide higher temperature conditions (*i.e.,* closer to the flat-rated highest temperature) at the simulated altitude.

Since these policies represent only one means of compliance with the regulatory standards, the criteria noted above have not always been strictly applied. For example, experience from previous certification programs, combined with thorough substantiation of an acceptable model of engine thrust and lapse rate characteristics, has been used to allow extrapolations beyond 6,000 feet above the highest altitude tested without applying a conservative factor. In the same vein, the 3,000-foot extrapolation limit on engine data has not always been applied.

Considerably more experience has since been gained both in terms of modeling airplane and propulsion system (turbine engines and propellers, where appropriate) performance and in verifying the accuracy of these models for determining high (and low) altitude takeoff and landing performance. This experience has shown that the soundness of the extrapolation is primarily a function of the accuracy of the propulsion system performance model and its integration with the airplane drag model. The basic aerodynamic characteristics of the airplane do not change significantly with altitude or ambient temperature, and any such effects are readily taken into account by standard airplane performance modeling practices.

The effect of the proposed changes to the acceptable means of compliance that is proposed to replace the current guidance material in AC 25–7A would be to allow extrapolation of airplane takeoff and landing performance data to higher and lower altitudes without applying an arbitrary distance penalty if the following criteria are met:

- A comprehensive propulsion system model is developed covering the entire operational envelope and

substantiated by inflight thrust measurement

• Lapse rate takeoff testing to characterize the behavior of power setting, rotor speeds, propeller effects (i.e., torque, RPM, and blade angle), or gas temperature as a function of time, thermal state, or airspeed, as appropriate, is performed at an altitude within 3,000 feet of the maximum approved takeoff airport altitude.

• The combination of the propulsion system performance model an the airplane performance model is validated by the takeoff performance test data, climb performance tests, an tests used to determine airplane drag.

• Proper operation of other systems dependent on altitude is considered for the highest takeoff and landing altitude for which approval is sought.

This proposed methodology is consistent with, but more stringent than, some of the means of compliance that have been accepted in past certification programs. In some previous certification programs, the validation of lapse rate characteristics by takeoff demonstrations has not always been performed at an airport altitude within 3,000 feet of the maximum approved takeoff airport altitude.

This proposed revision to the AC 25–7A guidance material should act as a catalyst to provide more consistency throughout the industry for applying ''best practices'' in determining and substantiating airplane and propulsion system performance models throughout the operating envelope. Instead of applying an arbitrary takeoff and landing distance penalty for large extrapolations in altitude above the test altitude, this means of compliance encourages applications to develop and verify an accurate model of the propulsion system performance and substantiate its integration with the airplane drag model.

Since AC 25–7A only provides one acceptable means of compliance with the regulatory standard, applicants will continue to have the option of proposing the use of another means of compliance.

Dissenting Opinion

One member of the ARAC working group registered the following dissenting position regarding paragraph 3a(8)(v) of the proposed advisory material.

''It is recognized that starting capability for the engines and APU may be relevant to operations sat high altitude airports. However, there are no specific FAR/JAR requirements for engine or APU starting capability on the ground, so it is not appropriate to list ground starting capability as relevant to FAR/JAR compliance. It is requested that the references to engine and APU starting capability to deleted from paragraph 3a(8)(v).''

The FAA does not agree with the dissenting opinion. The lack of a ''specific'' FAR/JAR requirement for engine or APU starting on the ground does not mean that engine and APU starting need not be addressed prior to granting airworthiness approval. Section 25.1309(a) requires that ''equipment, systems, and installations whose functioning is required . . . must be designed to ensure that they perform their intended functions under any foreseeable operating condition.'' Regardless of this or any other ''non-specific'' requirement related to engine and APU starting, starting capability for the engines and APU is a consideration, as the working group member notes, that is relevant to operations at high altitude airports. Also, the wording of the AC paragraph of concern, ''consideration should be given to any other systems whose operation may be sensitive to, or dependent upon airport altitude, such as: engine and APU starting, passenger oxygen, autopilot, autoland, autothrottle system thrust set/operation,'' identifies these items as items that should be considered in the context of approval to operate from high altitude airports, not in reference to any specific part 25 requirement. Therefore, the references in paragraph 3a(8)(v) to engine and APU starting have been retained in the proposed revision to AC 25–7A.

Proposed Revisions to AC 25–7A

The guidance provided in the following proposed revision to AC 25–7A has been harmonized with that of the JAA, and provides a method of compliance that has been found acceptable to both the FAA and JAA.

This proposed revision should not be confused with other proposed revisions to AC 25–7A for which the FAA may currently be seeking comments. The revisions proposed in this notice address guidance material associated with the polices and certification approval practices relative to altitude temperature extrapolation of takeoff performance data.

1. Replace Existing Paragraph 3a(8) Through 3a(9) With the Following

3. Proof of Compliance.

(8) *Expansion of Takeoff and Landing Data for a Range of Airport Elevations.*

(i) These guidelines are applicable to expanding Airplane Flight Manual takeoff and landing data above and below the altitude at which the airplane takeoff and landing performance tests are conducted.

(ii) Historically, limits have been placed on the extrapolation or takeoff data. In general, takeoff data could be extrapolated 6,000 feet above and 3,000 feet below the test field elevation when proven testing and data reduction methods were used. For extrapolations beyond these limits, a 2 percent takeoff distance penalty was to be applied for every additional 1,000 feet extrapolation. Such limitations were generally not applied to extrapolation of landing data, provided the effect of the higher true airspeed on landing distance was taken into account.

(iii) Considerably more experience has since been gained both in terms of modeling airplane and propulsion system (*i.e.,* turbine engines and propellers, where appropriate) performance and in verifying the accuracy of these models for determining high (and low) altitude takeoff and landing performance. This experience has shown that the soundness of the extrapolation is primarily a function of the accuracy of the propulsion system performance model and its integration with the airplane drag model. The basic aerodynamic characteristics of the airplane do not change significantly with altitude or ambient temperature, and any such effects are readily taken into account by standard airplane performance modeling practices.

(iv) As a result, with installed propulsion system performance characteristics that have been adequately defined and verified, airplane takeoff and landing performance data obtained at one field elevation may be extrapolated to higher and lower altitudes within the limits of the operating envelope without applying additional performance conservatisms. It should be noted, however, that extrapolation of the propulsion system data used in the determination and validation of propulsion system performance characteristics is typically limited to 3,000 feet above the highest altitude at which propulsion system parameters were evaluated for the pertinent power/thrust setting. (See paragraph 9 of this AC for more information on an acceptable means of establishing and verifying installed propulsion system performance characteristics.)

(v) Note that certification testing for operation at airports that are above 8,000 feet should also include functional tests of the cabin pressurization system in accordance with paragraph 87b(3) of this AC. Consideration should be given to any

other systems whose operation may be sensitive to, or dependent upon airport altitude, such as: engine and APU starting, passenger oxygen, autopilot, autoland, autothrottle system thrust set/operation.

2. Replace Paragraph 9 in Its Entirety With the Following

9. *General—§ 25.101*

a. *Explanation—Propulsion System Behavior.* Section 25.101(c) requires that airplane ''performance must correspond to the propulsive thrust available under the particular ambient atmospheric conditions, the particular flight conditions, * * * '' The propulsion system's (*i.e.,* turbine engines and propellers, where appropriate), installed performance characteristics are primarily a function of engine power setting, airspeed, propeller efficiency (where applicable), altitude, and ambient temperature. the effects of each of these variables must be determined in order to establish the thrust available for airplane performance calculations.

b. *Procedures.*

(1) The intent of this testing is to develop a model of propulsion system performance that covers the approved flight envelope. Furthermore, it should be shown that the combination of the propulsion system performance model and the airplane performance model are validated by the takeoff performance test data, climb performance tests, and tests used to determine airplane drag. Installed propulsion system performance characteristics can be established via the following tests and analyses:

(i) Steady-state engine power setting vs. thrust (or power) testing. Engines should be equipped with adequate instrumentation to allow the determination of thrust (or power). Data should be acquired in order to validate the model, including propeller-installed thrust, if applicable, over the range of power settings, altitudes, temperatures, and airspeeds for which approval is sought. Although it is not possible to definitively list or foresee all of the types of instrumentation that might be considered adequate for determining thrust (or power) output, two examples used in past certification programs are: (1) engine pressure rakes, with engines calibrated in a ground test cell, and (2) fan speed, with engines calibrated in a ground test cell and the calibration data validated by the use of a flying test bed. In any case, the applicant should substantiate the adequacy of the instrumentation to be used for determining the thrust (or power) output.

(ii) Lapse rate takeoff testing to characterize the behavior of power setting, rotor speeds, propeller effects (i.e., torque, RPM, and blade angle), or gas temperature as a function of time, thermal state, or airspeed, as appropriate. These tests should include the operation of an Automotive Takeoff Thrust Control System (ATTCS), if applicable, and should cover the range of power settings for which approval is sought.

(A) Data for higher altitude power settings may be acquired via overboost (i.e., operating at a higher than normal power setting for the conditions) with the consent of the engine and propeller (when applicable manufacturer(s). When considering the use of overboost on turbopropeller propulsion system installations to stimulate higher altitude and ambient temperature range conditions, the capability to achieve an appropriate simulation should be evaluated based on the engine and propeller control system(s) and aircraft performance and structural considerations. Engine (gearbox) torque, rotor speed, or gas temperature limits, including protection devices to prohibit or limit exceedances, may prevent the required amount of overboost needed for performance at the maximum airport altitude sought for approval. Overboost may be considered as increased torque, reduced propeller speed, or a combination of both, in order to achieve the appropriate blade angle for the higher altitude and ambient temperature range simulation. Consideration for extrapolations will depend on the applicant's substantiation of the proper turbopropeller propulsion system simulated test conditions.

(B) Lapse rate charactertics should be validated by takeoff demonstrations at the maximum airport altitude for which takeoff approval is being sought. Alternatively, if overboost (See paragraph (A) above) is used to stimulate the thrust setting parameters of the maximum airport altitude for which takeoff approval is sought, the takeoff demonstrations of lapse rate characteristics can be performed at an airport altitude up to 3,000 feet lower than the maximum airport altitude.

(iii) Thrust calculation substantiation. Installed thrust should be calculated via a mathematical model of the propulsion system, or other appropriate means, adjusted as necessary to match the measured inflight performance characteristics of the installed propulsion system. The propulsion system mathematical model should define the relationship of thrust to the power setting parameter over the range of power setting, airspeed, altitude, and temperature for which approval is sought. For turbojet airplanes, the propulsion system mathematical model should be substantiated by ground tests in which thrust is directly measured via a calibrated load cell or equivalent means. For turboproller airplanes, the engine power measurement should be substantiated by a calibrated dynamometer or equivalent means, the engine jet thrust should be established by an acceptable enginer model, and the propeller thrust and power characteristics should be substantiated by wind tunnel testing or equivalent means.

(iv) Effects of ambient temperature. The flight tests of paragraph 9b(l)(i) above will typically provide data over a broad range of ambient temperatures. Additional data may be obtained from other flight or ground tests of the same type or series of engine. The objective is to confirm that the propulsion system model accurately reflects the effect of temperature over the range of ambient temperatures for which approval is being sought (operating envelope). Because thrust (or power) data can usually be normalized versus temperature using either dimensionless variables (e.g., theta exponents or a thermodynamic cycle model, it is usually uneccessary to obtain data over the entire ambient temperature range. There is no needed to conduct additional testing if:

(A) The data show that the behavior of thrust and limiting parameters versus ambient temperature can be predicted accurately and

(B) Analysis based upon the test data shows that the propulsion system will operate at rated thrust without exceeding propulsion system limits.

(2) Extrapolation of propulsion system performance data to 3,000 feet above the highest airport altitude test (up to the maximum takeoff airport altitude to be approved) is acceptable, provided the supporting data, including flight test and propulsion system operations data (e.g., engine and propeller control, limits exceedance, and surge protection devices scheduling), substantiates the proposed extrapolation procedures. Considerations for extrapolation depend upon an applicant's determination, understanding, and substantiation of the critical operating modes of the propulsion system. This understanding includes a determination and quantification of the effects that propulsion system installation and variations in ambient conditions have on these modes.

Issued in Renton, WA on August 9, 2001.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–20911 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Environmental Impact Statement: Juneau International Airport, Juneau, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental Notice of Intent.

SUMMARY: The Federal Aviation Administration announces extension of scoping comment period for Environmental Impact Statement (EIS) assessing implementation of projects proposed at the Juneau International Airport.

RESPONSIBLE OFFICIAL: Patricia A. Sullivan, Environmental Specialist, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513.

WRITTEN COMMENTS: Ken Wallace, Project Manager, SWCA, Inc., 230 South 500 East, Suite 380, Salt Lake City, UT 84102. Email: *kwallace@swca.com*.

FOR FURTHER INFORMATION CONTACT: Cathryn Collis, Compliance and Process Coordinator, SWCA, 230 South 500 East, Suite 380, Salt Lake City, UT 84102. Email: *ccollis@swca.com.*

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration published a Notice of Intent on June 1, 2001 to prepare and consider an EIS for implementation of proposed projects at the Juneau International Airport. Major projects proposed to be assessed in the EIS include: Creation of additional Runway Safety Area (RSA) centered about the runway that is 500 feet wide by the length of the runway plus 1,000 feet beyond each runway end; installation of a Medium Approach Lighting System with Rails (MALRS) to improve the approach to Runway 26; construction of a Snow Removal Equipment Building to provide needed storage space for the snow removal fleet; and construction of additional Aviation Development Areas to provide adequate facilities to accommodate the growing demand and tourism needs of helicopters and fixed wing aircraft. Construction of an access road between the Fuel Tank Farm and the Airport will also be evaluated in the EIS.

FAA has conducted initial public and interagency scoping meetings concerning the EIS and proposed actions, and has determined that additional time should be allowed for interested parties to submit written comments on the scope of the environmental study. Therefore, FAA will accept written comments through September 30, 2001. Comments may be submitted in writing to the address identified in **FOR FURTHER INFORMATION CONTACT** or through the comment submittal form found on the project web site at *www.jnu-eis.org*. An additional public meeting will be held in Juneau during the scoping comment period. Date and time for that meeting will be advertised in the daily Juneau Empire and on the project web site.

Issued in Anchorage, Alaska on August 3, 2001.

Barbara J. Johnson,

Acting Manager, Airports Division, AAL–600, Alaskan Region.

[FR Doc. 01–20910 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–10420]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intentions to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before October 19, 2001.

FOR FURTHER INFORMATION CONTACT: Michael Ferris, Maritime Administration, MAR 560, 400 Seventh Street, SW., Washington, DC 20590. Telephone: 202–366–2324. FAX: 202–366–7901. Copies of this collection can also be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Subsidy Voucher—Operating Differential Subsidy (Bulk & Liner Cargo Vessels).

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0024.

Form Numbers: MA 790, SF–1034 and Supporting Schedules.

Expiration Date of Approval: March 31, 2002.

Summary of Collection of Information: The Merchant Marine Act, 1936, authorizes the Secretary of Transportation to provide financial aid in the operation of contract vessels for bulk or liner cargo carrying services that help promote, develop, expand and maintain the foreign commerce of the United States. Vessel owners must submit documentation requesting the financial assistance to the Maritime Administration (MARAD).

Need and Use of the Information: MARAD will review the documentation to determine subsidy payable to operators for voyages performed in accordance with the Operating-Differential Subsidy (ODS) Agreements.

Description of Respondents: Operators of Bulk and Liner Vessels.

Annual Responses: 8.

Annual Burden: 16 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW, Washington, D.C. 20590. Comments may also be submitted by electronic means via the Internet at *http://dmses.dot.gov/submit.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT, Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://dms.dot.gov.*

By Order of the Maritime Administrator.

Dated: August 15, 2001.

Joel C. Richard,

Secretary.

[FR Doc. 01–20909 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–81–P

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 September 4, 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 August 15, 2001.

Suzanne Hedgepeth,

Director, Office of Hazardous Materials, Exemptions and Approvals.

Application No.	Docket No.	Applicant	Modification of exemption
7277–M		Structural Composites Industries, Pomona, CA[1]	7277
8162–M		Structural Composites Industries, Pomona, CA[2]	8162
8718–M		Structural Composites Industries, Pomona, CA[3]	8718
10019–M		Structural Composites Industries, Pomona, CA[4]	10019
10458–M		Marsulex, Inc., North York, Ontario, CA[5]	10458
10751–M		Dyno Nobel, Inc., Salt Lake City, UT[6]	10751
11194–M		Carleton Technologies, Inc., Pressure Tech. Div., Glen Burnie, MD[7]	11194
11379–M		TRW Automotive Occupant Safety Systems, Washington, MI[8]	11379
11489–M		TRW Automotive, Queen Creek, AZ[9]	11489
11579–M		Dyno Nobel, Inc., Salt Lake City, UT[10]	11579
12065–M	RSPA–98–3831	Petrolab Company Latham, NY[11]	12065
12557–M	RSPA–00–8301	Global Container Group, Inc. Baton Rouge, LA[12]	12557
12626–M	RSPA–01–8851	SMI Companies, Franklin, LA[13]	12626
12771–M	RSPA–01–10156.	Cytec Industries, Inc., West Paterson, NJ[14]	12771

[1] To modify the exemption to authorize the retest period from 3 to 5 years for non-DOT specification fiber reinforced plastic full composite cylinders used for the transportation of Division 2.1 and 2.2 materials.

[2] To modify the exemption to authorize the retest period from 3 to 5 years for non-DOT specification fiber reinforced plastic full composite cylinders used for the transportation of Division 2.2 materials.

[3] To modify the exemption to authorize the retest period from 3 to 5 years for non-DOT specification fiber reinforced plastic full composite cylinders used for the transportation of Division 2.2 materials.

[4] To modify the exemption to authorize the retest period from 3 to 5 years for non-DOT specification fiber reinforced plastic full composite cylinders used for the transportation of Division 2.2 materials.

[5] To modify the exemption to authorize the use of additional unloading facilities for the transportation of Class 8 and Division 2.3 materials in DOT Specification 111A100W2 tank car tanks.

[6] To modify the exemption to authorize the transportation of Class 1.4D, 1.4B, 1.1B and additional 1.1D explosives in the same motor vehicle with certain bulk combustible liquids and/or bulk Division 5.1 oxidizers.

[7] To modify the exemption to authorize the transportation of an additional Division 2.2 material in non-DOT specification full wrapped carbon fiber reinforced aluminum lined cylinders.

[8] To modify the exemption to authorize the use of the non-DOT specification pressure vessels in non-automotive safety systems.

[9] To modify the exemption to authorize the use of a contract carrier for transporting certain unapproved or unidentified items as approved, air bag inflators or air bag modules or seat belt pretensioners or seat belt modules as Division 1.4C explosive articles, segregated from other hazardous materials.

[10] To modify the exemption to authorize the transportation of Division 1.1D and 1.4D explosives on the same motor vehicle with Division 1.5D explosives.

[11] To modify the exemption to authorize the use of an alternative flash point test method by any person/company without party status exemption approval for the transportation of certain Class 3 materials in limited quantities.

[12] To reissue the exemption originally issued on an emergency basis authorizing the construction of certain DOT Specification 51 steel portable tanks designed in accordance with Section VIII, Division 1 of the ASME Code, except for design margin, for the transportation of certain Division 2.1 and 2.2 materials.

[13] To modify the exemption to authorize the transportation of additional Class 8 materials in a non-DOT specification steel portable tank equipped with an external bottom discharge valve.

[14] To modify the exemption originally issued on an emergency basis for the transportation of certain Division 2.3 materials in DOT Specification 3AA2400 cylinders not fitted with a pressure relief device and to increase the cylinder pressure to a maximum of 840 psig at 70 degrees F.

[FR Doc. 01–20924 Filed 8–17–01; 8:45 am]
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 September 19, 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 August 15, 2001.

J. Suzanne Hedgepeth,

Director, Office of Hazardous Materials, Exemptions and Approvals.

NEW EXEMPTIONS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of exemption thereof
12778–N	RSPA–01–10306	SF Phosphates Limited Co., Rock Springs, WY.	49 CFR 174.67(i) & (j)	To authorize tank cars, containing anydrous ammonia, to remain connected while standing without the physical presence of an unloader (Mode 2.)
12780–N	RSPA–01–10307	Vinings Industries, Inc., Kennesaw, GA.	49 CFR 172.202, 173.203	To authorize the transportation in commerce of samples of Class 8 and Class 9 hazardous materials in specially designed packaging. (Mode 1.)
12781–N	RSPA–01–10318	International Business Aircraft, Inc., Tulsa, OK.	49 CFR 172.101	To authorize the transportation in commerce of Class 1 explosives which are forbidden or exceed quantities presently authorized. (Mode 4.)
12782–N	RSPA–01–10318	Air Liquide American Corporation, Houston, TX.	49 CFR 173.301(g)(1)	To authorize the transportation in commerce of non-DOT specification cylinders equipped with plastic protection caps for use in transporting Division 2.1 and 2.2 compressed gases. (Mode 1.)
12783–N	RSPA–01–10309	CryoSurgery, Inc., Nashville, TN.	49 CFR 171.8, 173.144, 173.156, 173.304, 173.306.	To authorize the transportation in commerce of small units of compressed gas, refrigerant 404A as limited quantities and/or ORM–D intended for medical use. (Modes 1, 2, 3, 4, 5.)
12784–N	RSPA–01–10308	CrySurgery, Inc., Nashville, TN.	49 CFR 171.8, 173.144, 173.156, 173.304, 173.306.	To authorize the transportation in commerce of compressed, refigerant 22, when shipped in relatively small units to be reclassed as ORM–D and transported as consumer commodity for medical purposes. (Modes 1, 2, 3, 4, 5.)
12785–N	RSPA–01–10313	Monson Companies, South Portland, ME.	49 CFR 177.848	To authorize the transportation in commerce of Division 4.2 and Class 8 materials that are not authorized to be transported, or stored together in the same transport vehicle or storage facility. (Mode 1.)
12790–N	RSPA–01–10320	Environmental Management, Inc. (EMI).	49 CFR 173.201, 173.202, 173.203, 173.302, 173.304, 173.309, 173.34.	To authorize the transportation in commerce of non-DOT specification full open head, steel salvage cylinders for use in transporting damaged, leaking or improperly filled cylinders containing various hazardous materials. (Mode 1.)
12791–N	RSPA–01–10314	General Dynamics Ordnance Tactical Systems, Inc., Marion, IL.	49 CFR 173.1(b), 173.24(c), 173.25(a)(1), 173.3(a).	To authorize the one-time transportation in commerce of 35 drums containing explosives which do not meet Packing Instruction 115 of the HMR. (Mode 1.)
12792–N	RSPA–01–10321	Miami Products and Chemical Company, Fairborn, OH.	49 CFR 174.67(i) & (j)	To authorize tank cars, containing chlorine, to remain connected while standing without the physical presence of an unloader. (Mode 2.)

NEW EXEMPTIONS—Continued

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of exemption thereof
12795–N	RSPA–01–10340	Scientific Cylinder Corp., Englewood, CO.	49 CFR (e)(8), (e)(15)(vi) and (e)(19), 173.34(e)(1), (e)(3), (e)(4), (e)(5), (e)(6), (e)(7).	To authorize the transportation in commerce of DOT–3A cylinders manufactured from 6061 alloy which are 100% ultrasonic wall thickness inspected in lieu of the internal visual test. (Modes 1, 2, 3, 4.)
12800–N	RSPA–01–10317	Department of Energy, (DOE), Washington, DC.	49 CFR 173.427(b)	To authorize the transportation in commerce of unit train shipments in exclusive use of soil-like radioactive LSA–11 waste material in strong tight bulk packages (closed rail cars). (Mode 2.)

[FR Doc. 01–20925 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–344 (Sub–No. 1X)]

Chicago Southshore & South Bend Railroad—Abandonment Exemption—in LaPorte County, IN

On July 31, 2001, Chicago Southshore & South Bend Railroad (CSS) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad [1] extending from a connection at the east end of CSS's Lincoln Yard, near Second Street, to the end of the line at the facility of the Pioneer Lumber Company, a distance of less than one-half mile (approximately 2,400 feet), in LaPorte County, IN. The line traverses U.S. Postal Service ZIP Code 46360 and includes no stations.

Based on information in its possession, CSS states that the line does not contain federally granted rights-of-way. Any documentation in CSS's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by November 16, 2001.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by the filing fee, which currently is set at $1,000. See 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than September 10, 2001. Each trail use request must be accompanied by a $150 filing fee. See 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–344 (Sub-No. 1X) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW, Washington, DC 20423–0001; and (2) Troy W. Garris, 1300 Nineteenth Street, NW, Fifth Floor, Washington, DC 20036–1609. Replies to the CSS petition are due on or before September 10, 2001.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1545. (TDD for the hearing impaired is available at 1–800–877–8339.)

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our website at ''www.stb.dot.gov.''

Decided: August 14, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–20917 Filed 8–17–01; 8:45 am]

BILLING CODE 4915–01–P

[1] In its petition, CSS describes the line as an industrial lead track. CSS states that it is aware that the abandonment of industrial track is excepted from regulation by the Board pursuant to 49 U.S.C. 10906. It further states, however, that because the industrial track may previously have been a part of another carrier's main line, it is seeking this exemption out of an abundance of caution.

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 10, 2001.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before September 19, 2001 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0023.

Form Number: IRS Form 720.

Type of Review: Extension.

Title: Quarterly Federal Excise Tax Return.

Description: The information supplied on Form 720 is used by the IRS to determine the correct tax liability. Additionally, the data is reported by the IRS to Treasury so that funds may be transferred from the general revenue funds to the appropriate trust funds.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institution, Farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents/Recordkeepers: 50,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Form	Recordkeeping	Learning about the law or the form	Preparing and sending the form to the IRS
Form 720	23 hr., 53 min.	1 hr., 49 min.	4 hr., 40 min.
Schedule A	1 hr., 54 min.		1 min.
Schedule C Part I	1 hr., 54 min.	6 min.	7 min.
Schedule C Part II	22 hr., 28 min.	6 min.	28 min.
Schedule C Part III	14 min.		
Form 6197	4 hr., 18 min.	12 min.	16 min.
Form 6627	5 hr., 1 min.	6 min.	11 min.

Frequency of Response: Quarterly.

Estimated Total Reporting/Recordkeeping Burden: 3,479,551 hours.

OMB Number: 1545–0245.

Form Number: IRS Form 6627.

Type of Review: Extension.

Title: Environmental Taxes.

Description: Form 6627 is attached to Form 720 to compute and collect tax on chemical substances, and ozone-depleting chemicals.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents/Recordkeepers: 1,610.

Estimated Burden Hours Per Respondent/Recordkeeper: 1 hour, 47 minutes.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 5,174 hours.

OMB Number: 1545–1621.

Form Number: IRS Forms W–8BEN, W–8ECI, W–8EXP, and W–8IMY.

Type of Review: Extension.

Title: W–8BEN: Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding;

W–8ECI: Certificate of Foreign Person's Claim From Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States;

W–8EXP: Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding; and

W–8IMY: Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding.

Description: Form W–8BEN is used for certain types of income to establish that the person is a foreign person, is the beneficial owner of the income for which Form W–8BEN is being provided and, if applicable, to claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty.

Form W–8ECI is used to establish that the person is a foreign person, is the beneficial owner of the income for which Form W–8ECI is being provided, and to claim that the income is effectively connected with the conduct of a trade or business within the United States.

Form W–8EXP is given and, if applicable, to claim a reduced rate of, or exemption from, withholding.

Form W–8IMY is provided to a withholding agent or payer by a foreign intermediary, foreign partnership, and certain U.S. branches to make representations regarding the status of beneficial owners or transmit appropriate documentation to the withholding agent.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.

Estimated Number of Respondents/Recordkeepers: 3,180,640.

Estimated Burden Hours Per Respondent/Recordkeeper:

Form	Recordkeeping	Learning about the law or the form	Preparing and sending the form to the IRS
W–8BEN	5 hr., 58 min.	3 hr., 46 min.	4 hr., 2 min.
W–8ECI	3 hr., 35 min.	3 hr., 22 min.	3 hr., 35 min.
W–8EXP	7 hr., 10 min.	5 hr., 28 min.	5 hr., 49 min.
W–8IMY	5 hr., 58 min.	4 hr., 38 min.	6 hr., 8 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 43,280,135 hours.

Clearance Officer: Garrick Shear, Internal Revenue Service, Room 5244, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 01–20849 Filed 8–17–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Financial Management Service; Proposed Collection of Information: Depositor's Application To Withdraw Postal Savings

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Financial Management Service, 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 a continuing information collection. By this notice, the Financial Management Service solicits comments concerning the form ''Depositor's Application to Withdraw Postal Savings.''

DATES: Written comments should be received on or before October 19, 2001.

ADDRESSES: Direct all written comments to Financial Management Service, 3700 East West Highway, Programs Branch, Room 144, Hyattsville, Maryland 20782.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Rose Brewer, Judgment Fund Branch, 3700 East West Highway, Room 630F, Hyattsville, MD 20782, (202) 874–6664.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), the Financial Management Service solicits comments on the collection of information described below.

Title: Depositor's Application to Withdraw Postal Savings.

OMB Number: 1510–0034.

Form Number: POD 315.

Abstract: This form is used as an application for payment of Postal Savings accounts by depositors or their legal representatives. This form also serves to identify the depositor and insures that payment is made to the proper party.

Current Actions: Extension of currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 700.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 350.

Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget 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.

Dated: August 15, 2001.

Judith R. Tillman,

Assistant Commissioner, Financial Operations.

[FR Doc. 01–20918 Filed 8–17–01; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209626–93]

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–209626–93 (TD 8620), Notice, Consent, and Election Requirements Under Sections 411(a)(11) and 417 (§§ 1.411(a)–11T and 1.417(e)–1T).

DATES: Written comments should be received on or before October 19, 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 Allan Hopkins, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Notice, Consent, and Election Requirements Under Sections 411(a)(11) and 417.

OMB Number: 1545–1471.

Regulation Project Number: REG–209626–93.

Abstract: These regulations provide guidance concerning the notice and consent requirements under Code section 411(a)(11) and the notice and election requirements of Code section 417. Regulation section 1.417(a)–11(c) provides that a participant's consent to a distribution under code section 411(a)(11) is not valid unless the participant receives a notice of his or her rights under the plan no more than 90 and no less than 30 days prior to the annuity starting date. Regulation section 1.417(e)–1 sets forth the same 90/30-day time period for providing the notice explaining the qualified joint and survivor annuity and waiver rights under Code section 417(a)(3).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, not-for-profit institutions and Federal, state, local or tribal governments.

Estimated Number of Respondents: 750,000.

Estimated Time Per Respondent: .011 hr.

Estimated Total Annual Burden Hours: 8,333.

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: August 15, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–20921 Filed 8–17–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for the Statistics of Income (SOI) Corporate Survey

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 the Statistics of Income (SOI) Corporate Survey.

DATES: Written comments should be received on or before October 19, 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 survey should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5242, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Statistics of Income (SOI) Corporate Survey.

OMB Number: 1545–1351.

Abstract: The SOI Corporate Survey is a yearly self-administered mail survey sent to a small select group of the very largest U.S. corporations. The survey is voluntary and requests specific line item tax return data. The survey data are used to supplement the SOI corporate files in order to produce corporate advance tax data estimates. Advance tax data has been requested by the Bureau of Economic Analysis in the Department of the Commerce, the Office of Tax Analysis in the Department of the Treasury, and the Joint Committee on Taxation in the U.S. Congress for tax analysis purposes.

Current Actions: There are no changes being made to the survey at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 175.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 88.

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: August 14, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–20922 Filed 8–17–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–06: OTS Nos. H–3774 and 06459]

PFS Bancorp, Inc., Aurora, Indiana; Approval of Conversion Application

Notice is hereby given that on August 9, 2001, the Managing Director, Office of Thrift Supervision, or his designee, acting pursuant to delegated authority, approved the application of People's Federal Saving Bank, Aurora, Indiana, to convert to the stock form of organization. Copies of the application are available for inspection at the Dissemination Branch, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, and the Central Regional Office, Office of Thrift Supervision, 1 South Wacker Drive, Suite 2000, Chicago, Illinois 60606.

Dated: August 14, 2001.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 01–20866 Filed 8–17–01; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

Monday,
August 20, 2001

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 400, 430, et al.
Medicaid Program; Medicaid Managed Care; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 400, 430, 431, 434, 435, 438, 440, and 447

[CMS–2104–P]

RIN 0938–AK96

Medicaid Program; Medicaid Managed Care

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Medicaid regulations published in the **Federal Register** on January 19, 2001 (66 FR 6228) setting forth policies to implement provisions of the Balanced Budget Act of 1997 (BBA) that—allow the States greater flexibility by permitting them to amend their State plan to require certain categories of Medicaid beneficiaries to enroll in managed care entities without obtaining waivers if beneficiary choice is provided; establish new beneficiary protections in areas such as quality assurance, grievance rights, and coverage of emergency services; and eliminate certain requirements viewed by State agencies as impediments to the growth of managed care programs, such as the enrollment composition requirement, the right to disenroll without cause at any time, and the prohibition against enrollee cost-sharing. In addition, this proposed rule would expand on existing regulatory beneficiary protections provided to enrollees of prepaid health plans (PHPs) by requiring certain PHPs that provide services on an inpatient basis to meet specified BBA requirements that would not otherwise apply to these entities.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 4 p.m. on October 19, 2001.

ADDRESSES: Mail written comments (one original and three copies) to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2104–P, P.O. Box 8016, Baltimore, MD 21244–8016.

To ensure that mailed comments are received in time for us to consider them, please allow for possible delays in delivering them.

If you prefer, you may deliver (by hand or courier) your written comments (one original and three copies) to one of the following addresses: Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code CMS–2104–P. For information on viewing public comments see the beginning of the **SUPPLEMENTARY INFORMATION** section.

If you have comments on the information collection requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Information Services, DHES, SSG, Attn: Julie Brown, CMS–2001–F, Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850;

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, Desk Officer.

FOR FURTHER INFORMATION CONTACT: Part 438, Subparts A and B—Bruce Johnson: (410) 786–0615.

Subpart C—Tim Roe: (410) 786–2006
Subpart D—Ann Page: (410) 786–0083
Subpart F—Tim Roe: (410) 786–2006
Subpart H—Tim Roe: (410) 786–2006
Subpart I—Tim Roe: (410) 786–2006
Subpart J—Bruce Johnson (410) 786–0615

For other amendments—Dierdre Duzor (410) 786–4626

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at 7500 Security Blvd, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view the public comments, phone: (410) 786–7195.

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $9. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

This **Federal Register** document is also available from the **Federal Register** online database through GPO Access, a service of the U.S. Government Printing Office. The Website address is: http://www.access.gpo.gov/nara/index.html.

I. Background

A. General

In 1965, amendments to the Social Security Act (the Act) established the Medicaid program as a joint Federal and State program for providing financial assistance to individuals with low incomes to enable them to receive medical care. Under the Medicaid program, each State establishes its own eligibility standards, benefits packages, payment rates and program administration in accordance with certain Federal statutory and regulatory requirements. The provisions of each State's Medicaid program are described in the State's Medicaid ''State plan'' that we must approve. In addition to approving State plans and monitoring States for compliance with Federal Medicaid laws, the Federal role also includes providing matching funds to State agencies to pay for a portion of the costs of providing health care to Medicaid beneficiaries. Medicaid beneficiaries typically include low-income children and their families, pregnant women, individuals age 65 and older, and individuals with disabilities. (Throughout this preamble, we use the term ''beneficiaries'' to mean ''individuals eligible for and receiving Medicaid benefits.'' The term ''recipients'' in the CFR text has the same meaning as the term ''beneficiary.'')

When the Medicaid program was created, coverage typically was provided through reimbursements by the State agency to health care providers who submitted claims for payment after they provided health care services to Medicaid beneficiaries. This reimbursement arrangement is referred to as ''fee-for-service'' payment. Before 1982, 99 percent of Medicaid beneficiaries received Medicaid coverage through fee-for-service

arrangements. Since 1982, State agencies increasingly have provided Medicaid coverage through contracts with managed care organizations (MCOs), such as health maintenance organizations (HMOs). Through these contracts an MCO is paid a fixed, prospective, monthly payment for each beneficiary enrolled with the entity for health coverage. This payment approach is referred to as ''capitation.'' Beneficiaries enrolled in capitated MCOs are required to receive health care services provided under the MCO's contract, through the MCO that receives the capitation payment. The Omnibus Budget Reconciliation Act (OBRA) of 1981 (Pub. L. 97–35 enacted on August 13, 1981) allowed State agencies to mandate that Medicaid beneficiaries enroll in MCOs, which increased the use of MCOs. In most States, mandatory enrollment takes place for at least certain categories of beneficiaries. To achieve this mandatory enrollment, before the enactment of the Balanced Budget Act (BBA) of 1997 (Pub. L. 105–33, enacted on August 5, 1997), States were required to obtain a waiver of a Medicaid statutory requirement for beneficiary ''freedom of choice'' of providers. (State programs that offered beneficiaries voluntary enrollment in MCOs do not require these waivers.) As a result, in 1997, just before the passage of the BBA, almost 8.5 million Medicaid beneficiaries, or 43 percent of all Medicaid beneficiaries, were enrolled in MCOs for a comprehensive array of Medicaid services. Some of these beneficiaries and additional Medicaid beneficiaries were enrolled in other organizations that received capitated payment for a limited array of services, such as behavioral health or dental services. These organizations that receive capitation payment for a limited array of services are referred to as ''Prepaid Health Plans (PHP).''

While the Act was further amended in the 1980's and in 1990 to address certain aspects of Medicaid managed care, the BBA represents the first comprehensive revision to Federal statutes governing Medicaid managed care in over a decade. In general, Chapter One (subtitle H) of the BBA significantly renovated the Medicaid managed care program by modifying Federal statute to: (1) Allow States to mandate the enrollment of certain Medicaid beneficiaries into MCOs without having to first seek a waiver of Federal law; (2) eliminate requirements on the composition of enrollment in MCOs that had not been proven to be effective; (3) apply consumer protections that were receiving widespread acceptance in the commercial and Medicare marketplaces to Medicaid beneficiaries; for example, consumer information standards and standards for access to services; and (4) apply the advances and developments in health care quality improvement that are in widespread use in the private sector to State Medicaid managed care programs. Specifically, sections 4701 through 4710 of the BBA provisions: (1) Reduce requirements for State agencies to obtain waivers to implement certain managed care programs; (2) eliminate enrollment composition requirements for managed care contracts; (3) increase beneficiary protections for enrollees in Medicaid managed care entities; (4) improve quality assurance; (5) establish solvency standards; (6) protect against fraud and abuse; (7) permit a period of guaranteed eligibility for Medicaid beneficiaries; and (8) improve certain administrative features of State managed care programs.

B. Statutory Basis

Section 4701 of the BBA enacted section 1932 of the Act, changes terminology in title XIX of the Act (most significantly, the BBA uses the term ''managed care organization'' to refer to entities previously labeled (''health maintenance organizations''), and amends section 1903(m) to require that MCOs and MCO contracts comply with applicable requirements in newly added section 1932. Among other things, section 1932 permits States to require most groups of Medicaid beneficiaries to enroll in managed care arrangements without waiver authority granted under section 1915(b) or 1115(a) of the Act. Under the statute before the BBA, a State agency was required to obtain Federal authority to waive beneficiary free choice of providers in order to restrict their coverage to managed care arrangements. Section 1932 also defines the term ''managed care entity'' (MCE) to include MCOs and primary care case managers (PCCMs); establishes new requirements for managed care enrollment and choice of coverage; and requires MCEs and State agencies to provide specified information to enrollees and potential enrollees.

Section 4702 amended section 1905 of the Act to provide for States to contract with primary care case managers without waiver authority. Instead, primary care case management services may be made available under a State's Medicaid plan as an optional service.

Section 4703 eliminated a former statutory requirement that no more than 75 percent of the enrollees in an MCO be Medicaid or Medicare beneficiaries.

Section 4704 created section 1932(b) of the Act to add increased protections for those enrolled in managed care arrangements. These include, the application of a ''prudent layperson's'' standard to determine whether emergency room use by a beneficiary was appropriate; criteria for showing adequate capacity and services; grievance procedures; and protections for enrollees against liability for payment of an organization's or provider's debts in the case of insolvency.

Section 4705 created section 1932(c) of the Act, which requires States to develop and implement quality assessment and improvement strategies for their managed care arrangements and to provide for external, independent review of managed care activities.

Section 4706 provided that, with limited exceptions, an MCO must meet the same solvency standards set by States for private HMOs, or otherwise be licensed or certified by the State as a risk-bearing entity.

Section 4707 enacted section 1932(d) of the Act to add protections against fraud and abuse, such as restrictions on marketing and sanctions for noncompliance.

Section 4708 added a number of provisions to the Act to improve the administration of managed care arrangements. These include, provisions raising the threshold value of managed care contracts that require the Secretary's prior approval, and permitting the same copayments in MCOs as apply to fee-for-service arrangements.

Section 4709 allows States the option to provide 6 months of guaranteed eligibility for all individuals enrolled in an MCE.

Section 4710 specifies the effective dates for all the provisions identified in sections 4701 through 4709, and specifies that these provisions do not apply to the extent they are inconsistent with the terms and conditions of waivers under section 1915(b) or section 1115 of the Act.

C. Federal Register Publications

On September 29, 1998, we published in the **Federal Register** (63 FR 52022) a proposed rule, setting forth proposed regulations to implement the above provisions of the BBA. In that 1998 proposed rule, we also proposed to strengthen regulatory requirements of PHPs by incorporating regulatory requirements that would otherwise apply only to MCOs. We received over 300 comments on the 1998 proposed rule. The comments were extensive and generally addressed all sections of that

proposed rule. On January 19, 2001, we published in the **Federal Register** (66 FR 6228) a final rule with comment period that summarized, and responded to the public comments we received on the proposed rule. It also contained additional provisions not included in the 1998 proposed rule. Among these were revisions eliminating the existing ''upper payment limit'' (UPL) on risk capitation payments in § 447.361, and replacing this limit with provisions in § 438.6(c) setting forth requirements designed to ensure that rates were actuarially sound. We invited comments only on these last two changes.

In a **Federal Register** notice (66 FR 11546) published on February 26, 2001, we announced a 60-day delay in the effective date of the January 19, 2001 final rule with comment period. This 60-day delay postponed the effective date of the rule until June 18, 2001. This delay in effective date was necessary to give Department officials the opportunity for further review and consideration of the new regulations. During that review, we heard from key stakeholders in the Medicaid managed care program, including States, advocates for beneficiaries, and provider organizations. These parties expressed strong (sometimes opposing) views about the regulation. In particular, concerns were expressed about the revisions based on public comments we received on the proposed rule. Other commenters raised concerns about how we chose to implement those provisions in the final rule without further opportunity for public comment. As a result of these comments, on June 18, 2001, we published a final rule in the **Federal Register** that delayed the effective date of the January 19, 2001 final rule with comment period an additional 60 days, from June 18, 2001 until August 17, 2001, (66 FR 32776) for further review and consideration on the most appropriate way to address the concerns expressed by key stakeholders. In response to these concerns, we have prepared and are requesting public comment on the proposed rule that is set forth in this notice of proposed rulemaking. In addition, in order to give us the time in the coming months to consider the public comments and take final action on this rulemaking, we have also published in the August 17, 2001 **Federal Register** an interim final rule with comment period that further delays until August 16, 2002, the effective date of the January 2001 final rule with comment period.

We are publishing this new proposed rule to address some of the concerns that were expressed to the Department during our review, as well as to allow additional opportunity for public comment. In developing this proposed rule, we have been guided by several considerations. First, we gave serious attention to all the concerns that have been communicated to us to date. We have tried to discern when a difference of opinion represented different goals or different methods of achieving the same goals. We believe that all commenters have expressed the same goal, namely: strong, viable, State Medicaid managed care programs that deliver high quality health care to Medicaid beneficiaries. We have attempted to craft a regulation that will help States to achieve this goal.

Second, we have drafted the provisions of this rule in full recognition of the statutorily-designed structure of the Medicaid program as a Federal-State partnership. States are assigned the responsibility of designing their State programs, and typically do so addressing local, as well as State needs. We have drafted this regulation to recognize the responsibilities of the States and the need to employ different approaches to achieving the same goal within their varying State marketplaces and health care delivery systems.

Third, we appreciate that new advances and findings in health care, health care quality assessment and improvement, and health services research unfold on an almost daily basis. In many instances, States have been at the forefront of implementing these new developments and innovations. We have sought to standardize, through regulation, those practices that have been found to be necessary to the delivery of high quality health care. We simultaneously have sought to continue to allow States, in consultation with their State and local partners and customers (beneficiaries), to determine the best approach to implementing their managed care program when there is an absence of clear evidence about the superiority of a given approach.

Overall, we recognize the great diversity and sometimes ''special needs'' of Medicaid beneficiaries. While the greatest numbers (54 percent) of Medicaid beneficiaries are children, 11 percent are age 65 or older. Medicaid also serves as a significant source of health care for individuals with disabilities and conditions that place them at risk of developing disabilities. In 1997, more than 6 million children and adults were eligible for Medicaid on the basis of a physical, mental, or cognitive disability. The Medicaid program insures more than half of all people with Acquired Immune Deficiency Syndrome (AIDS) in this country and up to 90 percent of children with AIDS. Medicaid also is a significant source of health care coverage for individuals with serious and persistent mental illness, and children in foster care. Our report to the Congress, ''*Safeguards for Individuals with Special Health Care Needs Enrolled in Medicaid Managed Care*'' (November 6, 2000), summarized existing evidence on effective practices in caring for individuals with special health care needs. That report provides a basis for some of the provisions in this proposed regulation.

The regulations in this proposed rule would mostly be set forth as new provisions in part 438 created in the January 19, 2001 final rule. All new managed care regulations created under the authority of the BBA, other sections of existing Medicaid regulations pertaining to managed care, and appropriate cross references will appear in this new part. By creating this new part, we aim to help users of the regulations to better understand the overall regulatory framework for managed care. More detailed discussions of the content of each of the subparts of this proposed rule are found at the beginning of each subpart.

D. Overview of Medicaid Managed Care

Medicaid managed care programs have been in existence almost since the inception of the Medicaid program in 1965. In New York State, Medicaid beneficiaries were enrolled in the Health Insurance Plan of Greater New York beginning in 1967. The State of Washington began contracting with Group Health of Puget Sound in 1970, and, by 1972, various regional operations of Kaiser-Permanente served Medicaid beneficiaries in three different States. Initially, there were no statutory or regulatory provisions specifically addressing the use of managed care by State agencies.

As a result of the increasing use of managed care in Medicaid, Medicare and the private sector, statutory provisions and regulations have since been adopted to specifically address Medicaid managed care. In 1976, the Health Maintenance Organization Act put forth the first specific Federal requirements for Medicaid contracts with HMOs or comparable organizations, by essentially requiring, with some exceptions, that contracts with entities to provide ''comprehensive'' specified services, be entered into only with Federally qualified HMOs. By 1981, little more than 1 percent of Medicaid beneficiaries were enrolled in managed care. Further legislative and regulatory changes made in 1981 and 1982 made possible more

widespread use of managed care by State agencies but were also accompanied by increased requirements in some areas (for example, OBRA 1981 required that Medicaid enrollees be allowed to voluntarily disenroll without cause from HMOs. This was subsequently amended to permit a 6-month lock-in for individuals enrolled in Federally qualified HMOs.) Until the BBA, modification of the laws and regulations governing Medicaid managed care after OBRA 1981 and the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248, enacted on September 3, 1982) has occurred in a piecemeal manner. The BBA represents the first major revision of the statutes governing Medicaid managed care in over a decade.

The period from 1981 to the present has seen significant changes in Medicaid managed care programs. While only approximately 250,000 Medicaid beneficiaries were enrolled in managed care in 1981, by 1997 this number had increased to over 15 million. As of June 2000, approximately 56 percent of the entire Medicaid population received at least some services through an MCO, PHP, or a primary care case management arrangement. In the last decade, a number of studies and reports have documented that State agencies need both flexibility and assistance to implement new approaches and tools to effectively administer their contracts with MCOs. A 1997 General Accounting Office Report entitled, ''*Medicaid Managed Care—Challenge of Holding Plans Accountable Requires Greater State Effort*,'' indicated the need for priority attention to beneficiary information and education, and access to care and quality monitoring.

As noted above, Medicaid managed care contracts were originally entered into by some State agencies without any specific statutory provision for these arrangements. When the Congress acted to regulate managed care arrangements, it limited the applicability of these statutory requirements to contracts that were comprehensive in the services they covered.

Specifically, the statutory requirements enacted by the Congress in section 1903(m) of the Act have always applied to contracts for inpatient services plus any one of the other services specified in section 1903(m)(2)(A) of the Act, or for any three of the non-inpatient services specified in section 1903(m)(2)(A) of the Act. Managed care contracts that were less than comprehensive remained exempt from all statutory managed care requirements. In recognition of this fact, we have in the past exercised our authority under section 1902(a)(4) of the Act to specify ''methods of administration'' that were ''necessary for proper and efficient administration'' to impose regulatory requirements on entities that were exempt from the statutory requirements in section 1903(m), either because they provided less than comprehensive services or because they were specifically exempted by the Congress from complying with section 1903(m) requirements. These entities were called ''prepaid health plans,'' or ''PHPs.''

The regulatory requirements we applied to PHPs were not as stringent in many areas as those under section 1903(m). For example, while PHPs were subject to an enrollment composition requirement like comprehensive HMO contractors, the PHP enrollment composition requirement could be waived by the State for ''good cause.'' PHPs also were not subject to the section 1903(m) requirement that beneficiaries have the right to disenroll without cause at any time, and beneficiaries enrolled in PHPs thus could have their ability to disenroll restricted under section 1915(b) waiver authority, (where the right to disenroll required under section 1903(m) could not be waived).

In part, because of the less stringent requirements that applied to PHPs, there has been a substantial growth in PHP enrollment. Some of these PHPs are single service managed care plans (for example, behavioral health plans) and their enrollees are also enrolled in other managed care plans for their routine primary and acute care. Other PHPs, such as the Health Insurance Plan (HIP) of New York, provide a full range of services, but were exempted by the Congress from the requirements in section 1903(m) of the Act. As discussed more fully below, in this proposed rule, we are proposing to require that certain PHPs meet most of the requirements that will apply to MCOs.

Concurrent with the increasing size of, and need for, stronger Medicaid managed care programs, over the last decade we have been developing improved tools, techniques, and strategies that State agencies can use to strengthen their managed care programs. In 1991, we began the Quality Assurance Reform Initiative (QARI) to provide technical assistance tools and assistance to State agencies. In 1993, we produced a QARI guide entitled, ''*A Health Care Quality Improvement System for Medicaid Managed Care—A Guide for States*,'' which contained four areas of guidance for States: (1) a framework for quality improvement systems for Medicaid managed care programs; (2) guidelines for internal quality assurance programs of Medicaid HMOs and PHPs; (3) guidelines for clinical and health services focus areas and use of quality indicators and clinical practice guidelines; and (4) guidelines for the conduct of external quality reviews conducted under section 1902(a)(30)(C) of the Act. In 1995, we worked collaboratively with the National Committee for Quality Assurance (NCQA) and the American Public Human Services Association to produce a Medicaid version of the Health Plan Employer Data and Information Set (HEDIS). HEDIS is a standardized quality performance measurement system used by private sector purchasers of managed care services, which we modified for use by State agencies. We contracted with NCQA to develop ''*Health Care Quality Improvement Studies in Managed Care Settings: Design and Assessment—A Guide for State Medicaid Agencies*''.

In 1996, we undertook the Quality Improvement System for Managed Care (QISMC) initiative to accomplish several goals: (1) To update the 1993 QARI guidelines; (2) to develop coordinated Medicare and Medicaid quality standards that would reduce duplicative or conflicting efforts; (3) to make the most efficient and effective use of recent developments in the art and science of quality measurement, while allowing sufficient flexibility to incorporate developments in this rapidly evolving discipline; and (4) to assist the Federal government and State agencies in becoming more effective ''value-based'' purchasers of health care for vulnerable populations. In developing QISMC, we worked with representatives from, and with tools developed by, health plans, State agencies, advocacy organizations, and experts in quality measurement and improvement such as the NCQA, the Foundation for Accountability (FACCT) and the Joint Commission on the Accreditation of Healthcare Organizations. With the assistance of the experts and their products, we identified the approaches, tools, and techniques that we believed would most effectively measure and improve health care quality in managed care. The quality assurance provisions of this regulation espouse the same philosophy and goals for performance improvement as are reflected in QISMC, but have been modified based on recent developments in Medicaid, managed care and quality assessment and improvement. For example, QISMC was written before our report to the Congress addressing

individuals with special health care needs.

In 1997, the Agency for Health Care Policy and Research (AHCPR) (now, the Agency for Healthcare Research and Quality) produced a set of consumer survey instruments and measurement tools under the auspices of the Consumer Assessment of Health Plan Study (CAHPS). The CAHPS instruments include measures and tools specifically designed for use by State agencies. Also in 1997, the George Washington University Center for Health Policy Research published a compendium of provisions of State contracts with Medicaid managed care organizations. This nationwide study of Medicaid managed care contracts has provided valuable information that can be used by all State agencies in the design and management of their managed care contracts.

More recently, in 1999, we produced a technical assistance manual for State agencies entitled, ''*Writing and Designing Print Materials for Beneficiaries: A Guide for State Medicaid Agencies*.'' This technical assistance tool for States was in direct response to the BBA statutory provisions calling for dissemination of information to Medicaid beneficiaries. Similarly, we currently have two additional technical assistance projects underway. A contract with FACCT will produce in the Fall of 2001 a manual describing valid and reliable tools that State agencies can use to identify children and adults with special health care needs. A contract with the Center for Health Program Development and Management at the University of Maryland Baltimore County will develop a guidance manual for States that will describe various approaches to using health status-based risk adjustment in making payments to MCOs.

These and other tools we have in planning stages can be applied to the efforts of State agencies to become even more effective in purchasing managed care services for Medicaid beneficiaries. This proposed rule provides an opportunity to clarify for MCOs, beneficiaries, and State agencies, how these advances in the management and oversight of health care can be applied to Medicaid managed care programs.

Through these regulations, we promote uniform national application of knowledge and best practices learned from these initiatives. While we promote uniform best practice, the Medicaid statute has always given State agencies latitude to design their Medicaid programs, as long as they meet certain minimum Federal standards. Current Federal requirements in the Medicaid managed care area are imposed either as conditions for Federal matching funds to support contracts with MCOs, as conditions for receiving a waiver of freedom of choice under section 1915(b) of the Act, or as conditions for falling within the section 1932 exception to the freedom of choice requirement in section 1902(a)(23) of the Act. In the first case, failure to comply with section 1932 requirements could result in a disallowance of Federal financial participation (FFP) in contract payments. In the latter two cases, if the State fails to meet conditions for the section 1932 exception to the freedom-of-choice requirement in section 1902(a)(23), or has its section 1915(b) waiver nonrenewed or terminated for a failure to meet waiver conditions, the State agency would be out of compliance with the freedom of choice requirement in section 1902(a)(23), and the State agency would be subject to a compliance enforcement action under section 1904 of the Act.

Because the Medicaid program is a State-administered program subject to Federal guidance and rules, Medicaid regulations do not generally adopt the same approach to regulating managed care organizations as Federal Medicare regulations. Instead, Medicaid rules generally regulate State agencies and place requirements on their contracts with managed care organizations or managed care programs.

This proposed rule adopts this direction in implementing the new requirements in the BBA, and, as discussed below, extends many of these requirements to certain PHPs.

Section 4710(c) provided for a time-limited exemption from the requirements in sections 4701 through 4710 for approved waiver programs or demonstration projects under the authority of sections 1115 or 1915(b) of the Act. Specifically, the BBA States section 4710(c) provided that none of the provisions contained in sections 4701 through 4710 would affect the terms and conditions of any approved section 1915(b) waiver or demonstration project under section 1115, as the waiver or demonstration project was in effect on the date of the enactment of the BBA (that is, August 5, 1997.) We interpreted this ''grandfather provision'' to apply only for the period for which the waiver or demonstration project was approved as of August 5, 1997. Thus, at the expiration of any 2-year waiver period under section 1915(b), or at the end of the period for which a demonstration project was approved under section 1115, the grandfather provision in section 4710(c) would no longer apply.

In general, during the period approved as of August 5, 1997, any provision of a State's approved section 1115 or section 1915(b) waiver program that was specifically addressed in the State's waiver proposal, statutory waivers, special terms and conditions, operational protocol, or other official State policy or procedures approved by us, was not affected by the BBA provisions, even if it differed from the BBA managed care requirements. As long as the BBA provisions were addressed in the State's approved waiver materials, no determination needed to be made as to whether the State's policy or procedures meet or exceeded the BBA requirements. If the BBA provisions were not addressed, the State was required to meet the BBA requirements, except as specified below for newly submitted or amended waivers.

As noted above, under our interpretation, the exemption from the BBA requirements applied to section 1915(b) waiver programs only until the date that the waiver authority approved or in effect as of August 5, 1997 expired, which in all cases occurred no later than 1999. As of the date of the two year section 1915(b) waiver period approved on August 5, 1997 expired, the State was required to comply with all BBA requirements that were in effect.

In the case of section 1115 demonstrations, while the ''grandfather'' provision in 4710(c) only applies until the end of the period for which the demonstration project was approved as of August 5, 1997, if the demonstration project has been extended under the provisions in section 1115(e) of the Act, existing terms and conditions inconsistent with BBA requirements are extended for three years, nullifying the effect of the ''expiration'' of the grandfather provision in section 4710(c). Therefore, any exemptions from the BBA requirements to which these programs were entitled under the ''grandfather provision'' may continue during the period of the extended waiver authority.

The Medicare, Medicaid, and State Child Health Insurance Program Benefits Improvement and Protection Act of 2000 (BIPA), enacted on December 21, 2000 (Pub. L. 106–554) provided for additional extensions of section 1115 health care reform demonstrations, but did not include language extending the same terms and conditions through this period. Thus, we conclude that provisions of the BBA would apply to the demonstrations in these extension periods under BIPA,

unless the Secretary uses his discretionary authority to waive the requirements.

For newly submitted or amended section 1915(b) or section 1115 waivers, the Secretary of DHHS retains the discretionary authority to waive the BBA managed care provisions. Generally, waivers are granted that allow States some flexibility in operating their Medicaid programs, while promoting the proper and efficient administration of a State's plan. In particular, for the BBA provisions related to increased beneficiary protections and quality assurance standards, we anticipate that the BBA provisions would apply unless a State can demonstrate that a waiver program beneficiary protection or quality standard would equal or exceed the BBA requirement.

II. Provisions of the Proposed Rule

This proposed rule would amend the Medicaid regulations setting forth policies to implement provisions of the Balanced Budget Act of 1997 (BBA) that (1) allow the States greater flexibility by permitting them to amend their State plan to require certain categories of Medicaid beneficiaries to enroll in managed care entities without obtaining waivers if beneficiary choice is provided; (2) establish new beneficiary protections in areas such as quality assurance, grievance rights, and coverage of emergency services; and (3) eliminate certain requirements viewed by State agencies as impediments to the growth of managed care programs, such as the enrollment composition requirement, the right to disenroll without cause at any time, and the prohibition against enrollee cost-sharing. In addition, this proposed rule would expand on existing regulatory beneficiary protections provided to enrollees of prepaid health plans (PHPs) by requiring certain PHPs that provide services on an inpatient basis to meet specified BBA requirements that would not otherwise apply to these entities.

Under our proposal, virtually all managed care regulations would be set forth in 42 CFR part 438. Some existing sections from part 434, would be moved to this part. We propose this restructuring to assist the reader in easily accessing all managed care regulations. The proposed new organizational format for part 438 is as follows:

Subpart A—General Provisions
Subpart B—State Responsibilities
Subpart C—Enrollee Rights and Protections
Subpart D—Quality Assessment and Performance Improvement
Subpart E—[Reserved]
Subpart F—Grievance System
Subpart G [Reserved]
Subpart H—Certifications and Program Integrity
Subpart I—Sanctions
Subpart J—Conditions for Federal Financial Participation

A. General Provisions (Subpart A)

1. Basis and Scope (§ 438.1)

Section 438.1 of the regulations sets forth the basis and scope of part 438, including the fact that regulations in this part implement sections 1902(a)(4), 1903(m), 1905(t), and 1932 of the Act. Section 438.1 of the regulations also briefly describes these statutory provisions, and sets forth the scope of the applicabilty of these regulations.

2. Definitions (§ 438.2)

Section 438.2 includes definitions of terms that apply for the purpose of part 438. These definitions reflect revisions in terminology made in section 4701(b) of the BBA. The most significant of these changes is the use of the term Managed Care Organization (MCO) to refer to entities with comprehensive risk contracts that were formerly referred to by the term ''health maintenance organization'' (HMO). There is a new statutory definition of Medicaid MCO, which builds on the pre-BBA definition of HMO. As was the case for the pre-BBA definition of HMO, absent a statutory exemption, an entity must be found to meet the definition of MCO in order to enter into a Medicaid ''comprehensive risk contract'' (defined in § 430.5). The new statutory definition defines an MCO as one of several listed types of full risk arrangements (for example, HMOs, a provider sponsored organization, an ''M+C organization'' that contracts with Medicare) or any other ''public or private entity'' that complies with advanced directive requirements in section 1902(w) of the Act, and meets a modified version of the same two requirements included in the pre-BBA definition of HMO. The first of these two requirements, involving access to services covered under the contract, is unchanged by the BBA (see section 1903(m)(1)(A)(i) of the Act). The second requirement, involving meeting State-approved solvency standards, has been amended to require (with some exceptions discussed in section 3 below) that the MCO be licensed as an HMO or as a risk bearing entity (see section 1903(m)(1)(A)(ii) of the Act.) Finally, the new statutory definition provides that an entity that is a Federally-qualified HMO under title XIII of the Public Health Service Act is deemed to meet the above access and solvency requirements (but not the advance directive requirements).

In § 438.2, we essentially have adopted the statutory definition of MCO. Because the managed care entities specifically listed in the revised version of section 1903(m)(1)(A) of the Act all necessarily fall within the category ''public or private organization,'' our definition refers only to a ''public or private entity'' that meets the requirements in question. Because Federally qualified HMOs are deemed to meet the access and solvency requirements in sections 1903(m)(1)(A)(i), (m)(1)(A)(ii), and (m)(1)(C) of the Act, we do not apply these requirements to Federally qualified HMOs in our definition of MCO. Finally, we have retained a third requirement from the current regulation implementing the pre-BBA definition of HMO (see § 434.20(c)(1)). This provision requires that the entity be organized primarily for the purpose of providing health care services.

Section 438.2 of the regulations also includes existing definitions of current managed care terms, and the statutory definitions of primary care case management and primary care case manager from the BBA. We have not included the term ''managed care entity'' in the definitions or the text of the regulation. This term was used in the BBA to include MCOs and PCCMs. However, for purpose of clarity in the proposed rule, we have specified in the text of the regulation whether each specific provision applies to MCOs, PCCMs or both.

While most existing managed care definitions are unchanged, we are proposing to split the current designation of prepaid health plans (PHPs) into two new types of entities. We rely upon the authority in section 1902(a)(4) of the Act to permit States to contract with PHPs and to establish the requirements that these entities must meet. The earliest PHPs in Medicaid managed care programs were predominantly the equivalent of a capitated PCCM. Over the years, States have developed programs using capitated reimbursement for much larger delivery systems, most notably in the area of behavioral health. These contracts may include a portion of the inpatient hospital benefit, as well as physician, outpatient, and some other limited Medicaid services. States have also developed PHPs to deliver transportation services and contracted with dental PHPs to expand access to dental care for the Medicaid population. We have recently reviewed proposals to contract for institutional long-term care

services on a risk basis. Based on these developments, we have concluded that it is no longer appropriate to describe all of these models in the same way or subject them all to the same requirements.

In this proposed rule, we have eliminated the term PHP and replaced it with two types of entities—Prepaid Inpatient Health Plans (PIHPs), and Prepaid Ambulatory Health Plans (PAHPs). ''Prepaid inpatient health plan'' (PIHP) means an entity that provides medical service on the basis of capitation or other non-State plan payment rates, is responsible for any inpatient hospital or institutional services, and does not have a comprehensive risk contract. ''Prepaid ambulatory health plan'' (''PAHP'') means an entity that provides medical service on the basis of capitation or other non-State plan payment rates, is not responsible for any inpatient or institutional services, and does not have a comprehensive risk contract.

These two definitions include all entities that were previously defined as PHPs, but make a distinction between (1) those responsible for at least some (but not all) inpatient hospital or institutional care an enrollee receives, as in the case of a large behavioral health plans, and (2) those that are not, such as dental or transportation plans and capitated PCCMs. The requirements that each type of entity must meet are set forth in § 438.8. By making the distinction between these two types of entities, we are able to impose requirements that more accurately reflect the scope of benefits that they contract to provide. We are seeking comments on whether prepaid contracts that include home and community based services should be subject to the additional MCO-like requirements that we have proposed to apply to PIHPs.

The new requirements enacted by the Congress in the BBA apply to managed care arrangements in one or more of three ways. First, section 1903(m)(2)(A)(xi) of the Act requires that MCOs and MCO contracts comply with all applicable requirements in the new section 1932 of the Act enacted by the BBA. Thus, unless the above-discussed ''grandfather provision'' in section 4710(c) of the BBA applies to the requirement in question, these requirements apply to an MCO whether the MCO is participating in a mandatory managed care enrollment program or is offered as a purely voluntary enrollment option.

Requirements in section 1932 of the Act also apply as conditions for meeting the definition of ''primary care case manager'' (which incorporates the definition of ''primary care case management contract'' requiring compliance with requirements in section 1932 of the Act). Meeting this definition is required in order for a non-MCO to participate as an enrollment option under a mandatory managed care enrollment program under section 1932(a) of the Act. Meeting this definition also makes an entity eligible for automatic re-enrollment under section 1903(m)(2)(H) of the Act, whether enrollment was originally voluntary or mandatory. Finally, meeting this definition permits an entity to offer ''primary care case management services'' as a State plan service under section 1905(a)(25) of the Act.

Certain requirements in section 1932 of the Act apply only in the context of a mandatory managed care enrollment program under section 1932(a) of the Act. The latter includes specific requirements on comparative information, as found in § 438.10(h); and methods for establishing certain enrollment practices and the default enrollment process, as found in § 438.50.

The terms MCO and PCCM are used in the statute to identify where different requirements apply only to that entity. (As discussed above, the term ''managed care entity'' is used to describe requirements that apply both to MCOs and PCCMs.) As proposed in § 438.2, an MCO is either a Federally qualified HMO or any other public or private entity that is organized primarily for the purpose of providing health care services, makes the services it provides to its Medicaid enrollees as accessible (in terms of timeliness, amount, duration, and scope) as those services are to other Medicaid beneficiaries within the area served by the entity, and meets the solvency standards of § 438.116. Thus, in general, HMOs that participate in Medicaid would be considered as MCOs. For purposes of this rule, as described in detail under § 438.8(a), most requirements that would apply to MCOs would also apply to PIHPs. Section 438.8(b) contains requirements that apply to PAHPs.

3. Contract Requirements (§ 438.6)

Proposed § 438.6 contains most of the existing managed care provisions currently found in part 434, revised to reflect changes made by the BBA.

Proposed § 438.6(a) clarifies that the CMS Regional Office must review and approve all MCO, PIHP, and PAHP contracts, including those that, on the basis of their value, are not subject to the prior approval requirement in § 438.806.

Section 438.6(b), like the current § 434.20(a), proposes that State agencies may enter into comprehensive risk contracts only with certain specified entities. In addition to entities meeting the definition of MCO, certain other entities are listed that either are exempt from the requirement in section 1903(m)(1)(A) of the Act that comprehensive risk contractors meet the definition of MCO, or are exempt altogether from the statutory requirements in section 1903(m)(2)(A) of the Act, and from the requirements in this proposed rule.

Proposed § 438.6(c) addresses the computation of capitation payments. We are proposing to delete the upper payment limit requirement for risk contracts in existing § 447.361 and create a new § 438.6(c), *Payments under risk contracts*, which: (1) Does not include a UPL; (2) requires actuarial certification of capitation rates; (3) specifies data elements that must be included in the methodology used to set capitation rates; (4) requires States to consider the costs for individuals with special health care needs or catastrophic claims in developing rates; (5) requires States to provide explanations of risk sharing or incentive methodologies; and (6) imposes special rules, including a limitation on the amount that can be paid under FFP in some of these arrangements.

We believe that the UPL is no longer an effective tool for purposes of judging capitated payment rates. Many States no longer have fee-for-service base year data recent enough to use as a reasonable comparison to the costs of a current capitated managed care system, and the UPL may not account for the cost of all services expected to be delivered under an MCO contract.

In these changes, we are proposing that we move from a review that compares capitation rates in risk contracts to the historical fee-for-service cost of the services under contract for an actuarially equivalent non-enrolled population, to a review of the utilization and cost assumptions and methodology used by the state to set the actual capitation rates. Eliminating the UPL requirement removes what has become a barrier to effective managed care contracting in some areas, and increasingly irrelevant as a regulatory tool. We also believe that this change could result in a more appropriate review of capitation rates by examining how the rates have been established rather than how they compare to an increasingly difficult to establish fee-for-service equivalent.

This change does not affect the rules governing UPLs for other types of

providers or services including the currently applicable provisions in §§ 447.272, 447.304, and 447.321 or those in a final rule published in the **Federal Register** (66 FR 3148) on January 12, 2001 on payments to hospitals, nursing facilities, intermediate care facilities for the mentally retarded, and clinics. Nor will this change affect the UPL for nonrisk contracts in § 447.362, which remains in effect.

As set forth above, FFP is only available for risk contracts to the extent that payments are determined on an actuarially sound basis. Under these provisions, we have determined that where total payments exceed 105 percent of the capitation payments paid under the contract, these payments are no longer actuarially sound. Thus, no FFP would be available for payments resulting from risk corridors or incentive arrangements for amounts that exceed 105 percent of the capitation payments made under the contract. If the risk corridor or incentive arrangement does not apply to all enrollees or services under the contract, the 105 percent limit is based only in that portion of the total capitation payments for the enrollees or services covered by the arrangement. States could make payments under these arrangements with their own funds, but would be precluded from claiming FFP for these payments.

This limitation protects the Federal government against potentially unlimited exposure under risk corridor or bonus arrangements. This is particularly important since the ''cost-effectiveness'' requirement in section 1915(b) and the ''budget neutrality'' standard imposed under section 1115(a) demonstrations generally do not contain an outright limit on the Federal share of expenditures under the contract. And, neither of these limits apply to voluntary managed care contracts under section 1915(a) or contracts for mandatory enrollment under section 1932(a)(1)(A) using State plan authority.

Without any upper limit on the amount that can be paid in incentive arrangements or risk sharing mechanisms the potential exists for inefficiency or inappropriate actions by the contractor to maximize funding, resulting in rates that bear no relationship to those certified by actuaries, and that, thus, are no longer ''actuarially sound.'' We have proposed limitations in §§ 438.6(c)(5)(ii) and 438.814 as a workable alternative to the current UPL which meets the following criteria: (1) It provides a clear consistent rule that can be applied to all risk contracts, regardless of the authority under which the contract operates (waiver or otherwise); (2) it should not discourage the use of any of these arrangements; (3) it explicitly conditions Federal matching on the imposition of these limits under any of these arrangements to prevent any potential abuses; and (4) it can be easily administered. Similarly, proposed § 438.60 also clarifies that a State may not make payments directly to providers for services that are available under its contracts with MCOs, PIHPs, or PAHPs, except where these payments are provided for in Federal statute or regulation. This provision is intended to preclude duplicate or supplemental payments for amounts that should be included in the capitation rate.

Although not part of this proposed rule, we also are planning to revise the policies governing cost effectiveness for section 1915(b) waiver programs. The current regulations at § 431.55, which require waiver programs to be cost effective and efficient and require States to document this cost effectiveness of their waiver programs, will remain unchanged. However, HCFA is modifying the process by which States document this cost effectiveness through re-issuance of State Medicaid Manual provisions and revision of the section 1915(b) Medicaid waiver applications. The revised waiver cost effectiveness test will apply to all waivers under section 1915(b) of the Act, regardless of the payment system, such as capitation or fee-for-service.

Section 438.6(d) includes the enrollment requirements currently in § 434.25. We specify that an MCO, PIHP, PAHP, or PCCM contract must provide for an open enrollment period when the MCO, PIHP, PAHP, or PCCM accepts individuals eligible for enrollment in the order in which they apply without restriction, unless authorized by the Regional Administrator, up to the limits specified in the contract. In § 438.6(d)(2), we have added language expressly providing for exceptions to the requirement that enrollment be voluntary.

Section 438.6(e) includes language currently in § 434.20(d) and provides that an MCO contract may cover services not provided under the State plan to enrolled beneficiaries. If enrollment is voluntary, the additional services may, under section 1915(a) of the Act, be provided without regard to statewideness and comparability. If enrollment is mandated under section 1932(a) of the Act, the statute provides that contracts can be carried out without regard to statewideness and comparability requirements. If enrollment is mandated under sections 1915(b) or 1115 of the Act, CMS can waive statewideness and comparability requirements if additional services are offered.

Section 438.6(f) would retain the requirement currently found in § 434.20(e)(1), that contracts comply with the general contract requirements in § 438.6, and has been expanded to specify Federal anti-discrimination statues with which contracts must comply.

Section 438.6(g) contains the current requirement in § 434.38 that risk contracts must provide the Medicaid agency and the Department of Health and Human Services, including CMS, the right to inspect or audit financial records of the MCO or its subcontractors.

Proposed § 438.6(h) would implement the physician incentive plan requirements in section 1903(m)(2)(A)(x) of the Act, which currently are implemented in existing paragraphs (2) through (4) of § 434.70(a) of the regulations. We propose to expand this requirement to apply to PIHPs and PAHPs, both of which may contract with physicians and put them at financial risk. Section 1903(m)(2)(A)(x) of the Act requires that MCOs comply with the physician incentive plan requirements in section 1876(i)(8) of the Act, which prior to 1999, applied to entities with Medicare risk contracts under section 1876 of the Act. Section 1876(i)(8) of the Act prohibits certain physician incentive payments and requires incentive plans that place physicians at ''substantial financial risk'' for services they do not provide to conduct enrollee surveys, and provide ''adequate and appropriate'' stop-loss protection. Section 1876(i)(8) of the Act was implemented in § 417.479, which defines ''substantial financial risk'' and ''adequate and appropriate'' stop-loss protection. The current Medicaid physician incentive plan provisions in paragraphs (a)(2) through (a)(4) of § 434.70 reference § 417.479.

On January 1, 1999, however, Medicare risk contractors were required to enter into Medicare+Choice (M+C) contracts under Part C of Title XVIII if they wished to continue to contract with Medicare. The physician incentive rules in part 417 of the regulations that implemented section 1876(i)(8) of the Act no longer apply and will be removed from the Code of Federal Regulations.

Section 1852(j)(4) of the Act, which applies to M+C organizations, contains the same substantive requirements governing physician incentive plans as section 1876(i)(8) of the Act. We have

implemented section 1852(j)(4) in M+C regulations in part 422. While the substantive requirements and standards in section 1852(j)(4) of the Act are identical to those in section 1876(i)(8) of the Act, the regulations in part 422 implementing section 1852(j)(4) of the Act differ from those in part 417 implementing section 1876(i)(8) of the Act in one significant respect. Because the data in question are now available from other sources, we deleted a reporting requirement involving capitation arrangements. (See 63 FR 35002.) Because the regulations in part 417 have not applied to Medicare contracts since 1998, we did not revise the regulations in part 417 to eliminate this reporting requirement.

Even though the Medicaid statute continues to cite section 1876(i)(8) of the Act, proposed § 438.6(g) incorporates the regulations in part 422 that implement nearly identical statutory language, and the same substantive requirements, as set forth in section 1852(j)(4) of the Act.

Section 438.6(i) contains the ''advance directive'' requirements currently found in § 434.28, which also must be met in order for an entity to qualify as an MCO or PIHP.

Section 438.6(j) would implement the statutory requirement that ''HIOs'' that began operating on or after January 1, 1986 and are not otherwise exempted by statute, comply with all requirements in section 1903(m)(2)(A) of the Act if they have a comprehensive risk contract, including the requirement that they meet the definition of MCO. This provision would replace the current § 434.44.

Section 438.6(k) specifies additional rules that apply to contracts with primary care case managers. These rules relate to the provision of care and services within reasonable and adequate hours of operation; specification for arrangements or referral to other physicians or practitioners; prohibitions on discrimination in enrollment, disenrollment, or re-enrollment; and provisions on enrollee rights to disenroll.

Section 438.6(l) incorporates terminology currently in § 434.6(a)(ii)(b) on subcontracts. Section 438.6(m) incorporates terminology currently in § 434.29 on choice of health professionals.

4. Provisions That Apply to PIHPs and PAHPs (§ 438.8)

In this proposed rule, we propose to eliminate the term PHP and replaced it with two types of entities—Prepaid Inpatient Health Plans (PIHPs), and Prepaid Ambulatory Health Plans (PAHPs). A PIHP is an entity that provides medical services to enrollees, under a contract with the State agency that is not risk comprehensive, but for which payment is made on a prepaid capitation basis or other payment arrangements that do not use State plan payment rates, and in which the entity provides, arranges for, or is otherwise responsible for the provision of, any inpatient hospital or institutional services for its enrollees. Like a PIHP, a PAHP is an entity that provides medical services to enrollees, under a contract with the State agency that is not risk comprehensive, and for which payments are made on the basis of prepaid capitation payments or other payment arrangements that do not use State plan payment rates. However, unlike a PIHP, a PAHP the entity does not provide or arrange for, and is not otherwise responsible for the provision of any inpatient hospital services for its enrollees. All entities that met the definition of PHP under part 434 will meet one of these definitions in § 438.8.

Title XIX does not specifically address State contracts with PHPs (now PIHPs or PAHPs), and thus does not impose requirements on these entities. Instead, we have relied upon section 1902(a)(4) of the Act for the authority to publish regulations governing these entities. This section of the Act provides the Secretary with discretion to specify methods of administration determined to be necessary for proper and efficient operation of State Medicaid programs. Under that authority we are now substituting the terms PIHP and PAHP and proposing to apply specific provisions of this proposed rule to each of these entities.

This change, from the approach taken in the January 19, 2000 final rule, which applied most of these requirements to all PHPs, is warranted for several reasons. First, the scope of services under PHP contracts with States has greatly expanded over the years. The earliest PHPs in Medicaid managed care programs were predominantly capitated PCCMs. States have developed programs using capitated reimbursement for much larger delivery systems, most notably in the area of behavioral health. These contracts may include a portion of the inpatient hospital benefit, as well as physician, outpatient, and some other limited Medicaid services. More than two-thirds of all current PHP contracts are of this type. States have also developed PHPs to deliver transportation services and found that contracting with dental PHPs provides an opportunity to expand access to dental care for the Medicaid population. We have recently reviewed proposals to contract for institutional long-term care services on a risk basis. Based on these developments, we have concluded that it is no longer appropriate to describe all of these models in the same way or subject them all to the same requirements.

Second, the BBA and this proposed rule contain many significant beneficiary protections that were intended to apply to MCOs and States contracting with MCOs. We believe that these protections are also appropriate for those PHPs that are responsible for a benefit package that closely resembles the risk comprehensive range of services provided by MCOs. However, where PHPs contract to provide a much more limited array of services, such as transportation or dental care, we believe applying the same requirements would not be appropriate. Thus we are making a distinction between these two types of entities based on whether they are responsible for all or some of the inpatient hospital or institutional services needed by their enrollees.

In § 438.8(a), we propose to make PIHPs subject to nearly all of the requirements that apply to MCOs, including: the contract requirements of § 438.6, except for requirements that pertain to HIOs; the information requirements in § 438.10; the provision against provider discrimination in § 438.12; the State responsibility provisions of subpart B, except § 438.50; the enrollee rights and protection provisions in subpart C of this part; the quality assessment and performance improvement requirements in subpart D of this part to the extent that they are applicable to services furnished by the PIHP; the grievance system provisions in subpart F of this part; and the certification and program integrity protection provisions in subpart H of this part.

Under proposed § 438.8(a)(6), the State agency would have to require, at a minimum, through its contract, that the PIHP meet all of the requirements that MCOs must meet relating to minimum performance levels and performance improvement levels that apply to services furnished by the PIHP. The nature of some PIHPs may not allow them to report on performance measures in all of the clinical and non-clinical areas as MCOs can. Also, some PIHPs may not be able to undertake performance projects in the same clinical areas as MCOs can address. The State agency would be required to evaluate the applicability of the MCO performance measures and improvement project areas when establishing the PIHP's contractual

obligations for its quality assessment and performance improvement program.

In proposed § 438.8(b) we would make PAHPs subject to the following requirements: the contract requirements of § 438.6, except for requirements for advance directives and those that pertain to HIOs; designated portions of the information requirements in § 438.10; the provision against provider discrimination in § 438.12; the State responsibility provisions of subpart B, except § 438.50; designated portions of subpart C on enrollee rights and protections; and § 438.206(a) on availability of services.

We have not applied the provisions for sanctions in subpart I to PIHPs or PAHPs (except to the extent that they contract as PCCMs, in which case designated provisions apply). This does not, however, preclude States from applying sanctions to PIHPs and/or PAHPs with which they contract. Similarly, we have not specifically applied the Conditions for FFP in subpart J to PIHPs or PAHPs, since these provisions govern the Federal-State relationship rather than the State-contractor relationship. Nonetheless, provisions governing the availability of FFP to a State may have an impact on the contract a State implements with a PIHP and a PAHP, such as the provisions in § 438.812 governing costs under risk and nonrisk contracts and in § 438.814 governing the limit on payment in excess of capitation rates.

We believe that this two-tiered approach provides the flexibility necessary for innovative contracting by States while applying regulatory requirements that are appropriate to the range of services under the contract. We note that a primary care case manager as defined in section 1905(t)(2) of the Act, could also meet the definition of a PAHP and be subject to the requirements in § 438.8(b). In this case, the primary care case manager would be both a PAHP and a PCCM. This entity would be subject to the requirements in § 438.6(k) and § 438.8(b).

While we are proposing to apply MCO requirements to PIHPs and PAHPs, State agencies would still be free to apply for Federal waiver authority, under sections 1915(b) or 1115 of the Act, to seek relief from some of the provisions. For example, a State agency may request 1915(b) waiver authority for a behavioral health managed care program in which enrollees are mandated to use a single behavioral health PIHP. In this instance, the Secretary has the discretionary authority to waive freedom of choice, under section 1902(a)(23) of the Act, and the right to disenroll in part 438 (for PIHPs and PAHPs is authorized under section 1902(a)(4) of the Act, and therefore, can be waived) to enable the State agency to establish or continue these programs.

5. Information Requirements (§ 438.10)

Section 438.10(b) contains the basic rule that all enrollment notices and informational and instructional materials relating to enrollment in MCOs, PIHPs, PAHPs, and PCCMs must be provided in a manner and form that are easily understood by Medicaid enrollees and potential enrollees. As a general rule, each State agency, MCO, PIHP, PAHP, PCCM, and enrollment broker must meet the requirements of § 438.10 that pertain to language and format requirements (as specified in § 438.10(c) and (d)). However, a distinction is made within the regulation as to which information needs to be provided to an enrollee or a potential enrollee. We have defined these terms in § 438.10(a). And we have made a distinction between which information needs to be provided to all managed care enrollees and which information needs to be provided only to MCO and PIHP enrollees. Finally, we have identified some information that only has to be made available upon request.

In § 438.10(c) we propose requirements for the languages in which information would have to be made available. We are proposing to require that State agencies establish a methodology for determining the prevalent languages spoken by populations in a geographic area and include provisions in their MCO, PIHP, PAHP, or PCCM contracts to ensure that written materials are available in those specified languages. States have discretion to determine criteria for when a language is ''prevalent'' for purposes of this requirement, as long as they comply with the requirements of Title VI of the Civil Rights Act of 1964. For technical assistance, States may contact the HHS Office of Civil Rights. Enrollees and potential enrollees must be informed about how to obtain written information published in prevalent languages in that area. Specific methodologies, such as those based upon a consideration of geographic composition, population density, or enrolled population are not imposed by this regulation, as the most appropriate approach to fulfilling this requirement may vary from State to State. However, we are proposing that the State agency, enrollment broker, MCO, PIHP, PAHP, and PCCM be required to have oral interpretation services available free of charge for each enrollee and potential enrollee who has limited English proficiency, and that enrollees and potential enrollees be informed about how to obtain these services.

In § 438.10(d), we propose to implement the requirement in section 1932(a)(5)(A) of the Act that all written information be provided in an easily understood language and format. Generally, materials should be understandable to enrollees at a fourth-fifth grade reading level, or at another level established by the State agency that adequately reflects the potential population to be enrolled. Materials should use an easily readable typeface (for example, 14 point), frequent headings, and should provide short, simple explanations of key concepts. Technical or legal language should be avoided whenever possible. Use of focus groups and cognitive testing may be beneficial in determining the appropriateness of the information. In addition, in § 438.10(d)(1)(i) and (ii), we propose that enrollment notices as well as informational and instructional materials relating to enrollment in MCOs, PIHPs, PAHPS, and PCCMs take into account the specific needs of enrollees and potential enrollees. This would include furnishing information in alternative formats for the visually impaired (through other media such as, large print, Braille, or audio tapes) and for individuals with limited reading proficiency (through video or audio tapes).

In § 438.10(e) we propose to require the State to provide certain information to potential enrollees. While section 1932(a)(5)(B) requires MCOs and PCCMs to make information available to enrollees and potential enrollees ''upon request,'' we believe it is important to ensure that potential enrollees have certain information prior to enrollment, so they may make an informed choice. It would be unreasonable, however, to require every MCO, PIHP, PAHP or PCCM to provide the relevant information to all potential enrollees. The State agency is the more appropriate entity to do so. Therefore, under authority in section 1902(a)(4) of the Act to provide for necessary and proper methods of administration, we propose in § 438.10(e) that the State (or its contracted representative) be required to provide the information described below to each potential enrollee.

The required information includes general information about the basic features of managed care; which populations are excluded from enrollment, subject to mandatory enrollment, or free to enroll voluntarily in the MCOs, PIHPs, PAHPs and PCCMs; and MCO, PIHP, PAHP and

PCCM responsibilities for coordination of enrollee care. In addition, § 438.10(e)(2)(ii) proposes to require the State to provide at least summary information specific to each MCO, PIHP, and PAHP, and for PCCM programs in the potential enrollee's service area, including benefits covered, cost sharing, service area, network provider information, and benefits covered under the State plan but not available under the contract.

In § 438.10(f), we propose to require MCOs, PIHPs, PAHPs, and PCCMs or States on behalf of their PCCM programs, to provide certain information to their own enrollees. We have proposed this requirement because we do not believe that enrollees can effectively access their benefits if they are not furnished adequate information concerning these fundamental elements as enrollees' rights and responsibilities. Further, it is our belief that it is not sufficient for this information to merely be ''available'' at designated locations. Therefore, in keeping with the Congress' intent to provide adequate information to actual enrollees, under the authority in section 1902(a)(4), we propose to require these entities to provide basic information that all enrollees should have. In addition, we propose in paragraphs (f)(1) through (f)(5) to require specific timeframes for the provision of specific information, such as disenrollment rights, and changes in providers or operations of the managed care program. Paragraph (f)(2) specifically would require MCOs, PIHPs, PAHPs, PCCMs or the State to notify enrollees annually of their right to request information listed in paragraphs (f) and (g) of this section (as applicable).

In proposed § 438.10(f)(6), we set forth the type of information that, under section 1932(a)(5)(B) of the Act, MCOs and PCCMs must provide to enrollees. We are proposing in § 438.10(f)(6) to require that the information must also be furnished to enrollees of PIHPs and PAHPs. This information must include at least the following:

- Names, locations and telephone numbers of current network providers, including identification of those who speak languages other than English and those who are not accepting new patients. At a minimum, information on the provider networks should include information on primary care physicians, specialists, and hospitals. We also suggest that information be provided regarding ancillary care providers on which enrollees with special health care needs may be dependent for care. If this information is not included, information must be provided to enrollees explaining how they can obtain this supplemental information. Enrollees making a decision about whether to enroll in a particular MCO, PIHP, PAHP, or PCCM may rely on the provider listing in making their selection, and may assume that they will be able to obtain covered services from any of the providers listed. Therefore, if a provider is not accepting new Medicaid enrollees, this must be clearly indicated, as this provider may not be a choice for new enrollees.
- Any restriction on the enrollee's freedom of choice among network providers. It is essential that the MCO's, PIHP's, PAHP's, or PCCM program's informational materials emphasize any limitations on enrollees' provider selections. If an MCO, PIHP, PAHP, or PCCM program contracts with formal subnetworks, or the entity's arrangement with primary care providers allow for the establishment of informal subnetworks, the informational materials must clearly indicate which providers are available under each subnetwork. The materials must also explain the procedures under which an enrollee may request referral to an affiliated provider not included in the subnetwork.
- Enrollee rights as described in § 438.100.
- Grievance and fair hearing procedures.
- Benefits offered, and the amount, duration, and scope of benefits and services available under the contract. Sufficient detail should be furnished to ensure that beneficiaries receive the services to which they are entitled, such as pharmaceuticals, mental health, and substance abuse services.
- Procedures for obtaining services, including authorization requirements. These procedures must include the procedures for obtaining pharmaceuticals and mental health and substance abuse services, as well as the procedure for obtaining out-of-area coverage.
- The extent to which an enrollee may obtain services from out-of-network providers. For example, enrollees should be notified of their right to obtain family planning services from any Medicaid-participating provider (unless otherwise restricted).
- Provisions for coverage of after-hours, emergency, and post-stabilization services.
- Policies on referrals for specialty care and other services not furnished by the enrollee's primary care provider.
- Cost sharing, if any.
- Any benefits to which they may be entitled under the Medicaid program, but that are not made available to them through the MCO, PIHP, PAHP, or PCCM. For example, enrollees would have to be provided notice about how to access mental health coverage if it is not a service covered by the MCO, PIHP, PAHP, or PCCM or if the entity provides only limited coverage. This information would have to be provided either directly by the State agency or through the MCO, PIHP, PAHP, or PCCM. The notice would have to provide information on where and how enrollees may access benefits such as mental health coverage not available through the entity. In addition, this notice would be required to include information on how transportation services not covered by the MCO, PIHP, PAHP, or PCCM would be furnished.

While State agencies would be required to develop grievance and appeal processes for enrollees in accordance with subpart F of part 438, this proposed requirement is not meant to imply that State agencies must establish grievance and appeal processes for individual health care providers. However, if these processes exist, information on the processes must be made available to enrollees and potential enrollees in accordance with the requirements of this section.

Proposed § 438.10(g) would require MCOs and PIHPs to provide additional information to their enrollees, based on provisions that apply only to those types of entities. This information must be provided by the MCO or PIHP except where prohibited by the State agency through restrictions on marketing or some other means (in which case the State agency or subcontractor of the State agency must provide the information). MCOs and PIHPs would be required to provide information on grievance, appeal and fair hearing procedures and timeframes in § 438.400. This includes the following:

- The right to a State fair hearing, the method for obtaining a State fair hearing, and the rules that govern representation at the hearing.
- The right to file grievances and appeals.
- The requirements and timeframes for filing a grievance or appeal.
- The availability of assistance in the filing process.
- The toll-free numbers that the enrollee can use to file a grievance or an appeal by phone.
- The fact that, when requested by the enrollee, benefits will continue if the enrollee files an appeal or a request for State fair hearing within the timeframes specified for filing; and that the enrollee may be required to pay the cost of services furnished while the

appeal is pending, if the final decision is adverse to the enrollee.

Further, if the State agency chooses to furnish appeal rights to providers, it must provide MCO and PIHP enrollees information on these appeal rights. We note that while section 1932(a)(5)(A)(ii) of the Act provides for furnishing information on ''procedures available to * * * a health care provider to challenge or appeal'' an MCO decision, there is no Federal Medicaid requirement that these procedures be provided by MCOs or PIHPs. To the contrary, as discussed below, the requirement in section 1932(b)(4) of the Act that MCOs have grievance procedures refers to rights extended to an enrollee ''or a provider on behalf of an enrollee.''

MCOs and PIHPs are also required to provide information on advance directives, physician incentive plans, and upon request, information on the structure and operation of the entity as follows:

- Health plans' and health care facilities' licensure, certification, and accreditation status; and
- Information on health professionals, including but not limited to, education and board certification and recertification.
- Other information on accessing services, including physical accessibility and non-English languages spoken
- A description of procedures to control utilization and expenditures
- A summary of the method for compensating physicians.

We are distinguishing between information that must be furnished to all enrollees and information furnished on request because it is our belief that some information is not typically used by enrollees in selecting a provider. By making the information available by request, interested beneficiaries can obtain the information, and MCOs and PIHPs are not required to furnish information that will not be used.

Proposed § 438.10(h) would implement section 1932(a)(5)(C) of the Act, which requires that comparative information be provided by State agencies that implement mandatory managed care programs under the authority in section 1932(a)(1)(A) of the Act. Under proposed § 438.10(h), this information would be provided directly by the State agency, or through the MCO or PCCM at least annually, as well as upon request. The information must be presented in a comparative chart-like form that facilitates comparison among MCOs and PCCMs and must be available in the prevalent languages (as determined by the State) spoken by populations in the geographic area. It should include the following information for each MCO or PCCM: (1) The service area of the MCO or PCCM; (2) the benefits covered; (3) any cost-sharing imposed by the MCO or PCCM; and (4) to the extent available, quality and performance indicators, including, but not limited to, disenrollment rates, as defined by the State agency and consumer satisfaction. State agencies must specify the meaning of ''disenrollment rates'' and the voluntary disenrollment from one plan to another plan.

6. Provider Discrimination (§ 438.12)

Proposed § 438.12 would reflect the anti-discrimination provisions in section 1932(b)(7) of the Act. Those provisions state that an MCO must not discriminate with respect to participation, reimbursement, or indemnification as to any provider who is acting within the scope of the provider's license or certification under applicable State law, solely on the basis of the license or certification. Section 1932(b)(7) also states, that this provision does not prohibit an organization from including providers only to the extent necessary to meet the needs of the MCO's enrollees, from establishing different payment rates, or from establishing measures designed to maintain quality and control costs consistent with the responsibilities of the MCO.

Proposed § 438.12 must not be construed as an ''any willing provider'' provision. We believe that in section 1932(b)(7) of the Act the Congress intended only to ensure that MCOs do not adopt arbitrary policies concerning non-physician providers who, in the past, may have been discriminated against because they do not hold the same licenses and certifications as practicing physicians. Any discriminatory actions may have provided beneficiaries with fewer choices and may have reduced beneficiaries' overall access to quality health care. Accordingly, under proposed § 438.12, MCOs and, under the authority in section 1902(a)(4) of the Act, PIHPs would be required to implement policies for provider participation, reimbursement, and indemnification that are not arbitrary, but rather relate to quality factors such as outcome measures and satisfaction surveys, cost factors, and other legitimate business concerns.

We also propose in § 438.12 that an MCO or PIHP that declines to include individual or groups of providers in its network must give the provider written notice of the reason for its decision.

B. State Responsibilities (Subpart B)

1. State Plan Requirements (§ 438.50)

Proposed § 438.50 would implement section 1932(a)(1)(A) of the Act, which permits State agencies to enroll their Medicaid beneficiaries in an MCO or PCCM on a mandatory basis without a waiver under sections 1915(b) or 1115 of the Act. Under section 1932(a)(1)(A) of the Act and proposed § 438.50, a State agency no longer needs to request, obtain, and seek periodic renewal of CMS waivers to restrict freedom of choice for most Medicaid beneficiaries. Rather, a State agency may amend its Medicaid plan to require these Medicaid beneficiaries to enroll in MCOs or PCCMs, without being out of compliance with the freedom of choice, statewideness, or comparability of services requirements.

We are requiring State agencies to submit a Medicaid State plan amendment to implement the managed care provisions under section 1932(a)of the Act and the implementing regulations at § 438.50. As specified in the current regulations at § 430.16, we must make a decision to approve or disapprove a State agency's request within 90 days of receipt of the State plan amendment, or we may request additional information from the State agency. If we ask for additional information, we must make a decision to approve or disapprove a State plan amendment within 90 days of receipt of the State agency's response to the additional information request. As with other State plan amendments, the effective date provisions specified in the current regulations at §§ 430.20 and 447.256 apply to State plan amendments submitted to implement a section 1932(a) of the Act request. Thus, section 1932(a) State plan amendments may be effective as early as the first day of the quarter in which a State plan amendment is submitted to CMS.

Under proposed § 438.50(b), we identify what the State plan would be required to specify, including the payment method, whether the State contracts on a comprehensive risk basis, and how the State involves the public. Under paragraph (c), State agencies wishing to utilize the authority in § 438.50 would be required to provide assurances of State compliance with all applicable requirements.

Proposed § 438.50(d) reflects the statutory exclusion of the following populations from mandatory managed care enrollment under the State plan option in section 1932(a) of the Act:

- Dual Medicare-Medicaid eligibles.
- Indians who are members of Federally-recognized tribes except when

the MCO or PCCM is either the Indian Health Service or an Indian Health program operated by a tribe or tribal organization under a contract, grant, cooperative agreement, or compact with The Indian Health Service.

• Children (under 19 years of age) who are—

—eligible for Supplemental Security Income benefits under Title XVI of the Act;

—described in section 1902(e)(3) of the Act;

—in foster care or other out-of-home placement;

—receiving foster care or adoption assistance; or

—receiving services through a family-centered, community-based, coordinated care system receiving grant funds under section 501(a)(1)(D) of the Act.

While State agencies are prohibited from enrolling the above groups under the State plan option, a State agency may permit voluntary enrollment of these individuals in a program authorized under section 1932(a) of the Act or use a section 1915(b) waiver or section 1115 demonstration authority to mandate enrollment for these individuals in a managed care system. Under section 1915(b) or section 1115 authority, a State agency would be required to demonstrate how the individuals' special needs and circumstances would be met under the managed care arrangements. There is a growing body of State experience and best practices regarding enrollment of these groups. We will use this knowledge when evaluating whether a particular State's waiver or demonstration request demonstrates that their program will adequately address the needs and complexities of these groups, that set them apart from the groups that can be mandatorily enrolled without a waiver.

The requirements in paragraph (e) reflect the requirements in section 1932(a)(4)(C) on enrollment priorities. For beneficiaries enrolled under the State plan option under section 1932(a)(1) of the Act, the State agency must establish a method whereby individuals already enrolled with an MCO or PCCM must be given priority to continue that enrollment where the MCO or PCCM does not have the capacity to enroll all individuals seeking enrollment under the program.

Proposed § 438.50(f) reflects the provisions in section 1932(a)(4)(D) of the Act, which stipulate that in applying the default assignment provision under section 1932(a)(1) programs, State agencies are required to establish an enrollment process that takes into consideration a beneficiary's existing relationships with providers and providers'traditional service to Medicaid beneficiaries. If enrollment based on the foregoing considerations is not possible, States must utilize an assignment process that equitably distributes enrollees among qualified, available MCOs or PCCMs.

Except when State agencies have a fee-for-service experience or prior MCO or PCCM enrollment data regarding an individual, it may be difficult to establish a provider and individual relationship for default assignment purposes. We recommend that State agencies ask potential enrollees in this situation for the names of providers from whom they receive services and whether they would wish to continue this relationship. When the beneficiary identifies a provider who is participating and has additional capacity, this information should be used in determining the individual's assignment. In this instance, the State agency makes the assignment to any MCO or PCCM in which that provider participates.

We propose under § 438.50(f)(3) that existing provider-individual relationships be defined as the provider who was the main source of care for the beneficiary in the last year. This can be established through State records of previous MCO or PCCM enrollment or fee-for-service experience, or through contact with the beneficiary. Under proposed § 438.50(f)(4), we describe providers as traditionally serving Medicaid beneficiaries if the provider has experience in dealing with the Medicaid population. If the State agency has no recent claims history, cannot get a response from the beneficiary, or the named provider does not participate, the State agency must give consideration to traditional providers. If no traditional providers are available, remaining individuals are to be equitably distributed among qualified MCOs and PCCMs with adequate capacity.

2. Choice of MCO, PIHPs, PAHPs, and PCCMs (§ 438.52)

Subject to certain exceptions, under section 1932(a)(3) of the Act, a State agency that requires Medicaid beneficiaries to enroll in an MCO or PCCM must offer to its beneficiaries a choice of at least two MCOs or PCCMs. This is consistent with the longstanding requirement under section 1915(b) waivers that beneficiaries have at least two options. This requirement derived from the fact that the right to disenroll provided in section 1903(m)(2)(A)(vi) of the Act could not be waived under section 1915(b) of the Act. Thus, in the case of a comprehensive risk contract subject to section 1903(m) of the Act (formerly HMO contracts, now MCO contracts), a beneficiary has always had the right to disenroll to another option. Section 1932(a)(3) of the Act reflects this existing mandatory managed care policy, and applies to primary care case managers under section 1905(t) of the Act as well. Therefore, a State agency could comply with this provision by offering a choice of two practitioners for a primary care case management system as long as each practitioner is a separate primary care provider. We also propose to extend this requirement to PIHPs and PAHPs.

Section 1932(a)(3) of the Act provides two exceptions to the general choice of coverage requirement in section 1932(a)(3)(A) of the Act. First, under section 1932(a)(3)(B) of the Act, in rural areas, a State agency may restrict choice of coverage to a single MCO, PIHP, PAHP, or PCCM if certain conditions are met. In those situations, the State agency must allow the beneficiary to choose from at least two physicians or case managers (to the extent that at least two physicians or case managers are available to furnish care and services in the area), and the State agency must allow the beneficiary to obtain assistance from any other provider outside the network in appropriate circumstances, as established by the State agency under CMS regulations.

Since a State agency may elect to implement this rural exception, the BBA requires us to promulgate regulations under which State agencies can establish the ''appropriate circumstances'' under which an individual will be permitted to obtain care from any provider. In § 438.52(b)(2), we propose the following as appropriate circumstances under which a State agency must permit beneficiaries to seek out-of-plan treatment: (1) When a service or type of provider is not available within the MCO, PIHP, PAHP, or PCCM network; (2) for up to 60 days, when a provider that is not part of the MCO, PIHP, PAHP, or PCCM network, has an existing relationship with the beneficiary, is the beneficiary's main source of care, and has not accepted an offer to participate in the network; (3) when the only plan or provider available to the beneficiary does not, because of moral or religious objections, furnish the service the enrollee seeks; or (4) when the beneficiary's primary care provider determines that there is unnecessary risk to the beneficiary to receive separately a related service not

available in the network. We also propose that State agencies have the discretion to determine additional circumstances that warrant out-of-network treatment. The State agency must ensure that enrollees are informed of the appropriate circumstances for out-of-plan treatment. We invite comments and additional suggestions in this area.

For purposes of the rural area exception in section 1932(a)(3)(B) of the Act, we propose in paragraph (b)(3) to define ''rural area'' as any area not meeting the Medicare definition of ''urban area'' at § 412.62(f)(1)(ii). Under this definition, any area that is part of a Metropolitan Statistical Area cannot be considered ''rural'' for the purposes of this exception. Areas designated as Metropolitan Areas, Primary Metropolitan Statistical Areas, or Consolidated Metropolitan Statistical Areas are all considered to be urban. Therefore, they are ineligible for this exception.

In the case of certain HIOs (specifically, pre-1986 HIOs or the county-operated HIOs in California that are exempt from section 1903(m) of the Act), the choice requirement in section 1932(a)(3)(A)of the Act is deemed to be met if a choice of at least two providers within the entity is provided.

Finally, we propose in paragraph (d) that when there is a rural or HIO exception to choice, any limitation to change between primary care providers may be no more restrictive than the limitations on disenrollment under § 438.56(c).

Section 1932(a)(4)(A)(i) of the Act expressly permits individuals to disenroll at any time with cause. Under section 1932(a)(4)(A)(ii), enrollees must be permitted to disenroll without cause during the initial 90 days of enrollment with an MCO or PCCM, and at least once every 12 months thereafter. If read to apply in all circumstances, this requirement would be inconsistent with allowing only one MCO or PCCM option, such as under the rural area and HIO exceptions provided under sections 1932(a)(3)(B) and (C) of the Act. We believe that in authorizing mandatory enrollment in a single entity under these exceptions, while imposing as a condition the right to choose among individual providers within the entity, the Congress was providing for an implicit exception to the general rule under section 1932(a)(4) of the Act in these cases. Under these exceptions, therefore, we propose that the requirements in section 1932(a)(4)(A) of the Act are deemed satisfied by providing that beneficiaries can disenroll to a different primary care physician or case manager. Thus, individuals may disenroll from their current primary care provider, but must continue as an enrollee in the MCO or PCCM system. This would make it unnecessary for a State agency to operate a parallel fee-for-service system for those individuals who disenroll. We note that this ''exception'' to the ordinary operation of the requirement in section 1932(a)(4) of the Act would also be incorporated in section 1903(m)(2)(A)(vi) of the Act, which cannot be waived under a section 1915(b) waiver program. Thus, under our proposed rule, a State agency could offer a single MCO or multi-provider PCCM in a rural area under a section 1915(b) waiver, as long as the requirements in § 438.52(c) are satisfied. (The issue of section 1903(m)(2)(A)(vi) of the Act does not arise for the HIOs addressed in § 438.52(d), because they are exempt from section 1903(m) requirements.)

3. Enrollment and Disenrollment: Requirements and Limitations (§ 438.56)

Section 1932(a)(4) of the Act contains new requirements that apply to the enrollment and disenrollment of beneficiaries in MCOs and PCCMs. In addition to applying ''directly'' to mandatory programs under section 1932(a)(1)(A) of the Act, these requirements are also incorporated under section 1903(m)(2)(A) of the Act for MCOs and section 1905(t) of the Act for PCCMs. Thus, these new requirements also apply to voluntary programs, and, unless the ''grandfather provision'' in section 4710(c) of the BBA applies or an exception is authorized by CMS under section 1115(a)(2) in the case of a demonstration project, to mandatory programs under section 1915(b) or section 1115.

Under section 1932(a)(4)(A) of the Act, enrolled beneficiaries may terminate or change their enrollment for cause at any time, unless the beneficiary is enrolled in a single MCO or PCCM in a rural area as described earlier in regards to § 438.52(b). Beneficiaries must also be permitted to disenroll without cause from an MCO or PCCM within the first 90 days of the initial enrollment period of up to 12 months, and annually thereafter. We propose in § 438.56 that these enrollment provisions would apply to all PIHPs and PAHPs as well. Thus, the provisions apply to virtually all Medicaid managed care entities and programs.

We propose to replace § 434.27, which required HMO and PHP contracts to specify when they could request beneficiary disenrollment, with proposed § 438.56(b). The new requirement specifies the conditions under which an MCO, PIHP, PAHP, or PCCM may request beneficiary disenrollment. These conditions are consistent with Medicare+Choice requirements.

The right of an enrollee to disenroll without cause (paragraph (c)(2)) during the first 90 days of enrollment, from a particular MCO, PIHP, PAHP, or PCCM and at least annually thereafter, replaces the pre-BBA version of section 1903(m)(2)(A)(vi) of the Act, which provided enrollees with the right to disenroll without cause at any time, or in the case of Federally qualified HMOs and certain other entities, at least every 6 months.

Under the pre-BBA version of section 1903(m)(2)(A)(vi) of the Act, a 12-month lock-in was possible only under a section 1115 demonstration, since section 1115(a)(2) authority was required in order to exempt an HMO from the requirement in that version of section 1903(m)(2)(A)(vi) of the Act. The BBA permitted 12-month lock-ins without demonstration authority, and even in the case of a voluntary program.

In addition to extending the maximum enrollment period from 6 months to 12 months and allowing for a 90-day, without-cause disenrollment period, section 1932(a)(4) of the Act—

- Applies this lengthened enrollment period to all MCOs and PCCMs, rather than a specific type of HMO;
- Requires that beneficiaries be notified of their ability to disenroll or change plans during an enrollment period that occurs at least every 12 months, and at least 60 days before the start of each enrollment period; and
- Eliminates all previous statutory provisions on enrollment and termination of enrollment.

Under proposed § 438.56(c), the above provisions apply to enrollment and disenrollment in MCOs, PIHPs, PAHPs, and PCCMs, regardless of authority, with the exception of (1) waiver or demonstration projects ''grandfathered'' under section 4710(c) of the BBA, and (2) States that have been granted an exception from these rules under section 1115, or, for PIHPs and PAHPs, under section 1915(b) of the Act.

We note that the language in section 1932(a)(4)(A)(ii) of the Act specifies that the 90-day period to disenroll without cause is to begin on the date the individual ''receives notice of such enrollment * * *'' However, we recognize that a literal application of this starting date could make this provision extremely difficult for State agencies to administer, and therefore propose in § 438.56(c)(2)(i) that the 90 days will begin when enrollment is

effective or notice is sent, whichever is later.

We provide that the 90-day period for disenrollment without cause applies only when an individual first enrolls with a particular MCO, PIHP, PAHP, or PCCM. The language in section 1932(a)(4) of the Act regarding the 90-day period for disenrollment without cause expressly provides for a 90-day period that begins with enrollment with the entity in which the beneficiary is enrolled. Thus, beneficiaries are entitled to a 90-day ''without cause'' period for disenrollment any time they enroll in a new MCO, PIHP, PAHP, or PCCM.

Section 1932(a)(4) of the Act provides for a notice of termination rights under which an enrollee must be informed of his or her ability to terminate or change enrollment at least 60 days before the start of each enrollment period. This 60-day period gives individuals the opportunity to change MCO, PIHP, PAHP, or PCCM effective with the start of their initial enrollment period with a particular MCO, PIHP, PAHP, or PCCM. If they choose to remain in the same plan, they have had their opportunity for disenrollment without cause and declined it. However, enrollees who change plans, would have an opportunity to try out the new MCO, PIHP, PAHP, or PCCM and determine whether they wish to remain enrolled through the enrollment period. This interpretation is consistent with the statutory language, that refers to a 90-day period beginning with the date of enrollment with ''the entity,'' and is also consistent with what we believe to be the intent of this provision. We believe that this provision was designed to provide a beneficiary with a period of time to try out an MCO, PIHP, PAHP, or PCCM and see whether it is right for him or her. A beneficiary who has already had a 90-day period with a particular MCO, PIHP, PAHP, or PCCM does not need another one in order to try out that entity. The only exceptions provided are when a beneficiary is automatically re-enrolled under paragraph (g) and missed the annual enrollment opportunity, and when a State imposes intermediate sanctions specified in proposed § 438.702(a)(3).

Proposed § 438.56(d) sets forth procedures for disenrollment. The enrollee may submit a disenrollment request orally or in writing to the State agency. In § 438.56(d)(1)(ii), we propose that the MCO, PIHP, PAHP, or PCCM may approve the request for disenrollment if the State agency permits this.

We propose to describe cause for disenrollment in paragraph (d)(2) to include circumstances in which the beneficiary moves out of the MCO, PIHP's, PAHP's, or PCCM's service area; cases in which the plan does not cover, because of moral or religious objections, a service the enrollee seeks; and for other reasons determined by the State, such as for homeless individuals or migrant workers.

In paragraph (d)(3) and (d)(4), we propose that the disenrollment request be processed within the timeframe specified in paragraph (e), or the request be deemed approved. In paragraph (d)(5), we permit the State agency to require that the enrollee seek redress in the MCO's, PIHP's, PAHP's, or PCCM's grievance system before making a determination on the request.

In paragraph (e), we propose to establish the timeframe for processing all disenrollment requests. The effective date of an approved disenrollment would have to be no later than the first day of the second month in which the request was filed. If a determination is not made within that timeframe, it would be considered approved.

In accordance with section 1932(a)(4)(B) of the Act, we propose, in § 438.56(f), a requirement for States that restrict disenrollment to notify enrollees 60 days before the start of each enrollment period, and ensure access to the State fair hearing process if disenrollment for cause is denied.

Section 1932(a)(4), of the Act requires State agencies to permit disenrollment without cause at least every 12 months after the individual's enrollment with an MCO or PCCM. State agencies may fulfill this requirement by having an annual open season for all MCO or PCCM enrollees or establishing an open enrollment opportunity for each individual based on the individual's date of enrollment. Through this regulation, we would apply these provisions to PIHPs and PAHPs as well.

Section 438.56(g) incorporates section 4732(c) of Pub. L. 101–508, effective November 5, 1990, as well as the provision set forth in section 4702(b)(1) of the BBA, to allow State agencies to provide in their State plans and contracts with MCOs and PCCMs for the automatic re-enrollment of beneficiaries who become disenrolled from the MCO or PCCM solely by virtue of becoming temporarily (for months or less) ineligible for Medicaid.

4. Conflict of Interest Safeguards (§ 438.58)

Under section 1932(d)(3) of the Act, State agencies cannot enter into contracts with any MCO, unless the State agency has in effect conflict-of-interest safeguards with respect to its officers and employees, and local officers and employees who have responsibilities relating to contracts with these MCOs, or to the default enrollment process. These safeguards must be at least as effective as the Federal safeguards provided under section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423). This provision applies to contracts entered into or renewed by October 1, 1997 and signed by both parties.

The Federal Procurement Policy Act specifies prohibitions for former and current employees from entering into any type of communications with individuals or third parties to unduly influence their decisions. These provisions include the following:

- Prohibited conduct by competing contractors.
- Prohibited conduct by procurement officials.
- Refusal to engage in discussion with competing contractors.
- Disclosure to unauthorized persons.
- Certification and enforcement matters.

These requirements are designed to ensure that there is no undue influence or preference given to an MCO because a State employee has an interest in that MCO and to require State agencies to have stringent safeguards over individuals for the proper and efficient administration of a State Plan.

Before section 1932(d)(3) of the Act was added by section 4207 of the BBA, section 1902(a)(4)(C) of the Act provided that Medicaid State and local officers or employees, former officers or employees, and partners of former officers or employees were prohibited from committing any act that is prohibited by Section 207 or 208 of title 18 of the United States Code. Section 207 or 208 of title 18, prohibits former and current employees from entering into communications to influence on behalf of any other persons.

In proposed § 438.58, we would extend these provisions to PIHPs and PAHPs as well, under our authority under section 1902(a)(4) of the Act.

5. Limit on Payment to Other Providers (§ 438.60)

We are proposing to redesignate existing § 434.57 as § 438.60, and to clarify that this section prohibits payments to providers for services available under an MCO, PIHP, or PAHP contract. The only exceptions to this prohibition are for payments specifically authorized by Federal statute or regulation.

6. Continued Service to Beneficiaries (§ 438.62)

We propose to redesignate § 434.59 as § 438.62 with appropriate changes in terminology.

7. Monitoring Procedures (§ 438.66)

We propose to redesignate § 434.63 as § 438.66 with non-substantive revisions and appropriate changes in terminology.

C. Enrollee Rights and Protections (Subpart C)

1. Enrollee Rights (§ 438.100)

We are proposing requirements to ensure that each contract with an MCO or PIHP have written polices regarding enrollee rights and that MCOs, PIHPs, PAHPs, and PCCMs ensure compliance with Federal and State laws affecting the rights of enrollees. Under this proposed rule, as set forth in proposed § 438.100, each enrollee would have the right to receive information in accordance with proposed § 438.10; be treated with respect and consideration for enrollee dignity and privacy; receive information on available treatment options or alternative courses of care; participate in decision-making regarding his or her health care; and be free from any form of restraint or seclusion used as a means of coercion, discipline, convenience, or retaliation. In addition, each enrollee of an MCO or PIHP would have the right to obtain a second opinion from a qualified health care provider in accordance with proposed § 438.206(b), and to access his or her medical records and request that they be amended or corrected.

We are proposing these standards because interpersonal aspects of care are highly important to most patients and closely related to quality of care. Enrollees' interactions with the organization and its providers can have an important bearing on their willingness and ability to understand and comply with recommended treatments and hence on outcomes and costs. Further, under proposed § 438.100, the MCO, PIHP, PAHP, and PCCM would have to comply with any other Federal and State law pertaining to enrollee rights. These requirements extend to an individual acting on behalf of someone who is unable to exercise his or her rights.

In proposed § 438.100(d), we would require that States ensure that MCOs, PIHPs, PAHPs, and PCCMs and their subcontractors comply with Federal and State laws affecting the rights of enrollees. Federal laws affecting the rights of enrollees include, but are not limited to: Title VI of the Civil Rights Act of 1964 as implemented by regulations at 45 CFR part 484; the Age Discrimination Act of 1975 as implemented by regulations at 45 CFR part 91; the Rehabilitation Act of 1973; and Titles II and III of the Americans with Disabilities Act; and other laws regarding privacy and confidentiality.

2. Enrollee-Provider Communications (§ 438.102)

Medicaid beneficiaries have historically been entitled to receive from their health care providers the full range of medical advice and counseling that is appropriate for their condition. The BBA expanded upon this basic right by expressly precluding an MCO from establishing restrictions that interfere with enrollee-practitioner communications. Under proposed § 438.102, which expands this right to PIHPs and PAHPs, a health care professional who is acting within his or her scope of practice, must be permitted to freely advise a patient about his or her health status and discuss appropriate medical care or treatment for that condition or disease regardless of whether the care or treatment is covered under the contract with the MCO, PIHP, or PAHP. A health care professional means a physician, physician assistant, physical or occupational therapist, therapist assistant, speech-language pathologist, audiologist, registered or practical nurse (including nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, and certified nurse midwife), licensed certified social worker, registered respiratory therapist, and certified respiratory therapy technician.

While the new provision precludes MCOs, PIHPs, and PAHPs from interfering with enrollee-practitioner communications, it does not require MCOs, PIHPs and PAHPs to provide reimbursement for, or provide coverage of counseling or referral services for specific services, if the MCO, PIHP, or PAHP objects to the service on moral or religious grounds. Please note, however, that the State agency remains responsible for ensuring access to all covered services. In these cases, the MCO, PIHP, or PAHP must inform beneficiaries in writing of its policies before and during enrollment. If the MCO, PIHP, or PAHP changes its policies with regard to a specific counseling or referral service, the organization must provide written notification to enrollees within 90 days of the change. However, this timeframe, while sufficient to meet the statutory requirement related to changes in counseling or referral services, is overridden by the provision at proposed § 438.10(e)(1)(ii) that requires the MCO and PIHP to furnish the information at least 30 days before the effective date of the policy.

3. Marketing Activities (§ 438.104)

Terminology. We currently require each MCO, under § 434.36, to specify in its contract a methodology for assuring that marketing plans, procedures, and materials are accurate and do not mislead, confuse, or defraud either recipients or the Medicaid agency. Section 1932(d)(2) of the Act, established by section 4707(a) of the BBA, further strengthened consumer protections and prohibits fraud and abuse by restricting marketing activities by MCOs and PCCMs. Section 1932(d)(2) of the Act requires that marketing materials be distributed to the entire service area covered under contract, prohibits ''cold-call'' marketing, and requires that marketing materials not be distributed without the prior approval of the State agency. We propose to implement these BBA provisions and prohibit certain other marketing practices, under proposed § 438.104. We also propose to extend the requirements to PIHPs and PAHPs.

For the purposes of this regulation, we propose in § 438.104(a) to define marketing materials as materials produced in any medium, by or on behalf of an MCO, PIHP, PAHP, or PCCM, used to communicate with individuals who are not its enrollees and that can reasonably be interpreted as intended to influence the individuals to enroll in that particular MCO, PIHP, PAHP, or PCCM.

Required Marketing Activities. In § 438.104(b)(1)(i) and (ii), we propose to reflect the requirements in section 1932(d)(2)(B) of the Act that MCOs and PCCMs must: (1) Obtain State approval before distributing marketing materials; and (2) distribute marketing materials to the entire service area in which they have contracts under sections 1903(m) or 1903(t)(3) of the Act. According to the last sentence in section 1932(d)(2)(A)(i) of the Act this, prior approval requirement was to take effect on a date specified by the Secretary in consultation with the State agency. Following this consultation, this requirement became effective on July 1, 1998. In § 438.104(b)(1)(iii), we propose to include the requirement in section 1932(d)(2)(D) of the Act that MCOs and PCCMs that comply with the information requirements set forth in § 438.10 to ensure that each Medicaid beneficiary receives accurate oral and written information in order that the individual can make an informed decision whether or not to enroll.

Prohibited Marketing Activities. In § 438.104(b)(1)(iv), we propose to include the prohibition in section 1932(d)(2) of the Act on the MCO, PCCM, or any agent attempting to influence enrollment with the MCO or PCCM in conjunction with the sale of any other insurance. We interpret this to mean that MCOs and PCCMs may not entice a Medicaid beneficiary to join the MCO or PCCM by offering the sale of any other type of insurance as a bonus for enrollment. However, we invite comment on this provision since no legislative history is available to help determine if this interpretation is accurate.

In § 438.104(b)(1)(v) we propose to include the prohibition in section 1932(d)(2)(E) of the Act barring an MCO or PCCM, directly or indirectly, from conducting door-to-door, telephonic, or other ''cold-call'' marketing of enrollment. MCOs , PCCMs, and their employees are prohibited from conducting these marketing practices either by themselves (directly) or by using an agent, affiliated provider, or contractor (indirectly). This provision does not prohibit MCOs and PCCMs from engaging in other State approved activities, such as marketing at health fairs, procuring billboards, bus signs, or other broadcast advertising materials, and contacting in person, Medicaid beneficiaries who request further information about the entity. However, it is the prerogative of the State agency to further limit marketing practices beyond those prohibited or required by Federal statute. Cold-call marketing is defined in proposed § 438.104(a) as any unsolicited personal contact with a potential enrollee by an employee, affiliated provider or contractor of the entity for the purpose of influencing enrollment with that entity. This would include those activities as a physician or other member of the medical staff or salesperson or other managed care entity, employee, or independent contractor approaching a beneficiary in order to influence the Medicaid beneficiaries decision to enroll with a particular plan.

In addition, we propose in § 438.104(b)(2) to implement the provision in section 1932(d)(2)(A)(i)(II) of the Act on the distribution by MCOs, PCCMs, or any agents, of marketing materials that contain false or materially misleading information by requiring that MCO and PCCM contracts specify the methods by which compliance with this requirement is assured. Examples of misleading marketing information would be an assertion that the beneficiary must enroll with the MCO or PCCM to get Medicaid benefits, or that the MCO or PCCM is recommended or endorsed by us.

Consultation in State Agency Approval of Marketing Materials. In § 438.104(c) we propose to specify the requirement in section 1932(d)(2)(A)(ii) of the Act that State agencies provide for consultation with a Medical Care Advisory Committee (MAC) in the process of reviewing and approving marketing materials. Currently, MAC is described in the regulations at § 431.12. The current MCAC must include Board-certified physicians and other representatives of the health professions who are familiar with the medical needs of low-income population groups and with the resources available and required for their care; members of consumers' groups that include Medicaid recipients and consumer organizations such as labor unions, cooperatives, consumer sponsored prepaid group practice plans, and others; and the Director of the Public Welfare Department or the Public Health Department, whichever does not head the Medicaid agency. State agencies do not have to use the current MCAC but can establish a new MCAC for consultation in reviewing and approving marketing material. If a new MCAC is established, it must be composed of similar membership to that described above and in § 431.12.

4. Liability for Payment (§ 438.106)

In § 438.106, we propose to specify the requirement in section 1932(b)(6) of the Act that MCOs protect Medicaid beneficiaries from being held responsible for payment liabilities incurred by the MCO or by a health care provider with a contractual, referral, or other arrangement with the MCO. For example, under the regulation, if the MCO, PIHP, or PAHP were to become bankrupt, the Medicaid enrollee would not have to assume responsibility for costs that the MCO, PIHP, or PAHP was responsible for covering, nor any of the debts of the providers affiliated with the MCO, PIHP, or PAHP. In addition, if the MCO, PIHP, or PAHP fails to receive payment from the State agency, or if a provider fails to receive payment from the State agency or the MCO, PIHP, or PAHP, the Medicaid enrollee cannot be held responsible for these payments. The Medicaid enrollee cannot be held responsible for payments to a provider in excess of the amount that he or she would have owed if the MCO, PIHP, or PAHP had directly provided the service.

5. Cost Sharing (§ 438.108)

Proposed § 438.108 would require compliance with the restrictions on cost-sharing in §§ 447.50 through 447.60. We note that section 4708(b) of the BBA amended sections 1916(a)(2)(D) and 1916(b)(2)(D) of the Act to eliminate the prohibition that existed prior to the BBA on the imposition cost-sharing by MCOs. Copayments for services provided by MCOs, PIHPs, and PAHP, may now be imposed in the same manner as copayments are applied under fee-for-service, as discussed in §§ 447.50 through 447.60.

Accordingly, State agencies must use their fee-for-service payment rates to serve as the basis for determining copayments that can be assigned for managed care services. State agencies would be allowed to impose copayment requirements to the same extent that they are allowed to impose copayment requirements on Medicaid beneficiaries not enrolled in MCOs, PIHPs, and PAHPs. For example, State agencies would have the option of establishing a standard copayment amount for managed care services that is determined by applying the maximum copayment amounts specified at § 447.54 as applied to the State agency's fee-for-service payment for that service.

In addition, any beneficiary groups excluded by statute from having to pay copayments under fee-for-service would continue to be excluded from any copayment responsibility for managed care services. These beneficiary groups include children, pregnant women, and institutionalized beneficiaries. Also prohibited are copayments for emergency services and family planning services.

We also propose in § 447.53(e) that no provider may deny services to an individual who is eligible for the services on account of the individual's inability to pay the cost sharing. This language closely tracks the statutory language in section 1916(e) of the Act. This proposed provision applies to services furnished by either an MCO or under fee-for-service.

6. Emergency and Post-Stabilization Services (§ 438.114)

Section 4704(a) of the BBA added section 1932(b)(2) to the Act to assure that Medicaid managed care beneficiaries have the right to immediately obtain emergency care and services, and the right to post-stabilization services following an emergency condition under certain circumstances. Each contract with an MCO and PCCM must require the organization to provide for coverage of emergency services and post-stabilization services as described below. In section 1932(b)(2)(A)(i) of the Act, while the Congress required MCOs and PCCMs to provide coverage of

emergency services, it did not define the word ''coverage'' even though these health care models generally do not cover emergency services in the same manner. In proposed § 438.114, we interpret the obligation in section 1932(b)(2)(A)(i) of the Act to provide for coverage of emergency services to mean that an MCO or State (as payer of a PCCM) that pays for hospital services generally, must pay for the cost of emergency services obtained by Medicaid enrollees. We interpret coverage in the PCCM context to mean that the PCCM must allow direct access to emergency services without prior authorization. We apply different meanings to the word ''coverage'' because while PCCMs are individuals paid on a fee-for-service basis, they receive a State payment to manage an enrollee's care. Unlike MCOs, PCCMs would not likely be involved in a payment dispute involving emergency services, they could be involved in an authorization dispute over whether a self-referral to an emergency room is authorized without prior approval of the PCCM. Accordingly, in § 438.114(c)(2), we propose to provide that enrollees of PCCMs are entitled to the same emergency services coverage without prior authorization that is available to MCO enrollees under section 1932(b)(2) of the Act.

The BBA further stipulates that emergency services must be covered without regard to prior authorization or the emergency care provider's contractual relationship with the organization. These provisions collectively enable a Medicaid enrollee to immediately obtain emergency services at the nearest provider when and where the need arises.

Section 1932(b)(2)(B) of the Act defines emergency services as covered inpatient or outpatient services that are furnished by a provider qualified to furnish these services under Medicaid that are needed to evaluate or stabilize an emergency medical condition. An ''emergency medical condition'' is in turn defined in section 1932(b)(2)(C) of the Act as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in placing the health of the individual (or for a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, serious impairment to body functions, or serious dysfunction of any bodily organ or part. While this standard encompasses clinical emergencies, it also clearly requires MCOs to base coverage decisions for emergency services on the severity of the symptoms at the time of presentation and to cover examinations when the presenting symptoms are of sufficient severity to constitute an emergency medical condition in the judgment of a prudent layperson. The above definitions are set forth in proposed § 438.114(a).

In some cases, the ''emergency'' services required to diagnose or treat an ''emergency medical condition'' may fall within the scope of services that a PIHP, or even a PAHP, is required to cover under its contract. In this case, we believe that enrollees should have the same rights to have these services covered without delay, and ''out of plan'' as in the case of services covered by an MCO or through a PCCM. Accordingly, through our authority in section 1902(a)(4) of the Act, we provide in proposed § 438.114(f) that the requirements in § 438.114 apply to PIHPs and PAHPs to the extent that the services required to treat the emergency medical condition, or the required post-stabilization services in question, fall within the scope of the services for which the PIHP or PAHP is responsible.

Proposed § 438.114(b) requires that MCOs, PIHPs, PAHPs (to the extent applicable), at-risk PCCMs, or the State agency pay for emergency and post-stabilization services without prior authorization (other than the pre-approval of post-stabilization services no later than within one hour of a request for approval).

Proposed § 438.114(c)(1)(i) provides that an MCO or, to the extent applicable, a PIHP or PAHP, must pay for emergency services regardless of whether the entity that furnishes the services has a contract with the MCO, PIHP, or PAHP. In proposed § 438.114(c)(1)(ii), MCOs, PIHPs, or PAHPs may not deny payments if, on the basis of symptoms identified by the enrollee, he or she appeared to have an emergency medical condition, but turned out not to have a condition in which the absence of immediate medical care would have resulted in serious jeopardy to the health of the individual or, in the case of a pregnant woman, the health of her unborn child, serious impairment of bodily function, or serious dysfunction of any bodily organ or part. Likewise, the MCO, PIHP, PAHP, or PCCM cannot deny payment if the enrollee obtained services based on instructions of a practitioner or other representative of the MCO, PIHP, or PAHP. Proposed § 438.114(c)(2) provides that if a PCCM contract is a risk contract that covers the services, a PCCM system must allow enrollees to obtain emergency services outside of the PCCM system.

Proposed § 438.114(d) further clarifies financial responsibility. Proposed § 438.114(d)(1) provides that MCOs, PIHPs and PAHPs (to the extent applicable), at-risk PCCMs, or States may not limit what constitutes an emergency medical condition through lists of symptoms or final diagnoses/conditions and may not refuse to process a claim because it does not contain the primary care provider's authorization number. Proposed § 438.114(d)(2) provides that an enrollee who, based on the treating emergency provider's determination, has an emergency medical condition, may not be held liable for payment concerning the screening and treatment of that condition necessary to stabilize the enrollee. Proposed § 438.114(d)(3) provides that the attending physician or practitioner actually treating the enrollee determines when the enrollee is sufficiently stabilized for transfer or discharge, and that this determination is binding on the MCO, PIHP, or PAHP for coverage purposes.

Section 1932(b)(2)(A)(ii) of the Act also provides MCO and PCCM enrollees with the right to coverage of ''post-stabilization'' services after they have been ''stabilized'' (that is, they no longer have an emergency medical condition) following an admission for an emergency medical condition. Specifically, the services that must be covered are those that must be covered under Medicare rules implementing section 1852(d)(2) of the Act, in the same manner as these rules apply to M+C plans offered under Part C of Title XVIII. In section 1932(b)(2)(A) of the Act, this requirement was effective 30 days after the Medicare rules were established, which was August 26, 1998. The M+C post-stabilization requirements referenced by section 1932(b)(2)(A)(ii) of the Act are set forth in proposed § 438.114(e), which references § 422.113(c) of the M+C final regulation. Post-stabilization care means covered services, related to an emergency medical condition, that are provided after an enrollee is stabilized in order to maintain the stabilized condition, or under the circumstances described in paragraph § 422.113(c)(2)(iii), to improve or resolve the enrollee's condition.

The above emergency provisions are consistent with most of the emergency services provisions in the M+C regulations.

These regulations deviate from Medicare in two ways. First, the Medicare statute has specific provisions

for non-emergency, but urgently needed services, while the Medicaid statute does not contain any similar references. Second, the PCCM, PIHP, and PAHP models are delivery systems unique to Medicaid; and there is no Medicare counterpart to the special rules described above that apply to PCCM enrollees.

7. Solvency Standards (§ 438.116)

Section 4706 of the BBA amended section 1903(m)(1) of the Act by providing additional requirements for the solvency standards that an MCO must meet. Previously, MCOs had to make adequate provision against the risk of insolvency to the satisfaction of the State agency, and provide that enrolled Medicaid beneficiaries were not held liable for the debts of the MCO in the case of insolvency. Now, under the BBA, unless they meet one of the exceptions noted below, MCOs must either meet the same solvency standards that the State agency establishes for its private HMOs, or otherwise be licensed or certified by the State agency as a risk bearing entity. By meeting these standards, these MCOs are considered to have met the general solvency standards. However, this provision does not apply to MCOs that do not provide inpatient and physician services, are public entities, have solvency guaranteed by the State agency, or are Federally qualified health centers (FQHCs) or are controlled by an FQHC that meets the solvency standards already established for these centers by the State agency. For further clarification, the term ''control'' (for an MCO being controlled by an FQHC) means the possession, whether direct or indirect, of the power to direct or cause the direction of the management and policies of the MCO through membership, board representation, or an ownership interest equal to or greater than 50.1 percent. These MCOs must still meet the general requirement that MCOs have to make adequate provision against the risk of insolvency to the satisfaction of the State agency and provide that Medicaid beneficiaries enrolled will not be held liable for the debts of the MCO in the case of its insolvency.

In accordance with our authority under section 1902(a)(4), we have extended the new solvency requirements in section 1903(m)(1)(A) to PIHPs and PAHPs, as the risks to enrollees from an insolvency apply equally in these settings.

D. Quality Assessment and Performance Improvement (Subpart D)

1. Background

Before the passage of the BBA, Medicaid statute and regulations included a number of disparate and incremental provisions addressing quality. The statute focused specifically on services furnished by HMOs under 1903(m) of the Act. Section 1902(a)(30)(C) of the Act required State agencies to conduct on an annual basis, an independent, external review of the quality of services furnished under each State contract with an HMO.

Medicaid regulations contained several provisions that related to quality. Specifically, the regulations required HMOs to have an internal quality assurance plan that met limited requirements (§ 434.34); required the State to conduct periodic medical audits of HMOs to ensure that each organization furnished quality and accessible care to all Medicaid enrollees (§ 434.53); provided that contracts include provisions that identify the population covered under the contract, and to specify the amount, duration, and scope of medical services to be provided (§ 434.6(a)), required the State to obtain proof from its contractor of its ability to provide services under the contract efficiently, effectively, and economically (§ 434.50(b)), and proof that the contractor furnished the health services required by the enrolled recipients as promptly as is appropriate, meeting the State agency's quality standards (§ 434.52). The State agency and HHS were given discretion in the regulations to evaluate through inspection or other means, the quality, appropriateness, and timeliness of services performed under the contract (§ 434.6(a)(6)).

Other requirements that related to the quality of services included grievance procedures for beneficiaries enrolled in HMOs (§ 434.32), emergency medical services (§ 434.30), enrollee choice of health professional (§ 434.29), other State monitoring procedures (§ 434.63), and use of sanctions for HMO failure to provide medically necessary services resulting in an adverse effect on the enrollee.

In addition to the above, Medicaid statute included several indirect assurances related to quality, such as a requirement that States contract with HMOs that met certain enrollment composition requirements (specifically, at least 25 percent of a health plan's enrollment was to consist of persons not covered by Medicare or Medicaid), solvency standards for HMOs serving Medicaid beneficiaries, and a requirement that the State ensure that access to and quality of services provided under managed care are at least comparable to those provided under the fee-for-service program. For the latter, neither the statute nor the regulation specified the specific methods or standards to support the access and quality assurances.

As illustrated above, a number of the statutory and regulatory requirements before 1997 were duplicative (for example, periodic audits of managed care plans by State agencies and external reviews of HMOs from an agent of the State) or otherwise failed to allow for improvements in technology of measuring and improving quality (for example, use of performance measures and consumer surveys). As a consequence, it was unclear to many stakeholders how the various statutory and regulatory requirements worked together to effectively and efficiently ensure, and improve where appropriate, the quality of care delivered under managed care arrangements.

2. Overview

Under section 1932 (c)(1)(A) of the Act, as added by section 4705(a) of the BBA, each State that elects to furnish services to Medicaid beneficiaries through an MCO must develop and implement a quality assessment and performance improvement strategy that includes access standards, other measures, monitoring procedures, and periodic review. This statutory arrangement applies regardless of whether the managed care arrangement is mandatory or voluntary. Further, this strategy must be ''consistent with standards'' that we establish in regulations (section 1932(c)(1)(B) of the Act).

Proposed subpart D of part 438 contains our proposed standards, developed in accordance with the statute. The proposed standards, discussed later in greater detail, would require a State's strategy to include various access standards, structure and operation standards, and measurement and improvement standards. Once developed, each State would be required to review the strategy to ensure its overall effectiveness in achieving its desired results.

Many of the requirements in this subpart would be imposed on States. States in turn would impose these requirements on MCOs. As previously discussed, we have proposed to add PIHPs as entities subject to this subpart under our authority at section 1902(a)(4) of the Act.

Proposed Provisions of Subpart D

3. Scope (§ 438.200)

This section sets forth the scope of Subpart D.

4. State Responsibilities (§ 438.202)

This section sets forth the State responsibilities in implementing its quality strategy. Specifically, proposed § 438.202 would require that each State contracting with an MCO or PIHP do the following:

- Have a written strategy for assessing and improving the quality of managed care services provided by the MCO and PIHP.
- Have a means for obtaining input of recipients and other stakeholders in the development of the strategy, including making the strategy available for public comment before adopting it as final.
- Ensure compliance with standards established by the State.
- Conduct periodic reviews to evaluate the effectiveness of the strategy and update the strategy, periodically, as needed.
- Submit a copy of the initial strategy to CMS as well as a revised strategy when significant changes are made.

Additionally, regular reports on the implementation and effectiveness of the strategy would have to be submitted to us, consistent with the State's periodic reviews.

5. Elements of State Quality Strategies (§ 438.204)

This section sets forth the minimum elements of a State's quality strategy. We propose that these elements include the following:

- MCO and PIHP contract provisions that incorporate the standards in this subpart.
- Procedures for accessing the quality and appropriateness of care and services furnished to all Medicaid enrollees under the MCO and PIHP contracts, including individuals with special health care news. We suggest states reference the November 6, 2000 Report to the Congress entities safeguards for individuals with special health care needs enrolled in Medicaid managed care to determine what populations to consider when determining individuals with special health care needs. We also propose that the State strategy include procedures that identify the race, ethnicity, and primary language spoken of each Medicaid enrollee. We would require the latter information to be provided to the MCO and PIHP at the time of enrollment.
- Continuous monitoring and evaluation of MCO and PIHP compliance with the standards.
- Performance measures and levels, identified and developed by CMS in consultation with States and other relevant stakeholders.
- Arranging for annual, external independent reviews of quality outcomes and timeliness of, and access to, the services covered under the contract.
- Appropriate use of intermediate sanctions that, at a minimum, meet the requirements of subpart I of this part.
- An information system that supports initial and ongoing operation and review of the State's quality strategy.
- Standards, at least as stringent as those in the following sections of this subpart, for access to care, structure and operations, and quality measurement and improvement.

In the development of the proposed rule, some stakeholders expressed concern over any provision that would require States to identify to MCOs and PIHPs the race, ethnicity, and primary language spoken by MCO and PIHP enrollees. Some stakeholders expressed concern that the requirement for ethnicity would require States to change their information systems. They questioned whether the value of requiring this information was worth the cost. In response to these concerns, we believe that most States are currently collecting and reporting data on race and ethnicity and, thus, should not have to expend significant costs for systems changes. Based on this current practice, we believe that States should not be unduly burdened by this provision of the proposed rule. We invite comments on this issue.

We have included as an element of States quality strategies that they must include ''performance measures and levels, certified and developed by CMS in consultation with States and other relevant stakeholders.'' We propose this requirement because of the increasing interest in comparable information across health plans and States on their performance in serving Medicaid enrollees. We invite public comment on this proposal, including what would be an effective means to provide State and other stakeholder input into the development of these measures.

Access standards. The following sections are proposed in accordance with statutory authority that requires State agencies that contract with MCOs under section 1903(m) of the Act to develop a quality assessment and improvement strategy that includes standards for access to care so that all covered services are available in a manner that ensures continuity of care, adequate primary care, and specialized services capacity (section 1932(c)(1)(A) of the Act, as added by section 4704 of the BBA).

6. Availability of Services (§ 438.206)

- *Basic rule.* Paragraph (a) of this section sets forth the basic requirement for this section, which would require the State to ensure, through its contracts, that all covered services are available and accessible to enrollees.
- *Delivery Network.* Paragraph (b) of this section would require the State to ensure the following:

—Each MCO and PIHP maintains and monitors a network of appropriate providers that is supported by written agreements and is sufficient to provide adequate access to all services covered under the contract. (Each MCO and PIHP would have to consider the anticipated enrollment in the MCO or PIHP, the expected utilization of services, considering enrollee characteristics and health care needs, the number and types (in terms of training, experience, and specialization) of providers required to furnish the contracted services, the numbers of network providers who are not accepting new Medicaid patients, and the geographic location of providers and Medicaid enrollees, considering distance, travel time, the means of transportation ordinarily used by Medicaid enrollees, and whether the location provides physical access for Medicaid enrollee with disabilities.)

—The MCO or PIHP provides female enrollees with direct access to a women's health specialist within the network for covered care necessary to provide women's routine and preventative health care services.

—The MCO or PIHP provides for a second opinion from a qualified health care professional within the network, or arranges for the enrollee to obtain one outside of the network, at no cost to the enrollee.

—If the network is unable to provide necessary medical services, covered under the contract, to a particular enrollee, the MCO or PIHP adequately and timely covers these services out of network for the enrollee, for as long as the MCO or PIHP is unable to provide them.

—The MCO or PIHP requires the out-of-network providers to coordinate with the MCO or PIHP with respect to payment and ensures that cost to the enrollee is no greater than it would be if the services are furnished within the network.

—The MCO or PIHP demonstrates that its providers are credentialed as required by § 438.214.

• *Furnishing of services.* Paragraph (c) of this section would require States to ensure that MCOs and PIHPs meet requirements addressing the following:

—Timely access to services. Specifically, MCOs and PIHPs would have to meet and require their providers to: meet State-established standards for timely access to care, that would take into account the urgency of need for services; ensure that the network providers offer hours of operation that are no less than the hours of operation offered to commercial enrollees or comparable to Medicaid fee-for-service, if the provider serves only Medicaid enrollees; make services available 24 hours a day, 7 days a week, when medically necessary; establish mechanisms to ensure compliance; monitor continuously to determine compliance; and take corrective action if there is a failure to comply.

—Cultural considerations. In addition to timely access standards, we believe that it is important for MCOs and PIHPs to address cultural considerations. Therefore, we are proposing in paragraph (c)(2) of this section that each MCO and PIHP participates in the State's efforts to promote the delivery of services in a culturally competent manner to all enrollees, including those with limited English proficiency and diverse cultural and ethnic backgrounds.

7. Assurances of Adequate Capacity and Services (§ 438.207)

Apart from the statutory provisions addressing the State's quality strategy, and the need to develop access standards under that strategy, the statute specifically requires MCOs to provide to the State agency and the Secretary adequate assurances that it has the capacity to serve the expected enrollment in its service area (section 1932(b)(5) of the Act, as added by section 4704(a) of the BBA). The statute provides that the adequate assurances must be provided in a time and manner determined by the Secretary, and must demonstrate that each MCO offers an appropriate range of services and a sufficient number, mix, and geographic distribution of providers of services.

The requirements in this section are proposed in accordance with section 1932(b)(5) of the Act, described earlier. In order to avoid confusion between proposed § 438.206 and § 438.207, we would clarify that proposed § 438.207 would address procedural requirements for submitting assurances of adequate capacity and services, while proposed § 438.206 would address substantive standards relating to the availability of services. Both sections are related in the sense that we are requiring MCOs and PIHPs to submit documentation to the State (which in turn will submit assurances to CMS) addressing how the MCO or PIHP has met the access standards proposed under § 438.206. We believe this fulfills the intent of Congress that MCOs submit assurances of adequate capacity and services, in a form and manner determined by the Secretary. As previously discussed, we added PIHPs as entities subject to this subpart under our authority at 1902(a)(4) of the Act.

• *Basic Rule.* Section 438.207(a) sets forth the basic provision of this section. It would require the State to ensure, through its contracts, that each MCO and each PIHP provides assurances to the State that it has the capacity to serve the expected enrollment in its service area in accordance with the State's standards for access to care under this subpart.

• *Nature of assurances.* Paragraph (b) of this section would require each MCO and each PIHP to submit documentation to the State, in a format specified by the State and acceptable to CMS, to demonstrate that it complies with the following requirements:

—Offers an appropriate range of services, including preventive services, primary care services and specialty services that is adequate for the anticipated number of enrollees for the service area.

—Maintains a network of providers that is sufficient in number, mix, and geographic distribution to meet the needs of the anticipated number of enrollees in the service area.

• *Timing of documentation.* Paragraph (c) would require each MCO and PIHP to submit the documentation described in paragraph (b) of this section as specifies by the State, and specifically—

—At the time it enters into a contract with the State.

—At any time there has been a significant change (as defined by the State) in the MCO's or PIHP's operations that would affect adequate capacity and services. These include changes in the MCO or PIHP services, benefits, geographic service area or payments, and enrollment of a new population in the MCO or PIHP.

• *State review and submission to CMS.* Paragraph (d) would require the State, after it reviews the documentation submitted by the MCO or PIHP, to certify to CMS that the MCO or PIHP has complied with the State's requirements for availability of services, as set forth in § 438.206.

• *CMS's right to inspect documentation.* Paragraph (e) would ensure that the State makes available to CMS, upon request, all documentation collected by the State from the MCO or PIHP.

8. Coordination and Continuity of Care (§ 438.208)

Basic Requirement. Paragraph (a) of this section sets forth the basic requirement of this proposed section. We would require the State to ensure, through its contracts, that MCOs and PIHPs, except as otherwise specified in this section, meet the provisions outlined in this section. This paragraph also acknowledges two exceptions: one for PIHPs and another for MCOs that serve dually eligible enrollees. It would permit a State to determine, based on the scope of the PIHP's services, and the way the State has organized the delivery of managed care services, whether a PIHP is required to perform the screenings and assessments specified in paragraph (c) or required to meet the primary care requirements of paragraph (e)(1). The second exception would permit the State to determine to what extent an MCO that serves enrollees who are also enrolled in a Medicare+Choice plan and receive Medicare benefits, must meet the screening and assessment, referral and treatment plan, and primary care and coordination requirements of paragraphs (c), (d) and (e)(1) of this section, respectively.

We believe that the paragraphs of this section should apply to PIHPs to the extent they are applicable to the services furnished by the PIHP. Because some PIHPs provide services to the most vulnerable Medicaid enrollees, many of whom have been diagnosed with chronic conditions or who are determined to have long term care needs, it is important that those PIHPs have mechanisms for timely screening and assessment of enrollees requiring special attention. We acknowledge, however, that the State might design a system that involves PIHPs for which the screening and assessment function is performed by an acute care MCO and imposing a similar requirement on the PIHP would be duplicative (that is, a carve-out program for mental health services in which the enrollee was referred by the MCO contracted to provide physical health services). Likewise, some of the requirements of this section might be duplicative for an MCO that serves dual eligible enrollees who are also enrolled in a Medicare+Choice plan and receive Medicare benefits. Accordingly, we drafted an exception that would permit

a State to determine the application of these requirements to the MCOs, based on the services the MCO is contracted to furnish. We invite comments in this area.

State Responsibility To Identify Certain Enrollees with Special Health Care Needs. This paragraph would require the State implement a mechanism to identify to its enrollment broker, if applicable prior to enrollment, and the MCO and PIHP, upon enrollment, individuals with special health care needs, as specified by the state. This requirement is proposed to facilitate the early identification and assessment of enrollees with special health care needs. Although we do not define in regulation the term ''special health care needs,'' our Report to the Congress entitled, ''*Safeguards for Individuals with Special Health Care Needs Enrolled in Medicaid Managed Care*'' (November 6, 2000), identified certain groups of individuals at risk of having special health care needs. We encourage States to consider those groups as they establish their own definitions. We invite comment in this area.

Screening and Assessment. This paragraph sets forth the requirement that the State (either through its own staff or its enrollment broker), or at the State's discretion, each MCO or PIHP (through appropriate health care professionals) must ensure a best effort is made to meet the following standards:

The proposed requirements of this section permit States some discretion to use their own staff or an enrollment broker to conduct screening and assessment functions of individuals enrolling in MCOs or PIHPs. It also permits States to require MCOs or PIHPs, as appropriate, to perform the screening and assessment functions through appropriate health care professionals. We acknowledge that 100 percent compliance may not be achieved in the case of individuals who refuse to undergo a screening or assessment, or for those the MCO or PIHP has tried to contact on multiple occasions but has been unable to reach. In those cases the MCO or PIHP, through appropriate health care professionals, should ensure that this information is documented in the enrollee's medical records explaining why the screening or assessment was not performed.

Treatment plans. This paragraph proposes that the State ensures that each MCO and PIHP has a mechanism in place for enrollees determined through an assessment to have ongoing special conditions that require a course of treatment or regular care monitoring as follows:

- The enrollee may directly access a specialist (for example, through a standing referral or an approved number of visits) as is appropriate for the enrollee's condition and identified needs.
- A treatment plan, if required by the MCO or PIHP, is developed by a specialist in consultation with the enrollees primary care provider; is developed with enrollee participation; is approved by the MCO or PIHP in a timely manner, if an approval is required; and is in accordance with the State's quality assurance and utilization review standards. We envision that for children with special healthcare needs, enrollee participation would also encompass participation by the family.

During the development of this proposed rule, some stakeholders expressed concern that our requirements not be overly prescriptive and burdensome with respect to screening, assessment, and treatment plans. We believe the proposed rules set forth minimum requirements that are critical to the success of managed care for persons with special health care needs. We further believe that some level of prescription is necessary to ensure that enrollees with ongoing special conditions who are undergoing a course of treatment or requiring care coordination from specialist can do so without having to receive a referral from their primary care provider for each specialist visit or treatment. We invite public comments in this area. Further treatment plans should be updated when these are changes in the enrollee's condition, including changes in developmental status and needs.

- *Primary care and coordination program.* This paragraph would require each MCO and each PIHP to implement a coordination program that meets State requirements and achieves the following:
  - —Ensures that each enrollee has an ongoing source of primary care appropriate to his or her needs and a person or entity formally designated as primarily responsible for coordinating the health care services furnished to the enrollee.
  - —Coordinates the services the MCO or PIHP furnishes to the enrollee with the services the enrollee receives from any other MCOs and PIHPs.
  - —Shares with other MCOs and PIHPs serving the enrollee the results of its screenings and assessments of the enrollee so that those activities need not be duplicated.
  - —Ensures that in the process of coordinating care, each enrollee's privacy is protected consistent with privacy rules at 45 CFR 160 and 164.

9. Coverage and Authorization of Services (§ 438.210)

- *Coverage.* This paragraph sets forth proposed basic coverage requirements. We are proposing that each contract with an MCO or PIHP do the following:
  - —Identify, define, and specify each service that the MCO or PIHP is required to offer.
  - —Require that the MCO or PIHP make available the services it is required to furnish in no less than the amount, duration, and scope that are specified in the State plan and that are sufficient to reasonably be expected to achieve the purpose for which the services are furnished.
  - —Provide that the MCO or PIHP may not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of the diagnosis, type of illness, or condition (although they may place appropriate limits on services on the basis of criteria such as medical necessity or utilization control, provided the services furnished can reasonably be expected to achieve their purpose).
  - —Specify what constitutes ''medically necessary services'' in a manner that is no more restrictive than the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures, and addresses the extent to which the MCO or PIHP is responsible for covering services related to the prevention, diagnosis, and treatment of health impairments, the ability to achieve age-appropriate growth and development, and the ability to attain, maintain, or regain functional capacity.
- *Processing of requests.* In this paragraph, we are proposing that, for the processing of requests for initial and continuing authorizations of services, each contract must require the following:
  - —The MCO or PIHP and its subcontractors have in place, and follow, written policies and procedures.
  - —Any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollees's condition or disease. For the review criteria, we propose that MCOs and PIHPs have in effect mechanisms to ensure the consistent application of the review criteria for authorization decision;

and consult with requesting providers when appropriate.

• *Notice of adverse action.* In this paragraph, we are proposing that each contract be required to provide for the MCO or PIHP to notify the requesting provider, and give the enrollee written notice of any decision by the MCO or PIHP to deny a service authorization request, or a decision to authorize a service in an amount, duration, or scope that is less than requested. We specify that the notice must meet the requirements of § 438.404, except that the notice to the provider need not be in writing.

• *Timeframe for decisions.* In this paragraph, we are proposing that each MCO or PIHP contract provide for the following decisions and notices for standard authorization decisions and expedited authorization decisions. For standard authorization decisions, the MCO or PIHP would provide notice as expeditiously as the enrollee's health condition requires and within State-established timeframes that may not exceed 14 calendar days following receipt of the request for service (with a possible extension of up to 14 additional calendar days if the enrollee, or the provider, requests an extension or the MCO or PIHP justifies (to the State agency upon request) a need for additional information and how the extension is in the enrollee's interest). For cases in which a provider indicates, or the MCO or PIHP determines, that following the standard timeframe could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, the MCO or PIHP would be required to make an expedited authorization decision, and provide notice as expeditiously as the enrollee's health condition requires and no later than 3 working days after receipt of the request for service. We propose that the MCO or PIHP be permitted to extend the 3 working days time period by up to 14 calendar days if the enrollee requests an extension, or if the MCO or PIHP justifies that a need for additional information is in the enrollee's interest.

• *Compensation for utilization management activities.* This paragraph would require each contract to provide that compensation to individuals or entities that conduct utilization management activities is not structured so as to provide incentives for the individual or entity to deny, limit, or discontinue medically necessary services to any enrollee.

Structure and Operation Standards. The following sections are proposed in accordance with statutory authority that requires State agencies that contract with MCOs under section 1903(m) of the Act to develop a quality assessment and improvement strategy that includes examination of other aspects of care and service directly related to the improvement of quality of care (Section 1932(c)(1)(A) of the Act, as added by section 4704 of the BBA).

10. Provider Selection (§ 438.214)

• *General rules.* This paragraph sets forth the proposed rules for this section. The State would be required to ensure, through its contracts, that MCOs and PIHPs implement written policies and procedures for the selection and retention of providers and that those policies and procedures include, at a minimum, the requirements outlined in the following paragraphs.

• *Credentialing and recredentialing requirements.* In this paragraph, we propose that each MCO and PIHP would have to follow a documented process for credentialing and recredentialing of providers who have signed contracts or participation agreements with the MCO or the PIHP.

• *Nondiscrimination.* In this paragraph, we would require the MCO and PIHP provider selection policies and procedures to be consistent with the antidiscrimination requirements at § 438.12 and to not discriminate against particular providers that serve high risk populations or specialize in conditions that require costly treatment.

• *Excluded providers.* This proposed paragraph would provide that MCOs or PIHPs may not employ or contract with providers excluded from participation in Federal health care programs under either section 1128 or section 1128A of the Act.

• *State requirements.* In this paragraph, we are proposing that MCOs and PIHPs comply with any additional requirements established by the State.

11. Enrollee Information (§ 438.218)

In this section, we propose to incorporate the information requirements under § 438.10 as part of the State's quality strategy.

12. Confidentiality (§ 438.224)

This section sets forth the requirement that States must ensure MCOs and PIHPs meet privacy requirements at Subpart F of part 431 of this chapter and 45 CFR 160 and 164.

13. Enrollment and Disenrollment (§ 438.226)

In this section, we propose to incorporate the enrollment and disenrollment requirements in other parts of this rule as part of the State's quality assessment and improvement strategy. We would require the State to ensure that each MCO and PIHP contract complies with the enrollment and disenrollment requirements and limitations set forth in § 438.56.

14. Grievance Systems (§ 438.228)

In this section, we propose to incorporate the requirements for a grievance system as part of the State's quality assessment and improvement strategy. Thus, we would require the State to ensure, through its contracts, that each MCO and PIHP has in effect a grievance system that meets the requirements of subpart F of this part. We also require that if the State delegates to the MCO or PIHP responsibility for notice of action under subpart E of part 431 of this chapter, the State must conduct random reviews of each delegated MCO or PIHP and its providers and subcontractors to ensure that they are notifying enrollees in a timely manner.

15. Subcontractual Relationships and Delegation (§ 438.230)

In this section, we address subcontracting and delegation. We would require the State to ensure, through its contracts, that each MCO and PIHP oversees and is accountable for any functions and responsibilities that it delegates to any subcontractor, and meets specific conditions. The specific conditions require the following:

• Before any delegation, each MCO and PIHP evaluates the prospective subcontractor's ability to perform the activities to be delegated.

• There be a written agreement that specifies the activities and report responsibilities delegated to the subcontractor and provides for revoking delegation or imposing other sanctions if the subcontractor's performance is inadequate.

• The MCO or PIHP monitors the subcontractor's performance on an ongoing basis and subjects it to formal review according to a periodic schedule established by the State, consistent with industry standards or State MCO laws and regulations.

• If any MCO or PIHP identifies deficiencies or areas for improvement, the MCO and the subcontractor take corrective action.

Measurement and Improvement Standards. The following sections are proposed pursuant to statutory authority that requires State agencies that contract with MCOs under section 1903(m) of the Act to develop a quality assessment and improvement strategy that includes procedures for monitoring and evaluating the quality and

appropriateness of care and services to enrollees (section 1932(c)(1)(A) of the Act, as added by section 4704 of the BBA).

16. Practice Guidelines (§ 438.236)

This section addresses the adoption, dissemination, and application of practice guidelines. We propose that each MCO and PIHP adopts practice guidelines that: (1) are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field; (2) consider the needs of the MCO's or PIHP's enrollees; (3) are adopted in consultation with contracting health care professionals; and (4) are reviewed and updated periodically as appropriate. We also propose that MCOs and PIHPs disseminate the guidelines to all affected providers and, upon request, to enrollees and potential enrollees. Finally, we specify that decisions with respect to utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

17. Quality Assessment and Performance Improvement Program (§ 438.240)

• *General rules.* This paragraph sets forth the proposed general requirements of this section. We would require the State to ensure, through its contracts, that each MCO and PIHP has an ongoing quality assessment and performance improvement program for the services it furnishes to its enrollees. In addition, we specify that CMS, in consultation with States and other stakeholders, may specify standardized quality measures, and topics for performance improvement projects to be required by States in their contracts with MCOs and PIHPs.

• *Basic elements of an MCO and PIHP quality assessment and performance improvement programs.* In this paragraph, we propose the basic elements of an MCO and PIHP quality assessment and improvement program. We propose that, at a minimum, the State must require that each MCO and PIHP do the following:

—Conduct performance improvement projects as described in paragraph (d) of this section.
—Have in effect mechanisms to detect both underutilization and overutilization of services.
—Have in effect mechanisms to assess the quality and appropriateness of care furnished to enrollees with special health care needs.

We specify that the performance improvement projects would have to achieve, through ongoing measurements and intervention, demonstrable and sustained improvement in significant aspects of clinical care and non-clinical care areas that can be expected to have a favorable effect on health outcomes and enrollee satisfaction.

• *Performance measurement and improvement.* In this paragraph, we propose that each MCO and PIHP annually measure its performance, using standard measures required by the State consistent with the requirements of § 438.204(c), and report its performance to the State.

• *Performance improvement projects.* In this paragraph, we propose the following:

—Each MCO and PIHP would be required to have an ongoing program of performance improvement projects that focuses on clinical and non-clinical areas.
—Each MCO and PIHP must report the status and results of each project to the State as requested.

We envision States will establish quality indicators that are objective, clearly and unambiguously defined, and based on current clinical knowledge or health services research, and capable of measuring outcomes such as changes in health status, functional status, and enrollee satisfaction, or valid proxies of these outcomes. Further, performance improvement projects must use objective quality indicators, the implementation of system interventions to achieve improvement in quality, evaluation of the effectiveness of the interventions, and planning and initiation of activities for increasing or sustaining improvement.

Finally, we specify that each performance improvement project must be completed in a reasonable time period so as to generally allow information on the success of performance improvement projects in the aggregate to produce new information on quality of care every year.

In the development of this proposed rule, some stakeholders expressed concern that we not mandate the number, type, or quantity of quality improvement studies a State requires the MCO to undertake. Stakeholders expressed concern that targets for improvement vary greatly from State to State, and region to region within a State. Thus, a national consensus would be difficult to achieve. Further, stakeholders also expressed concern that we not set minimum levels for performance measures, noting that by setting them at a level that all plans could reasonably achieve, we might lower performance in the aggregate. Moreover, our actions might undercut a State's negotiating position. We are sympathetic to many the above concerns, and have considered them in the development of this proposed rule. However, as the art of quality improvement and measurement advances, we believe that we should have the ability to specify standardized measures and topics for improvement projects. We preserve this right in regulation and clarify that, in exercising this right, we will consult with States and other stakeholders to achieve consensus to the greatest extent possible. We invite public comments in this area.

• *Program review by the State.* In this paragraph, we propose requirements for the State's review of the MCO and PIHP quality assessment and improvement program. We would require the State to review, at least annually, the impact and effectiveness of each MCO's and PIHP's quality assessment and performance improvement program. We also would require the State's review to address the MCO's and PIHP's performance on the standard measures on which it is required to report, and the results of the each MCO's and PIHP's performance improvement projects. Finally, we specify that the State may require that an MCO or PIHP have in effect a process for its own evaluation of the impact and effectiveness of its quality assessment and performance improvement program.

18. Health Information Systems (§ 438.242)

This section proposes requirements for health information systems. We generally would require the State to ensure, through its contracts, that the MCO and PIHP maintains a health information system that collects, analyzes, integrates, and reports data and can achieve the objectives of this subpart. We specify that the system should provide information on areas including, but not limited to, utilization, grievances, and disenrollments for other than loss of Medicaid eligibility. At a minimum, the MCO and PIHP would be required to do the following:

• Collect data on enrollee and provider characteristics as specified by the State, and on services furnished to enrollees through an encounter data system or other methods as may be specified by the State.

• Ensure that data received from providers is accurate and complete.

• Make all collected data available to the State, and upon request to CMS, as required in this subpart. In ensuring that the data from providers is accurate and complete, we specify that the MCO and PIHP must have mechanisms to verify

the accuracy and timeliness of reported data, screen the data for completeness, logic, and consistency, and collect service information in standardized formats to the extent feasible and appropriate.

E. Subpart E

We are proposing to reserve Subpart E.

F. Grievance Systems (Subpart F)

Proposed Subpart F is based on section 1902(a)(3) of the Act, (which requires a State plan to provide an opportunity for a fair hearing to any person whose request for assistance is denied or not acted upon promptly), section 1902(a)(4) of the Act, which (authorizes the Secretary to specify methods of administration that are ''necessary'' for ''proper and efficient administration''), and section 1932(b)(4) of the Act, (which requires that MCOs have an internal grievance procedure under which a Medicaid enrollee, or a provider on behalf of an enrollee, may challenge the denial of coverage of or payment by the MCO).

In this subpart, we propose regulations that lay out the elements of the grievance system required under section 1932(b)(4) of the Act, and how it interfaces with the State fair hearing requirements in section 1902(a)(3). We define terms, describe what constitutes a notice of action, and address how grievances and appeals must be handled, including timeframes for taking action. We include a process for expedited resolution of appeals in specific circumstances; address the requirement for continuation of benefits; and lay out the requirements relating to record keeping, monitoring and effectuation of reversed appeal resolutions.

1. Statutory Basis and Definitions (§ 438.400)

Definitions of terms used in proposed subpart F are found in proposed § 438.400 and would have the following meanings:

Action means, in the case of an MCO or PIHP or any of its providers,

- The denial or limited authorization of a requested service, including the type or level of service;
- The reduction, suspension, or termination of a previously authorized service;
- The denial, in whole or in part, of payment for a service; or
- For a resident of a rural area with only one MCO or PIHP, the denial of a Medicaid enrollee's request to exercise his or her right to obtain services outside the network.

Appeal means a request for review of an action, as ''action'' is defined in this subpart.

Governing body means the MCO's or PIHP's Board of Directors, or a designated committee of its senior management.

Grievance is defined as an expression of dissatisfaction about any matter other than an action. This term can also be used to refer to the overall system that includes grievances and appeals handled at the MCO or PIHP level and access to the State Fair Hearing Process. Possible subjects for grievances include, but are not limited to, the quality of care or services provided, aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee's rights.

2. General Requirements (Proposed § 438.402)

Proposed § 438.402 would require that each MCO and PIHP must have a grievance system in place for enrollees that includes a grievance process, an appeal process, and access to the State's fair hearing system.

Proposed § 438.402(b)(1) would specify that an enrollee may file a grievance or an MCO or PIHP level appeal, and may request a State fair hearing. In addition, a provider, acting on behalf of an enrollee and with the enrollee's written consent may file an appeal. However, the provider cannot file a grievance or request a State fair hearing on behalf of the enrollee.

Under § 438.402(b)(2), we propose timeframes within which the enrollee or provider may file an appeal. Our intent is to mirror the filing timeframes for the State fair hearing, that is, a reasonable amount of time up to 90 days. In addition, we have incorporated the longstanding policy at section 2901.3 of the Medicaid Manual that beneficiaries be given a minimum of 20 days to file an appeal. We believe that this policy gives beneficiaries a reasonable amount of time to file an appeal. Therefore, the proposed regulation requires that the State specify a timeframe for filing an appeal that is no less than 20 days and does not exceed 90 days from the date of the MCO's or PIHP's notice of action. Within this timeframe, the enrollee or the provider may file an appeal, and in a State that does not require exhaustion of the MCO and PIHP level appeals, the enrollee may request a State fair hearing.

In proposed § 438.402(b)(3), we specify the manner in which enrollees may file grievances, and enrollees or the provider may file appeals. For grievances, the enrollee may file either orally or in writing either to the State or with the MCO or PIHP, as determined by the State. The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal. While enrollees may start the appeal clock with an oral request, they must follow it with a written request as a written appeal best documents the issue being appealed. In expedited situations, this proposed rule provides that the enrollee is not required to place the appeal in writing.

3. Notice of Action (§ 438.404)

We are proposing that the notice MCOs and PIHPs would be required to provide to enrollees under proposed § 438.404 be the first step in the grievance system. It would serve as the enrollee's first formal indication that the MCO or PIHP will or has taken action, such as denying payment or denying, limiting, reducing, suspending or terminating a service through a service authorization decision. We propose that the notice must meet the language and format requirements of proposed § 438.10(c) and (d) of this chapter to ensure ease of understanding. The notice would be required to include the elements that are listed in proposed § 438.404, as follows:

- The action the MCO or PIHP or its contractor has taken or intends to take.
- The reasons for the action.
- The enrollee's or the provider's right to file an MCO or PIHP appeal.
- If the State does not require the enrollee to exhaust the MCO or PIHP level appeal procedures, the enrollee's right to request a State fair hearing.
- The procedures for exercising the rights specified in this section.
- The circumstances under which expedited resolution of an appeal is available, and how to request it.
- The enrollee's right to have benefits continue pending resolution of the appeal how to request that benefits be continued and, the circumstances under which the enrollee may be required to pay the costs of these services.

In proposed § 438.404(c) we specify the timeframes in which the MCO and PIHP must mail the notices. Under proposed § 438.404(c)(1), timeframes for notices for the reduction, suspension, or termination of previously authorized services are governed by the State fair hearing regulations found in 42 CFR 431 Subpart E. While some MCOs and PIHPs may find the advance notice requirement inappropriate, there are exceptions to advance notice that allow notice to be given on the date of the action (see § 431.213). These exceptions would cover the situation in which a

provider believes an immediate change in care is appropriate for the health condition of the enrollee. For denial of payment, we propose that notice be given at the time of any action affecting the claim. Proposed § 438.404(c)(3) and (c)(4) requires that for standard service authorization decisions that deny or limit services, notice must be given within the timeframes specified in § 438.210(d). Further, if the MCO or PIHP were to extend the timeframe in accordance with proposed § 438.210(d), it would have to give the enrollee written notice of the reason for the decision to extend the timeframe, inform the enrollee of the right to file a grievance if he or she disagrees with that decision, and issue and carry out its determination as expeditiously as the enrollee's health conditions requires and no later than the date the extension expires. In situations where the service authorization decision is not reached within specified timeframes, we propose at § 438.404(c)(5) that notice be mailed on the date that the timeframe expires. Finally, for expedited service authorization decisions, notice must be given within the timeframes specified in proposed § 438.210(e).

4. Handling of Grievances and Appeals (§ 438.406)

Section 438.406 proposes to set forth how grievances and appeals must be handled. The general requirement for handling grievances and appeals would require MCOs and PIHPs to do the following:

- Give enrollees any reasonable assistance in completing forms and taking other procedural steps.
- Acknowledge receipt of each grievance and appeal.
- Ensure that individuals who make decisions on grievances and appeals are individuals who were not involved in any previous level of review or decision making and who, if deciding an appeal of a denial that is based on lack of medical necessity, a grievance regarding denial of expedited resolution of an appeal, or a grievance or appeal that involves clinical issues, are health care professionals who have the appropriate clinical expertise in treating the enrollee's condition or disease.

We would require the MCO and PIHP, at proposed § 438.406(a)(1), to give enrollees any reasonable assistance. We would also require that MCOs and PIHPs make interpreter services available to enrollees, as well as, toll free numbers that have adequate TTY/TTD and interpreter capability. By including these as examples of types of assistance required to meet certain needs, we do not intend that other reasonable assistance need not be given. We believe, for example, that MCOs and PIHPs are required by this provision to provide reasonable assistance to meet other needs of enrollees, and assisting enrollees who have low-literacy abilities.

Proposed § 438.406(b) specifies the following requirements that the appeals process would have to meet:

- Provide that oral inquiries seeking to appeal an action are treated as appeals and must be confirmed in writing, unless the enrollee or the provider requests expedited resolution. This is required in order to establish the earliest possible filing date for the appeal;
- Provide the enrollee a reasonable opportunity to present evidence, and allegations of fact or law, in person as well as in writing;
- Provide the enrollee and his or her representative the opportunity, before and during the appeals process, to examine the enrollee's case file, including medical records, and any other documents and records considered during the appeals process;
- Include, as parties to the appeal, the enrollee and his or her representative or the legal representative of a deceased enrollee's estate.

5. Resolution and Notification: Grievances and Appeals (§ 438.408)

In § 438.408(a) we propose to require that the MCO or PIHP must dispose of each grievance and resolve each appeal, and provide notice, as expeditiously as the enrollee's health condition requires. In addition, this section proposes that the State must establish timeframes for disposition of grievances and resolution of appeals, but that they may not exceed the specific timeframes proposed in this section.

While we are proposing timeframes to resolve appeals, we realize that Congress, as part of proposals for a patient's bill of rights, is considering several other timeframes for internal MCO appeals. Some of these proposals would apply the timeframes to the Medicaid program. We believe that uniform timeframes, across payers, are desirable in that this will make the process more understandable to enrollees and ease the burden on health plans of administering the internal appeals system. Therefore, our intent, in this proposed rule, is to consider a patient's bill of rights when enacted by the Congress.

Under proposed § 438.408(b), we would establish the specific timeframes for disposition of grievances and resolution of appeals. For disposition of a grievance and notice to affected parties, the State may establish a timeframe for disposition that may not exceed 90 days from the day the MCO or PIHP receives the grievance. For standard resolution of an appeal and notice to affected parties, we propose at § 438.408(b)(2) that the State establish a timeframe that is no longer than 45 days from the day the MCO or PIHP receives the appeal. However, we would allow this timeframe to be extended. Under proposed § 438.408(c) we specify that the MCO or PIHP may extend the timeframe by up to 14 calendar days if the enrollee requests the extension, or the MCO or PIHP shows (to the satisfaction of the State agency, upon its request) that there is need for additional information and how the delay is in the enrollee's interest.

Proposed § 438.408(b)(3) would provide a maximum timeframe for expedited resolution of appeals and notice to affected parties. We propose that the State establish a timeframe that is no longer than 3 working days after the MCO or PIHP receives the appeal. We believe that expedited resolution is necessary to ensure that appeals of situations that potentially place an enrollee's heath in jeopardy are not delayed. Although States have historically instituted different processes to protect beneficiaries, we believe that a standardized expedited appeal process is needed to protect beneficiaries in a capitated health care delivery system. Further, this is an important beneficiary protection and is necessary to ensure that the overall timeframe of 90 days for a decision at the State fair hearing (excluding the time the beneficiary takes to file for a State fair hearing) can be met in all cases. However, similar to standard resolution of appeals, we propose that this expedited timeframe can also be extended by 14 calendar days if the enrollee requests extension or the MCO or PIHP shows (to the satisfaction of the State agency, upon its request) that there is need for additional information and how the delay is in the enrollee's interest.

We do propose some parameters for the extension process. Under proposed § 438.408(c)(2), if the MCO or PIHP grants themselves an extension, they would be required to notify the enrollee in writing of the reason for the delay. In § 438.408(d), we propose, that the State must establish the method MCOs and PIHPs will use to notify an enrollee of the disposition of a grievance. Under proposed § 438.408(e), we specify that written notice of the appeal resolution must include the following:

- The results of the resolution process and the date it was completed.

• For appeals not resolved in favor of the enrollee, the enrollee's right to request a State fair hearing and how to do so, the right to request to receive continuation of benefits, and that the enrollee may be held liable for the cost of those continued benefits if the State fair hearing decision upholds the MCO's or PIHP's action.

Finally at proposed § 438.408(f) we outline the requirements for State fair hearings. We propose that the State must permit the enrollee to request a State fair hearing within a reasonable time period specified by the State, but not less than 20 days or in excess of 90 days from the date of the MCO's or PIHP's notice of resolution (if the State requires exhaustion of the MCO or PIHP level appeal procedures) or from the date on the MCO's or PIHP's notice of action (if the State does not require exhaustion and the enrollee appeals directly to the State for a fair hearing). We also felt it was important to outline at proposed § 438.408(f)(2) that the parties to the State fair hearing include the MCO or PIHP as well as the enrollee and his or her representative or the representative of a deceased enrollee's estate.

6. Expedited Resolution of Appeals. (§ 438.410)

In proposed § 438.410 we specify that each MCO and PIHP must establish and maintain an expedited review process for appeals when the MCO or PIHP determines or the provider indicates that taking the time for a standard resolution could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function. Further, the MCO or PIHP would be required to ensure that punitive action is neither threatened nor taken against a provider who requests an expedited resolution or supports an enrollee's appeal.

If the MCO or PIHP denies a request for expedited resolution of an appeal, according to proposed § 438.410(c), it would be required to transfer the appeal to the timeframe for standard resolution in accordance with § 438.408(b)(2) and give the enrollee prompt oral notice of the denial following within two calendar days with a written notice.

7. Record Keeping and Reporting Requirements (§ 438.416)

Proposed § 438.416 would require the State to require MCOs and PIHPs to maintain records of grievances and appeals and review the information as part of the State quality strategy.

8. Continuation of Benefits While the MCO or PIHP Appeal and the State Fair Hearing are Pending (§ 438.420)

In § 438.420, we propose that when the dispute involves the termination, suspension, or reduction of a previously authorized course of treatment, the MCO or PIHP must continue the enrollee's benefits until issuance of the final appeal decision or State fair hearing decision, if all of the following occur:

• The enrollee or the provider files the appeal timely.

• The services were ordered by an authorized provider.

• The period covered by the authorization has not expired.

• The enrollee requests extension of benefits.

We specify that timely filing means filing on or before the later of either the expiration of the timeframe specified by the State (in accordance with § 438.404(c)(2)) and communicated in the notice of action or the intended effective date of the MCO's or PIHP's proposed action.

This provision would apply only when the MCO physician initially authorized the services (that is, it would not apply to pre-service authorization requests that were denied) and when the beneficiary requests the services be continued (that is, the mere action of filing for an appeal or State fair hearing in a timely manner is not sufficient for benefits to be continued). The continuation of benefits provision would not require a further statement of authorization from the MCO physician or affect benefits not originally authorized. We expect that the MCO will neither take nor threaten to take any punitive action against a physician who requests continuation of benefits or supports an enrollee's request for continuation of benefits.

If the MCO or PIHP continues or reinstates the enrollee's benefits while the appeal is pending, according to proposed § 438.420(c), the benefits must be continued until one of the following occurs:

• The enrollee withdraws the appeal.

• The MCO or PIHP resolves the appeal against the enrollee, unless the enrollee has requested a State fair hearing with continuation of benefits until a State fair hearing decision is reached.

• A State fair hearing office issues a hearing decision adverse to the enrollee.

Beneficiaries who have received continuation of benefits while they appeal to the MCO or PIHP are not obligated to pursue their appeal further, through the State fair hearing process, if the MCO or PIHP denies their appeal. It remains the beneficiaries' choice. It is important to note, however, that enrollees who lose their appeal at either the MCO, PIHP or State fair hearing levels will be liable for the costs of all appealed services from the later of the effective date of the notice of intended action or the date of the timely-filed appeal, through the date of the denial of the appeal. As a result, in § 438.420(d), we propose that if the final resolution of the appeal is adverse to the enrollee (that is, it upholds the MCO's or PIHP's action) the MCO or PIHP may recover the cost of the services furnished to the enrollee while the appeal was pending, to the extent that they were furnished solely because of the requirements of this section, and in accordance with § 431.230(b).

We considered but rejected an option that would have required MCOs to automatically forward appeals they reject to the State fair hearing process for external review, as is currently the case in Medicare. Under this option, continuation of benefits could have also automatically occurred with the forwarding of the request. We have rejected this as well. We determined that this option would have been too burdensome and in many cases would result in forwarding unnecessary paperwork to the State fair hearing office.

9. Effectuation of Reversed Appeal Resolutions (§ 438.424)

In § 438.424 we propose that if the MCO, PIHP, or the State fair hearing officer reverses a decision to deny, limit, or delay services that were not furnished while the appeal was pending, the MCO or PIHP must authorize or provide the disputed services promptly, and as expeditiously as the enrollee's health condition requires. Furthermore, if the MCO, PIHP, or the State fair hearing officer reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO, PIHP, or the State would be required to pay for those services, in accordance with State policy and regulations.

G. Subpart G

We are proposing to reserve Subpart G.

H. Certifications and Program Integrity Protections (Subpart H)

Subpart H contains provisions pertaining to plan certification of data, information, and material and general contract provisions.

Sections 1902(a)(4) and (a)(19) of the Act establish methods of administration that are necessary for the proper and efficient operation of the plan and ensure that care and services will be provided in a manner consistent with the best interest of the recipient and to preserve the integrity of the Medicaid program.

In this proposed rule, we are requiring MCOs and PIHPs to certify the accuracy, completeness, and truthfulness of any data, including but not limited to, enrollment information, encounter data, data upon which payment is based, and other information required by the State, that may be submitted to determine the basis for payment from a State agency. The certification must be made by the MCO's or PIHP's Chief Executive Officer, Chief Operating Officer, or their delegate. Each MCO and PIHP must certify that it is in substantial compliance with the contract and provide additional certification as required by the State. Consistent with the Medicare+Choice provisions, we propose to require that the certifications be based on best knowledge, information, and belief.

We are also requiring, consistent with Medicare+Choice, that any entity seeking to contract as an MCO or PIHP must have administrative and management arrangements or procedures, including a mandatory compliance plan, designed to guard against fraud and abuse. We specify in § 438.608 what those arrangements must include.

I. Sanctions (Subpart I)

Section 1932(e)(1) of the Act requires, as a condition for entering into or renewing contracts under section 1903(m) of the Act, that States establish intermediate sanctions that the State may impose on an MCO that commits one of six specified offenses: (1) Failing substantially to provide medically necessary services; (2) imposing premiums or charges in excess of those permitted; (3) discriminating among enrollees based on health status or requirements for health care services; (4) misrepresenting or falsifying information; (5) failing to comply with physician incentive plan requirements; and (6) distributing marketing materials that have not been approved or that contain false or materially misleading information. In the case of the violation related to marketing materials (number 6), the statute imposes sanctions against PCCMs as well as MCOs. Proposed § 438.700 contains the above provisions from section 1932(e)(1) of the Act.

In section 1932(e)(2) of the Act, the Congress provided specific sanction authority under which States may impose civil money penalties in specified amounts for specified violations, take over temporary control of an MCO, suspend enrollment or payment for new enrollees, or authorize enrollees to disenroll without cause. These provisions are reflected in proposed § 438.702(a). Given the extraordinary nature of the sanction of taking over management of an MCO, we propose in § 438.706 that this sanction be imposed only in the case of ''continued egregious behavior,'' in situations in which there is ''substantial risk'' to enrollee health, or when the sanction is ''necessary to ensure the health of enrollees.'' We also want to clarify that States have the right and authority to terminate an MCO's contract before temporary management would have to be imposed. We recognize the burden associated with this sanction and realize that most States would rather terminate a contract before having to impose temporary management. We believe we have written the proposed rule to allow this flexibility.

We have not applied the sanction provisions to PIHPs and PAHPs because we do not believe that the statutory authority on which PIHPs and PAHPs are based (section 1902(a)(4) of the Act) provides authority to publish regulations that would authorize a State to impose civil money penalties or other sanctions that are provided for by the Congress only in the case of MCOs.

Although these sanctions are referenced in section 1932(e)(1) of the Act as sanctions to be imposed on MCOs, and on PCCMs only in the case of marketing violations, section 1932(e)(2)(C) of the Act refers to a ''managed care entity,'' while paragraphs (D) and (E) that follow refer to ''the entity'' and provide for suspension of enrollment or suspension of payment after the date the Secretary notifies ''the entity'' of a determination that it has violated ''section 1903(m) or * * * section [1932].'' While only an MCO could violate section 1903(m) of the Act, a PCCM could violate requirements of section 1932 of the Act that apply to MCOs and PCCMs generally or to PCCMs specifically. In proposed § 438.700(d), we interpret the foregoing language to mean that the sanctions in sections 1932(e)(2)(D) and (E) of the Act are available in the case of a PCCM that violates ''any requirement'' in section 1932 of the Act. The general intermediate sanction authority in paragraphs (D) and (E) of section 1932(e)(2) of the Act is reflected in proposed § 438.700(d) for MCOs. In light of the foregoing interpretation, paragraphs (a)(4) and (a)(5) of proposed § 438.702 can be applied to MCOs or PCCMs rather than MCOs only, even though the only ''determinations'' that apply to PCCMs are terminations under proposed § 438.700(c) (marketing violations) or the general violations of section 1932 of the Act that are addressed in proposed § 438.700(d).

Section 1932(e)(3) of the Act requires that, for MCOs with chronic violations, the State impose temporary management and allow disenrollment without cause. This provision is implemented in proposed § 438.706.

Section 1932(e)(4) of the Act authorizes State agencies to terminate the contract of any MCO or PCCM that fails to meet the requirements in sections 1932, 1903(m), or 1905(t) of the Act. This authority is implemented in proposed § 438.708. Under section 1932(e)(4)(B) of the Act, before terminating a contract, the State is required to provide a hearing. Proposed § 438.710 sets forth this hearing requirement as well as procedures for the hearing. Under section 1932(e)(4)(C) of the Act, enrollees must be notified of their right to disenroll immediately without cause in the case of any enrollee subject to a termination hearing. Proposed § 438.722 reflects this provision.

Section 1932(e)(5) of the Act contains a general requirement that States provide ''notice'' and ''such other due process protections as the State may provide'' in the case of sanctions other than terminations, which are governed by section 1932(e)(4)(B) of the Act. Section 1932(e)(5) of the Act also provides that ''a State may not provide a managed care entity with a . . . hearing before imposing the sanction'' of temporary management. Proposed § 438.706(c) reflects this statutory language.

In proposed § 438.724, we propose that States be required to notify CMS whenever they impose or lift a sanction.

The new sanction authority in section 1932(e) of the Act represents the first time that the Congress has granted Medicaid sanction authority directly to State agencies. Under section 1903(m)(5) of the Act, which the Congress has left in place, CMS has authority to impose sanctions when Medicaid-contracting MCOs commit offenses that are essentially the same as those identified in section 1932(e)(1) of the Act. In proposed § 438.730, we retain the existing regulations implementing section 1903(m)(5) of the Act, which is currently in § 434.67.

J. Conditions for Federal Financial Participation (Subpart J)

In subpart J, we propose to include both existing and new regulations pertaining to State eligibility for FFP in payments under managed care contracts. Absent a statutory exemption from its provisions, section 1903(m)(2)(A) of the Act conditions Federal matching in payments under a comprehensive risk contract on compliance with the requirements in section 1903(m)(2)(A) of the Act. The requirements of this section of the Act include an entity meeting the definition of MCO, payment on an actuarially sound basis, prior approval by CMS of the contract, physician incentive requirements, and the new disenrollment rights under section 1932(a)(4) of the Act, which are incorporated under section 1903(m)(2)(A)(vi) of the Act. Most significantly, section 1903(m)(2)(A)(xi) of the Act conditions Federal matching in comprehensive risk contracts on the contract's and the MCO's compliance with applicable requirements in section 1932 of the Act. This includes the MCO's role in complying with the State quality strategy proposed under subpart D, the beneficiary protections in subpart C, and the grievance requirements in subpart F. All of the requirements in this part that apply to MCOs implement either section 1903(m) or section 1932 of the Act. Thus, Federal matching in MCO contracts is conditioned on compliance with these requirements.

1. Basic Requirements (§ 438.802)

We propose in § 438.802 that FFP is available in expenditures for payments under an MCO contract only for periods during which the contract meets the requirements of part 438 and is in effect. We also propose that FFP is available only when the MCO and its subcontractors are in substantial compliance with the physician incentive plan requirements and the requirements of the MCO contract.

2. Prior Approval (§ 438.806)

Section 4708(a) of the BBA amended section 1903(m)(2)(A)(iii) of the Act to require the Secretary's prior approval for all MCO contracts involving expenditures in excess of $1,000,000 for 1998. For subsequent years, the threshold amount for MCO contracts will be increased by the percentage increase as determined by the consumer price index for all urban consumers.

Before the amendments made by section 4708 (a) of the BBA, section 1903 (m)(2)(A)(iii) of the Act required that the Secretary must provide prior approval for all HMO contracts involving expenditures in excess of $100,000. There was no reference in statute or regulations made for monetary increases of the threshold amount in future years.

3. Exclusion of Entities (§ 438.808)

We propose to redesignate existing § 434.80 as 438.808 to describe entities that must be excluded.

4. Expenditures for Enrollment Broker Services (§ 438.810)

Proposed § 438.810 would implement section 1903(b)(4) of the Act, added by section 4707(b) of the BBA, which provides for limitations on FFP in payments to enrollment brokers. Prior to this provision, there was no reference or provisions in current law or regulations specifically pertaining to enrollment brokers and their expenditures. This provision clarifies that States' expenditures for enrollment brokers are considered necessary for the proper administration of the State Plan, but only if the broker is independent of any managed care entity or health care provider that provides services in the same State in which the broker is conducting enrollment activities. No owner, employee, board member, or person who has a contract with the broker may have financial interest in that entity or provider, nor may the individual have been debarred by any Federal agency or subject to civil penalties under the Act or be excluded from participation under title XVIII or XIX of the Act. An enrollment broker would not meet the test for independence if it is an MCO, PIHP, PAHP, PCCM or other health care provider, or owns, or is owned by an MCO, PIHP, PAHP, PCCM, or other health care provider in the State in which the broker operates. This would include county eligibility employees performing enrollment activities when the county also provides health care services.

In addition, under our proposed rule, State agencies would be required to submit to CMS all initial enrollment broker contracts or Memoranda of Agreement (MOA) for approval. Contracts being renewed with the same contractor would not be subject to approval. We are proposing to impose this requirement under our authority under section 1902(a)(4) of the Act to provide for necessary and proper methods of administration. We believe that it is important that all parties know whether an enrollment broker arrangement meets the requirements for FFP. We accordingly believe that it is ''necessary and proper'' for the State agency to obtain approval of broker arrangements. CMS will review contracts or MOAs to ensure that they meet the requirements for FFP.

5. Costs Under Risk and Nonrisk Contracts (§ 438.812)

Proposed § 438.812 contains the rules on Federal matching rates for medical services and administrative costs under risk and non-risk contracts currently set forth in §§ 434.74 and 434.75.

6. Limit on Payments in Excess of Capitation Rates (§ 483.814)

As discussed earlier in this preamble in regards to proposed § 438.6(c), we propose in § 438.814 that FFP is not available in expenditures for payments under risk corridors or incentive payments in excess of 105 percent of the aggregate capitation payments made under proposed § 438.6(c). We are concerned that without any upper limit on the amount that can be paid in incentive arrangements or risk-sharing mechanisms, the potential exists for inefficiency or inappropriate actions by the contractor to maximize funding. This funding maximization may result in payments that bear no relationship to the rates certified by actuaries and that are no longer ''actuarially sound.''

K. Amendments and Revisions to Parts 400, 430, 431, 434, 435, 440, and 447

1. Revisions to Part 400

We propose at § 400.203 to add the following definitions. We propose specifying that PCCM stands for primary care case manager and PCP stands for primary care physician. We believe it is important to include these definitions early in the regulation text, as these are commonly used terms that are used in numerous subparts.

We also propose to revise the definition of provider to mean either of the following: (1) For the fee-for-service program, any individual or entity furnishing Medicaid services under an agreement with the State Medicaid agency; and (2) for managed care programs, any individual or entity that is engaged in the delivery of health care services and is legally authorized to do so by the State in which it delivers the services. We believe that this definition is sufficiently broad to allow State flexibility in designation of its providers.

2. Revisions to Part 430

We propose to add a new § 430.5, containing two definitions that currently appear in part 434 or elsewhere. We propose to revise the definition of contractor to eliminate listed examples and apply it more

broadly to any contractor that meets the current introductory clause. The definition, as proposed, would specify that a contractor means any entity that contracts with the State agency, under the State plan and in return for a payment, to process claims, to provide or pay for medical services, or to enhance the State agency's capability for effective administration of the program.

We also propose to include a definition of representative. This term will have the meaning given by each State consistent with its laws, regulations, and policies. We believe that this definition will allow flexibility in determining who can serve as a Medicaid beneficiary's representative and will not place any restrictions on State definitions currently in use.

3. Revisions to Part 431

We propose conforming amendments to part 431 to reflect changes in terminology and other new provisions enacted in the BBA. As discussed in section II.B.5. of this preamble, we also have made conforming changes to the fair hearing regulations in part 431, subpart E, to reflect the MCO grievance and appeals requirements in part 438 subpart F.

4. Revisions to Part 434

As discussed earlier, we propose to revise part 434 to remove provisions relating to managed care, which we have moved to part 438.

5. Revisions to Part 435

Technical and Conforming Changes. We propose conforming amendments to part 435 to reflect changes in terminology and other new provisions enacted in the BBA. As discussed above, in section II.B.5. of this preamble, we also have made conforming changes to the fair hearing regulations in subpart E of part 435 to reflect the grievance and appeals provisions in subpart F of part 438. In addition, we propose to implement BBA changes to the rules on guaranteed eligibility.

Guaranteed Eligibility (§§ 435.212 and 435.326). Prior to the enactment on August 5, 1997 of section 4709 of the BBA, section 1902(e)(2) of the Act provided that State agencies, at their option, could provide for a minimum enrollment period, during which a Medicaid individual enrolled in a Federally qualified HMO or one of certain other specified entities retains eligibility for Medicaid services the HMO provides even if the enrollee otherwise loses Medicaid eligibility. Even though this provision was enacted in 1983, since that time only a few State agencies have opted to implement this provision. One factor we believe that has kept State agencies from making greater use of this provision is the requirement that it was limited only to those individuals who were enrolled in Federally qualified HMOs and other entities that are not prevalent in all States.

Section 4709 of the BBA expands section 1902(e)(2)(A) of the Act to include individuals enrolled in MCOs and primary care case management systems. This expansion greatly increases the number of individuals who will be potentially eligible for the guaranteed eligibility provision.

Specifically, section 4709 expands the State's option to guarantee up to 6 months of eligibility in two ways: (1) it expands the types of MCOs or PCCMs whose members may have guaranteed eligibility in that it now includes anyone who is enrolled with a Medicaid MCO as defined in section 1903(m)(1)(A) of the Act, and (2) it expands the option to include those individuals enrolled with a primary care case manager as defined in section 1905(t) of the Act. The provision also describes that when Medicaid benefits are furnished under the guaranteed eligibility provisions, the benefits include only those provided by the MCO or by or through the case manager. This provision applies to the 50 States and the District of Columbia.

We note that section 1902(e)(2) limits the ''guaranteed'' benefits provided for under its authority to benefits provided to the individual as an enrollee of the MCO, or by or through the case manager for primary care case management enrollees. For primary care case management arrangements, we have interpreted that the guaranteed benefits provided under this provision extend to services that do not require case-by-case authorization of the case manager, such as emergency services, dental, or OB/GYN services received by an enrollee. The scope of the blanket authorization can be defined by the State agency. An example of a blanket authorization would be one that allows Medicaid beneficiaries to access emergency room or dental services without the need to consult a case manager.

6. Revisions to Part 440: Primary Care Case Management Services (§ 440.168)

Section 4702 of the BBA adds primary care case management services to the list of optional Medicaid services in section 1905(a) of the Act. The BBA also added section 1905(t) to the Act. This new section defines primary care case management services, identifies who may provide them, and sets forth requirements for contracts between primary care case managers and the State agency. Before to the BBA, State agencies were permitted to implement a primary care case management system only through a freedom of choice waiver under section 1915(b)(1) of the Act or through a section 1115 waiver authority. This provision was set forth in order to allow State agencies more flexibility in providing quality services to Medicaid beneficiaries through an arrangement that has proven to be cost effective for the Medicaid program. We are proposing to add § 440.168—Primary Care Case Management Services. This new section will define primary care case management services and identify who may provide them.

Primary care case management services means case management related services that include the locating, coordinating, and monitoring of health care services provided by a primary care case management provider under contract with the State agency as set forth in § 438.6(k). This includes the authority for a primary care case management provider to deny services that are not medically necessary to require preauthorization of services.

A primary care case manager is a physician, physician group practice, or an entity employing or having other arrangements with physicians to provide primary care case management services under contract with the State agency. At the State's option, nurse practitioners, certified nurse midwives, and physician assistants may also qualify as primary care case management providers.

Primary care for the purpose of this provision includes all health care services and laboratory services customarily provided by or through a general practitioner, family medicine physician, internal medicine physician, obstetrician/gynecologist, or pediatrician in accordance with State licensure and certification laws and regulations.

7. Revisions to Part 447

Technical and Conforming Changes. We propose to make technical and conforming changes reflecting changes in terminology and other revisions made by the BBA.

Timely Claims Payment by Managed Care Organizations (§ 447.46). The purpose of this new section of the regulations is to implement section 4708(c) of the BBA, which added section 1932(f) to the Act. Under this provision, contracts, under section 1903(m) of the Act, with managed care organizations must provide that payment to affiliated health care providers for items and services covered

under the contract must be made on a timely basis, consistent with the claims payment procedures described under section 1902(a)(37)(A) of the Act. To be consistent with section 1902(a)(37(A) of the Act, the Medicaid MCO's contract must ensure that 90 percent of claims for payment (for which no further written information or substantiation is required in order to make payment) made for services covered under the contract and furnished by health care providers are paid within 30 days of receipt and that 99 percent of the claims are paid within 90 days of receipt. However, the MCO and health care providers have the flexibility to establish an alternative payment schedule that is mutually agreed upon. If an alternative payment schedule is established, it should also be described in the managed care organization's contract, so that providers are ensured payment under the procedures agreed to.

We also made conforming changes to §§ 447.53 through 447.60.

III. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval.

In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comments on each of these issues for the information collection requirements discussed below.

The following information collection requirements and associated burdens are subject to the PRA. For purposes of this requirement, we incorporated pertinent managed care data from the 2000 Medicaid enrollment report. As of June, 2000, there were 339 managed care organizations (MCOs) (this includes 3 HIOs that must adhere to the MCO requirements of this regulation), 37 primary care case management (PCCM) systems, 376 managed care entities (MCOs and PCCMs combined), 123 mental health and substance abuse prepaid health plans (PIHPs) and 34 dental, primary care and transportation prepaid health plans (PAHP), all of which have previously been regulated as PHPs. There were a total of 25,731,040 beneficiaries enrolled in these plans (some beneficiaries are enrolled in more than one plan) in 48 States and the District of Columbia (Wyoming and Alaska do not currently enroll beneficiaries in any type of managed care).

A. Section 438.6 Contract Requirements

Section 438.6(c) Payments Under Risk Contracts

1. Requirement

Section 438.6(c) would modify the rules governing payments to MCOs, PIHPs and PAHPs by doing the following: (1) Eliminates the upper limit (UPL) requirements; (2) requires actuarial certification of capitation rates; (3) specifies data elements that must be included in the methodology used to set capitation rates; (4) requires States to consider the costs for individuals with chronic illness, disability, ongoing health care needs, or catastrophic claims in developing rates; (5) requires States to provide explanations of risk sharing or incentive methodologies; and (6) imposes special rules, including a limitation on the amount that can be paid under FFP in some of these arrangements.

2. Burden

We believe that the burden of providing additional information to support the actuarial soundness of a State's capitation rates will be offset by the elimination of the UPL requirement. States will no longer be required to extract FFS data and manipulate the data by trending and other adjustments in order to establish a FFS equivalent for purposes of comparison to capitation rates. We invite comment on this burden assumption.

B. Section 438.8 Provisions That Apply To PIHPs and PAHPs

Section 438.8(a) Contract Requirements

1. Requirement

This section specifies which of the contract requirements contained in § 438.6 apply to PIHPs and which apply to PAHPs. Requirements for advance directives apply only to PIHPs, while physician incentive plan requirements apply to both PIHPs and PAHPs.

2. Burden

PHPs (now designated as PIHPs and PAHPs) have not previously been required to maintain written policies and procedures with respect to advance directives. This rule requires the PIHPs to provide written information to enrollees of their rights under this provision and the PIHP's policies for the implementation of those rights. We project 8 hours for each of the 123 PIHPs to establish this policy and 2 minutes per enrollee for provision of this information, and acceptance of this right to each of approximately 6.3 million individuals enrolled in PIHPs. The total time for this would be 210,984 hours.

Under the physician incentive plan provision, PIHPs and PAHPs, like MCOs, will be required to provide descriptive information to States and us to determine whether or not there is substantial financial risk in their subcontracts. In addition, enrollees must be surveyed and provided information on the risk arrangements when substantial risk exists.

We are basing our projections of burden upon information published in the **Federal Register** on March 27, 1996 and December 31, 1996 (61 FR 13445 and 61 FR 69049) that contained the original regulatory provisions on physician incentive plans for Medicare and Medicaid HMOs. Based on those assumptions, we believe no more than one third of the approximately 157 PIHPs and PAHPs use incentive or risk payment arrangements with their subcontracting providers. Affected PIHPs and PAHPs would be required to provide detailed responses to State surveys regarding their payment mechanisms and amounts. At the projected 100 hours per response for approximately 52 PIHPs and PAHPs the total burden would be 5,200 hours. For those PIHPs and PAHPs with substantial financial risk, there are other requirements such as stop loss insurance and beneficiary surveys. We believe there would be minimal additional burden as a result of these requirements (because many already comply with these requirements) and that this would apply to no more than one fourth of those PIHPs and PAHPs with risk or incentive payments, or a total of 13. We estimate an additional 10 hours per plan for a total of 113 hours. Altogether, we estimate 5,313 hours of burden through imposition of this requirement on PIHPs and PAHPs.

C. Section 438.10 Information requirements

Section 438.10(e), (f), (g), and (h)

1. Requirement

In summary, § 438.10 requires that each State or its contracted representative, or at the option of the State, each MCO, PIHP, PAHP, and PCCM furnish information to enrollees and potential enrollees to meet the requirements of this section. Paragraph (c)(4) requires that the State notify enrollees and potential enrollees, and require each MCO, PIHP, and PAHP and PCCM to notify its enrollees and potential enrollees that oral interpretation and written information are available in languages other than English and how to access those services. The basic information listed in paragraph (e) of this section must be provided to each potential enrollee by the State, MCO, or PIHP. The information listed paragraph (f) must be furnished to enrollees by the MCO or PIHP within a reasonable time after it receives from the State notice of the beneficiary's enrollment. The MCO or PIHP must notify enrollees annually of their right to disenroll and receive the information listed in paragraph (f)(6) and, if applicable, paragraph (g). The information that must be provided includes the following:

2. Information for Potential Enrollees

General information must be provided about the basic features of managed care, which populations are excluded from enrollment, subject to mandatory enrollment, or free to enroll voluntarily in an MCO or PIHP, and MCO, and PIHP responsibilities for coordination of enrollee care.

Information specific to each MCO and PIHP serving an area that encompasses the potential enrollee's service area must be provided in summary form, or in more detail, upon request of the enrollee. This includes information on benefits covered; cost sharing if any; service area; names, locations, and telephone numbers of current network providers, including at a minimum information on primary care physicians, specialists, and hospitals, and identification of providers that are not accepting new patients; and benefits that are available under the State plan but are not covered under the contract, including how and where the enrollee may obtain those benefits, any cost sharing, and how transportation is provided.

3. Information for Enrollees

The State must notify enrollees of their disenrollment rights annually. The State, or the MCO, PIHP, PAHP, and PCCM, if delegated this responsibility by the State, must provide certain information to new enrollees and notify enrollees annually of their right to request additional information. The State must give each enrollee written notice of any change (that the State defines as ''significant'') in the information specified at least 30 days before the intended effective date of the change and make a good faith effort to give written notice of termination of a contracted provider, within 15 days after receipt or issuance of the termination notice, to each enrollee who received his or her primary care from, or was seen on a regular basis by, the terminated provider.

Information Required for MCOs, PIHPs, PAHPs, and PCCMs

- Names, locations, and telephone numbers of current network providers, including information at least on primary care physicians, specialists, and hospitals, and identification of providers that are not accepting new patients.
- Any restrictions on the enrollee's freedom of choice among network providers.
- Enrollee rights as specified in § 438.100.
- Kinds of benefits, and amount, duration, and scope of benefits available under the contract.
- Procedures for obtaining benefits, including authorization requirements.
- The extent to which, and how, enrollees may obtain benefits, including family planning services, from out-of-network providers.
- The extent to which, and how, after-hours and emergency coverage are provided.
- The rules for emergency and post-stabilization services, as set forth in § 438.114.
- Additional information that is available upon request, and how to request that information.
- Cost sharing, if any.
- Any benefits that are available under the State plan but are not covered under the contract, including how and where the enrollee may obtain those benefits, and cost sharing, and how transportation is provided. The State must furnish information about how and where to obtain the service.

Additional Information Required of MCOs and PIHPs

- Grievance, appeal, and fair hearing procedures and timeframes, as provided in § 438.400 through § 438.424, in a State-approved or State-developed description.
- Advance directives, as set forth in § 438.6(I)(2).
- Physician incentive plans as set forth in § 438.70(a)(4).
- Additional information that is available upon request, including information on the structure and operations of the MCO or PIHP.

Burden. We believe the burden placed on States, MCOs, PIHPs, PAHPs, and PCCMs and enrollment brokers as a result of this requirement is the time associated with modifying the content of existing information materials, as well as the time associated with distributing the materials to enrollees as specified by the regulation. We estimate that it will initially take 12 hours for each MCO, PIHP, PAHP, or PCCM to modify existing information materials to conform with the requirement above. We further estimate that there are approximately 533 MCOs, PIHPs, PAHPs, and PCCMs equating to an initial modification burden of approximately 6,396 hours. After the initial modification, we estimate that it will take MCOs, PIHPs, PAHPs, and PCCMs approximately 4 hours each to annually update the information materials, equating to an annual total burden of approximately 2,132 hours.

We estimate that that it will take MCOs, PIHPs, PAHPs, and PCCMs 5 minutes to mail a packet of materials to potential enrollees and enrollees. We estimate that each year approximately 15 percent of the Medicaid managed care enrollee population are new enrollees. This equates to approximately 3.9 million potential enrollees a year for a total burden on the States of 65,000 hours. Mailing the annual packet of information to the 25,731,040 enrollees, at 5 minutes a packet, will result in a burden to the State, or the MCOs, PIHPs, PAHPs, and PCCMs, if delegated this responsibility by the State, of 2,144,253 hours.

We similarly estimate that it will take 5 minutes for MCO, PIHPs, PAHPs, and PCCM to supply information requested by potential enrollees and enrollees. We estimate that 10 percent of potential enrollees and enrollees will request information each year. For the 390,000 potential enrollees requesting information, this results in a burden on States of 6,500 hours. For the 2,573,104 enrollees requesting information, this results in a burden on States, or MCO, PIHPs, PAHP, and PCCMs if delegated this responsibility by the State, of 214,425 hours.

Section 438.10(h)

1. Requirement

In summary, § 438.10(h) states that if a State plan provides for mandatory

MCO or PCCM enrollment under section 1932(a)(1)(A) of the Act, the State or its contracted representative must provide information in a comparative, chart-like format, to potential enrollees. The information must include the MCO's or PCCM's service area, the benefits covered under the contract, any cost sharing imposed by the MCOs or PCCMs and, to the extent available, quality and performance indicators, including but not limited to disenrollment rates and enrollee satisfaction.

2. Burden

We believe that the additional burden on States (that is, burden not yet captured in the above provisions) is the length of time associated with creating the comparative chart. We estimate that it will take States approximately 4 hours each to create the comparative chart. Currently 9 States per year have approved manage care under the State Plan Option, for a total annual burden of approximately 36 hours.

D. Section 438.12 Provider Discrimination Prohibited

1. Requirement

This section requires that if an MCO, PIHP, or PAHP declines to include individual or groups of providers in its network, it must give the affected providers written notice of the reason for its decision.

2. Burden

The burden associated with this requirement is the time it takes the MCO, PIHP, or PAHP to draft and furnish the providers with the requisite notice. We estimate that it will take 1 hour to draft and furnish any given notice. We estimate that on average each MCO, PIHP, and PAHP will need to produce 10 notices per year for a total of 4,960 hours.

E. Section 438.50(b) State Plan Information

1. Requirements

Each State must have a process for the design and initial implementation of the State plan that involves the public and have methods in place to ensure ongoing public involvement once the State plan has been implemented.

2. Burden

The burden associated with this section includes the time associated with developing the process for public involvement, including annual updates. We estimate that it will take 40 hours per State to develop the process for involving, the public for a total burden of 1,960 hours (48 States and D.C.). We estimate that ensuring ongoing public involvement will take another 20 hours per State annually for a total annual burden of 980 hours.

F. Section 438.56 Disenrollment: Requirements and Limitations

Section 438.56(b)

1. Requirement

All MCO, PIHP, PAHP, and PCCM contracts must:

(1) Specify the reasons for which the MCO, PIHP, PAHP, or PCCM may request disenrollment of an enrollee;

(2) Provide that the MCO, PIHP, PAHP, or PCCM may not request disenrollment because of a change in the enrollee's health status, or because of the enrollee's utilization of medical services, diminished mental capacity, or uncooperative or disruptive behavior resulting from his or her special needs; and

(3) Specify the methods by which the MCO, PIHP, PAHP, or PCCM ensures the agency that it does not request disenrollment for reasons other than those permitted under the contract.

2. Burden

The burden of submitting this supporting documentation when MCOs, PIHPs and PAHPs, or PCCMs request disenrollment of beneficiaries would be 2 hours per request. We calculate that approximately one-tenth of one percent of enrollees (25,731) would be affected, or 48 per MCO, PIHP, PAHP, or PCCM annually. The total burden would be 51,462 hours, or approximately 97 hours per MCO, PIHP, PAHP, or PCCM.

Section 438.56(d)(1)

1. Requirement

In order to disenroll, the beneficiary (or his or her representative) must submit an oral or written request to the State agency (or its agent) or to the MCO, PIHP, PAHP, or PCCM where permitted.

2. Burden

We believe that the burden associated with this requirement is the length of time it would take enrollees to submit in writing a disenrollment request, if they choose to use the written format. We estimate that it will take approximately 10 minutes per enrollee to generate a written disenrollment request. We estimate that approximately 5 percent of MCO, PIHP, PAHP, and PCCM enrollees will request that they be disenrolled from an MCO, PIHP, PAHP, or PCCM. Approximately one-fourth of the enrollees will choose a written rather than an oral request. This equates to an annual burden of approximately 10 minutes multiplied by 321,638 affected enrollees (one-fourth of the 1,286,552 enrollees requesting disenrollment), or approximately 53,606 hours.

Section 438.56(d)(3)

1. Requirement

When MCOs, PIHP, PAHP, or PCCMs are processing disenrollment requests and do not act to approve them, they must submit written notice to the State and then the State takes action. When a State is acting on a for-cause disenrollment request, they may request written information from the MCO, PIHP, PAHP, or PCCM to determine the outcome. In addition, if the MCO, PIHP, PAHP, or PCCM approves the disenrollment for cause, it must give the enrollee and the State agency written notice of its determination.

2. Burden

We believe that the burden associated with this requirement is the time taken for MCOs, PIHPs and PAHPs, or PCCMs to submit written notice to the State and beneficiaries.

Of the 1,286,552 affected enrollees, we calculate that one-fifth (257,310) will not be approved. If each notice takes 15 minutes to produce, the total burden would be 64,328 hours. Of the 257,310 enrollees not approved, we calculate that three-fourths (192,983) will involve the State requesting information from the MCO, PIHP, PAHP, or PCCM justifying the denial. At 1 hour per request, the total burden on MCOs, PIHPs, PAHPs, or PCCMs would be 192.983 hours.

We estimate that the MCOs, PIHPs, PAHPs, and PCCMs will need to produce notices for the remaining four-fifths of enrollees whose disenrollment (1,029,240) is approved. As this notice will probably be a short form letter, with attachments as necessary, we believe that it will take ten minutes per request to send out the notices, for an annual burden of 171,540 hours.

G. Section 438.102 Enrollee-Provider Communications

1. Requirement

Section 438.102(c) states that the general rule in paragraph (b) of this section does not require the MCOs and PIHPs to cover, furnish, or pay for a particular counseling or referral service if the MCO or PIHPs objects to the provision of that service on moral or religious grounds; and makes written information on these policies available to: (1) prospective enrollees, before and during enrollment; and, (2) current

enrollees, within 90 days after adopting the policy for any particular service.

2. Burden

The above information collection requirement is subject to the PRA. However, we believe the burden associated with these requirements is captured in the general information requirements in § 438.10.

H. Section 438.114 Emergency Services

1. Requirement

Section 438.114(b) states that at the time of enrollment and at least annually thereafter, each MCO, PIHP, PAHP, and State (for a PCCM) must provide, in clear, accurate, and standardized form, information that, at a minimum, describes or explains (1) What constitutes an emergency, with reference to the definitions in paragraph (a) of this section, (2) the appropriate use of emergency services, (3) the process and procedures for obtaining emergency services, including use of the 911 telephone system or its local equivalent, (4) the locations of emergency settings and other locations at which MCO, PIHP, or PAHP physicians and hospitals provide emergency services and post-stabilization care covered under the contract, and (5) the fact that prior authorization is not required.

2. Burden

The following information collection requirement is subject to the PRA. However, we believe the burden associated with these requirements is captured in the general information requirements in § 438.10.

I. Section 438.202 State Responsibilities

1. Requirement

Each State contracting with an MCO or PIHP must have a written strategy for assessing and improving the quality of managed care services offered by the MCO or PIHP, make it available for public comment before adopting it in final, and conduct periodic reviews to evaluate the effectiveness of the strategy at least every 3 years. Each State must also submit to us a copy of the initial strategy and a copy of the revised strategy whenever significant changes are made. In addition, States are required to submit to us regular reports on the implementation and effectiveness of the strategy, consistent with the State's own periodic review of its strategy's effectiveness.

2. Burden

The burden associated with this section is limited to those States offering managed care through MCOs or PIHPs (41) and includes the time associated with developing the proposed strategy, publicizing the proposed strategy, incorporating public comments, submitting an initial copy of the strategy to us prior to its implementation and whenever significant changes are made, and submitting regular reports on the implementation and effectiveness of the strategy. We estimate that it will take 40 hours per State to develop the proposed strategy for a total burden of 1640 hours. We estimate that publicizing the proposed strategy will take 2 hours per State for a total burden of 82 hours. We estimate that incorporating public comments for the final strategy will take another 40 hours per State for a total burden of 1640 hours. We estimate it will take 1 hour per State to submit an initial copy of the strategy to us and whenever significant changes are made for a total of 41 hours. We estimate it will take 40 hours per State to create and submit a report on the implementation and effectiveness of the strategy and that these reports will be submitted at least every 3 years for a total annual burden of 546 hours.

J. Section 438.204 Elements of State Quality Strategies

1. Requirement

In this proposed rule we require at § 438.204(b)(1)(iii) that a State identify the race, ethnicity, and primary language spoken by each MCO and PIHP enrollee and report this information to each MCO and PIHP in which each beneficiary enrolls at the time of their enrollment.

2. Burden

We believe that most States currently track race and ethnicity data in their eligibility systems. If States do not, minor changes in their software will be needed. With respect to primary language of enrollees, there will likely be additional programming needed for all States. We estimate that this would require 2 hours of programming for each of the 41 jurisdictions for a total of 82 hours.

K. Section 438.207 Assurances of Adequate Capacity and Services

1. Requirement

Section 438.207(b) requires that each MCO and PIHP must submit documentation to the State, in a format specified by the State and acceptable to us, to demonstrate that it has the capacity to demonstrate that it complies with specified requirements and that it has the capacity to serve the expected enrollment in its service area in accordance with the State'standards for access to care and meets specified requirements.

Section 438.207(c) requires that this documentation be submitted to the State at least annually, and specifically at the time the MCO or PIHP enters into a contract with the State and at any time there has been a significant change (as defined both by the State and this regulation) in the MCO's or PIHP's operations that would affect adequate capacity and services.

Section 438.207(d) requires the State, after reviewing the MCO's or PIHP's documentation, to certify to us that the MCO or PIHP has complied with the State's requirements for availability of services, as set forth at § 438.206.

2. Burden

We believe that MCOs and PIHPs already collect and provide this information to State agencies as part of their customary and usual business practices and that the only additional burden on MCOs and PIHPs is the length of time required for MCOs and PIHPs to compile this information in the format specified by the State agency, and the length of time for the MCOs and PIHPs to mail the information to the State and to us. We estimate that it will take each MCO and PIHP approximately 20 hours to compile the information necessary to meet this requirement, for a total of 20 hours multiplied by 462 MCOs and PIHPs, or approximately 9,240 hours. In addition, we estimate that it will take MCOs and PIHPs approximately 5 minutes each to mail the materials associated with this burden to the State for an annual burden of approximately 5 minutes multiplied by 462 MCOs and PIHPs, or approximately 39 hours.

We estimate that obtaining information on: (1) The numbers and types of persons with special health care needs that could be anticipated to enroll in the MCO or PIHP; (2) the types of experienced providers they would require; (3) the experience of the existing providers in the MCOs or PIHPs network; and (4) the numbers and types of additional experienced providers needed, would require an estimated 40 hours of work for each of the 462 MCOs and PIHP for a total estimated burden of 18,480 hours.

L. Section 438.240 Quality Assessment and Performance Improvement Program; Performance Improvement Projects

1. Requirement

Section 438.240(c) states that each MCO and PIHP must annually measure

its performance using standard measures required by the State and report its performance to the State. In addition to using and reporting on measures of its performance, in § 438.240(d)(1) States are to ensure that each MCO and PIHP must have an ongoing program of performance improvement projects. In § 438.240(d)(2) each MCO and PIHP is required to report the status and results of each project to the State as requested.

2. Burden

This regulation would require States to require each MCO and PIHP to have an ongoing program of performance improvement. Based on discussions with the 17 States with the largest Medicaid managed care enrollments, all 17 States are already have these programs. Because the use of performance measures in managed care has become commonplace in commercial, Medicare, and Medicaid managed care, we do not believe that this regulatory provision imposes any new burden on MCOs, PIHPs, or States.

For the requirements for an ongoing program performance improvement projects in § 438.240(d), we estimate that, in any given year, each MCO and PIHP will complete two projects, and will have 4 others underway. We further expect that States will request the status and results of each MCOs and PIHPs projects annually. Accordingly, we estimate that it will take each MCO and PIHP 5 hours to prepare its report for each project, for an annual total burden of 30 hours per MCO and PIHP. In aggregate, this burden equates to 30 hours multiplied by an estimated 462 MCOs and PIHPs, or approximately 13,860 hours.

M. Section 438.242 Health Information Systems

1. Requirement

Section 438.242(b)(1) requires the State to require each MCO and PIHP to collect data on enrollee and provider characteristics as specified by the State, and on services furnished to enrollees, through an encounter data system or other methods as may be specified by the State.

2. Burden

The above information collection requirement is subject to the PRA. However, we believe that the burden associated with these information collection requirements is exempt from the Act in accordance with 5 CFR 1320.3(b)(2) because the time, effort, and financial resources necessary to comply with these requirements would be incurred by persons in the normal course of their activities.

N. Section 438.402 General Requirements

1. Requirement

In summary, § 438.402 requires each MCO and PIHP to have a grievance system, sets out general requirements for the system, and establishes filing requirements. It provides that grievances and appeals may be filed either orally or in writing, but that oral appeals (except those for expedited service authorization decisions) must be followed by a written request.

2. Burden

We estimate that approximately 1 percent of 19 million MCO and PIHP enrollees (190,000) annually will file a grievance with their MCO or PIHP and that approximately .5 percent (95,000) annually will file an appeal. For these cases, we estimate that the burden on the enrollee filing a grievance or appeal is approximately 20 minutes per case. The total annual burden on enrollees is 95,000 hours.

O. Section 438.404 Notice of Action

1. Requirement

In summary, § 438.404 states that if an MCO or PIHP intends to deny, limit, reduce, or terminate a service; deny payment; deny the request of an enrollee in a rural area with one MCO or PIHP to go out of network to obtain a service; or fails to furnish, arrange, provide, or pay for a service in a timely manner, the MCO or PIHP must give the enrollee timely written notice and sets forth the requirements of that notice.

2. Burden

We estimate that the burden associated with this requirement is the length of time it would take an MCO or PIHP to provide written notice of an intended action. We estimate that it will take MCOs and PIHP 30 seconds per action to make this notification. We estimate that approximately 5 percent (950,000) of the approximately 19 million MCO and PIHP enrollees will receive one notice of intended action per year from their MCO or PIHP (approximately 17 hours per MCO or PIHP) for a total burden of approximately 7917 hours.

P. Section 438.406 Handling of Grievances and Appeals

1. Requirement

In summary, § 438.406 states that each MCO and PIHP must acknowledge receipt of each grievance and appeal.

2. Burden

The above information collection requirement is not subject to the PRA. It is exempt under 5 CFR 1320.4(a) because it occurs as part of an administrative action.

Q. Section 438.408 Resolution and Notification: Grievances and Appeals

1. Requirement

In summary, § 438.408 states that for grievances filed in writing, the MCO or PIHP must notify the enrollee in writing of its decision within specified timeframes. The notice must also specify that the enrollee has the right to seek further review by the State and how to seek it. All decisions on appeals must be sent to the enrollee in writing within specified timeframes and, for notice of expedited resolution, the MCO or PIHP must also provide oral notice. The decision notice must include the MCO or PIHP contact for the appeal and the results of the process and the date it was completed. For an oral grievance that does not relate to quality of care, the MCO or PIHP may provide oral notice unless the enrollee requests that it be written.

2. Burden

The above information collection requirements are not subject to the PRA. They are exempt under 5 CFR 1320.4(a) because they occur as part of an administrative action.

R. Section 438.410 Expedited Resolution of Grievances

Paragraph (c)

1. Requirement

Paragraph (c), Action following denial of a request for expected resolution, requires each MCO and PIHP to provide written notice to an enrollee whose request for expedited resolution is denied.

2. Burden

The above information collection requirement is not subject to the PRA. It is exempt under 5 CFR 1320.4(a) because it occurs as part of an administrative action.

S. Section 438.416 Record Keeping and Reporting Requirements

1. Requirement

Section 438.416 paragraphs (a) and (c) state that each MCO and PIHP must maintain records of grievances and appeals.

2. Burden

We estimate that approximately 95,000 (.5 percent) of the approximately

19 million MCO and PIHP enrollees will file a grievance or appeal with their MCO or PIHP (205 per MCO or PIHP). The recording and tracking burden associated with each grievance is estimated to be 1 minute per request (3.4 hours per MCO or PIHP), for a total burden of 1,583 hours (1 minute multiplied by an estimated 95,000 enrollees who would file a grievance or appeal).

T. Section 438.604 Data That Must Be Certified

1. Requirement

Each MCO and PIHP must certify that it is in substantial compliance with its contract. Certification is required, as provided in § 438.606, for all documents specified by the State.

2. Burden

While the requirement for MCOs and PIHP to certify its compliance with its contract and for all documents required by the State, the burden associated with these requirements is captured during the submission of the information. Therefore, we are assigning 1 token hour of burden for this requirement. Submission of the certified information and data occurs when the MCO or PIHP requests payment from the State according to the terms of its contract. There is no burden assigned to the submission as it is not required by this regulation, but rather by terms of the MCO's or PIHP's contract with the State.

U. Section 438.710 Due Process: Notice of Sanction and Pre-termination Hearing

Section 438.710(a) Due Process: Notice of Sanction and Pre-termination Hearing

1. Requirement

Section 438.710(a) states that before imposing any of the sanctions specified in this subpart, the State must give the affected MCO or PCCM written notice that explains the basis and nature of the sanction.

2. Burden

The above information collection requirements are not subject to the P.A. They are exempt under 5 CFR 1320.4(a) because they occur as part of an administrative action.

Section 438.710 (b)(2) Due Process: Notice of Sanction and Pre-termination Hearing

1. Requirement

Section 438.710(b)(2) states that before terminating an MCO's or PCCM's contract, the State must:

(i) Give the MCO or PCCM written notice of its intent to terminate, the reason for termination, the time and place of the hearing;

(ii) After the hearing, give the entity written notice of the decision affirming or reversing the proposed termination of the contract and, for an affirming decision, the effective date of termination; and

(iii) For an affirming decision, give enrollees of the MCO or PCCM notice of the termination and information, consistent with § 438.10, on their options for receiving Medicaid services following the effective date of termination.

2. Burden

The above information collection requirement is not subject to the PRA. It is exempt under 5 CFR 1320.4(a) because it occurs as part of an administrative action.

V. Section 438.722 Disenrollment During Termination Hearing Process

1. Requirement

Section 438.722(a) states that after a State has notified an MCO or PCCM of its intention to terminate the MCO or PCCM's contract, the State may give the MCO's or PCCM's enrollees written notice of the State's intent to terminate the MCO's or PCCM's contract.

2. Burden

States already have the authority to terminate MCO or PCCM contracts according to State law and have been providing written notice to the MCOs or PCCMs. States are now given, at their discretion, the option of notifying the MCO's or PCCM's enrollees of the State's intent to terminate the MCO's or PCCM's contract. While it is not possible to gather an exact figure, we estimate that 12 States may terminate 1 contract per year. We estimate that it will take States 1 hour to prepare the notice to enrollees, for a total burden of 12 hours. In addition, we estimate that it will take States approximately 5 minutes per beneficiary to notify them of the termination, equating to a burden of 5 minutes multiplied by 12 States multiplied by 46,194 beneficiaries per MCO or PCCM, for a burden of approximately 46,194 hours. The total burden of preparing the notice and notifying enrollees is 46,206.

W. Section 438.724

1. Requirement

Section 438.724 requires that the State give our Regional Office written notice whenever it imposes or lifts a sanction. The notice must specify the affected MCO, the kind of sanction, and the reason for the State's decision to impose or lift a sanction.

2. Burden

We anticipate that no more than 36 States would impose or lift a sanction each year and that it would take each one 30 minutes to give the regional office notice. Thus the annual burden would be 18 hours.

X. Section 438.810 Expenditures for Enrollment Broker Services

1. Requirement

Section 438.810(c) requires that a State contracting with an enrollment broker must submit the contract or memorandum of agreement (MOA) for services performed by the broker to us for review and approval prior to the effective date of services required by the contract or MOA.

2. Burden

The burden associated with this requirement is the length of time for a State to mail each contract to us for review. We estimate that the burden associated with this requirement is 5 minutes per enrollment broker contract, for a total annual burden of approximately 3 hours per year (5 minutes multiplied by an estimated 35 enrollment broker contracts in the States using brokers).

We have submitted a copy of this proposed rule to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

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The following table summarizes the collection of information burden as discussed above.

NUMBER OF BURDEN HOURS (BASED ON 2000 ENROLLMENT REPORT)

	REQUIREMENT		STATE	PLAN	ENROLLEE
§438.8	**Provisions that apply to PIHPs and PAHPs**			**216,297**	
	~ written information on enrollee rights			210,984	
	~ information to State and CMS on financial risk			5,313	
§438.10	**Information requirements** (for potential enrollees and enrollees including information on benefits, the basic features of managed care, and information on enrollees' right to request information)		**2,430,214**	**8,528**	
438.10(e)(f)(g)(h)	~ modify existing materials				
	~ annual update of materials			6,396	
	~ mail information to potential enrollees		65,000	2,132	
	~ mail annual information to enrollees		2,144,253*		
	~ mail requested material to potential enrollees		6,500		
438.10(h)	~ create comparative chart		214,425*		
	Total information requirement burden hours	**2,438,742**	36		
§438.12	**Provider discrimination prohibited**			4,960	
§438.50(b)	**State plan information**		2,940		
§438.56	**Disenrollment: Requirements and limitations**			**480,313**	**53,606**
438.56(b)	~ submit documentation to State for disenrollment request			51,462	
438.56(d)(1)	~ enrollee written request for disenrollment				53,606
438.56(d)(3)	~ notice of dissapproval of disenrollment request			64,328	
438.56(d)(3)	~ MCO information to State justifying the denial			192,983	
438.56(d)(3)	~ notice to beneficiary of disenrollment approval	**533,919**		171,540	
	Total disenrollment requirement burden hours				
§438.202	**State responsibilities** (written strategy for assessing and improving quality)		3,950		
§438.204	**Elements of State quality strategies**		82		
§438.207	**Assurances of adequate capacity and services**			27,759	
§438.240	**Quality assessment and performance improvement program; Performance improvement projects**			13,860	
§438.402	**General requirements** (of the grievance system)				95,000
§438.404	**Notice of action** (associated with the grievance system)			7,917	
§438.416	**Record keeping and reporting requirements** (associated with the grievance system)			1,583	
§438.604	**Data that must be certified**			1	
§438.722	**Disenrollment of enrollees during MCO termination hearing**		46,206		
§438.724	**Notice of intent** (to impose or lift a sanction)		18		
§438.810	**Expenditures for enrollment broker services**		3		
	Burden hours by category		**2,483,413**	**761,217**	**148,606**
	Total Burden Hours	**3,393,236**			

* State may delegate these requirements to the MCO, PIHP, PAHP, or PCCM as applicable.

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IV. Regulatory Impact

A. Introduction

We have examined the impacts of this proposed rule as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule meets the criteria of being economically significant because the impact would be over $100 million.

The RFA requires agencies to analyze options for regulatory relief of small entities. This rule implements Medicaid managed care provisions as directed by BBA. The statute does not permit significant alternatives to these regulatory provisions; however, we invite comments on alternatives to provisions of this proposed rule that would reduce burden on small entities.

This proposed rule primarily impacts beneficiaries, State agencies, enrollment brokers, MCOs, PIHPs, PAHPs, and PCCMs. Small entities include small business in the health care sector with receipts of less than $5 million to $25 million, nonprofit organizations, and other entities. (See 65 FR 69432). For purposes of the RFA, individuals and State governments are not included in this definition. We estimate that in 2000 there were 339 MCOs, 123 PIHPs, 34 PAHPs, and 37 PCCMs. We believe that only a few of these entities qualify as small entities.

Specifically, we believe that the 37 PCCM systems are likely to be small entities, as are approximately 12 of the PAHPs. We believe that the 10 PAHPs that are at risk for ambulatory medical services only are likely to be small businesses, as are two dental PAHPs. We believe that the remaining PAHPs and all the MCOs and PIHPs have annual receipts from Medicaid contacts and other business interests in excess of $25 million.

We do not believe that the impact of the new provisions of this proposed regulation are great on the small entities that we have identified. The most significant requirement relates to providing information to enrollees. Specifically, PCCMs and PAHPs are required to make written materials available in languages that are prevalent in its service area (as determined by the State) and provide oral interpretation services when needed. We do not believe that PCCMs or PAHPs provide much written material to enrollees. In fact, in the proposed regulation, we place the responsibility on States, rather than PCCMs and PAHPs, to provide information to potential enrollees. The regulation does provide that the State may require the PCCM or PAHP to provide additional information to enrollees, at their request, concerning the grievance procedures available to enrollees. However, the State may take responsibility for this rather than require that it be done by the PCCM or PAHP. In either case, we believe that States will prepare this information so that the only burden on PCCMs and PAHPs would be to distribute the information when it is requested by an enrollee.

The regulation would require managed care entities, including PCCMs and PAHPs, to make oral interpretation services available to each potential enrollee or enrollee requesting them. We do not have information on which to base an estimate of the burden of this requirement. We invite comment on the burden of this provision and cost data to help us develop estimates.

PCCMs and PAHPs also must meet certain contract requirements, however, these are consistent with the nature of their business in contracting with the State for the provision of services to Medicaid enrollees. They, likewise, must meet requirements related to disenrollment of enrollees for cause, including receipt and initial processing of disenrollment requests if the State delegates this function to the PCCM or PAHP. However, as all enrollees will have an annual opportunity to disenroll, we believe that the number of disenrollment requests for cause will be small. In addition, PCCMs and PAHPs must submit marketing material to the State for review and approval and must cover and pay for emergency services based on the prudent layperson standard (this only applies to PCCMs if they have a risk contract). We believe that only the two dental PAHPs are likely to produce marketing material and that only the 10 PAHPs with a risk contract will be subject to the emergency services provision.

PAHPs must meet two other requirements. First they may not discriminate against providers seeking to participate in the plan. This requirement imposes no burden. Second, they must meet solvency standards to ensure that Medicaid enrollees will not be responsible for any debt should the entity become insolvent. We believe that this imposes little burden in addition to normal business requirements for entities assuming risk.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 100 beds.

We do not anticipate that the provisions in this proposed rule would have a substantial economic impact on most hospitals, including small rural hospitals. The BBA provisions include some new requirements on States, MCOs, and PIHPs, but no new direct requirements on individual hospitals. The impact on individual hospitals would vary according to each hospital's current and future contractual relationships with MCOs and PIHPs. Furthermore, the impact would also vary according to each hospital's current procedures and level of compliance with existing statute and regulation pertaining to Medicaid managed care. For these reasons, this proposed rule is not expected to have a significant impact on the operations of a substantial number of hospitals.

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an expenditure in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector, of $110 million or more (adjusted annually for inflation). We have determined that this rule does not impose any mandates on State, local, or tribal governments, or the private sector that would result in an annual expenditure of $110 million or more.

B. Summary of the Proposed Rule

This proposed rule implements the Medicaid provisions as directed by the BBA. The primary objectives of these provisions are to allow for greater flexibility for State agencies to participate in Medicaid managed care programs and provide greater beneficiary protections and quality assurance standards. The regulation addresses pertinent areas of concern between States and MCOs, PIHPs, and, for some provisions, PAHPs and PCCMs.

Specific provisions of the regulation include the following:

• Permitting States to require in their State plan that Medicaid beneficiaries be enrolled in managed care.

• Eliminating the requirement that no more than 75 percent of enrollees in an MCO or PHP be Medicaid or Medicare enrollees.

• Specifying a grievance and appeal procedure for MCO and PIHP enrollees.

• Providing for the types of information that must be given to enrollees and potential enrollees, including requirements related to language and format.

• Requiring that MCOs and PIHPs document for the States that they have adequate capacity to serve their enrollees and that States certify this to us.

• Specifying quality standards for States, MCOs, and PIHPs.

• Increasing program integrity protections and requiring certification of data by MCOs and PIHPs.

• Increasing the threshold for prior approval of MCO contracts from $100,000 to $1 million.

• Permitting cost sharing for managed care enrollees under the same circumstances as permitted in fee-for-service.

• Expanding the managed care population for which States can provide 6 months of guaranteed eligibility.

• Revising the rules for setting capitation rates.

It would be extremely difficult to accurately quantify the overall impact of this regulation on States, MCOs, PIHPs, PAHPs, and PCCMs because there is enormous variation among States and these entities regarding their current regulatory and contract requirements, as well as organizational structure and capacity. Any generalization would mask important variations in the impact by State or managed care program type. The Lewin Group, under a contract with the Center for Health Care Strategies, released a study of the cost impact of the original proposed regulation published on September 29, 1998 the **Federal Register** (63 FR 52022). Because this new proposed regulation addresses the same areas as the September 29, 1998 proposed rule and includes many similar provisions, the Lewin study remains the best information we have available on the potential incremental impact of this proposed regulation. However, the study did not analyze the original proposed regulation in total, but focused on four areas within the original proposed regulation: individual treatment plans, initial health assessments, quality improvement programs, and grievance systems/State fair hearings. While the study's focus is limited to selected provisions of the previously proposed regulation, and some of the details of the provisions in this proposed rule differ from the earlier proposed rule, nevertheless, we believe that the overall cost conclusions are relevant to this proposed rule. In addition to examining the four regulatory requirements, the Lewin study cited the need to evaluate both the incremental and aggregate effects of the rule; the effect on different managed care environments (for example, overall enrollment; the Medicare, commercial, and Medicaid mix; geographic location); and differing regulatory requirements of the State (for example, State patient rights laws, regulation of noninsurance entities). The Lewin report also points out that many of the BBA provisions were implemented through previous guidance to the States, so the regulatory impact only captures a subset of the actual impact of the totality of BBA requirements.

According to the MCOs included in the Lewin study, many of the proposed provisions are not expected to have large incremental costs. The study mainly focused on the assessment and treatment management components of the regulation, as well as the quality improvement projects. For example, they estimate the cost of an initial assessment (called screening in this proposed regulation) as ranging from $0.17 to $0.26 per member per month (PMPM), but for an MCO that currently performs an initial assessment, the incremental cost is estimated as $0.03 to $0.06 PMPM. Extrapolating these estimates to the population of Medicaid managed care enrollees, if all enrollees were enrolled in plans doing initial assessments, the total cost would range from $6.8 million to $13.5 million. If all enrollees were enrolled in plans that did not perform initial assessments, the total cost would be $38 million to $58 million. Similarly, the costs of quality improvement projects can vary from $60,000 to $100,000 in the first year (start-up), $80,000 to $100,000 in the second and third years (the intervention and improvement measurement cycle), and $40,000 to $50,000 for the fourth and subsequent years (ongoing performance measurement).

In summary, according to the Lewin Study, States and their contracting managed care plans have already implemented many provisions of the BBA. While there are incremental costs associated with these proposed regulatory requirements, they would vary widely based on characteristics of individual managed care plans and States. Finally, the BBA requirements are being implemented in an increasingly regulatory environment at the State level. Therefore, States, MCOs, and PIHPs would likely face additional costs not related to these regulatory requirements absent these new regulations. Thus, the incremental impact of these requirements on costs to be incurred would be difficult if not impossible to project.

We believe that the overall impact of this proposed rule would be beneficial to Medicaid beneficiaries, MCOs, PIHPs PAHPs, PCCMs, States, and us. Many of the BBA Medicaid managed care requirements merely codify Federal statute standards widely in place in State law or in the managed care industry. Some of the BBA provisions represent new requirements for States, MCOs, PIHPs, PAHPs, and PCCMs but also provide expanded opportunities for participation in Medicaid managed care.

It is clear that all State agencies would be affected by this proposed Medicaid regulation but in varying degrees. Much of the burden would be on MCOs, PIHPs, PAHPs, and PCCMs contracting with States, but this would also vary by existing and continuing relationships between State agencies and MCOs, PIHPs, PAHPs, and PCCMs. This regulation is intended to provide States flexibility and minimize the compliance cost to States, MCOs, PIHPs, PAHPs, and PCCMs to the extent possible consistent with the detailed BBA requirements. We believe the proposed provisions would result in improved patient care outcomes and satisfaction over the long term.

Recognizing that a large number of entities, such as hospitals, State agencies, MCOs, and PIHPs would be affected by the implementation of these statutory provisions, and a substantial number of these entities may be required to make changes in their operations, we have prepared the following analysis. This analysis, in combination with the rest of the preamble, is consistent with the standards for analysis set forth by both the RFA and RIA.

C. State Options to Use Managed Care

Managed Care Organizations

Under this provision, a State agency may amend its State plan to require all Medicaid beneficiaries in the State to enroll in either an MCO or PCCM without the need to apply for a waiver of ''freedom of choice'' requirements under either section 1915(b) or 1115 of the Act. However, waivers would still be required to include certain exempted populations in mandatory managed care programs, notably SSI populations,

Indians, and groups of children with special needs. Federal review would be limited to a one-time State plan amendment approval, while States would no longer need to request waiver renewals every 2 years for section 1915(b) of the Act and 5 years for section 1115 of the Act waivers. State agencies may include ''exempted'' populations as voluntary enrollees in State plan managed care programs. Currently, nine States use State plan amendments to require beneficiary enrollment in MCOs and PCCMs. In short, the new State plan option provides State agencies with a new choice of method to require participation in managed care. The ability of States to require enrollment in managed care through their State plans rather than through a waiver would not alter the standards of care practiced by MCOs and health care providers and, therefore, would not change the cost of providing care to managed care enrollees.

Pursuing the State plan amendment option rather than a waiver under section 1915(b) or 1115 of the Act waiver may reduce State administrative costs because it would eliminate the need for States to go through the waiver renewal process. Likewise, we would benefit from a reduced administrative burden if fewer waiver applications and renewals are requested. However, we believe the overall reduction in burden to both States and to Medicare would be small in relation to the overall administrative requirements of the Medicaid program.

D. Elimination of 75/5 Rule

Before the passage of the BBA, nearly all MCOs, and PHPs contracting with Medicaid were required to limit combined Medicare and Medicaid participation to 75 percent of their enrollment, and State agencies had to verify enrollment composition as a contract requirement. Elimination of this rule allows MCOs, PIHPs, and PAHPs to participate without meeting this requirement and eliminates the need for States to monitor enrollment composition in contracting MCOs, PIHPs, and PAHPs. This would broaden the number of MCOs, PIHPs, and PAHPs available to States for contracting, leading to more choice for beneficiaries.

E. Increased Beneficiary Protection—Grievance Procedures

The BBA requires MCOs to establish internal grievance procedures that permit an eligible enrollee, or a provider on behalf of an enrollee, to challenge the denials of medical assistance or denials of payment. Prior to the enactment of the BBA, the regulations at 42 CFR 434.59, required MCOs and PHPs to have an internal grievance procedure. While the regulations have not specified a procedure for MCOs or PIHPs to follow for their grievance process, we believe that these entities have grievance systems that are similar in their processes to the requirements of this proposed regulation. This belief is supported by recent State surveys, such as the survey of 10 States conducted by the National Academy for State Health Policy in 1999, and the survey of 13 States conducted by the American Public Human Services Association in 1997. Therefore, while this regulation would require uniform procedures across MCOs and PIHPs, and would require MCOs and PIHPs to change their procedures to conform to the regulation, the requirements of the proposed regulation would not impose additional requirements on MCOs and PIHPs over what is currently in place.

In the Collection of Information section of this preamble, we assigned 7,917 burden hours to MCOs and PIHPs for the notice requirements of the grievance system, and 1583 hours for the record keeping requirements and summary reports to be prepared by MCOs and PIHPs and submitted to the States. This results in 9,500 total burden hours. Using the mean hourly wage for the health care service sector (the Bureau of Labor Statistics, March 2001) of $16.34, this would result in a total cost to MCOs and PIHPs of $155,230.

F. Provision of Information

In mandatory managed care programs, we have required that beneficiaries be informed of the choices available to them when enrolling with MCOs, PIHPs, PAHPs, and PCCMs. Section 1932(a)(5) of the Act, enacted in section 4701(a)(5) of the BBA, describes the kind of information that must be made available to Medicaid enrollees and potential enrollees. It also requires that this information, and all enrollment notices and instructional materials related to enrollment in MCOs, PIHPs, PAHPs, and PCCMs be in a format that can be easily understood by the individuals to whom it is directed. We do not believe that these requirements deviate substantially from current practice. Furthermore, there is no way to quantify the degree of burden on State agencies, MCOs, PIHPs, PAHPs, and PCCMs for several reasons. We do not have State-specific data on what information States currently provide, or the manner in which they provide it. Variability among States indicates that implementing or continuing enrollee information requirements would represent different degrees of difficulty and expense.

The information requirements for MCOs and PCCMs in the proposed regulation are required under the BBA. In this proposed regulation, however, we extend requirements to PIHPs and PAHPs. We welcome examples of the current experience of PIHPs and PAHPs in providing information to enrollees. This would assist us in more accurately estimating the impact of these provisions.

As a requirement under the provision of information section, State agencies opting to implement mandatory managed care programs under the State plan amendment option are required to provide comparative information on MCOs and PCCMs to potential enrollees. Currently only 9 States have exercised the option to use a State plan amendment to require beneficiary enrollment in managed care. However, for States that do select this option, we do not believe that providing the comparative data in itself represents a burden, as these are elements of information that most States currently provide. The regulation specifies that the information must be presented in a comparative or chart-like form that facilitates comparison among MCOs, and PCCMs. This may be perceived as a burden to States that have previously provided this information in some other manner; however, it is our belief that even in the absence of the regulation, the trend is for States, and many accreditation bodies such as the National Committee for Quality Assurance (NCQA), to use chart-like formats. Consequently, enrollees would benefit from having better information for selecting MCOs, and PCCMs. Only a few States have opted for State plan amendments so far, but it is anticipated that more States will participate over the long term. States that participate in the future will benefit from any comparative tools developed by other States. We state in the Collection of Information section of this preamble that 9 States availed themselves of the State Plan option, and thereby will be required to display information on a comparative chart. We are assuming it will take 4 hours to create a chart, or 36 hours for 9 States. Using the mean hourly wage for State employees (the Bureau of Labor Statistics, March 2001) of $17.05, this would result in total costs to States of $614.

G. Demonstration of Adequate Capacity and Services

The BBA requires Medicaid MCOs to provide the State and the Secretary of HHS with assurances of adequate

capacity and services, including service coverage, within reasonable timeframes. States currently require assurances of adequate capacity and services as part of their existing contractual arrangements with MCOs and PIHPs. However, certification of adequacy has not been routinely provided to us in the past. Under this rule, each State retains its authority to establish standards for adequate capacity and services within MCO and PIHP contracts. This may be perceived as a burden to MCOs and PIHPs, and for States that have not been required to formally certify that an MCO or PIHP meets the States' capacity and service requirements. However, certification to us would ensure an important beneficiary protection while imposing only a minor burden on States to issue a certification to us.

Quantifying the additional burden on States, MCOs, or PIHPs as a result of implementing this regulation is not feasible for several reasons. First, we do not have State-specific data on the types of detailed information States currently require of their MCOs and PIHPs to assure adequate capacity and services. Second, we do not have State-specific information on the manner in which State agencies collect and evaluate documentation in this area. Rather, each State agency has its own documentation requirements and its own procedures to assure adequate capacity and services. This regulation contemplates that States continue to have that flexibility.

Under this regulation, State agencies would determine and specify both the detail and type of documentation to be submitted by the MCO or PIHP to assure adequate capacity and services and the type of certification to be submitted to us. Accordingly, variability among State agencies implementing this regulation represents different degrees of detail and expense. Regardless of the level of additional burden on MCOs, PIHPs, State agencies, and us, Medicaid beneficiaries would receive continued protections in access to health care under both State and Federal statute. For purposes of the Collection of Information section of this preamble, we assume that it would take 20 hours per MCO or PIHP to complete this requirement. For the 462 MCOs and PIHPs, this requirement would take 9,240 hours to complete annually.

H. New Quality Standards

The BBA requires that each State agency have an ongoing quality assessment and improvement strategy for its Medicaid managed care contracting program. The strategy, among other things, must include: (1) Standards for access to care so that covered services are available within reasonable timeframes and in a manner that ensures continuity of care and adequate capacity of primary care and specialized services providers; (2) examination of other aspects of care and service directly related to quality of care, including grievance procedures, marketing, and information standards; (3) procedures for monitoring and evaluating the quality and appropriateness of care and service to enrollees; and (4) regular and periodic examinations of the scope and content of the State's quality strategy.

The provisions of this regulation propose requirements for State quality strategies and requirements for MCOs and PIHPs that States are to incorporate as part of their quality strategy. These MCO and PIHP requirements address: (1) MCO and PIHP structure and operations; (2) Medicaid enrollees' access to care; and (3) MCO and PIHP responsibilities for measuring and improving quality. While these new Medicaid requirements are a significant increase in Medicaid regulatory requirements in comparison to the regulatory requirements that existed before the BBA, we believe the increases are appropriate because many of the requirements are either identical to or consistent with quality requirements placed on MCOs by private sector purchasers, the Medicare program, State licensing agencies, and private sector accreditation organizations. While these new requirements also would have implications for State Medicaid agencies that would be responsible for monitoring for compliance with the new requirements, we believe that a number of recent statutory, regulatory, and private sector developments would enable State Medicaid agencies to more easily monitor for compliance than in the past at potentially less cost to the State. First, the BBA included provisions addressing how States are to fulfill the statutory requirement for an annual, external quality review (EQR) of each Medicaid-contracting MCO and PIHP. (These provisions are addressed in a separate rule). Prior to the BBA, 75 percent Federal financial participation in the cost of these activities was available to States only if the State used a narrowly defined list of entities to perform the quality review. The BBA opened up the possibility for use of a much wider array of entities to perform this function. Further, in our proposed rule to implement these EQR provisions published in the **Federal Register** on December 1, 1999 (64 FR 67223), we specified that the 75 percent Federal match would be available to EQR organizations that performed activities necessary for monitoring compliance with these BBA quality requirements for MCOs and PIHPs. The BBA also provided that States could exercise an option whereby MCOs that were accredited by a private accrediting organization under certain conditions could be determined to meet certain quality requirements specified in this rule, thereby avoiding costs to the State of directly monitoring for compliance with these requirements. In response to this, private accrediting organizations such as the National Committee for Quality Assurance have developed Medicaid accreditation product lines.

In addition, prior to issuance of that proposed rule, we worked closely with State Technical Advisory Groups (TAGs) in developing the managed care quality regulations and standards. Requirements under this proposed regulation build on a variety of initiatives of State Medicaid agencies and us to promote the assessment and improvement of quality in plans contracting with Medicaid, including:

The Quality Improvement System for Managed Care (QISMC), an initiative with State and Federal officials, beneficiary advocates, and the managed care industry to develop a coordinated quality oversight system for Medicare and Medicaid that reduces duplicate or conflicting efforts and emphasizes demonstrable and measurable improvement.

QARI, serving as a foundation to the development of QISMC, highlights the key elements in the Health Care Quality Improvement System (HCQIS), including internal quality assurance programs, State agency monitoring, and Federal oversight. This guidance emphasizes quality standards developed in conjunction with all system participants, such as managed care contractors, State regulators, Medicaid beneficiaries or their representatives, and external review organizations.

Further, we have built on efforts in other sectors in developing these quality requirements in order to capitalize on current activities and trends in the health care industry. For example, many employers and cooperative purchasing groups and some State agencies already require that organizations be accredited by the National Committee on Quality Assurance (NCQA), the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the American Accreditation Healthcare Commission (AAHC), or other independent bodies. Many also require that organizations report their performance using Health Plan Employer Data & Information Set

(HEDIS), Foundation for Accountability (FACCT), or other measures and conduct enrollee surveys using the Consumer Assessment of Health Plans Study (CAHPS) or other instruments. NCQA estimates that more than 90 percent of plans are collecting some or all of HEDIS data for their commercial population. Also, States have heightened their regulatory efforts through insurance or licensing requirements, and the National Association of Insurance Commissioners (NAIC) has developed model acts on network adequacy, quality assessment and improvement, and utilization review.

While we anticipate that many organizations would need to invest in new staff and information systems in order to perform these new quality improvement activities, it is difficult to quantify these financial and operational ''investments,'' as State agencies, MCOs, and PIHPs across the country exhibit varying capabilities in meeting these standards. These new quality requirements would present administrative challenges for some State agencies, MCOs, and PIHPs. However, States have significant latitude in how these requirements would be implemented. Acknowledging that there likely would be some degree of burden on States, MCOs, and PIHPs, we also believe that the long-term benefits of greater accountability and improved quality in care delivery would outweigh the costs of implementing and maintaining these processes over time.

I. Administration

1. Certifications and Program Integrity Protections

Sections 1902(a)(4) and (19) of BBA require that States conduct appropriate processes and methods to ensure the efficient operation of the health plans. This includes mechanisms to not only safeguard against fraud and abuse but also to ensure accurate reporting of data among health plans, States, and us.

Section 438.602 of the proposed regulation addresses the importance of reliable data that are submitted to States and requires MCOs and PIHPs to certify the accuracy of these data to the State. These data include enrollment information, encounter data, or other information that is used for payment determination. Even if States do not use encounter data to set capitation rates for MCOs and PIHPs, these data, along with provider and enrollment data, are useful for States in measuring quality performance and other monitoring of health plans. The provision of the proposed regulation that would require plans to attest to the validity of data presents an additional step in the process of data submission. MCOs and PHPs have historically worked closely with States when reporting Medicaid data in order to affirm that the data are accurate and complete. Submitting a certification of validity of data submitted does not represent a significant burden to health plans.

Section 438.606 would require MCOs and PIHPs to have effective operational capabilities to guard against fraud and abuse. As a result, MCOs and PIHPs would uncover information about possible violations of law that they would be required to report to the State. We do not believe that these would be frequent or large in number and, therefore, would not result in burdens to the MCOs and PIHPs beyond what is usual in the course of business.

2. Change in Threshold from $100,000 to $1 Million

Before the passage of the BBA, the Secretary's prior approval was required for all HMO contracts involving expenditures of $100,000 or more. Under the BBA, the threshold amount is increased to $1 million. This change in threshold would have minimal impact on plans currently contracting with State agencies for Medicaid managed care. Currently, only one or two plans in the country have annual Medicaid expenditures of under $1 million. Therefore, this proposed provision would not affect a significant number of plans or States.

J. Permitting Same Copayments in Managed Care as in FFP

Under section 4708(c) of the BBA, States may now allow copayments for services provided by MCOs to the same extent that they allow copayments under fee-for-service. Imposition of copayments in commercial markets typically results in lower utilization of medical services, depending on the magnitude of payments required of the enrollee. Thus, we would normally expect State agencies that implement copayments for MCO enrollees to achieve some savings. However, applying copayments to Medicaid enrollees may cause States and MCOs to incur administrative costs that more than offset these savings. This is due to several factors. First, the amount of copayments allowed by statute are significantly lower than typical commercial copayments. Second, it is difficult to ensure compliance with these payments, especially given that the enrollees have limited income. Third, to achieve maximum compliance, collection efforts would be necessary on the part of MCOs or PHPs. It is also possible that, if State agencies take advantage of this option, Medicaid managed care enrollees may defer receipt of health care services, their health conditions may deteriorate, and the costs of medical treatment may be greater over the long term. For these reasons, it is difficult to predict how many States would take advantage of this option or of the net costs or savings that would result.

K. Six-Month Guaranteed Eligibility

The legislation expanded the States' option to guarantee up to 6 months eligibility in two ways. First, it expands the types of MCOs whose members may have guaranteed eligibility, in that it now includes anyone who is enrolled with a Medicaid managed care organization as defined in section 1903(m)(1)(A) of the Act. Second, it expands the option to include those enrolled with a PCCM as defined in section 1905(t) of the Act. These changes were effective October 1, 1997. To the extent that State agencies choose this option, we expect MCOs, PIHPs, PAHPs, and PCCMs in those States to support the use of this provision since it affords health plans with assurance of membership for a specified period of time. Likewise, beneficiaries would gain from this coverage expansion, and continuity of care would be enhanced. The table below displays our estimates of the impact of the expanded option for 6 months of guaranteed eligibility under section 4709 of the BBA.

COST OF 6-MONTH GUARANTEED ELIGIBILITY OPTION

[Dollars in millions rounded to the nearest $5 million]

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Federal	55	80	115	165	230
State	45	60	90	125	175

COST OF 6-MONTH GUARANTEED ELIGIBILITY OPTION—Continued

[Dollars in millions rounded to the nearest $5 million]

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Total	100	140	205	290	405

Because this provision was effective shortly after enactment of the BBA, the estimates of Federal costs have been reflected in our Medicaid budget since FY 1998. The estimates assume that half of the current Medicaid population is enrolled in managed care and that this proportion would increase to about two-thirds by 2003. We also assume that 15 percent of managed care enrollees were covered by guaranteed eligibility under rules in effect prior to enactment of the BBA and that the effect of the expanded option under section 4709 of the BBA would be to increase this rate to 20 percent initially and to 30 percent by 2003. The guaranteed eligibility provision is assumed to increase average enrollment by 3 percent in populations covered by the option. This assumption is based on computer simulations of enrollment and turnover in the Medicaid program. Per capita costs used for the estimate were taken from the President's FY 1999 budget projections and the costs for children take into account the interaction of this provision with the State option for 12 months of continuous eligibility under section 4731 of the BBA. The distribution between Federal and State costs is based on the average Federal share representing 57 percent of the total costs.

In States electing the 6-month guaranteed eligibility option, Medicaid beneficiaries would have access to increased continuity of care, which should result in better health care management and improved clinical outcomes.

L. Financial Impact of Revised Rules for Setting Capitation Payments

This rule proposes to replace the current UPL requirement at 447.361 with new rate-setting rules incorporating an expanded requirement for actuarial soundness of capitation rates as described in detail in proposed 438.6(c). In general, we would not expect a major budget impact from the use of these proposed rate setting rules. While the rate setting rules may provide some states additional flexibility in setting higher capitation rates than what would have been allowed under current rules, we believe that the requirements for actuarial certification of rates, along with budgetary considerations by state policy makers, would serve to limit increases to within reasonable amounts. Moreover, the Secretary would retain the authority to look behind rates that appear questionable and disapprove any that did not comply with the proposed rate setting requirements.

M. Costs to States and Providers of Provisions Assigned Burden Hours

The preceding section on Collection of Information Requirements includes estimates of the number of hours it will take States, providers, and enrollees to provide information required under this regulation. For States, the total hours are estimated to be 42,342,191. To estimate the cost impact of these requirements on States, we assume the total cost of these requirements to be the sum of the estimated hours times the mean hourly wage for State employees of $17.05 (the Bureau of Labor Statistics, March, 2001), or $21,171,095. Because the Federal government shares the general administrative costs of the Medicaid program with the States, we estimate the total cost of these requirements to States to be approximately $10.5 million annually.

For MCOs, PIHPs, PAHPs, and PCCMs, we estimate that the Collection and Information Requirements will take 761,217 hours annually to complete. To estimate the cost impact of these requirements on providers, we multiplied these hours by the mean hourly wage for health care service workers of $16.34 (the Bureau of Labor Statistics, March, 2001) to estimate the cost of these requirements to be approximately $12.5 million.

N. Administrative Costs

This proposed regulation would require States to include certain specifications in their contracts with MCOs, PIHPs, PAHPs, and PCCMs and to monitor compliance with those contract provisions. It also requires States to take a proactive role in monitoring the quality of their managed care program. These requirements would add some administrative burden and costs to States. The amount of additional administrative cost would vary by State depending on how inclusive current practice is of the new requirements. In addition, for those States not using like requirements at present, we believe that most would be adopting similar requirements on their own in the future absent this proposed regulation.

The proposed regulation would also increase Federal responsibilities for monitoring State performance in managing their managed care programs. However, no new Federal costs are expected as we plan to use existing staff to monitor these new requirements.

O. Alternatives Considered

We considered allowing the January 19, 2001 final rule with comment to become effective as published, after the two 60-day delays in effective date for Department review. However, the serious concerns raised by some key stakeholders, especially regarding changes made to the final rule that had not been included in the proposed rule, led us to decide to develop a new proposed rule.

P. Conclusion

This BBA managed care proposed regulation would affect States, MCOs, PIHPs, PAHPs, PCCMs, providers, beneficiaries, and us in different ways. The initial investments that are needed by State agencies and MCOs, PIHPs, PAHPs, and PCCMs would result in improved and more consistent standards for the delivery of health care to Medicaid beneficiaries. Greater consumer safeguards would result from new quality improvement and protection provisions. Consequently, long term savings would derive from more consistent standards across States, MCOs, PIHPs, PAHPs, and PCCMs and increased opportunities for provider and beneficiary involvement in improved access, outcomes, and satisfaction.

Q. Federalism

Under Executive Order 13132, we are required to adhere to certain criteria regarding Federalism in developing regulations. We have determined that this proposed rule would not significantly affect States rights, roles, and responsibilities. This regulation, when published in final, would supersede existing State laws regulating managed care, unless State laws are more restrictive.

The BBA requires States that contract with organizations under section 1903(m) of the Act to have certain

beneficiary protections in place when mandating managed care enrollment. This rule proposes to implement those BBA provisions in accordance with the Administrative Procedure Act. This rule also proposes to eliminate certain requirements viewed by States as impediments to the growth of managed care programs, such as disenrollment without cause at any time and the inability to require enrollment in managed care without a waiver. We also propose to apply many of these requirements to prepaid health plans that provide for inpatient hospital and institutional services. We believe this is consistent with the intent of the Congress in enacting the quality and beneficiary protection provisions of the BBA. We worked with States in developing this proposed regulation. In 1997–1998, when we were developing the original proposed rule, we consulted with State Medicaid agency representatives in order to understand the potential impacts of the provisions of the regulations then being considered. In November, 1997 we met with the Executive Board of the National Association of State Medicaid Directors (NASMD) and discussed the process for providing initial guidance to States about the Medicaid provisions of the BBA. We provided this guidance in a series of over 50 letters to State Medicaid Directors. Much of the policy included in this proposed regulation relating to the State plan option provision was included in these letters. In May 1998, we briefed the Executive Committee of NASMD on the general content of the proposed regulation. More specific State input was obtained through discussions throughout the Spring of 1998 with the Medicaid Technical Advisory Groups (TAGs) on Managed Care and Quality. These groups are comprised of Medicaid agency staff with notable expertise in the subject area and our regional office staff and are staffed by the American Public Human Services Association. The Managed Care TAG devoted much of its agenda for several monthly meetings to BBA issues. The Quality TAG participated in two conference calls exclusively devoted to discussion of BBA quality issues. Through these contacts, we explored with State agencies their preferences regarding policy issues and the feasibility and practicality of implementing policy under consideration. We also invited public comments as part of the rulemaking process and received comments from over 300 individuals and organizations. Most of the commenters had substantial comments that addressed many provisions of the regulation.

Following publication of the final rule on January 19, 2001, the new Administration delayed the effective date of the rule to provide it an opportunity to conduct its own review of the regulation. Following the announcement of the delay, we received additional comments from the APHSA, individual States, provider organizations, and advocates for beneficiaries. We considered those comments when developing this proposed rule. To provide an opportunity for comment by the public, we are now soliciting comments on this proposed rule. We will consider and respond to all comments received in the preamble to the final rule.

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

List of Subjects

42 CFR Part 400

Grant programs-health, Health facilities, Health maintenance organizations (HMO), Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 430

Administrative practice and procedure, Grant programs-health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 434

Grant programs-health, Health maintenance organizations (HMO), Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs-health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 438

Grant programs-health, Managed care entities, Medicaid, Quality assurance, Reporting and recordkeeping requirements.

42 CFR Part 440

Grant programs-health, Medicaid.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

For the reasons set forth in the preamble, 42 CFR Chapter IV is proposed to be amended as set forth below:

PART 400—INTRODUCTION; DEFINITIONS

1. The authority citation for part 400 continues to read as follows:

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

2. In § 400.203, the following definitions for ''PCCM'' and ''PCP'' are added, in alphabetical order, and the definition of ''provider'' is revised to read as follows:

§ 400.203 Definitions specific to Medicaid.

* * * * *

PCCM stands for primary care case manager.

PCP stands for primary care physician.

Provider means either of the following:

(1) For the fee-for-service program, any individual or entity furnishing Medicaid services under an agreement with the Medicaid agency.

(2) For the managed care program, any individual or entity that is engaged in the delivery of health care services and is legally authorized to do so by the State in which it delivers the services.

* * * * *

PART 430—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

1. The authority citation for part 430 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. New § 430.5 is added to read as follows:

§ 430.5 Definitions.

As used in this subchapter, unless the context indicates otherwise—

Contractor means any entity that contracts with the State agency, under the State plan and in return for a payment, to process claims, to provide or pay for medical services, or to enhance the State agency's capability for effective administration of the program.

Representative has the meaning given the term by each State consistent with its laws, regulations, and policies.

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 431.51 [Amended]

2. In § 431.51, the following changes are made:

a. In paragraph (a) introductory text, the phrase ''and 1915(a) and (b) of the Act'' is revised to read ''1915(a) and (b) and 1932(a)(3) of the Act.''

b. Paragraphs (a)(4) and (a)(5) are revised and a new paragraph (a)(6) is added, to read as set forth below.

c. In paragraph (b)(1) introductory text, ''and part 438 of this chapter'' is added immediately before the comma that follows ''this section''.

d. In paragraph (b)(2), ''an HMO'' is revised to read ''a Medicaid MCO''.

§ 431.51 Free choice of providers.

(a) *Statutory basis.* * * *

(4) Section 1902(a)(23) of the Act provides that a recipient enrolled in a primary care case management system or Medicaid managed care organization (MCO) may not be denied freedom of choice of qualified providers of family planning services.

(5) Section 1902(e)(2) of the Act provides that an enrollee who, while completing a minimum enrollment period, is deemed eligible only for services furnished by or through the MCO or PCCM, may, as an exception to the deemed limitation, seek family planning services from any qualified provider.

(6) Section 1932(a) of the Act permits a State to restrict the freedom of choice required by section 1902(a)(23), under specified circumstances, for all services except family planning services.

* * * * *

§ 431.55 [Amended]

3. In § 431.55, a sentence is added at the end of paragraph (c)(1)(i), to read as follows:

§ 431.55 Waiver of other Medicaid requirements.

* * * * *

(c) * * *

(1) * * *

(i) * * * The person or agency must comply with the requirements set forth in part 438 of this chapter for primary care case management contracts and systems.

* * * * *

4. Section 431.200 is revised to read as follows:

§ 431.200 Basis and scope.

This subpart—

(a) Implements section 1902(a)(3) of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly;

(b) Prescribes procedures for an opportunity for hearing if the State agency takes action to suspend, terminate, or reduce services, or an MCO or PIHP takes action under subpart F of part 438 of this chapter; and

(c) Implements sections 1919(f)(3) and 1919(e)(7)(F) of the Act by providing an appeals process for any person who—

(1) Is subject to a proposed transfer or discharge from a nursing facility; or

(2) Is adversely affected by the pre-admission screening or the annual resident review that are required by section 1919(e)(7) of the Act.

5. In § 431.201, the following definition is added in alphabetical order:

§ 431.201 Definitions.

* * * * *

Service authorization request means a managed care enrollee's request for the provision of a service.

* * * * *

6. In § 431.220, the introductory text of paragraph (a) is revised, the semicolons after paragraphs (a)(1), (a)(2), and (a)(3) and the ''and'' after the third semicolon are removed and periods are inserted in their place, and a new paragraph (a)(5) is added, to read as follows:

§ 431.220 When a hearing is required.

(a) The State agency must grant an opportunity for a hearing to the following:

* * *

(5) Any MCO or PIHP enrollee who is entitled to a hearing under subpart F of part 438 of this chapter.

7. In § 431.244, paragraph (f) is revised to read as follows:

§ 431.244 Hearing decisions.

* * * * *

(f) The agency must take final administrative action as follows:

(1) Ordinarily, within 90 days from the earlier of the following:

(i) The date the enrollee files an MCO or PIHP appeal.

(ii) The date the enrollee files a request for State fair hearing.

(2) As expeditiously as the enrollee's health condition requires, but no later than 72 hours after the agency receives, from the MCO or PIHP, the case file and information for any appeal of a denial of a service that, as indicated by the MCO or PIHP—

(i) Meets the criteria for expedited resolution as set forth in § 438.410(c)(2) of this chapter, but was not resolved within the timeframe for expedited resolution; or

(ii) Was resolved within the timeframe for expedited resolution, but reached a decision wholly or partially adverse to the enrollee.

(3) As expeditiously as the enrollee's health condition requires, but no later than 72 hours after the agency receives, directly from an MCO or PIHP enrollee, a fair hearing request on a decision to deny a service that it determines meets the criteria for expedited resolution, as set forth in § 438.410(a) of this chapter.

* * * * *

PART 434—CONTRACTS

1. The authority citation for part 434 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 434.1 [Amended]

2. In § 434.1, paragraph (a) is revised to read as follows:

§ 434.1 Basis and scope.

(a) *Statutory basis.* This part is based on section 1902(a)(4) of the Act, which requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

* * * * *

§ 434.2 [Amended]

3. In § 434.2, the definitions of ''capitation fee'', ''clinical laboratory'', ''contractor'', ''enrolled recipient'', ''Federally qualified HMO'', ''health insuring organization'', ''Health maintenance organization (HMO)'', ''nonrisk'', ''Prepaid health plan (PHP) ''provisional status HMO'', and ''risk or underwriting risk'' are removed.

§ 434.6 [Amended]

4. In paragraph (a)(1), the term, ''appendix G'' is removed.

Subpart C [Removed]

5. Subpart C, consisting of §§ 434.20 through 434.38, is removed and reserved.

Subpart D [Amended]

6. In subpart D, §§ 434.42 and 434.44 are removed.

Subpart E [Removed]

7. Subpart E, consisting of §§ 434.50 through 434.67, is removed and reserved.

§ 434.70 [Revised]

8. Section 434.70 is revised to read as follows:

§ 434.70 Conditions for Federal financial participation (FFP).

(a) *Basic requirements.* FFP is available only for periods during which the contract—

(1) Meets the requirements of this part;

(2) Meets the applicable requirements of 45 CFR part 74; and

(3) Is in effect.

(b) *Basis for withholding.* CMS may withhold FFP for any period during which—

(1) The State fails to meet the State plan requirements of this part; or

(2) Either party substantially fails to carry out the terms of the contract.

§§ 434.71 through 434.75 and 434.80 [Removed]

9. Sections 434.71 through 434.75, and 434.80 are removed.

PART 435—ELIGIBILITY IN THE STATES, THE DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

1. The authority citation for part 435 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 435.212 [Amended]

2. In § 435.212, the following changes are made.

a. Throughout the section, ''HMO'', wherever it appears, is revised to read ''MCO''.

b. The section heading and the introductory text is revised to read as follows:

§ 435.212 Individuals who would be ineligible if they were not enrolled in an MCO or PCCM .

The State agency may provide that a recipient who is enrolled in an MCO or PCCM and who becomes ineligible for Medicaid is considered to continue to be eligible—

* * * * *

3. Section 435.326 is revised to read as follows:

§ 435.326 Individuals who would be ineligible if they were not enrolled in an MCO or PCCM.

If the agency provides Medicaid to the categorically needy under § 435.212, it may provide it under the same rules to medically needy recipients who are enrolled in MCOs or PCCMs.

§ 435.1002 [Amended]

4. In § 435.1002, in paragraph (a), ''§§ 435.1007 and 435.1008'' is revised to read ''§§ 435.1007, 435.1008, and 438.814 of this chapter.''

5. A new part 438 is added to chapter IV to read as follows:

PART 438—MANAGED CARE

Subpart A—General Provisions

Sec.
438.1 Basis and scope.
438.2 Definitions.
438.6 Contract requirements.
438.8 Provisions that apply to PIHPs and PAHPs.
438.10 Information requirements.
438.12 Provider discrimination prohibited.

Subpart B—State Responsibilities

438.50 State Plan requirements.
438.52 Choice of MCOs, PIHPs, PAHPs, and PCCMs.
438.56 Disenrollment: Requirements and limitations
438.58 Conflict of interest safeguards.
438.60 Limit on payment to other providers.
438.62 Continued services to recipients.
438.66 Monitoring procedures.

Subpart C—Enrollee Rights and Protections

438.100 Enrollee rights.
438.102 Provider-enrollee communications.
438.104 Marketing activities.
438.106 Liability for payment.
438.108 Cost sharing.
438.114 Emergency and post-stabilization services.
438.116 Solvency standards.

Subpart D—Quality Assessment and Performance Improvement

438.200 Scope.
438.202 State responsibilities.
438.204 Elements of State quality strategies.

Access Standards

438.206 Availability of services.
438.207 Assurances of adequate capacity and services.
438.208 Coordination and continuity of care.
438.210 Coverage and authorization of services.

Structure and Operation Standards

438.214 Provider selection.
438.218 Enrollee information.
438.224 Confidentiality.
438.226 Enrollment and disenrollment.
438.228 Grievance systems.
438.230 Subcontractual relationships and delegation.

Measurement and Improvement Standards

438.236 Practice guidelines.
438.240 Quality assessment and performance improvement program.
438.242 Health information systems.

Subpart E—[Reserved]

Subpart F—Grievance System

438.400 Statutory basis and definitions.
438.402 General requirements.
438.404 Notice of action.
438.406 Handling of grievances and appeals.
438.408 Resolution and notification: Grievances and appeals.
438.410 Expedited resolution of appeals.
438.414 Information about the grievance system to providers and subcontractors.
438.416 Recordkeeping and reporting requirements.
438.420 Continuation of benefits while the MCO or PIHP appeal and the State Fair Hearing are pending.
438.424 Effectuation of reversed appeal resolutions.

Subpart G—[Reserved]

Subpart H—Certifications and Program Integrity

438.600 Statutory basis.
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Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—General Provisions

§ 438.1 Basis and scope.

(a) *Statutory basis.* This part is based on sections 1902(a)(4), 1903(m), 1905(t), and 1932 of the Act.

(1) Section 1902(a)(4) requires that States provide for methods of administration that the Secretary finds necessary for proper and efficient operation of the State plan. The application of the requirements of this part to PIHPs and PAHPs that do not meet the statutory definition of an MCO or a PCCM is under the authority in section 1902(a)(4).

(2) Section 1903(m) contains requirements that apply to comprehensive risk contracts.

(3) Section 1903(m)(2)(H) provides that an enrollee who loses Medicaid eligibility for not more than 2 months may be enrolled in the succeeding month in the same MCO or PCCM if that MCO or PCCM still has a contract with the State.

(4) Section 1905(t) contains requirements that apply to PCCMs.

(5) Section 1932—

(i) Provides that, with specified exceptions, a State may require Medicaid recipients to enroll in MCOs or PCCMs;

(ii) Establishes the rules that MCOs, PCCMs , the State, and the contracts between the State and those entities must meet, including compliance with requirements in sections 1903(m) and 1905(t) of the Act that are implemented in this part;

(iii) Establishes protections for enrollees of MCOs and PCCMs ;

(iv) Requires States to develop a quality assessment and performance improvement strategy;

(v) Specifies certain prohibitions aimed at the prevention of fraud and abuse;

(vi) Provides that a State may not enter into contracts with MCOs unless it has established intermediate sanctions that it may impose on an MCO that fails to comply with specified requirements; and

(vii) Makes other minor changes in the Medicaid program.

(b) *Scope.* This part sets forth requirements, prohibitions, and procedures for the provision of Medicaid services through MCOs, PIHPs and PAHPs, and PCCMs. Requirements vary depending on the type of entity and on the authority under which the State contracts with the entity. Provisions that apply only when the contract is under a mandatory managed care program authorized by section 1932(a)(1)(A) of the Act are identified as such.

§ 438.2 Definitions.

As used in this part—

Capitation payment means a payment the State agency makes periodically to a contractor on behalf of each recipient enrolled under a contract for the provision of medical services under the State plan. The State agency makes the payment regardless of whether the particular recipient receives services during the period covered by the payment.

Comprehensive risk contract means a risk contract that covers comprehensive services, that is, inpatient hospital services and any of the following services, or any three or more of the following services:

(1) Outpatient hospital services.

(2) Rural health clinic services.

(3) FQHC services.

(4) Other laboratory and X-ray services.

(5) Nursing facility (NF) services.

(6) Early and periodic screening diagnostic, and treatment (EPSDT) services.

(7) Family planning services.

(8) Physician services.

(9) Home health services.

Federally qualified HMO means an HMO that CMS has determined is a qualified HMO under section 1310(d) of the PHS Act.

Health insuring organization (HIO) means an entity that in exchange for capitation payments, covers services for recipients—

(1) Through payments to, or arrangements with, providers; and

(2) Under a risk contract with the State.

Managed care organization (MCO) means an entity that has, or is seeking to qualify for, a comprehensive risk contract under this part, and that is—

(1) A Federally qualified HMO that meets the advance directives requirements of subpart I of part 489 of this chapter; or

(2) Any public or private entity that meets the advance directives requirements and is determined to also meet the following conditions:

(i) Makes the services it provides to its Medicaid enrollees as accessible (in terms of timeliness, amount, duration, and scope) as those services are to other Medicaid recipients within the area served by the entity.

(ii) Meets the solvency standards of § 438.116.

Nonrisk contract means a contract under which the contractor—

(1) Is not at financial risk for changes in utilization or for costs incurred under the contract that do not exceed the upper payment limits specified in § 447.362 of this chapter; and

(2) May be reimbursed by the State at the end of the contract period on the basis of the incurred costs, subject to the specified limits.

Prepaid ambulatory health plan (PAHP) means an entity that—

(1) Provides medical services to enrollees under contract with the State agency, and on the basis of prepaid capitation payments, or other payment arrangements that do not use State plan payment rates;

(2) Does not provide or arrange for, and is not otherwise responsible for the provision of any inpatient hospital or institutional services for its enrollees; and

(3) Does not have a comprehensive risk contract.

Prepaid inpatient health plan (PIHP) means an entity that—

(1) Provides medical services to enrollees under contract with the State agency, and on the basis of prepaid capitation payments, or other payment arrangements that do not use State plan payment rates;

(2) Provides, arranges for, or otherwise has responsibility for the provision of any inpatient hospital or institutional services for its enrollees; and

(3) Does not have a comprehensive risk contract.

Primary care means all health care services and laboratory services customarily furnished by or through a general practitioner, family physician, internal medicine physician, obstetrician/gynecologist, or pediatrician, to the extent the furnishing of those services is legally authorized in the State in which the practitioner furnishes them.

Primary care case management means a system under which a PCCM contracts with the State to furnish case management services (which include the location, coordination and monitoring of primary health care services) to Medicaid recipients.

Primary care case manager (PCCM) means a physician, a physician group practice, an entity that employs or arranges with physicians to furnish primary care case management services or, at State option, any of the following:

(1) A physician assistant.

(2) A nurse practitioner.

(3) A certified nurse-midwife.

Risk contract means a contract under which the contractor—

(1) Assumes risk for the cost of the services covered under the contract; and

(2) Incurs loss if the cost of furnishing the services exceeds the payments under the contract.

§ 438.6 Contract requirements.

(a) *Regional office review.* The CMS Regional Office must review and approve all MCO, PIHP, and PAHP contracts, including those risk and nonrisk contracts that, on the basis of their value, are not subject to the prior approval requirement in § 438.806.

(b) *Entities eligible for comprehensive risk contracts.* A State agency may enter into a comprehensive risk contract only with one of the following:

(1) An MCO.

(2) The entities identified in section 1903(m)(2)(B)(i), (ii), and (iii) of the Act.

(3) Community, Migrant, and Appalachian Health Centers identified in section 1903(m)(2)(G) of the Act. Unless they qualify for a total exemption under section 1903(m)(2)(B)

of the Act, these entities are subject to the regulations governing MCOs under this part.

(4) An HIO that arranges for services and became operational before January 1986.

(5) An HIO described in section 9517(c)(3) of the Omnibus Budget Reconciliation Act of 1985 (as added by section 4734(2) of the Omnibus Budget Reconciliation Act of 1990).

(c) *Payments under risk contracts*—(1) *Terminology.* As used in this paragraph, the following terms have the indicated meanings:

(i) *Actuarially sound capitation rates* means capitation rates that—

(A) Have been developed in accordance with generally accepted actuarial principles and practices;

(B) Are appropriate for the populations to be covered, and the services to be furnished under the contract; and

(C) Have been certified, as meeting the requirements of this paragraph (c), by actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board.

(ii) *Adjustments to smooth data* means adjustments made, by cost-neutral methods, across rate cells, to compensate for distortions in costs, utilization, or the number of eligibles.

(2) *Basic requirements.* (i) All capitation rates paid under risk contracts and all risk-sharing mechanisms in contracts must be actuarially sound.

(ii) The contract must specify the payment rates and any risk-sharing mechanisms, and the actuarial basis for computation of those rates and mechanisms.

(3) *Requirements for actuarially sound rates.* In setting actuarially sound capitation rates, the State must apply the following elements, or explain why they are not applicable:

(i) Base utilization and cost data that are derived from the Medicaid population, or if not, are adjusted to make them comparable to the Medicaid population.

(ii) Adjustments made to smooth data and adjustments to account for factors such as inflation, an MCO, PIHP, or PAHP administration (subject to the limits in paragraph (c)(4)(ii) of this section), and utilization;

(iii) Rate cells specific to the enrolled population, by:

(A) Eligibility category;

(B) Age;

(C) Gender;

(D) Locality/region; and

(E) Risk adjustments based on diagnosis or health status (if used).

(iv) Other payment mechanisms and utilization and cost assumptions that are appropriate for individuals with chronic illness, disability, ongoing health care needs, or catastrophic claims, using risk adjustment, risk sharing, or other appropriate cost-neutral methods.

(4) *Documentation.* The State must provide the following documentation:

(i) The actuarial certification of the capitation rates.

(ii) An assurance (in accordance with paragraph (c)(3) of this section) that all payment rates are based only upon services covered under the State plan and to be provided under the contract to Medicaid-eligible individuals.

(iii) Its projection of expenditures under its previous year's contract (or under its FFS program if it did not have a contract in the previous year) compared to those projected under the proposed contract.

(iv) An explanation of any incentive arrangements, or stop-loss, reinsurance, or any other risk-sharing methodologies under the contract.

(5) *Special contract provisions.* (i) Contract provisions for reinsurance, stop-loss limits or other risk-sharing methodologies (other than risk corridors) must be computed on an actuarially sound basis.

(ii) If risk corridors or incentive arrangements result in payments that exceed the approved capitation rates, the FFP limitation of § 438.814 applies.

(iii) For all incentive arrangements, the contract must provide that the arrangement is—

(A) For a fixed period of time;

(B) Not to be renewed automatically;

(C) Designed to include withholds or other payment penalties if the contractor does not perform the specified activities or does not meet the specified targets;

(D) Made available to both public and private contractors;

(E) Not conditioned on intergovernmental transfer agreements; and

(F) Necessary for the specified activities and targets.

(d) *Enrollment discrimination prohibited.* Contracts with MCOs, PIHPs and PAHPs, and PCCMs must provide as follows:

(1) The MCO, PIHP, PAHP, or PCCM accepts individuals eligible for enrollment in the order in which they apply without restriction (unless authorized by the Regional Administrator), up to the limits set under the contract.

(2) Enrollment is voluntary, except in the case of mandatory enrollment programs that meet the conditions set forth in § 438.50(a).

(3) The MCO, PIHP, PAHP, or PCCM will not, on the basis of health status or need for health care services, discriminate against individuals eligible to enroll.

(4) The MCO, PIHP, PAHP, or PCCM will not discriminate against individuals eligible to enroll on the basis of race, color, or national origin, and will not use any policy or practice that has the effect of discriminating on the basis of race, color, or national origin.

(e) *Services that may be covered.* An MCO, PIHP, or PAHP, contract may cover, for enrollees, services that are in addition to those covered under the State plan.

(f) *Compliance with contracting rules.* All contracts under this subpart must:

(1) Comply with all applicable Federal and State laws and regulations including Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972 (regarding education programs and activities); the Age Discrimination Act of 1975; the Rehabilitation Act of 1973; and the Americans with Disabilities Act; and

(2) Meet all the requirements of this section.

(g) *Inspection and audit of financial records.* Risk contracts must provide that the State agency and the Department may inspect and audit any financial records of the entity or its subcontractors.

(h) *Physician incentive plans.* (1) MCO, PIHP, and PAHP contracts must provide for compliance with the requirements set forth in §§ 422.208 and 422.210 of this chapter.

(2) In applying the provisions of §§ 422.208 and 422.210, references to ''M+C organization'', ''CMS'', and ''Medicare beneficiaries'' must be read as references to ''MCO, PIHP, or PAHP'', ''State agency'' and ''Medicaid recipients'', respectively.

(i) *Advance directives.* (1) All MCO and PIHP contracts must provide for compliance with the requirements of § 422.128 of this chapter for maintaining written policies and procedures for advance directives.

(2) The MCO or PIHP must provide adult enrollees with written information on advance directives policies, and include a description of applicable State law.

(3) The information must reflect changes in State law as soon as possible, but no later than 90 days after the effective date of the change.

(j) *Special rules for certain HIOs.* Contracts with HIOs that began operating on or after January 1, 1986, and that the statute does not explicitly exempt from requirements in section

1903(m) of the Act are subject to all the requirements of this part that apply to MCOs and contracts with MCOs. These HIOs may enter into comprehensive risk contracts only if they meet the criteria of paragraph (a) of this section.

(k) *Additional rules for contracts with PCCMs.* A PCCM contract must meet the following requirements:

(1) Provide for reasonable and adequate hours of operation, including 24-hour availability of information, referral, and treatment for emergency medical conditions.

(2) Restrict enrollment to recipients who reside sufficiently near one of the manager's delivery sites to reach that site within a reasonable time using available and affordable modes of transportation.

(3) Provide for arrangements with, or referrals to, sufficient numbers of physicians and other practitioners to ensure that services under the contract can be furnished to enrollees promptly and without compromise to quality of care.

(4) Prohibit discrimination in enrollment, disenrollment, and re-enrollment, based on the recipient's health status or need for health care services.

(5) Provide that enrollees have the right to disenroll from their PCCM in accordance with § 438.56.

(l) *Subcontracts.* All subcontracts must fulfill the requirements of this part that are appropriate to the service or activity delegated under the subcontract.

(m) *Choice of health professional.* The contract must allow each enrollee to choose his or her health professional in the MCO to the extent possible and appropriate.

§ 438.8 Provisions that apply to PIHPs and PAHPs.

(a) The following requirements and options apply to PIHPs, PIHP contracts, and States with respect to PIHPs, to the same extent that they apply to MCOs, MCO contracts, and States for MCOs.

(1) The contract requirements of § 438.6, except for requirements that pertain to HIOs.

(2) The information requirements in § 438.10.

(3) The provision against provider discrimination in § 438.12.

(4) The State responsibility provisions of subpart B except § 438.50.

(5) The enrollee rights and protection provisions in subpart C of this part.

(6) The quality assessment and performance improvement provisions in subpart D of this part to the extent that they are applicable to services furnished by the PIHP.

(7) The grievance system provisions in subpart F of this part.

(8) The certification and program integrity protection provisions set forth in subpart H of this part.

(b) The following requirements and options apply to PAHPs, PAHP contracts, and States for PAHPs.

(1) The contract requirements of § 438.6, except for requirements for advance directives and those that pertain to HIOs.

(2) Designated portions of the information requirements in § 438.10.

(3) The provision against provider discrimination in § 438.12.

(4) The State responsibility provisions of subpart B except § 438.50.

(5) Designated portions of subpart C on enrollee rights and protections.

(6) Section 438.206(a) on availability of services.

§ 438.10 Information requirements.

(a) Terminology. As used in this section, the following terms have the indicated meanings:

Potential enrollee means a Medicaid recipient who is subject to mandatory enrollment or may voluntarily elect to enroll in a given managed care program, but is not yet an enrollee of a specific in a MCO, PIHP, PAHP, or PCCM.

Enrollee means a Medicaid recipient who is currently enrolled in an MCO, PIHP, PAHP, or PCCM in a given managed care program.

(b) Basic rule. Each State, enrollment broker, MCO, PIHP, PAHP, and PCCM must provide all enrollment notices, informational materials, and instructional materials relating to enrollees and potential enrollees in a manner and format that may be easily understood.

(c) Language. The State must:

(1) Establish a methodology for identifying the prevalent non-English languages spoken by enrollees and potential enrollees throughout the State. ''Prevalent'' means a non-English language spoken by a significant number or percentage of potential enrollees and enrollees in the State.

(2) Provide written information in each prevalent non-English language.

(3) Require each MCO, PIHP, PAHP, and PCCM to make its written information available in the prevalent non-English languages in its particular service area.

(4) Make oral interpretation services available and require each MCO, PIHP, PAHP, and PCCM to make those services available free of charge to the each potential enrollee and enrollee. This applies to all non-English languages, not just those that the State identifies as prevalent.

(5) Notify enrollees and potential enrollees, and require each MCO, PIHP, PAHP, and PCCM to notify its enrollees—

(i) That oral interpretation is available for any language and written information is available in prevalent languages; and

(ii) How to access those services.

(d) Format. (1) Written material must—

(i) Use easily understood language and format;

(ii) Be available in alternative formats and in an appropriate manner that takes into consideration the special needs of those who, for example, are visually limited or have limited reading proficiency.

(2) All enrollees and potential enrollees must be informed that information is available in alternative formats and how to access those formats.

(e) Information for potential enrollees. (1) The State or its contracted representative must provide the information specified in paragraph (e)(2) of this section to each potential enrollee as follows:

(i) At the time the potential enrollee first becomes eligible to enroll in a voluntary program, or is first required to enroll in a mandatory enrollment program; and

(ii) Within a timeframe that enables the potential enrollee to use the information in choosing among available MCOs, PIHP, PAHPs, or PCCMs.

(2) The information for potential enrollees must include the following:

(i) General information about—

(A) The basic features of managed care;

(B) Which populations are excluded from enrollment, subject to mandatory enrollment, or free to enroll voluntarily in the program; and

(C) MCO, PIHP, PAHP, and PCCM responsibilities for coordination of enrollee care;

(ii) Information specific to each MCO, PIHP, PAHP, or PCCM program operating in potential enrollee's service area. A summary of the following information is sufficient, but the State must provide more detailed information upon request:

(A) Benefits covered;

(B) Cost sharing, if any;

(C) Service area;

(D) Names, locations, telephone numbers of, and non-English language spoken by current contracted providers, and including identification of providers that are not accepting new patients. For MCOs, PIHPs, and PAHPs, this includes at a minimum information

on primary care physicians, specialists, and hospitals.

(E) Benefits that are available under the State plan but are not covered under the contract, including how and where the enrollee may obtain those benefits, any cost sharing, and how transportation is provided. For a counseling or referral service that the MCO, PIHP, PAHP, or PCCM does not cover because of moral or religious objections, the State must furnish information about where and how to obtain the service.

(f) *General Information for all enrollees of MCOs, PIHPs, PAHPs, and PCCMs.* Information must be made available to MCO, PIHP, PAHP, and PCCM enrollees as follows:

(1) The State must notify all enrollees of their disenrollment rights at least annually, and no less than 60 days before the start of each enrollment period.

(2) The State, its contracted representative, or the MCO, PIHP, PAHP, or PCCM must notify all enrollees of their right to request and obtain the information listed in paragraph (f)(6) of this section, (and (g) of this section if applicable) at least once a year.

(3) The State, its contracted representative, or the MCO, PIHP, PAHP, or PCCM must furnish to each of its enrollees the information specified in paragraph (f)(6) of this section, (and (g) of this section if applicable) within a reasonable time after the MCO, PIHP, PAHP, or PCCM receives, from the State or its contracted representative, notice of the recipient's enrollment.

(4) The MCO, PIHP, PAHP, or PCCM must give each enrollee written notice of any change (that the State defines as ''significant'') in the information specified in paragraph (f)(6) of this section, at least 30 days before the intended effective date of the change.

(5) The MCO, PIHP, and where appropriate, the PAHP or PCCM, must make a good faith effort to give written notice of termination of a contracted provider, within 15 days after receipt or issuance of the termination notice, to each enrollee who received his or her primary care from, or was seen on a regular basis by, the terminated provider.

(6) The following information must also be provided to all enrollees:

(i) Names, locations, telephone numbers of, and non-English languages spoken by current network providers, including information at least on primary care physicians, specialists, and hospitals, and identification of providers that are not accepting new patients.

(ii) Any restrictions on the enrollee's freedom of choice among network providers.

(iii) Enrollee rights and responsibilities, as specified in § 438.100.

(iv) Information on grievance and fair hearing procedures, and for MCO and PIHP enrollees, the information specified in § 438.10(g)(i).

(v) The amount, duration, and scope of benefits available under the contract in sufficient detail to ensure that enrollees understand the benefits to which they are entitled.

(vi) Procedures for obtaining benefits, including authorization requirements.

(vii) The extent to which, and how, enrollees may obtain benefits, including family planning services, from out-of-network providers.

(viii) The extent to which, and how, after-hours and emergency coverage are provided, including:

(A) What constitutes emergency medical condition, emergency services, and post-stabilization services, with reference to the definitions in § 438.114 (a).

(B) The fact that prior authorization is not required for emergency services.

(C) The process and procedures for obtaining emergency services, including use of the 911 telephone system or its local equivalent.

(D) The locations of any emergency settings and other locations at which providers and hospitals furnish emergency services and post-stabilization services covered under the contract.

(E) The fact that, subject to the provisions of this section, the enrollee has a right to use any hospital or other setting for emergency care.

(ix) The post-stabilization care services rules set forth at § 422.113(c) of this chapter.

(x) Policy on referrals for specialty care and for other benefits not furnished by the enrollee's primary care provider.

(xi) Cost sharing, if any.

(xii) How and where to access any benefits that are available under the State plan but are not covered under the contract, including any cost sharing, and how transportation is provided. For a counseling or referral service that the MCO, PIHP, PAHP, or PCCM does not cover because of moral or religious objections, the MCO, PIHP, PAHP, or PCCM need not furnish information on how and where to obtain the service. The State must furnish information about how and where to obtain the service.

(g) *Specific Information Requirements for enrollees of MCOs and PIHPs.* In addition to the requirements in § 438.10(e), MCOs and PIHPs must provide the following information to their enrollees:

(1) Grievance, appeal, and fair hearing procedures and timeframes, as provided in §§ 438.400 through 438.424, in a State-developed or State-approved description, that must include:

(i) For State fair hearing—

(A) The right to hearing;

(B) The method for obtaining a hearing; and

(C) The rules that govern representation at the hearing.

(ii) The right to file grievances and appeals

(iii) The requirements and timeframes for filing a grievance or appeal.

(iv) The availability of assistance in the filing process.

(v) The toll-free numbers that the enrollee can use to file a grievance or an appeal by phone.

(vi) The fact that, when requested by the enrollee—

(A) Benefits will continue if the enrollee files an appeal or a request for State fair hearing within the timeframes specified for filing; and

(B) The enrollee may be required to pay the cost of services furnished while the appeal is pending, if the final decision is adverse to the enrollee.

(vii) Any appeal rights that the State chooses to make available to providers to challenge the failure of the organization to cover a service.

(2) Advance directives, as set forth in § 438.6(i)(2).

(3) Physician incentive plans as set forth in § 434.70(a)(4) of this chapter.

(4) Additional information that is available upon request, including information on the structure and operation of the MCO or PIHP.

(h) *Special rules: States with mandatory enrollment under state plan authority.*—(1) *Basic rule.* If the State plan provides for mandatory enrollment under § 438.50, the State or its contracted representative must provide information on MCOs, and PCCMs (as specified in paragraph (g)(3) of this section), either directly or through the MCO or PCCM.

(2) *When and how the information must be furnished.* The information must be furnished to all potential enrollees—

(i) At least once a year; and

(ii) In a comparative, chart-like format.

(3) *Required information.* Some of the information is the same as the information required for potential enrollees under paragraph (d) of this section. However, all of the information in this paragraph is subject to the timeframe and format requirements of

paragraph (g)(2) of this section, and includes the following for each contracting MCO or PCCM:

(i) The MCO's or PCCM's service area.

(ii) The benefits covered under the contract.

(iii) Any cost sharing imposed by the MCO or PCCM.

(iv) To the extent available, quality and performance indicators, including, but not limited to, disenrollment rates as defined by the State, and enrollee satisfaction.

§ 438.12 Provider discrimination prohibited.

(a) *General rules.* (1) An MCO, PIHP, or PAHP may not discriminate for the participation, reimbursement, or indemnification of any provider who is acting within the scope of his or her license or certification under applicable State law, solely on the basis of that license or certification. If an MCO, PIHP, or PAHP declines to include individual or groups of providers in its network, it must give the affected providers written notice of the reason for its decision.

(2) In all contracts with health care professionals an MCO, PIHP, or PAHP must comply with the requirements specified in § 438.214.

(b) *Construction.* Paragraph (a) of this section may not be construed to—

(1) Require the MCO, PIHP, or PAHP to contract with providers beyond the number necessary to meet the needs of its enrollees;

(2) Preclude the MCO, PIHP, or PAHP from using different reimbursement amounts for different specialties or for different practitioners in the same specialty; or

(3) Preclude the MCO, PIHP, or PAHP from establishing measures that are designed to maintain quality of services and control costs and are consistent with its responsibilities to enrollees.

Subpart B—State Responsibilities

§ 438.50 State Plan requirements.

(a) *General rule.* A State plan that provides for requiring Medicaid recipients to enroll in managed care entities must comply with the provisions of this section, except when the State imposes the requirement—

(1) As part of a demonstration project under section 1115 of the Act; or

(2) Under a waiver granted under section 1915(b) of the Act.

(b) *State plan information.* The plan must specify—

(1) The types of entities with which the State contracts;

(2) The payment method it uses (for example, whether fee-for-service or capitation);

(3) Whether it contracts on a comprehensive risk basis; and

(4) The process the State uses to involve the public in both design and initial implementation of the program and the methods it uses to ensure ongoing public involvement once the State plan has been implemented.

(c) *State plan assurances.* The plan must provide assurances that the State meets applicable requirements of the following statute and regulations:

(1) Section 1903(m) of the Act, for MCOs and MCO contracts.

(2) Section 1905(t) of the Act, for PCCMs and PCCM contracts.

(3) Section 1932(a)(1)(A) of the Act, for the State's option to limit freedom of choice by requiring recipients to receive their benefits through managed care entities.

(4) This part, for MCOs and PCCMs.

(5) Part 434 of this chapter, for all contracts.

(6) Section 438.6(c), for payments under any risk contracts, and § 447.362 of this chapter for payments under any nonrisk contracts.

(d) *Limitations on enrollment.* The State must provide assurances that, in implementing the State plan managed care option, it will not require the following groups to enroll in an MCO or PCCM:

(1) Recipients who are also eligible for Medicare.

(2) Indians who are members of Federally recognized tribes, except when the MCO or PCCM is—

(i) The Indian Health Service; or

(ii) An Indian health program or Urban Indian program operated by a tribe or tribal organization under a contract, grant, cooperative agreement or compact with the Indian Health Service.

(3) Children under 19 years of age who are—

(i) Eligible for SSI under title XVI;

(ii) Eligible under section 1902(e)(3) of the Act;

(iii) In foster care or other out-of-home placement;

(iv) Receiving foster care or adoption assistance; or

(v) Receiving services through a family-centered, community-based, coordinated care system that receives grant funds under section 501(a)(1)(D) of title V, and is defined by the State in terms of either program participation or special health care needs.

(e) *Priority for enrollment.* The State must have an enrollment system under which recipients already enrolled in an MCO or PCCM are given priority to continue that enrollment if the MCO or PCCM does not have the capacity to accept all those seeking enrollment under the program.

(f) *Enrollment by default.* (1) For recipients who do not choose an MCO or PCCM during their enrollment period, the State must have a default enrollment process for assigning those recipients to contracting MCOs and PCCMs.

(2) The process must seek to preserve existing provider-recipient relationships and relationships with providers that have traditionally served Medicaid recipients. If that is not possible, the State must distribute the recipients equitably among qualified MCOs and PCCMs available to enroll them, excluding those that are subject to the intermediate sanction described in § 438.702(a)(4).

(3) An ''existing provider-recipient relationship'' is one in which the provider was the main source of Medicaid services for the recipient during the previous year. This may be established through State records of previous managed care enrollment or fee-for-service experience, or through contact with the recipient.

(4) A provider is considered to have ''traditionally served'' Medicaid recipients if it has experience in serving the Medicaid population.

§ 438.52 Choice of MCOs, PIHPs, PAHPs, and PCCMs.

(a) *General rule.* Except as specified in paragraphs (b) and (c) of this section, a State that requires Medicaid recipients to enroll in an MCO, PIHP, PAHP, or PCCM must give those recipients a choice of at least two entities.

(b) *Exception for rural area residents.* (1) Under any of the following programs, and subject to the requirements of paragraph (b)(2) of this section, a State may limit a rural area resident to a single MCO, PIHP, PAHP, or PCCM system:

(i) A program authorized by a plan amendment under section 1932(a) of the Act.

(ii) A waiver under section 1115 of the Act.

(iii) A waiver under section 1915(b) of the Act.

(2) A State that elects the option provided under paragraph (b)(1) of this section, must permit the recipient—

(i) To choose from at least two physicians or case managers; and

(ii) To obtain services from any other provider under any of the following circumstances:

(A) The service or type of provider (in terms of training, experience, and specialization) is not available within the MCO, PIHP, PAHP, or PCCM network.

(B) The provider is not part of the network, but is the main source of a service to the recipient, provided that—

(*1*) The provider is given the opportunity to become a participating provider under the same requirements for participation in the MCO, PIHP, PAHP, or PCCM network as other network providers of that type.

(*2*) If the provider chooses not to join the network, or does not meet the necessary qualification requirements to join, the enrollee will be transitioned to a participating provider within 60 days (after being given an opportunity to select a provider who participates).

(C) The only plan or provider available to the recipient does not, because of moral or religious objections, provide the service the enrollee seeks.

(D) The recipient's primary care provider or other provider determines that the recipient needs related services that would subject the recipient to unnecessary risk if received separately (for example, a cesarean section and a tubal ligation) and not all of the related services are available within the network.

(E) The State determines that other circumstances warrant out-of-network treatment.

(3) As used in this paragraph, ''rural area'' is any area other than an ''urban area'' as defined in § 412.62(f)(1)(ii) of this chapter.

(c) *Exception for certain health insuring organizations (HIOs).* The State may limit recipients to a single HIO if—

(1) The HIO is one of those described in section 1932(a)(3)(C) of the Act;

(2) The recipient who enrolls in the HIO has a choice of at least two primary care providers within the entity.

(d) *Limitations on changes between primary care providers.* For an enrollee of a single MCO, PIHP, PAHP, or HIO under paragraph (b)(2) or (b)(3) of this section, any limitation the State imposes on his or her freedom to change between primary care providers may be no more restrictive than the limitations on disenrollment under § 438.56(c).

§ 438.56 Disenrollment: Requirements and limitations.

(a) *Applicability.* The provisions of this section apply to all managed care arrangements whether enrollment is mandatory or voluntary and whether the contract is with an MCO, a PIHP, PAHP, or a PCCM.

(b) *Disenrollment requested by the MCO, PIHP, PAHP or PCCM.* All MCO, PIHP, PAHP, and PCCM contracts must—(1) Specify the reasons for which the MCO, PIHP, PAHP or PCCM may request disenrollment of an enrollee;

(2) Provide that the MCO, PIHP, PAHP or PCCM may not request disenrollment because of a change in the enrollee's health status, or because of the enrollee's utilization of medical services, diminished mental capacity, or uncooperative or disruptive behavior resulting from his or her special needs (except where his or her continued enrollment in the MCO, PIHP, PAHP or PCCM seriously impairs the entity's ability to furnish services to either this particular enrollee or other enrollees); and

(3) Specify the methods by which the MCO, PIHP, PAHP or PCCM assures the agency that it does not request disenrollment for reasons other than those permitted under the contract.

(c) *Disenrollment requested by the enrollee.* If the State chooses to limit disenrollment, its MCO, PIHP, PAHP, and PCCM contracts must provide that a recipient may request disenrollment as follows:

(1) For cause, at any time.

(2) Without cause, at the following times:

(i) During the 90 days following the date of the recipient's initial enrollment with the MCO, PIHP, PAHP or PCCM, or the date the State sends the recipient notice of the enrollment, whichever is later.

(ii) At least once every 12 months thereafter.

(iii) Upon automatic reenrollment under paragraph (g) of this section, if the temporary loss of Medicaid eligibility has caused the recipient to miss the annual disenrollment opportunity.

(iv) When the State imposes the intermediate sanction specified in § 438.702(a)(3).

(d) *Procedures for disenrollment.* (1) *Request for disenrollment.* The recipient (or his or her representative) must submit an oral or written request—

(i) To the State agency (or its agent); or

(ii) To the MCO, PIHP, PAHP or PCCM, if the State permits MCOs, PIHP, PAHPs, and PCCMs to process disenrollment requests.

(2) *Cause for disenrollment.* The following are cause for disenrollment:

(i) The enrollee moves out of the MCO's, PIHP's, PAHP's or PCCM's service area.

(ii) The plan does not, because of moral or religious objections, cover the service the enrollee seeks.

(iii) The enrollee needs related services (for example a cesarean section and a tubal ligation) to be performed at the same time; not all related services are available within the network; and the enrollee's primary care provider or another provider determines that receiving the services separately would subject the enrollee to unnecessary risk.

(iv) Other reasons, including but not limited to, poor quality of care, lack of access to services covered under the contract, or lack of access to providers experienced in dealing with the enrollee's health care needs.

(3) *MCO, PIHP, PAHP or PCCM action on request.* (i) An MCO, PIHP, PAHP or PCCM may either approve a request for disenrollment or refer the request to the State.

(ii) If the MCO, PIHP, PAHP, PCCM, or State agency (whichever is responsible) fails to make a disenrollment determination so that the recipient can be disenrolled within the timeframes specified in paragraph (e)(1) of this section, the disenrollment is considered approved.

(4) *State agency action on request.* For a request received directly from the recipient, or one referred by the MCO, PIHP, PAHP or PCCM, the State agency must take action to approve or disapprove the request based on the following:

(i) Reasons cited in the request.

(ii) Information provided by the MCO, PIHP, PAHP or the PCCM at the agency's request.

(iii) Any of the reasons specified in paragraph (d)(2) of this section.

(5) *Use of the MCO, PIHP, PAHP, or PCCM grievance procedures.* (i) The State agency may require that the enrollee seek redress through the MCO, PIHP, PAHP, or PCCM's grievance system before making a determination on the enrollee's request.

(ii) The grievance process, if used, must be completed in time to permit the disenrollment (if approved) to be effective in accordance with the timeframe specified in § 438.56(e)(1).

(iii) If, as a result of the grievance process, the MCO, PIHP, PAHP, or PCCM approves the disenrollment, the State agency is not required to make a determination.

(e) *Timeframe for disenrollment determinations.* (1) Regardless of the procedures followed, the effective date of an approved disenrollment must be no later than the first day of the second month following the month in which the enrollee or the MCO, PIHP, PAHP or PCCM files the request.

(2) If the MCO, PIHP, PAHP or PCCM or the State agency (whichever is responsible) fails to make the determination within the timeframes specified in paragraphs (e)(1) and (e)(2) of this section, the disenrollment is considered approved.

(f) *Notice and appeals.* A State that restricts disenrollment under this section must take the following actions:

(1) Provide that enrollees and their representatives are given written notice of disenrollment rights at least 60 days

before the start of each enrollment period.

(2) Ensure access to State fair hearing for any enrollee dissatisfied with a State agency determination that there is not good cause for disenrollment.

(g) *Automatic reenrollment: Contract requirement.* If the State plan so specifies, the contract must provide for automatic reenrollment of a recipient who is disenrolled solely because he or she loses Medicaid eligibility for a period of 2 months or less.

§ 438.58 Conflict of interest safeguards.

(a) As a condition for contracting with MCOs, PIHPs, or PAHPs, a State must have in effect safeguards against conflict of interest on the part of State and local officers and employees and agents of the State who have responsibilities relating to the MCO, PIHP, or PAHP contracts or the default enrollment process specified in § 438.50(f).

(b) These safeguards must be at least as effective as the safeguards specified in section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423).

§ 438.60 Limit on payment to other providers.

The State agency must ensure that no payment is made to a provider other than the MCO, PIHP, or PAHP for services available under the contract between the State and the MCO, PIHP, or PAHP, except where these payments are provided for in title XIX of the Act or in 42 CFR.

§ 438.62 Continued services to recipients.

The State agency must arrange for Medicaid services to be provided without delay to any Medicaid enrollee of an MCO, PIHP, PAHP, or PCCM whose contract is terminated and for any Medicaid enrollee who is disenrolled from an MCO, PIHP, PAHP or PCCM for any reason other than ineligibility for Medicaid.

§ 438.66 Monitoring procedures.

The State agency must have in effect procedures for monitoring the MCO's, PIHP's, or PAHP's operations, including, at a minimum, operations related to:

(a) Recipient enrollment and disenrollment.

(b) Processing of grievances and appeals.

(c) Violations subject to intermediate sanctions, as set forth in subpart I of this part.

(d) Violations of the conditions for FFP, as set forth in subpart J of this part.

(e) All other provisions of the contract, as appropriate.

Subpart C—Enrollee Rights and Protections

§ 438.100 Enrollee rights.

(a) *General rule.* The State must ensure that—

(1) Each MCO and each PIHP has written policies regarding the enrollee rights specified in this section; and

(2) Each MCO, PIHP, PAHP, and PCCM complies with any applicable Federal and State laws that pertain to enrollee rights, and ensures that its staff and affiliated providers take those rights into account when furnishing services to enrollees.

(b) *Specific rights.* (1) *Basic requirement.* The State must ensure that each managed care enrollee is guaranteed the rights as specified in paragraphs (b)(2) and (b)(3) of this section.

(2) An enrollee of an MCO, PIHP, PAHP, or PCCM has the following rights: The right to—

(i) Receive information in accordance with § 438.10.

(ii) Be treated with respect and with due consideration for his or her dignity and privacy.

(iii) Receive information on available treatment options and alternatives, presented in a manner appropriate to the enrollee's condition and ability to understand. (The information requirements for services that are not covered under the contract because of moral or religious objections are set forth in § 438.10(e).)

(iv) Participate in decisions regarding his or her health care, including the right to refuse treatment.

(v) Be free from any form of restraint or seclusion used as a means of coercion, discipline, convenience, or retaliation, as specified in other Federal regulations on the use of restraints and seclusion.

(3) An enrollee of an MCO or a PIHP also has the right to—

(i) Be furnished health care services in accordance with §§ 438.206 through 438.210.

(ii) Obtain a second opinion from an appropriately qualified health care professional in accordance with § 438.206(b)(3).

(iii) Request and receive a copy of his or her medical records, and to request that they be amended or corrected, as specified in 45 CFR part 164.

(c) *Free exercise of rights.* The State must ensure that each enrollee is free to exercise his or her rights, and that the exercise of those rights does not adversely affect the way the MCO, PIHP, PAHP, or PCCM and its providers or the State agency treat the enrollee.

(d) *Compliance with other Federal and State laws.* The State must ensure that each MCO, PIHP, PAHP, and PCCM complies with any other applicable Federal and State laws (such as: Title VI of the Civil Rights Act of 1964 as implemented by regulations at 45 CFR part 80; the Age Discrimination Act of 1975 as implemented by regulations at 45 CFR part 91; the Rehabilitation Act of 1973; and Titles II and III of the Americans with Disabilities Act and other laws regarding privacy and confidentiality).

§ 438.102 Provider-enrollee communications.

(a) *Health care professional defined.* As used in this subpart, ''health care professional'' means a physician or any of the following: a podiatrist, optometrist, chiropractor, psychologist, dentist, physician assistant, physical or occupational therapist, therapist assistant, speech-language pathologist, audiologist, registered or practical nurse (including nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, and certified nurse midwife), licensed certified social worker, registered respiratory therapist, and certified respiratory therapy technician.

(b) *General rules.* (1) An MCO, PIHP, or PAHP may not prohibit, or otherwise restrict a health care professional acting within the lawful scope of practice, from advising or advocating on behalf of an enrollee who is his or her patient, for the following:

(i) The enrollee's health status, medical care, or treatment options, including any alternative treatment that may be self-administered.

(ii) Any information the enrollee needs in order to decide among all relevant treatment options.

(iii) The risks, benefits, and consequences of treatment or non-treatment.

(iv) The enrollee's right to participate in decisions regarding his or her health care, including the right to refuse treatment, and to express preferences about future treatment decisions.

(2) Subject to the information requirements of paragraph (c) of this section, an MCO, PIHP, or PAHP that would otherwise be required to provide, reimburse for, or provide coverage of, a counseling or referral service because of the requirement in paragraph (b)(1) of this section is not required to do so if the MCO, PIHP, or PAHP objects to the service on moral or religious grounds.

(c) *Information requirements: MCO, PIHP, and PAHP responsibility.* (1) An MCO, PIHP, or PAHP that elects the option provided in paragraph (b)(3) of this section must furnish information

about the services it does not cover as follows:

(i) To the State—

(A) With its application for a Medicaid contract; and

(B) Whenever it adopts the policy during the term of the contract.

(ii) Consistent with the provisions of § 438.10—

(A) To potential enrollees, before and during enrollment; and

(B) To enrollees, within 90 days after adopting the policy with respect to any particular service. (Although this timeframe would be sufficient to entitle the MCO, PIHP, or PAHP to the option provided in paragraph (b)(3) of this section, the overriding rule in § 438.10(f)(4) requires the MCO, PIHP, or PAHP to furnish the information at least 30 days before the effective date of the policy.)

(2) As specified in § 438.10(d) and (e), the information that MCOs, PIHPs, and PAHPs must furnish to enrollees and potential enrollees does not include how and where to obtain the service excluded under paragraph (b)(3) of this section.

(d) *Information requirements: State responsibility.* For each service excluded by an MCO, PIHP, or PAHP under paragraph (b)(2) of this section, the State must provide information on how and where to obtain the service, as specified in § 438.10(e)(2)(ii)(E).

(e) *Sanction.* An MCO that violates the prohibition of paragraph (b)(1) of this section is subject to intermediate sanctions under subpart I of this part.

§ 438.104 Marketing activities.

(a) *Terminology.* As used in this section, the following terms have the indicated meanings:

Cold-call marketing means any unsolicited personal contact by the MCO, PIHP, PAHP, or PCCM with a potential enrollee for the purpose of marketing as defined in this paragraph.

Marketing means any communication, from an MCO, PIHP, PAHP, or PCCM to a Medicaid recipient who is not enrolled in that entity, that can reasonably be interpreted as intended to influence the recipient to enroll in that particular MCO's, PIHP's, PAHP's, or PCCM's Medicaid product, or either to not enroll in, or to disenroll from, another MCO's, PIHP's, PAHP's, or PCCM's Medicaid product.

Marketing materials means materials that—

(1) Are produced in any medium, by or on behalf of an MCO, PIHP, PAHP, or PCCM; and

(2) Can reasonably be interpreted as intended to market to potential enrollees.

MCO, PIHP, PAHP, or *PCCM* include any of the entity's employees, affiliated providers, agents, or contractors.

(b) *Contract requirements.* Each contract with an MCO, PIHP, PAHP, or PCCM must comply with the following requirements:

(1) Provide that the entity—

(i) Does not distribute any marketing materials without first obtaining State approval;

(ii) Distributes the materials to its entire service area as indicated in the contract;

(iii) Complies with the information requirements of § 438.10 to ensure that, before enrolling, the recipient receives, from the entity or the State, the accurate oral and written information he or she needs to make an informed decision on whether to enroll;

(iv) Does not seek to influence enrollment in conjunction with the sale or offering of any other insurance; and

(v) Does not, directly or indirectly, engage in door-to-door, telephone, or other cold-call marketing activities.

(2) Specify the methods by which the entity assures the State agency that marketing, including plans and materials, is accurate and does not mislead, confuse, or defraud the recipients or the State agency. Statements that will be considered inaccurate, false, or misleading include, but are not limited to, any assertion or statement (whether written or oral) that—

(i) The recipient must enroll in the MCO, PIHP, PAHP, or PCCM in order to obtain benefits or in order to not lose benefits; or

(ii) The MCO, PIHP, PAHP, or PCCM is endorsed by CMS, the Federal or State government, or similar entity.

(c) *State agency review.* In reviewing the marketing materials submitted by the entity, the State must consult with the Medical Care Advisory Committee established under § 431.12 of this chapter or an advisory committee with similar membership.

§ 438.106 Liability for payment.

Each MCO, PIHP, and PAHP must provide that its Medicaid enrollees are not held liable for any of the following:

(a) The MCO's, PIHP's, or PAHP's debts, in the event of the entity's insolvency.

(b) Covered services provided to the enrollee, for which—

(1) The State does not pay the MCO, PIHP, or PAHP, or

(2) The State, or the MCO, PIHP, or PAHP does not pay the individual or health care provider that furnishes the services under a contractual, referral, or other arrangement.

(c) Payments for covered services furnished under a contract, referral, or other arrangement, to the extent that those payments are in excess of the amount that the enrollee would owe if the MCO, PIHP, or PAHP provided the services directly.

§ 438.108 Cost sharing.

The contract must provide that any cost sharing imposed on Medicaid enrollees is in accordance with §§ 447.50 through 447.60 of this chapter.

§ 438.114 Emergency and post-stabilization services.

(a) *Definitions.* As used in this section—

Emergency medical condition has the meaning given the term in § 422.113(b) of this chapter.

Emergency services has the meaning given the term in § 422.113(b) of this chapter.

Post-stabilization care services has the meaning given the term in § 422.113(c) of this chapter.

(b) *Coverage and payment: General rule.* The following entities are responsible for coverage and payment of emergency services and post-stabilization care services.

(1) The MCO, PIHP, or PAHP.

(2) The PCCM that has a risk contract that covers these services.

(3) The State, in the case of a PCCM that has a fee-for-service contract.

(c) *Coverage and payment: Emergency services.* (1) The entities identified in paragraph (c) of this section—

(i) Must cover and pay for emergency services regardless of whether the entity that furnishes the services has a contract with the MCO, PIHP, PAHP, or PCCM; and

(ii) May not deny payment for treatment obtained under either of the following circumstances:

(A) An enrollee had an emergency medical condition, including cases in which the absence of immediate medical attention would not have had the outcomes specified in paragraphs (b)(1)(i)(A), (B), and (C) of the definition of emergency medical condition in § 422.113 of this chapter.

(B) A representative of the MCO, PIHP, PAHP, or PCCM instructs the enrollee to seek emergency services.

(2) A PCCM must—

(i) Allow enrollees to obtain emergency services outside the primary care case management system regardless of whether the case manager referred the enrollee to the provider that furnishes the services; and

(ii) Pay for the services if the manager's contract is a risk contract that covers those services.

(d) *Additional rules for emergency services.* (1) The entities specified in paragraph (c) of this section may not—

(i) Limit what constitutes an emergency medical condition with reference to paragraph (a) of this section, on the basis of lists of diagnoses or symptoms; and

(ii) Refuse to process any claim because it does not contain the primary care provider's authorization number.

(2) An enrollee who has an emergency medical condition may not be held liable for payment of subsequent screening and treatment needed to diagnose the specific condition or stabilize the patient.

(3) The attending emergency physician, or the provider actually treating the enrollee, is responsible for determining when the enrollee is sufficiently stabilized for transfer or discharge, and that determination is binding on the entities identified in paragraph (c) of this section as responsible for coverage and payment.

(e) *Coverage and payment: Post-stabilization care services.* Post-stabilization care services are covered and paid for in accordance with provisions set forth at § 422.113 (c) of this chapter. In applying those provisions, reference to ''M+C organization'' must be read as reference to the entities responsible for Medicaid payment, as specified in paragraph (b) of this section.

(f) *Applicability to PIHPs and PAHPs.* To the extent that services required to treat an emergency medical condition fall within the scope of the services for which the PIHP or PAHP is responsible, the rules under this section apply.

§ 438.116 Solvency standards.

(a) *Requirement for assurances* (1) Each MCO, PIHP, and PAHP that is not a Federally qualified HMO (as defined in section 1310 of the Public Health Service Act) must provide assurances satisfactory to the State showing that its provision against the risk of insolvency is adequate to ensure that its Medicaid enrollees will not be liable for the MCO's, PIHP's, or PAHP's debts if the entity becomes insolvent.

(2) Federally qualified HMOs, as defined in section 1310 of the Public Health Service Act, are exempt from this requirement.

(b) *Other requirements*—(1) *General rule.* Except as provided in paragraph (b)(2) of this section, an MCO, PIHP, and PAHP must meet the solvency standards established by the State for private health maintenance organizations, or be licensed or certified by the State as a risk-bearing entity.

(2) *Exception.* Paragraph (b)(1) of this section does not apply to an MCO, PIHP, or PAHP that meets any of the following conditions:

(i) Does not provide both inpatient hospital services and physician services.

(ii) Is a public entity.

(iii) Is (or is controlled by) one or more Federally qualified health centers and meets the solvency standards established by the State for those centers.

(iv) Has its solvency guaranteed by the State.

Subpart D—Quality Assessment and Performance Improvement

§ 438.200 Scope.

This subpart implements section 1932(c)(1) of the Act and sets forth specifications for quality assessment and performance improvement strategies that States must implement to ensure the delivery of quality health care by all MCOs and PIHPs. It also establishes standards that States, MCOs and PIHPs must meet.

§ 438.202 State responsibilities.

Each State contracting with an MCO or PIHP must—

(a) Have a written strategy for assessing and improving the quality of managed care services offered by all MCOs and PIHPs:

(b) Provide for the input of recipients and other stake-holders in the development of the strategy, including making the strategy available for public comment before adopting it in final;

(c) Ensure compliance with standards established by the State, consistent with this subpart; and

(d) Conduct periodic reviews to evaluate the effectiveness of the strategy, and update the strategy periodically, as needed.

(e) Submit to CMS the following:

(1) A copy of the initial strategy, and a copy of the revised strategy whenever significant changes are made.

(2) Regular reports on the implementation and effectiveness of the strategy.

§ 438.204 Elements of State quality strategies.

At a minimum, State strategies must include the following—

(a) The MCO and PIHP contract provisions that incorporate the standards specified in this subpart.

(b) Procedures that—

(1) Assess the quality and appropriateness of care and services furnished to all Medicaid enrollees under the MCO and PIHP contracts, including individuals with special health care needs.

(2) Identify the race, ethnicity, and primary language spoken of each Medicaid enrollee. States must provide this information to the MCO and PIHP for each Medicaid enrollee at the time of enrollment.

(3) Continuously monitor and evaluate the MCO and PIHP compliance with the standards.

(c) Performance measures and levels identified and developed by CMS in consultation with States and other relevant stakeholders.

(d) Arrangments for annual, external independent reviews of the quality outcomes and timeliness of, and access to, the services covered under each MCO and PIHP contract.

(e) Appropriate use of intermediate sanctions that, at a minimum, meet the requirements of subpart I of this part.

(f) An information system that supports initial and ongoing operation and review of the State's quality strategy.

(g) Standards, at least as stringent as those in the following sections of this subpart, for access to care, structure and operations, and quality measurement and improvement.

Access Standards

§ 438.206 Availability of services.

(a) *Basic rule.* Each State must ensure that all covered services are available and accessible to enrollees.

(b) *Delivery network.* The State must ensure, through its contracts, that each MCO, and each PIHP consistent with the scope of PHIP's contracted services, meets the following requirements.

(1) Maintains and monitors a network of appropriate providers that is supported by written agreements and is sufficient to provide adequate access to all services covered under the contract. In establishing and maintaining the network, each MCO and PIHP must consider the following:

(i) The anticipated Medicaid enrollment.

(ii) The expected utilization of services, considering Medicaid enrollee characteristics and health care needs.

(iii) The numbers and types (in terms of training, experience, and specialization) of providers required to furnish the contracted Medicaid services.

(iv) The numbers of network providers who are not accepting new Medicaid patients.

(v) The geographic location of providers and Medicaid enrollees, considering distance, travel time, the means of transportation ordinarily used by Medicaid enrollees, and whether the location provides physical access for Medicaid enrollees with disabilities.

(2) Provides female enrollees with direct access to a women's health specialist within the network for covered care necessary to provide women's routine and preventive health care services. This is in addition to the enrollee's designated source of primary care if that source is not a women's health specialist.

(3) Provides for a second opinion from a qualified health care professional within the network, or arranges for the enrollee to obtain one outside the network, at no cost to the enrollee.

(4) If the network is unable to provide necessary medical services, covered under the contract, to a particular enrollee, the MCO or PIHP must adequately and timely cover these services out of network for the enrollee, for as long as the MCO or PIHP is unable to provide them.

(5) Requires out-of-network providers to coordinate with the MCO or PIHP with respect to payment and ensures that cost to the enrollee is no greater than it would be if the services were furnished within the network.

(6) Demonstrates that its providers are credentialed as required by § 438.214.

(c) *Furnishing of services.* The State must ensure that each MCO and PHIP contract complies with the requirements of this paragraph.

(1) *Timely access.* Each MCO and each PIHP must—

(i) Meet and require its providers to meet State standards for timely access to care and services, taking into account the urgency of need for services.

(ii) Ensure that the network providers offer hours of operation that are no less than the hours of operation offered to commercial enrollees or comparable to Medicaid fee-for-service, if the provider serves only Medicaid enrollees.

(iii) Make services available 24 hours a day, 7 days a week, when medically necessary.

(iv) Establish mechanisms to ensure compliance.

(v) Monitor continuously to determine compliance.

(vi) Take corrective action if there is a failure to comply.

(2) *Cultural considerations.* Each MCO and each PIHP participates in the State's efforts to promote the delivery of services in a culturally competent manner to all enrollees, including those with limited English proficiency and diverse cultural and ethnic backgrounds.

§ 438.207 Assurances of adequate capacity and services.

(a) *Basic rule.* The State must ensure, through its contracts, that each MCO and each PIHP gives assurances to the State that it has the capacity to serve the expected enrollment in its service area in accordance with the State's standards for access to care under this subpart.

(b) *Nature of assurances.* Each MCO and each PIHP must submit documentation to the State, in a format specified by the State and acceptable to CMS, to demonstrate that it complies with the following requirements:

(1) Offers an appropriate range of services, including preventive services, primary care services and specialty services that is adequate for the anticipated number of enrollees for the service area.

(2) Maintains a network of providers that is sufficient in number, mix, and geographic distribution to meet the needs of the anticipated number of enrollees in the service area.

(c) *Timing of documentation.* Each MCO and each PIHP must submit the documentation described in paragraph (b) of this section as specified by the State, and specifically—

(1) At the time it enters into a contract with the State; and

(2) At any time there has been a significant change (as defined by the State) in the MCO's or PIHP's operations that would affect adequate capacity and services, including—

(i) Changes in MCO or PIHP services, benefits, geographic service area or payments, or;

(ii) Enrollment of a new population in the MCO or PIHP.

(d) *State review and submission to CMS.* After the State reviews the documentation submitted by the MCO or PIHP, the State must certify to CMS that the MCO or PIHP has complied with the State's requirements for availability of services, as set forth in § 438.206.

(e) *CMS' right to inspect documentation.* The State must make available to CMS, upon request, all documentation collected by the State from the MCO or PIHP.

§ 438.208 Coordination and continuity of care.

(a) *Basic requirement.* (1) *General rule.* Except as specified in paragraphs (a)(2) and (a)(3) of this section, the State must ensure through its contracts, that each MCO and PIHPs complies with the requirements of this section.

(2) *PIHP exception.* For PIHPs, the State determines, based on the scope of the entity's services, and on the way the State has organized the delivery of managed care services, whether a particular PIHP is required—

(i) To implement mechanisms for the screenings and assessments specified in paragraphs (c) of this section; and

(ii) To meet the primary care requirement of paragraph (e)(1) of this section.

(3) *Exception for MCOs that serve dually eligible enrollees.* (i) For an MCO that serves enrollees who are also enrolled in a Medicare+Choice plan and also receive Medicare benefits, the State determines to what extent that an MCO must meet the screening and assessment, referral and treatment plan and primary care and coordination provisions of paragraphs (c), (d), and (e)(1) of this section.

(ii) The State bases its determination on the services it requires the MCO to furnish to dually eligible enrollees.

(b) *State responsibility to identify certain enrollees with special health care needs.* The State must implement mechanisms to identify to its enrollment broker, if applicable prior to enrollment, and the MCO and PIHP, upon enrollment, individuals with special health care needs, as specified by the State.

(c) *Screening and assessment.* The State (either through its own staff or its enrollment broker) or at the State's discretion each MCO or PIHP (through appropriate health care professionals) must implement mechanisms for the identification and assessment of persons with special health care needs as defined by the State. These mechanisms should be identified in the State's quality improvement strategy in § 438.202.

(d) Referrals and treatment plans. The state must ensure that each MCO and PIHP has a mechanism in place for enrollees determined to have ongoing special conditions that require a course of treatment or regular care monitoring that:

(1) The enrollee may directly access a specialist (for example, through a standing referral or an approved number of visits) as is appropriate for the enrollee's condition and identified needs.

(2) A treatment plan, if required by the MCO or PIHP is developed by the specialist in consultation with the enrollee's primary care provider, and

(i) Is developed with enrollee participation.

(ii) Is approved by the MCO or PIHP in a timely manner, if this approval is required,

(iii) Is in accordance with the State's quality assurance and utilization review standards.

(e) *Primary care and coordination program.* Each MCO and each PIHP must implement a coordination program that meets State requirements and achieves the following:

(1) Ensures that each enrollee has an ongoing source of primary care appropriate to his or her needs and a person or entity formally designated as primarily responsible for coordinating the health care services furnished to the enrollee.

(2) Coordinates the services the MCO or PIHP furnishes to the enrollee with the services the enrollee receives from any other MCOs and PIHPs;

(3) Shares with other MCOs and PIHPs serving the enrollee the results of its screenings and assessments of the enrollee so that those activities need not be duplicated.

(4) Ensures that in the process of coordinating care, each enrollee's privacy is protected consistent with the confidentiality requirements in 45 CFR parts 160 and 164.

§ 438.210 Coverage and authorization of services.

(a) *Coverage.* Each contract with an MCO or PIHP must:

(1) Identify, define, and specify each service that the MCO or PIHP is required to offer.

(2) Require that the MCO or PIHP make available the services it is required to furnish in no less than the amount, duration, and scope that are specified in the State plan and are sufficient to reasonably be expected to achieve the purpose for which the services are furnished.

(3) Provide that the MCO or PIHP—

(i) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of the diagnosis, type of illness, or condition; and

(ii) May place appropriate limits on a service—

(A) On the basis of criteria such as medical necessity; or

(B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(2) of this section; and

(4) Specify what constitutes ''medically necessary services'' in a manner that—

(i) Is no more restrictive than the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and

(ii) Addresses the extent to which the MCO or PIHP is responsible for covering services related to the following:

(A) The prevention, diagnosis, and treatment of health impairments.

(B) The ability to achieve age-appropriate growth and development.

(C) The ability to attain, maintain, or regain functional capacity.

(b) *Processing of requests.* For the processing of requests for initial and continuing authorizations of services, each contract must require—

(1) That the MCO or PIHP and its subcontractors have in place, and follow, written policies and procedures.

(2) That the MCO or PIHP—

(i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and

(ii) Consult with the requesting provider when appropriate.

(3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollees's condition or disease.

(c) *Notice of adverse action.* Each contract must provide for the MCO or PIHP to notify the requesting provider, and give the enrollee written notice of any decision by the MCO or PIHP to deny a service authorization request, or to authorize a service in an amount, duration, or scope that is less than requested. The notice must meet the requirements of § 438.404, except that the notice to the provider need not be in writing.

(d) *Timeframe for decisions.* Each MCO or PIHP contract must provide for the following decisions and notices:

(1) *Standard authorization decisions.* For standard authorization decisions, provide notice as expeditiously as the enrollee's health condition requires and within State-established timeframes that may not exceed 14 calendar days following receipt of the request for service, with a possible extension of up to 14 additional calendar days, if—

(i) The enrollee, or the provider, requests extension; or

(ii) The MCO or the PIHP justifies (to the State agency upon request) a need for additional information and how the extension is in the enrollee's interest.

(2) *Expedited authorization decisions.* (i) For cases in which a provider indicates, or the MCO or PIHP determines, that following the standard timeframe could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, the MCO or PIHP must make an expedited authorization decision and provide notice as expeditiously as the enrollee's health condition requires and no later than 3 working days after receipt of the request for service.

(ii) The MCO or PIHP may extend the 3 working days time period by up to 14 calendar days if the enrollee requests an extension, or if the MCO or PIHP justifies (to the State agency upon request) a need for additional information and how the extension is in the enrollee's interest.

(e) *Compensation for utilization management activities.* Each contract must provide that, consistent with § 438.6(g), and § 422.208 of this chapter, compensation to individuals or entities that conduct utilization management activities is not structured so as to provide incentives for the individual or entity to deny, limit, or discontinue medically necessary services to any enrollee.

Structure and Operation Standards

§ 438.214 Provider selection.

(a) *General rules.* The State must ensure, through its contracts, that each MCO and PIHP implements written policies and procedures for selection and retention of providers and that those policies and procedures include, at a minimum, the requirements of this section.

(b) *Credentialing and recredentialing requirements.* Each MCO and PIHP must follow a documented process for credentialing and recredentialing of providers who have signed contracts or participation agreements with the MCO or the PIHP.

(c) *Nondiscrimination.* MCO and PIHP provider selection policies and procedures, consistent with § 438.12, do not discriminate against particular providers that serve high risk populations or specialize in conditions that require costly treatment.

(d) *Excluded providers.* MCOs or PIHPs may not employ or contract with providers excluded from participation in Federal health care programs under either section 1128 or section 1128A of the Act.

(e) *State requirements.* Each MCO and PIHP must comply with any additional requirements established by the State.

§ 438.218 Enrollee information.

The requirements that States must meet under § 438.10 constitute part of the State's quality strategy at § 438.204.

§ 438.224 Confidentiality.

The State must ensure, through its contracts, that (consistent with subpart F of part 431 of this chapter), for medical records and any other health and enrollment information that identifies a particular enrollee, each MCO and PIHP establishes and implements procedures consistent with confidentiality requirements in 45 CFR parts 160 and 164.

§ 438.226 Enrollment and disenrollment.

The State must ensure that each MCO and PIHP contract complies with the

enrollment and disenrollment requirements and limitations set forth in § 438.56.

§ 438.228 Grievance systems.

(a) The State must ensure, through its contracts, that each MCO and PIHP has in effect a grievance system that meets the requirements of subpart F of this part.

(b) If the State delegates to the MCO or PIHP responsibility for notice of action under subpart E of part 431 of this chapter, the State must conduct random reviews of each delegated MCO or PIHP and its providers and subcontractors to ensure that they are notifying enrollees in a timely manner.

§ 438.230 Subcontractual relationships and delegation.

(a) *General rule.* The State must ensure, through its contracts, that each MCO and PIHP—

(1) Oversees and is accountable for any functions and responsibilities that it delegates to any subcontractor; and

(2) Meets the conditions of paragraph (b) of this section.

(b) *Specific conditions.* (1) Before any delegation, each MCO and PIHP evaluates the prospective subcontractor's ability to perform the activities to be delegated.

(2) There is a written agreement that—

(i) Specifies the activities and report responsibilities delegated to the subcontractor; and

(ii) Provides for revoking delegation or imposing other sanctions if the subcontractor's performance is inadequate.

(3) The MCO or PIHP monitors the subcontractor's performance on an ongoing basis and subjects it to formal review according to a periodic schedule established by the State, consistent with industry standards or State MCO laws and regulations.

(4) If any MCO or PIHP identifies deficiencies or areas for improvement, the MCO and the subcontractor take corrective action.

Measurement and Improvement Standards

§ 438.236 Practice guidelines.

(a) *Basic rule.* The State must ensure, through its contracts, that each MCO and PIHP meets the requirements of this section.

(b) *Adoption of practice guidelines.* Each MCO and PIHP adopts practice guidelines that meet the following requirements:

(1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field;

(2) Consider the needs of the MCO's or PIHP's enrollees;

(3) Are adopted in consultation with contracting health care professionals; and

(4) Are reviewed and updated periodically as appropriate.

(c) *Dissemination of guidelines.* Each MCO and PIHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.

(d) *Application of guidelines.* Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

§ 438.240 Quality assessment and performance improvement program.

(a) *General rules.* (1) The State must require, through its contracts, that each MCO and PIHP have an ongoing quality assessment and performance improvement program for the services it furnishes to its enrollees.

(2) CMS, in consultation with States and other stakeholders, may specify standardized quality measures and topics for performance improvement projects to be required by States in their contracts with MCOs and PIHPs.

(b) *Basic elements of MCO and PIHP quality assessment and performance improvement programs.* At a minimum, the State must require that each MCO and PIHP comply with the following requirements:

(1) Conduct performance improvement projects as described in paragraph (d) of this section. These projects must achieve, through ongoing measurements and intervention, demonstrable and sustained improvement in significant aspects of clinical care and non-clinical care areas that are expected to have a favorable effect on health outcomes and enrollee satisfaction;

(2) Have in effect mechanisms to detect both underutilization and overutilization of services; and

(3) Have in effect mechanisms to assess the quality and appropriateness of care furnished to enrollees with special health care needs.

(c) *Performance measurement and improvement.* Each MCO and PIHP must annually measure its performance, using standard measures required by the State, consistent with the requirements of § 438.204(c), and report its performance to the State.

(d) *Performance improvement projects.* (1) MCOs and PIHPs must have an ongoing program of performance improvement projects that focus on clinical and non-clinical areas, and that involve the following:

(i) Measurement of performance using objective quality indicators.

(ii) Implementation of system interventions to achieve improvement in quality.

(iii) Evaluation of the effectiveness of the interventions.

(iv) Planning and initiation of activities for increasing or sustaining improvement.

(2) Each MCO and PIHP must report the status and results of each project to the State as requested. Each performance improvement project must be completed in a reasonable time period so as to generally allow information on the success of performance improvement projects in the aggregate to produce new information on quality of care every year.

(e) *Program review by the State.* (1) The State must review, at least annually, the impact and effectiveness of each MCO's and PIHP's quality assessment and performance improvement program. The review must include—

(i) The MCO's and PIHP's performance on the standard measures on which it is required to report; and

(ii) The results of the each MCO's and PIHP's performance improvement projects.

(2) The State may require that an MCO or PIHP have in effect a process for its own evaluation of the impact and effectiveness of its quality assessment and performance improvement program.

§ 438.242 Health information systems.

(a) *General rule.* The State must ensure, through its contracts, that each MCO and PIHP maintains a health information system that collects, analyzes, integrates, and reports data and can achieve the objectives of this subpart. The system must provide information on areas including, but not limited to, utilization, grievances, and disenrollments for other than loss of Medicaid eligibility.

(b) *Basic elements of a health information system.* The State must require, at a minimum, that each MCO and PIHP comply with the following:

(1) Collect data on enrollee and provider characteristics as specified by the State, and on services furnished to enrollees through an encounter data system or other methods as may be specified by the State.

(2) Ensure that data received from providers is accurate and complete by—

(i) Verifying the accuracy and timeliness of reported data;

(ii) Screening the data for completeness, logic, and consistency; and

(iii) Collecting service information in standardized formats to the extent feasible and appropriate.

(3) Make all collected data available to the State and upon request to CMS, as required in this subpart.

Subpart E—[Reserved]

Subpart F—Grievance System

§ 438.400 Statutory basis and definitions.

(a) *Statutory basis.* This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.

(1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

(2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) *Definitions.* As used in this subpart, the following terms have the indicated meanings:

Action means—

(1) In the case of an MCO or PIHP or any of its providers—

(i) The denial or limited authorization of a requested service, including the type or level of service;

(ii) The reduction, suspension, or termination of a previously authorized service;

(iii) The denial, in whole or in part, of payment for a service;

(iv) For a resident of a rural area with only one MCO or PIHP, the denial of a Medicaid enrollee's request to exercise his or her right to obtain services outside the network; or

Appeal means a request for review of an action, as ''action'' is defined in this section.

Governing body means the MCO's or PIHP's Board of Directors, or a designated committee of its senior management.

Grievance means an expression of dissatisfaction about any matter other than an action, as ''action'' is defined in this section. The term is also used to refer to the overall system that includes grievances and appeals handled at the MCO or PIHP level and access to the State Fair Hearing process. (Possible subjects for grievances include, but are not limited to, the quality of care or services provided, and aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee's rights.)

§ 438.402 General requirements.

(a) *The grievance system.* Each MCO and PIHP must have a system in place for enrollees that includes a grievance process, an appeal process, and access to the State's fair hearing system.

(b) *Filing requirements*—(1) *Authority to file.* (i) An enrollee may file a grievance and an MCO or PIHP level appeal, and may request a State fair hearing.

(ii) A provider, acting on behalf of the enrollee and with the enrollee's written consent, may file an appeal. A provider may not file a grievance or request a State fair hearing.

(2) *Timing.* The State specifies a reasonable timeframe that may be no less than 20 days and not to exceed 90 days from the date on the MCO's or PIHP's notice of action. Within that timeframe—

(i) The enrollee or the provider may file an appeal; and

(ii) In a State that does not require exhaustion of MCO and PIHP level appeals, the enrollee may request a State fair hearing.

(3) *Procedures.* (i) The enrollee may file a grievance either orally or in writing and, as determined by the State, either with the State or with the MCO or the PIHP.

(ii) The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal.

§ 438.404 Notice of action.

(a) *Language and format requirements.* The notice must be in writing and must meet the language and format requirements of § 438.10(c) and (d) of this chapter to ensure ease of understanding.

(b) *Content of notice.* The notice must explain the following:

(1) The action the MCO or PIHP or its contractor has taken or intends to take.

(2) The reasons for the action.

(3) The enrollee's or the provider's right to file an MCO or PIHP appeal.

(4) If the State does not require the enrollee to exhaust the MCO or PIHP level appeal procedures, the enrollee's right to request a State fair hearing.

(5) The procedures for exercising the rights specified in this paragraph.

(6) The circumstances under which expedited resolution is available and how to request it.

(7) The enrollee's right to have benefits continue pending resolution of the appeal, how to request that benefits be continued and, the circumstances under which the enrollee may be required to pay the costs of these services.

(c) *Timing of notice.* The MCO or PIHP must mail the notice within the following timeframes:

(1) For termination, suspension, or reduction of previously authorized Medicaid-covered services, within the timeframes specified in §§ 431.211, 431.213, and 431.214 of this chapter.

(2) For denial of payment, at the time of any action affecting the claim.

(3) For standard service authorization decisions that deny or limit services, within the timeframe specified in § 438.210(d)

(4) If the MCO or PIHP extends the timeframe in accordance with § 438.210(d), it must—

(i) Give the enrollee written notice of the reason for the decision to extend the timeframe and inform the enrollee of the right to file a grievance if he or she disagrees with that decision; and

(ii) Issue and carry out its determination as expeditiously as the enrollee's health condition requires and no later than the date the extension expires.

(5) For service authorization decisions not reached within the timeframes specified in § 438.210(d) (which constitutes a denial and is thus an adverse action), on the date that the timeframes expire.

(6) For expedited service authorization decisions, within the timeframes specified in § 438.210(e).

§ 438.406 Handling of grievances and appeals.

(a) *General requirements.* In handling grievances and appeals, each MCO and each PIHP must meet the following requirements:

(1) Give enrollees any reasonable assistance in completing forms and taking other procedural steps. This includes providing interpreter services and toll-free numbers that have adequate TTY/TTD and interpreter capability.

(2) Acknowledge receipt of each grievance and appeal.

(3) Ensure that the individuals who make decisions on grievances and appeals are individuals—

(i) Who were not involved in any previous level of review or decision-making; and

(ii) Who, if deciding any of the following, are health care professionals who have the appropriate clinical expertise in treating the enrollee's condition or disease.

(A) An appeal of a denial that is based on lack of medical necessity.

(B) A grievance regarding denial of expedited resolution of an appeal.

(C) A grievance or appeal that involves clinical issues.

(b) *Special requirements for appeals.* The process for appeals must:

(1) Provide that oral inquiries seeking to appeal an action are treated as appeals (to establish the earliest possible filing date for the appeal) and must be confirmed in writing, unless the enrollee or the provider requests expedited resolution.

(2) Provide the enrollee a reasonable opportunity to present evidence, and allegations of fact or law, in person as well as in writing. (The MCO or PIHP must inform the enrollee of the limited time available for this in the case of expedited resolution.)

(3) Provide the enrollee and his or her representative opportunity, before and during the appeals process, to examine the enrollee's case file, including medical records, and any other documents and records considered during the appeals process.

(4) Include, as parties to the appeal—

(i) The enrollee and his or her representative; or

(ii) The legal representative of a deceased enrollee's estate.

§ 438.408 Resolution and notification: Grievances and appeals.

(a) *Basic rule.* The MCO or PIHP must dispose of each grievance and resolve each appeal, and provide notice, as expeditiously as the enrollee's health condition requires, within State-established timeframes that may not exceed the timeframes specified in this section.

(b) *Specific timeframes.* (1) *Standard disposition of grievances.* For standard disposition of a grievance and notice to the affected parties, the timeframe is established by the State but may not exceed 90 days from the day the MCO or PIHP receives the grievance.

(2) *Standard resolution of appeals.* For standard resolution of an appeal and notice to the affected parties, the State must establish a timeframe that is no longer than 45 days from the day the MCO or PIHP receives the appeal. This timeframe may be extended under paragraph (d) of this section.

(3) *Expedited resolution of appeals.* For expedited resolution of an appeal and notice to affected parties, the State must establish a timeframe that is no longer than 3 working days after the MCO or PIHP receives the appeal. This timeframe may be extended under paragraph (c) of this section.

(c) *Extension of timeframes.* (1) The MCO or PIHP may extend the timeframes from paragraph (b) of this section by up to 14 calendar days if—

(i) The enrollee requests the extension; or

(ii) The MCO or PIHP shows (to the satisfaction of the State agency, upon its request) that there is need for additional information and how the delay is in the enrollee's interest.

(2) *Requirements following extension.* If the MCO or PIHP extends the timeframes, it must—For any extension not requested by the enrollee, give the enrollee written notice of the reason for the delay.

(d) *Format of notice.* (1) *Grievances.* The State must establish the method MCOs and PIHPs will use to notify an enrollee of the disposition of a grievance.

(2) *Appeals.* (i) For all appeals, the MCO or PIHP must provide written notice of disposition.

(ii) For notice of expedited resolution, the MCO or PIHP must also provide oral notice.

(e) *Content of notice of appeal resolution.* The written notice of the resolution must include the following:

(1) The results of the resolution process and the date it was completed.

(2) For appeals not resolved wholly in favor of the enrollees—

(i) The right to request a State Fair Hearing, and how to do so;

(ii) The right to request to receive benefits while the hearing is pending, and how to make the request; and

(iii) That the enrollee may be held liable for the cost of those benefits if the hearing decision upholds the MCO's or PIHP's action.

(c) *Requirements for State fair hearings.*—(1) *Availability.* The State must permit the enrollee to request a State fair hearing within a reasonable time period specified by the State, but not less than 20 or in excess of 90 days from whichever of the following dates applies—

(i) If the State requires exhaustion of the MCO or PIHP level appeal procedures, from the date of the MCO's or PIHP's notice of resolution; and

(ii) If the State does not require exhaustion of the MCO or PIHP level appeal procedures and the enrollee appeals directly to the State for a fair hearing, from the date on the MCO's or PIHP's notice of action.

(2) *Parties.* The parties to the State fair hearing include the MCO or PIHP as well as the enrollee and his or her representative or the representative of a deceased enrollee's estate.

§ 438.410 Expedited resolution of appeals.

(a) *General rule.* Each MCO and PIHP must establish and maintain an expedited review process for appeals, when the MCO or PIHP determines (for a request from the enrollee) or the provider indicates (in making the request on the enrollee's behalf or supporting the enrollee's request) that taking the time for a standard resolution could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function;

(b) *Punitive Action.* The MCO or PIHP must ensure that punitive action is neither taken against a provider who requests an expedited resolution or supports an enrollee's appeal.

(c) *Action following denial of a request for expedited resolution.* If the MCO or PIHP denies a request for expedited resolution of an appeal, it must—

(1) Transfer the appeal to the timeframe for standard resolution in accordance with § 438.408(b)(2);

(2) Give the enrollee prompt oral notice of the denial, and follow up within two calendar days with a written notice.

§ 438.414 Information about the grievance system to providers and subcontractors.

The MCO or PIHP must provide the information specified at § 438.10(g)(1) about the grievance system to all providers and subcontractors at the time they enter into a contract.

§ 438.416 Record keeping and reporting requirements.

The State must require MCOs and PIHPs to maintain records of grievances and appeals and must review the information as part of the state quality strategy.

§ 438.420 Continuation of benefits while the MCO or PIHP appeal and the State Fair Hearing are pending.

(a) *Terminology.* As used in this section, ''timely'' filing means filing on or before the later of the following:

(1) The expiration of the timeframe specified by the State (in accordance with § 438.402(b)(2)) and communicated in the notice of action.

(2) The intended effective date of the MCO's or PIHP's proposed action.

(b) *Continuation of benefits.* The MCO or PIHP must continue the enrollee's benefits if—

(1) The enrollee or the provider files the appeal timely;

(2) The appeal involves the termination, suspension, or reduction of a previously authorized course of treatment;

(3) The services were ordered by an authorized provider;

(4) The period covered by the authorization has not expired; and

(5) The enrollee requests extension of benefits.

(c) *Duration of continued or reinstated benefits.* If, at the enrollee's

request, the MCO or PIHP continues or reinstates the enrollee's benefits while the appeal is pending, the benefits must be continued until one of following occurs:

(1) The enrollee withdraws the appeal.

(2) The MCO or PIHP resolves the appeal against the enrollee, unless the enrollee has requested a State fair hearing with continuation of benefits until a State fair hearing decision is reached.

(3) A State Fair Hearing Office issues a hearing decision adverse to the enrollee.

(d) *Enrollee responsibility for services furnished while the appeal is pending.* If the final resolution of the appeal is adverse to the enrollee, that is, upholds the MCO's or PIHP's action, the MCO or PIHP may recover the cost of the services furnished to the enrollee while the appeal is pending, to the extent that they were furnished solely because of the requirements of this section, and in accordance with the policy set forth in § 431.230(b) of this chapter.

§ 438.424 Effectuation of reversed appeal resolutions.

(a) *Services not furnished while the appeal is pending.* If the MCO or PIHP, or the State fair hearing officer reverses a decision to deny, limit, or delay services that were not furnished while the appeal was pending, the MCO or PIHP must authorize or provide the disputed services promptly, and as expeditiously as the enrollee's health condition requires.

(b) *Services furnished while the appeal is pending.* If the MCO or PIHP, or the State fair hearing officer reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO or the PIHP or the State must pay for those services, in accordance with State policy and regulations.

Subpart G—[Reserved]

Subpart H—Certifications and Program Integrity Provisions

§ 438.600 Statutory basis.

This subpart is based on sections 1902(a)(4) and 1902(a)(19) of the Act.

(a) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(b) Section 1902(a)(19) requires that the State plan provide the safeguards necessary to ensure that eligibility is determined and services are provided in a manner consistent with simplicity of administration and the best interests of the recipients.

§ 438.602 Basic rule.

As a condition for contracting and for receiving payment under the Medicaid managed care program, an MCO or PIHP must comply with the certification and program integrity requirements of this section.

§ 438.604 Data that must be certified.

(a) *Data certifications.* When State payments to the MCO or PIHP are based on data submitted by the MCO or PIHP, the State must require certification of the data as provided in § 438.606. The data that must be certified includes, but is not limited to, enrollment information, encounter data, and other information required by the State and contained in contracts, proposals, and related documents.

(b) *Certification of substantial compliance with contract.* Regardless of whether payment is based on data, each MCO and PIHP must certify that it is in substantial compliance with its contract.

(c) *Additional certifications.* Certification is required, as provided in § 438.606, for all documents specified by the State.

§ 438.606 Source, content, and timing of certification.

(a) *Source of certification.* For the data specified in § 438.604, the MCO or PIHP must require that one of the following certify the data the MCO or PIHP submits to the State:

(1) The MCO's or PIHP's Chief Executive Officer.

(2) The MCO's or PIHP's Chief Financial Officer.

(3) An individual who has delegated authority to sign for, and who reports directly to, the MCO's or PIHP's Chief Executive Officer or Chief Financial Officer.

(b) *Content of certification.* The certification must attest, based on best knowledge, information, and belief, as follows:

(1) To the accuracy, completeness and truthfulness of data.

(2) That the MCO or PIHP is in substantial compliance with its contract.

(3) To the accuracy, completeness and truthfulness of documents specified by the State.

(c) *Timing of certification.* The MCO or PIHP must submit the certification concurrently with the certified data or, in the case of compliance with the terms of the contract, when requesting payment.

§ 438.608 Program integrity requirements.

(a) *General requirement.* The MCO or PIHP must have administrative and management arrangements or procedures, including a mandatory compliance plan, that are designed to guard against fraud and abuse.

(b) *Specific requirements.* The arrangements or procedures must include the following:

(1) Written policies, procedures, and standards of conduct that articulate the organization's commitment to comply with all applicable Federal and State standards.

(2) The designation of a compliance officer and a compliance committee that are accountable to senior management.

(3) Effective training and education for the compliance officer and the organization's employees.

(4) Effective lines of communication between the compliance officer and the organization's employees.

(5) Enforcement of standards through well-publicized disciplinary guidelines.

(6) Provision of internal monitoring and auditing.

(7) Provision for prompt response to detected offenses, and for development of corrective action initiatives relating to the MCO's or PIHP's contract.

Subpart I—Sanctions

§ 438.700 Basis for imposition of sanctions.

(a) Each State that contracts with a MCO must, and each State that contracts with a PCCM may, establish intermediate sanctions, as specified in § 438.702, that it may impose if it makes any of the determinations specified in paragraphs (b) through (d) of this section. The State's determination may be based on findings from onsite survey, enrollee or other complaints, financial status, or any other source.

(b) A MCO acts or fails to act as follows:

(1) Fails substantially to provide medically necessary services that the MCO is required to provide, under law or under its contract with the State, to an enrollee covered under the contract.

(2) Imposes on enrollees premiums or charges that are in excess of the premiums or charges permitted under the Medicaid program.

(3) Acts to discriminate among enrollees on the basis of their health status or need for health care services. This includes termination of enrollment or refusal to reenroll a recipient, except as permitted under the Medicaid program, or any practice that would reasonably be expected to discourage enrollment by recipients whose medical condition or history indicates probable

need for substantial future medical services.

(4) Misrepresents or falsifies information that it furnishes to CMS or to the State.

(5) Misrepresents or falsifies information that it furnishes to an enrollee, potential enrollee, or health care provider.

(6) Fails to comply with the requirements for physician incentive plans, as set forth (for Medicare) in §§ 422.208 and 422.210 of this chapter.

(c) A MCO or a PCCM distributes directly, or indirectly through any agent or independent contractor, marketing materials that have not been approved by the State or that contain false or materially misleading information.

(d) A MCO violates any of the requirements in section 1903(m) of the Act and implementing regulations, or a MCO or a PCCM violates any of the requirements of section 1932 of the Act and implementing regulations. (For these violations, only the sanctions specified in § 438.702(a)(4) and (a)(5) may be imposed.)

§ 438.702 Types of intermediate sanctions.

(a) The types of intermediate sanctions that a State may impose under this subpart include the following:

(1) Civil money penalties in the amounts specified in § 438.704.

(2) Appointment of temporary management as provided in § 438.706. (The State may not impose this sanction on a PCCM.)

(3) Granting enrollees the right to terminate enrollment without cause. (The State must notify the affected enrollees of their right to disenroll.)

(4) Suspension of all new enrollment, including default enrollment, after the effective date of the sanction.

(5) Suspension of payment for recipients enrolled after the effective date of the sanction and until CMS or the State is satisfied that the reason for imposition of the sanction no longer exists and is not likely to recur.

(b) State agencies retain authority to impose additional sanctions under State statutes or State regulations that address areas of noncompliance specified in § 438.700, as well as additional areas of noncompliance. Nothing in this subpart prevents State agencies from exercising that authority.

§ 438.704 Amounts of civil money penalties.

(a) *General rule.* The limit on, or specific amount of, a civil money penalty the State may impose varies depending on the nature of the MCO's or PCCM's action or failure to act, as provided in this section.

(b) *Specific limits.* (1) The limit is $25,000 for each determination under the following paragraphs of § 438.700:

(i) Paragraph (b)(1) (Failure to provide services).

(ii) Paragraph (b)(5) (Misrepresentation or false statements to enrollees, potential enrollees, or health care providers).

(iii) Paragraph (b)(6) (Failure to comply with physician incentive plan requirements).

(iv) Paragraph (c) (Marketing violations).

(2) The limit is $100,000 for each determination under paragraph (b)(3) (discrimination) or (b)(4) (Misrepresentation or false statements to CMS or the State) of § 438.700.

(3) The limit is $15,000 for each recipient the State determines was not enrolled because of a discriminatory practice under paragraph (b)(3) of § 438.700. (This is subject to the overall limit of $100,000 under paragraph (b)(2) of this section).

(c) *Specific amount.* For premiums or charges in excess of the amounts permitted under the Medicaid program, the amount of the penalty is $25,000 or double the amount of the excess charges, whichever is greater. The State must deduct from the penalty the amount of overcharge and return it to the affected enrollees.

§ 438.706 Special rules for temporary management.

(a) *Optional imposition of sanction.* The State may impose temporary management if it finds (through onsite survey, enrollee complaints, financial audits, or any other means) that—

(1) There is continued egregious behavior by the MCO, including but not limited to behavior that is described in § 438.700, or that is contrary to any requirements of sections 1903(m) and 1932 of the Act;

(2) There is substantial risk to enrollees' health; or

(3) The sanction is necessary to ensure the health of the MCO's enrollees—

(i) While improvements are made to remedy violations under § 438.700; or

(ii) Until there is an orderly termination or reorganization of the MCO.

(b) *Required imposition of sanction.* The State must impose temporary management (regardless of any other sanction that may be imposed) if it finds that an MCO has repeatedly failed to meet substantive requirements in section 1903(m) or section 1932 of the Act, or this subpart. The State must also grant enrollees the right to terminate enrollment without cause, as described in § 438.702(a)(3).

(c) *Hearing.* The State may not delay imposition of temporary management to provide a hearing before imposing this sanction.

(d) *Duration of sanction.* The State may not terminate temporary management until it determines that the MCO can ensure that the sanctioned behavior will not recur.

§ 438.708 Termination of an MCO or PCCM contract.

A State has the authority to terminate an MCO or PCCM contract and enroll that entity's enrollees in other MCOs or PCCMs, or provide their Medicaid benefits through other options included in the State plan, if the State determines that the MCO or PCCM has failed to do either of the following:

(a) Carry out the substantive terms of its contract; or

(b) Meet applicable requirements in sections 1932, 1903(m), and 1905(t) of the Act.

§ 438.710 Due process: Notice of sanction and pre-termination hearing.

(a) *Notice of sanction.* Before imposing any of the alternative sanctions specified in this subpart, the State must give the affected entity timely written notice that explains the following:

(1) The basis and nature of the sanction.

(2) Any other due process protections that the State elects to provide.

(b) *Pre-termination hearing.* (1) *General rule.* Before terminating an MCO or PCCM contract under § 438.708, the State must provide the entity a pre-termination hearing.

(2) *Procedures.* The State must do the following:

(i) Give the MCO or PCCM written notice of its intent to terminate, the reason for termination, and the time and place of the hearing;

(ii) After the hearing, give the entity written notice of the decision affirming or reversing the proposed termination of the contract and, for an affirming decision, the effective date of termination; and

(iii) For an affirming decision, give enrollees of the MCO or PCCM notice of the termination and information, consistent with § 438.10, on their options for receiving Medicaid services following the effective date of termination.

§ 438.722 Disenrollment during termination hearing process.

After a State notifies an MCO or PCCM that it intends to terminate the contract, the State may do the following:

(a) Give the entity's enrollees written notice of the State's intent to terminate the contract.

(b) Allow enrollees to disenroll immediately without cause.

§ 438.724 Notice to CMS.

(a) The State must give the CMS Regional Office written notice whenever it imposes or lifts a sanction.

(b) The notice must—

(1) Be given no later than 30 days after the State imposes or lifts a sanction; and

(2) Specify the affected MCO, the kind of sanction, and the reason for the State's decision to impose or lift a sanction.

§ 438.726 State plan requirement.

The State plan must provide for the State to monitor for violations that involve the actions and failures to act specified in this part and to implement the provisions of this part.

§ 438.730 Sanction by CMS: Special rules for MCOs with risk contracts.

(a) *Basis for sanction.* (1) A State agency may recommend that CMS impose the denial of payment sanction on an MCO with a comprehensive risk contract if the MCO acts or fails to act as specified in § 438.700(b)(1) through (b)(6).

(2) The State agency's recommendation becomes CMS's recommendation unless CMS rejects it within 15 days of receipt.

(b) *Notice of sanction.* If CMS accepts the recommendation, the State agency and CMS take the following actions:

(1) The State agency—

(i) Gives the MCO written notice of the proposed sanction;

(ii) Allows the MCO 15 days from date of receipt of the notice to provide evidence that it has not acted or failed to act in the manner that is the basis for the recommended sanction;

(iii) May extend the initial 15-day period for an additional 15 days if, before the end of the initial period, the MCO submits a written request that includes a credible explanation of why it needs additional time; and

(iv) May not grant an extension if CMS determines that the MCO's conduct poses a threat to an enrollee's health or safety.

(2) CMS conveys the determination to the OIG for consideration of possible imposition of civil money penalties under section 1903(m)(5)(A) of the Act and part 1003 of this title. In accordance with the provisions of part 1003, the OIG may impose civil money penalties in addition to, or in place of, the sanctions that may be imposed under this section.

(c) *Informal reconsideration.* (1) If the MCO submits a timely response to the notice of sanction, the State agency—

(i) Conducts an informal reconsideration that includes review of the evidence by a State agency official who did not participate in the original recommendation; and

(ii) Gives the MCO a concise written decision setting forth the factual and legal basis for the decision.

(2) The State agency decision under paragraph (c)(1) of this section, forwarded to CMS, becomes CMS's decision unless CMS reverses or modifies the decision within 15 days from date of receipt.

(3) If CMS reverses or modifies the State agency decision, the agency sends the MCO a copy of CMS's decision.

(d) *Effective date of sanction.* (1) If the MCO does not seek reconsideration, a sanction is effective 15 days after the date of the notice of sanction under paragraph (b) of this section.

(2) If the MCO seeks reconsideration, the following rules apply:

(i) Except as specified in paragraph (d)(2)(ii) of this section, the sanction is effective on the date specified in CMS's reconsideration notice.

(ii) If CMS, in consultation with the State agency, determines that the MCO's conduct poses a serious threat to an enrollee's health or safety, CMS may make the sanction effective earlier than the date of CMS's reconsideration decision under paragraph (c) of this section.

(e) *CMS's role.* CMS retains the right to independently perform the functions assigned to the State agency under this section.

Subpart J—Conditions for Federal Financial Participation

§ 438.802 Basic requirements.

FFP is available in expenditures for payments under an MCO contract only for the periods during which the following conditions are met:

(a) The contract—

(1) Meets the requirements of this part; and

(2) Is in effect.

(b) The MCO and its subcontractors are in substantial compliance with the physician incentive plan requirements set forth in §§ 422.208 and 422.210 of this chapter.

(c) The MCO and the State are in substantial compliance with the requirements of the MCO contract and of this part.

§ 438.806 Prior approval.

(a) *Comprehensive risk contracts.* FFP is available under a comprehensive risk contract only if—

(1) The Regional Office has confirmed that the contractor meets the definition of MCO or is one of the entities described in paragraphs (a)(2) through (a)(5) of § 438.6; and

(2) The contract meets all the requirements of section 1903(m)(2)(A) of the Act, the applicable requirements of section 1932 of the Act, and the implementing regulations in this part.

(b) *MCO contracts.* Prior approval by CMS is a condition for FFP under any MCO contract that extends for less than one full year or that has a value equal to, or greater than, the following threshold amounts:

(1) For 1998, the threshold is $1,000,000.

(2) For subsequent years, the amount is increased by the percentage increase in the consumer price index for all urban consumers.

(c) FFP is not available in an MCO contract that does not have prior approval from CMS under paragraph (b) of this section.

§ 438.808 Exclusion of entities.

(a) *General rule.* FFP is available in payments under MCO contracts only if the State excludes from the contracts any entities described in paragraph (b) of this section.

(b) *Entities that must be excluded.* (1) An entity that could be excluded under section 1128(b)(8) of the Act as being controlled by a sanctioned individual.

(2) An entity that has a substantial contractual relationship as defined in § 431.55(h)(3) of this chapter, either directly or indirectly, with an individual convicted of certain crimes as described in section 1128(b)(8)(B) of the Act.

(3) An entity that employs or contracts, directly or indirectly, for the furnishing of health care, utilization review, medical social work, or administrative services, with one of the following:

(i) Any individual or entity excluded from participation in Federal health care programs under either section 1128 or section 1128A of the Act.

(ii) Any entity that would provide those services through an excluded individual or entity.

§ 438.810 Expenditures for enrollment broker services.

(a) *Terminology.* As used in this section—

Choice counseling means activities such as answering questions and providing information (in an unbiased manner) on available MCO, PIHP's or PCCM delivery system options, and advising on what factors to consider when choosing among them and in selecting a primary care provider;

Enrollment activities means activities such as distributing, collecting, and processing enrollment materials and taking enrollments by phone or in person; and

Enrollment broker means an individual or entity that performs choice counseling or enrollment activities, or both.

Enrollment services means choice counseling, or enrollment activities, or both.

(b) *Conditions that enrollment brokers must meet.* State expenditures for the use of enrollment brokers are considered necessary for the proper and efficient operation of the State plan and thus eligible for FFP only if the broker and its subcontractors meet the following conditions:

(1) *Independence.* The broker and its subcontractors are independent of any MCO, PIHP, PAHP, PCCM, or other health care provider in the State in which they provide enrollment services. A broker or subcontractor is not considered ''independent'' if it—

(i) Is an MCO, PIHP, PAHP, PCCM or other health care provider in the State;

(ii) Is owned or controlled by an MCO, PIHP, PAHP, PCCM, or other health care provider in the State; or

(iii) Owns or controls an MCO, PIHP, PAHP, PCCM or other health care provider in the State.

(2) *Freedom from conflict of interest.* The broker and its subcontractor are free from conflict of interest. A broker or subcontractor is not considered free from conflict of interest if any person who is the owner, employee, or consultant of the broker or subcontractor or has any contract with them—

(i) Has any direct or indirect financial interest in any entity or health care provider that furnishes services in the State in which the broker or subcontractor provides enrollment services;

(ii) Has been excluded from participation under title XVIII or XIX of the Act;

(iii) Has been debarred by any Federal agency; or

(iv) Has been, or is now, subject to civil money penalties under the Act.

(c) *Approval.* The initial contract or memorandum of agreement (MOA) for services performed by the broker has been reviewed and approved by CMS.

§ 438.812 Costs under risk and nonrisk contracts.

(a) Under a risk contract, the total amount the State agency pays for carrying out the contract provisions is a medical assistance cost.

(b) Under a nonrisk contract—

(1) The amount the State agency pays for the furnishing of medical services to eligible recipients is a medical assistance cost; and

(2) The amount the State agency pays for the contractor's performance of other functions is an administrative cost.

§ 438.814 Limit on payments in excess of capitation rates.

FFP is not available for payments pursuant to risk corridors or incentive arrangements that exceed 105 percent of that portion of the aggregate amount of approved capitation payments attributable to the enrollees or services covered by the risk corridor or incentive arrangement.

PART 440—SERVICES: GENERAL PROVISIONS

1. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In subpart A, a new § 440.168 is added to read as follows:

§ 440.168 Primary care case management services.

(a) Primary care case management services means case management related services that—

(1) Include location, coordination, and monitoring of primary health care services; and

(2) Are provided under a contract between the State and either of the following:

(i) A PCCM who is a physician or may, at State option, be a physician assistant, nurse practitioner, or certified nurse-midwife.

(ii) A physician group practice, or an entity that employs or arranges with physicians to furnish the services.

(b) Primary care case management services may be offered by the State—

(1) As a voluntary option under the regular State plan program; or

(2) On a mandatory basis under section 1932 (a)(1) of the Act or under section 1915(b) or section 1115 waiver authority.

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. A new § 447.46 is added, to read as follows:

§ 447.46 Timely claims payment by MCOs.

(a) *Basis and scope.* This section implements section 1932(f) of the Act by specifying the rules and exceptions for prompt payment of claims by MCOs.

(b) *Definitions.* ''Claim'' and ''clean claim'' have the meaning given those terms in § 447.45.

(c) *Contract requirements.* (1) *Basic rule.* A contract with an MCO must provide that the organization will meet the requirements of §§ 447.45(d)(2) and (d)(3), and abide by the specifications of §§ 447.45(d)(5) and (d)(6).

(2) *Exception.* The MCO and its providers may, by mutual agreement, establish an alternative payment schedule.

(3) Any alternative schedule must be stipulated in the contract.

§ 447.53 [Amended]

3. In § 447.53, the following changes are made:

A. In paragraph (b) introductory text, the parenthetical phrase is removed.

B. Paragraph (b)(6) is removed.

C. A new paragraph (e) is added to read as follows:

§ 447.53 Applicability; specification; multiple charges.

(e) No provider may deny services, to an individual who is eligible for the services, on account of the individual's inability to pay the cost sharing.

§ 447.58 [Amended]

4. In § 447.58, ''Except for HMO services subject to the copayment exclusion in § 447.53(b)(6), if'' is removed and ''If'' is inserted in its place.

5. A new § 447.60 is added to subpart A to read as follows:

§ 447.60 Cost-sharing requirements for services furnished by MCOs.

Contracts with MCOs must provide that any cost-sharing charges the MCO imposes on Medicaid enrollees are in accordance with the requirements set forth in §§ 447.50 and 447.53 through 447.58 for cost-sharing charges imposed by the State agency.

§ 447.361 [Removed]

Section 447.361 is removed.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: August 1, 2001.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: August 10, 2001.

Tommy G. Thompson,

Secretary.

[FR Doc. 01–20715 Filed 8–16–01; 8:45 am]

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Monday,
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Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 187

Fees for FAA Services for Certain Flights; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 187

[Docket No.: FAA–00–7018; Amendment No. 187–12]

RIN 2120–AG17

Fees for FAA Services for Certain Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Rule.

SUMMARY: The FAA is issuing this final rule, required by law, lowering the fees it established by interim final rule, which was issued on May 30, 2000 (65 FR 36002, June 6, 2000). The interim final rule established fees for FAA air traffic and related services for certain aircraft that transit U.S.-controlled airspace but neither take off from, nor land in, the United States. This final rule allows the FAA to continue to charge fees as required by law. This action also addresses a recent Court of Appeals opinion concerning the interim final rule.

DATES: Effective August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Randall Fiertz, Office of Cost and Performance Management, (APF–2), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7140; fax (202) 493–4191.

SUPPLEMENTARY INFORMATION:

Availability of the Final Rule

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (http://dms.dot.gov/search).

(2) On the search page type in the last four digits of the Docket number (7018). Click on ''search.''

(3) On the next page, which contains the Docket summary information for Docket No. 7018, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through FAA's web page at http://www.faa.gov/avr/armhome.htm or the **Federal Register**'s web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Be sure to identify the amendment number or docket number of this rulemaking.

The Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at our site, http://www.faa.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us at *9–AWA–SBREFA@faa.gov.*

Introduction

Since 1996, the Federal Aviation Administration (FAA) has undertaken several rulemaking actions to impose fees for FAA services provided, made available, or used by certain flights. Congress directed the FAA to establish these fees to recover the cost of FAA services rendered to certain aircraft operators who otherwise do not contribute by taxes or other assessments to the cost of the air traffic control system. The details of the authority as well as the fees and other pertinent details are provided below.

The FAA's rulemaking efforts to impose these statutorily required fees have been repeatedly challenged in court. The most recent challenge resulted in an opinion of the U.S. Court of Appeals for the District of Columbia Circuit that was issued on July 13, 2001 (*Air Transport Association of Canada* vs. *FAA*; 00–1334, July 13, 2001). In that opinion, issued in response to a consolidated petition for review of the Interim Final Rule (IFR) that established the fees, the Court stated, ''Because FAA has failed to articulate the basis for its conclusions that 'the unit costs of providing [air traffic control] services to overflights within each environment [are] identical to the unit costs of providing [air traffic control] services to all air traffic within each environment,' we vacate the 2000 Rule and remand to the FAA for further proceedings consistent with this opinion.''

Because the Court faulted the *explanation* provided by the FAA in the IFR, and not the *substance* of the IFR, the FAA has determined that the publication of this Final Rule will both meet the requirements of the statute and address the concerns of the Court. Moreover, the publication of this rule completes the FAA's task of establishing the fees as directed by Congress. Also, this action provides a detailed record that explains the basis of these fees—which the FAA, through its agency expertise, developed to meet the Congressional mandate.

Overview

The provision of air traffic control and related services by the FAA involves an exceedingly complex series of events requiring thousands of people and hundreds of machines, collectively costing many billions of dollars. Some 40,000 to 50,000 flights operate within the U.S. air traffic system each day; only about 650 (or fewer than 1.5%) of these flights meet the definition of an Overflight, and only about 300 flights per day are currently subject to these fees.

As detailed below, many different services are provided, made available, or used in several different ways to flights operating in the U.S. air traffic system. While no two flights are exactly alike, all flights that enter the air traffic system receive benefits from the entire ATC system, whether requested or not. All the services provided by the FAA are required for all flights because the ATC system is an interdependent, interlocking chain of people and equipment that seamlessly benefits all flights in all circumstances, with or without the operators' participation or knowledge, to travel safely through U.S. airspace.

Services to these flights, as detailed below, usually begin with the filing of a flight plan, but continue well beyond the flight plan (e.g., training, airspace planning, emergency services, etc.). As Congress recognized, the development, operation and maintenance of the ATC system involves many activities and services (the statute lists a few of these services) whose fixed and common costs ''swamp'' any of the highly variable activities and services that are provided to, made available to, or used by any individual flight. FAA used its Cost Accounting System (described in the ''Costing Methodology Report,'' provided in the docket, FAA–00–7018, item 6) to determine the costs of providing the air traffic services used by all flights (including those subject to the fees). As costs can be segregated by the lines of business of the FAA (in this case Air Traffic Services), the costs can be further broken down by the major airspace environments (Terminal, Oceanic, and Enroute) where services are provided to flights in U.S.-controlled airspace. The flights that are subject to these fees use mainly Enroute and/or Oceanic services. Therefore, only the

costs of these two air traffic environments were used in deriving the fees, in part to ensure that only the costs ''directly related'' to services for flights in these two airspace environments would be considered in establishing fees.

Since the ATC system is available to all flights, and all flights benefit from the ATC system, the FAA does not distinguish between flights as to the services provided within each ATC environment. Consequently, there is little, if any, cost difference between any of the flights within each ATC environment. Nearly all costs for services provided or used serve to make the system available, with any individual flight cost variability lost in a sea of fixed and common costs (see discussion of the first comment below). While there are cost differences between the two environments (Enroute and Oceanic), and these are reflected in the fees, ultimately the costs of providing the air traffic control and related services to any given aircraft within each operational environment are essentially identical. Any cost variation in services provided an individual flight is *de minimis.* The costs are essentially the same, whether the flight flies at 41,000 feet, 31,000 feet, or 5000 feet, or whether the flight has one radio contact or many radio contacts with controllers. Also, the FAA has no current or projected system (nor does FAA believe one could be developed economically) that could track the *de minimis* cost difference that might exist between individual flights.

Accordingly, the fees described below fairly treat all users the same in terms of costs, just as all flights are treated the same in terms of the benefits and services. Those who are subject to the fees, who are otherwise interchangeable with any other user in the ATC system, pay fees based on the same costs as other users because the services provided, made available, or used are the same as for any other flight. Therefore, as detailed below, the fees imposed in this rulemaking are based directly on the costs to the FAA of providing services for safe air transportation for all flights, including those subject to fees.

As noted by the Court of Appeals in the case cited above, it would appear that the costs of some flights should be different from others. But the ATC system does not provide services individually; rather it provides benefits globally. This is because of the interlocking relationship of the costs of the air traffic control system and the requirement to have all services available to all flights at all times to achieve safety for all. Set forth below, especially in the FAA's response to the comments, are the details of how the FAA has complied with the statutory mandate, along with further explanation of why the cost to the FAA of any flight, in either the Enroute or the Oceanic environment, is essentially the same, on a per-mile basis, within each environment.

Background

Authority To Establish Fees

The Federal Aviation Reauthorization Act of 1996 (the Act) directs the FAA to establish by Interim Final Rule (IFR) a fee schedule and collection process for air traffic control (ATC) and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that neither take off from, nor land in, the United States (49 U.S.C. 45301, as amended by Public Law 104–264). Such flights are commonly referred to as ''Overflights.'' The Act further directs the FAA to seek public comment after issuing the Interim Final Rule and to subsequently issue a Final Rule.

The Act directs the FAA to ensure that the fees authorized by the Act are ''directly related'' to the FAA's costs of providing the service rendered. The Act further states that ''services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off from, nor land in, the United States.''

Services for which fees can be charged under the Act are those ''rendered'' or ''provided'' by the FAA. By specifying that these services include all ''services which are available to facilitate safe transportation over the United States,'' the Act further recognizes that, due to the integrated and interlocking nature of the air traffic control and related services, fees will be based on the cost of all FAA services provided, made available, or used by those aircraft operations covered by the Act.

Every aircraft, including those covered by the Act, directly receives the benefit of a wide variety of services through the integrated FAA system merely by being present in U.S.-controlled airspace. No request for services is necessary, as it is impossible for flights to safely pick and choose what services are necessary for their own safety and that of others in the ATC system.

It is clear that Congress well understood that the full range of these ATC and related services would be used by the FAA in calculating the fees when Congress provided that costs may be recovered for the many services that are available to facilitate safe transportation of aircraft over the United States.

Fee Concept

The FAA's ATC system is considered the preeminent ATC system in the world. Each year, some 40 percent of the world's aircraft operations take place within this system. The system is a fully integrated, massively complex collection of people and equipment, with backup capabilities and redundancies, which facilitates the safe transportation of aircraft in U.S. airspace every moment of the day.

To accomplish this task, the FAA makes available a wide array of services that are rendered directly or indirectly to the highly diverse and frequently dense aircraft operations in U.S. airspace. These aircraft operations range from the smallest, most basic, private aircraft operating in good weather from grass fields, to the largest, most sophisticated, commercial aircraft operating in bad weather to the busiest airports in the world. These aircraft operations also include a large assortment of U.S. and foreign government and military aircraft operating at all extremes of flight.

One category of these aircraft operations involves aircraft that neither land in nor takeoff from the United States, but do operate in U.S. airspace under the direction of the FAA. These ''Overflights'' are a microcosm of the larger, complex set of aircraft operations. Overflights involve virtually every size and type of aircraft flying everything from short distances at low altitudes to long distances at high altitudes. The same tremendous variety of equipment, instrumentation and capabilities seen in all other flights (i.e., non-Overflights) is also seen in Overflights.

The type and scope of interaction between the FAA and a given user, either an Overflight or a non-Overflight, may vary considerably from one flight to another, but the services rendered involve making available at all times the total system that facilitates the safe transportation of all aircraft. For the ATC system to properly provide safe flight to all operators, the many services provided, made available, or used must work together harmoniously so that the FAA can serve any aircraft anywhere in

the ATC system, regardless of how it is equipped and where it is going.

Any aircraft flying in FAA-controlled airspace may use any system or set of systems during any portion of the flight. Due to the passive nature of parts of the ATC system, such as navigational aids, the FAA does not always know precisely who is using a particular aspect of the ATC system, when, or how many times. Likewise, any aircraft flying in the ATC system receives many services automatically just by being in the system, without having to request the services specifically. All flights benefit from merely entering the system, and these benefits are far beyond any explicitly requested by a user.

Communication between the user and the FAA may be initiated by either the FAA or by the aircraft operator. Oftentimes, vital ATC services are provided and received without the full knowledge of both parties, the provider and the recipient. For example, the routing of aircraft to avoid other aircraft or bad weather, or to enjoy better flying conditions, is frequently accomplished by the FAA without the user's specific knowledge (or understanding of why a particular routing or re-routing was given by the FAA). Similarly, the use of navigational aids and other automatic flight information systems is nearly always accomplished without the knowledge of the FAA. For example, satellites and VOR's emit radio signals that are available for use for navigational purposes by any and all aircraft equipped to receive their signals—and this is a genuine benefit to all such aircraft—but the FAA has no way of knowing or metering when these signals are being received and by whom. These aspects of the ATC system, provided by the FAA at considerable cost, are in many ways comparable to signals and warnings used in other modes of transportation (e.g., highway traffic lights, warning signals at railroad crossings, lighted directional buoys in harbors and waterways, weather channels and reports), all of which contribute in major ways to transportation safety but are impossible to meter directly to specific users. Finally, many other services, such as emergency assistance or routing to an alternate airport, may be accomplished without the knowledge of affected aircraft, other than the one having the emergency or needing the service.

To establish fees that capture this dynamic, varied and highly integrated system that must meet the highest of safety standards, the FAA has chosen a fee-setting methodology (as detailed below) that not only captures the costs of making available the many services rendered, but fairly meters those costs among the users based on the number of miles flown in the ATC system by each user.

In summary, the fee system established under this rulemaking has been based directly on the FAA's costs of making the services rendered by this highly integrated ATC system available to all flights, including Overflights, to facilitate their safe operation in the airspace controlled by the United States.

Overflight Operations

Operators of overflight aircraft benefit from the FAA's provision of ATC and related services in several ways. First, and most importantly, FAA's air traffic services enhance safety through the availability of ATC, navigation, and communications services, as well as the provision of many emergency services that facilitate safe air transportation. Second, flying through U.S.-controlled airspace allows the operator to choose optimized routing for the aircraft, which is a substantial benefit. The level and type of ATC and other services that are provided or made available to operators of overflights depends, in part, on the portions of U.S.-controlled airspace such flights transit. These services that are available to operators include communications, navigation, radar surveillance, emergency services, and flight information services. For aircraft transiting U.S. enroute airspace, Air Route Traffic Control Centers (ARTCCs) provide separation by means of radar surveillance (if they are operating under instrument flight rules or generally in airspace above 18,000 feet). Also, these flights mainly use navigational aids and radio communication with ARTCCs.

For aircraft transiting oceanic airspace, where radar surveillance and some navigational aids are not available, navigation is generally conducted by on-board systems. Aircraft separation, however, is provided under procedural control, under which flights report their position to an air traffic controller each time they fly over a specified reporting point.

The FAA estimates that approximately 236,000 non-public flights (i.e. in aircraft that are not statutorily exempt) annually transit U.S.-controlled airspace without landing or taking off in the United States (see the report entitled ''Overflight Fee Development Report, as Amended,'' item 101 in the docket).

Charging overflights for ATC and related services is accepted in the international arena. The International Civil Aviation Organization (ICAO) states that ''where air navigation services are provided for international use, the providers may require the users to pay their share of the related costs * * *.'' (ICAO's Policies on Charges for Airports and Air Navigation Services, Paragraph 36 (Document 9082/6)). Further, paragraph 47 of Document 9082/6 notes that ''providers * * * may require all users to pay their share of the cost of providing them [air navigation services for international use] regardless of whether or not the utilization takes place over the territory of the provider State.'' (Document 9082/6, adopted by ICAO in December 2000, has been placed in the docket as item 119. An earlier version of this document, ICAO Document 9082/5, had been previously placed in the docket as item 7.)

Use of Overflight Fees

At the same time Congress passed the Act, it also established 49 U.S.C. 41742, which sets forth how the Overflight Fees are to be used. Each year, $50 million from fees or other funds made available to the FAA are authorized and appropriated for the Essential Air Service (EAS) program. This program, administered by the Office of the Secretary of Transportation, provides air carrier service to small communities. The statute has been in effect since October 1996, and $50 million has been authorized and appropriated each subsequent year. The statute underscores the need for the FAA to act expeditiously in establishing and collecting Overflight Fees.

History

On March 20, 1997, the FAA published an Interim Final Rule (IFR), ''Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace'' (62 FR 13496), which established fees for FAA air traffic and related services provided to certain aircraft that transit U.S.-controlled airspace but neither take off from, nor land in, the United States. The FAA invited public comment on the IFR and held a public meeting on May 1, 1997. The effective date of the rule was May 19, 1997, and the comment period closed on July 18, 1997. The FAA also published two additional amendments to that IFR on May 2, 1997 (62 FR 24286) and October 2, 1997 (62 FR 51736).

That rulemaking was subsequently challenged. The Air Transport Association of Canada (ATAC) and seven airlines petitioned the United States Court of Appeals for the District of Columbia (Court) to review the rule. On January 30, 1998, the Court issued its opinion on the eight consolidated petitions in the case of *Asiana Airlines* v. *the FAA,* 134 F. 3d 393 (D.C. Cir.

1998). The Court rejected the petitioners' claims that: (a) the FAA acted improperly in employing an expedited procedure before the effective date of the IFR; and (b) the FAA violated the anti-discrimination provisions of various international aviation agreements. However, the Court concluded that the FAA's methodology of determining cost violated statutory requirements. Therefore, the Court vacated the IFR fee schedule and remanded the IFR to the FAA for further proceedings consistent with the opinion. On July 24, 1998, the FAA published a Final Rule (63 FR 40000) removing the 1997 IFR.

After the FAA removed the 1997 IFR, the FAA met with various user and aviation interest groups to listen to their concerns about fees under the Act. The last such meeting was on May 24, 2000, and included the Department of Transportation General Counsel and members of her staff. A summary of each of these meetings can be found in the docket for this rulemaking.

On June 6, 2000, the FAA published a new Interim Final Rule with a request for comments and notice of another public meeting (65 FR 36002, June 6, 2000). The FAA held the public meeting on June 29, 2000, and 12 individuals representing 10 different organizations made presentations. A discussion of the comments made at the public meeting can be found in the following section of this document. The FAA began charging fees on August 1, 2000. The FAA extended the comment period on October 6, 2000 (65 FR 59713), and again on October 27, 2000 (65 FR 64401), closing the comment period on December 26, 2000. Also, on November 1, 2000, the Congress enacted the National Transportation Safety Board Amendments Act of 2000 (Public Law 106–424). Section 16 of that Act deemed the Interim Final Rule, published on June 6, 2000, to have been issued in accordance with the Act.

Just before the August 1, 2000, effective date of the current fees, the ATAC and seven airlines again petitioned the Court to review the Interim Final Rule. The petitions were again consolidated into a single case. Issues raised by the petitioners included some of the same process and procedure questions raised in the previous litigation, as well as new issues regarding the adequacy of information provided by the FAA to support the fees and whether the fees meet the statutory requirement of being ''directly related'' to the FAA's costs of providing the services. The Court heard oral arguments on May 14, 2001. On July 13, 2001, the Court issued an opinion, described in the ''Introduction'' section of this rulemaking.

Reports Adopted by the FAA

The FAA asked Capital Economics, a firm with expertise in finance, accounting and economics, to review the fee schedule developed by the FAA to recover the costs of providing ATC and related services to ''Overflights.'' Capital Economics is located in Washington, DC, and specializes in conducting analysis of complex regulatory issues. The FAA requested Capital Economics to assist in responding to comments on the IFR. The FAA has adopted for this rule the Capital Economics report, entitled ''A Review of FAA Overflight Fees.'' This report has been placed in the rulemaking docket (Docket No. FAA–00–7018, item 99).

The Capital Economics review confirms that the FAA's fee structure is well within the scope of commonly accepted economic, financial, and accounting principles as applied in a practical, real-world setting. Also, in Capital Economics' view, the FAA's reliance on a mileage-based fee structure complies with the statutory requirement that the fees be cost-based and not value-based. The review also finds that due to the prospective high metering costs of other alternative methods, the mileage-based metric is likely to be the least expensive measure to employ to assign costs to Overflights. In addition, the FAA agrees with Capital Economics' conclusion that there is no better alternative allocation mechanism than the mileage-based method used by the FAA, even ignoring metering costs. The report indicates that the fee structure developed by the FAA meets the ''subsidy-free'' test, which means that the Overflight Fees do not subsidize other agency costs, users, or services. The basis for these conclusions is captured in the Capital Economics report.

The FAA also has relied extensively on the work of the accounting and professional services firm, Arthur Andersen, which has been one of the agency's partners in developing its Cost Accounting System (CAS) and has provided advice to the FAA on CAS-related accounting matters. Arthur Andersen developed a ''Costing Methodology Report,'' which was used by the FAA in deriving its Overflight Fees. Arthur Andersen later published an Addendum to this report. Both of these items are included in the rulemaking docket (FAA–00–7018), items 6 and 101, respectively. The Costing Methodology Report describes how the CAS captures costs for all FAA lines of business and how costs are assigned to the Enroute and Oceanic Services. The Addendum to the Arthur Andersen report addresses several of the principal comments the FAA has received on the Overflight Fee IFR.

As noted above, the FAA has adopted the Capital Economics and Arthur Andersen reports in responding to many of the comments received in this rulemaking. Those comments are addressed in detail below.

Discussion of Comments

The FAA received a total of 57 different comments, many of them multiple times, from the 28 commenters listed below, in response to the Interim Final Rule, including statements made at the public meeting held on June 29, 2000. In addition, the FAA either already had or received several letters, reports and other items of information relating to the Interim Final Rule. The FAA carefully considered these documents as well as the comments prior to issuing this Final Rule.

A number of the commenters generally agree that the FAA has the right to collect fees for its services; however, many argue that the methodology the FAA uses to derive its fees is flawed. Several commenters requested additional information or clarification regarding certain underlying assumptions, cost categories, terminology, cost data, cost allocation processes, and reports provided by consultants. Although many of the requests for information did not identify a specific issue or problem, the FAA has attempted to respond to these comments wherever possible, and has provided an additional reference or a point of contact where further information can be obtained if needed.

Many commenters included extensive attachments in support of their position, which can be found in the docket. Most comments are from foreign air carriers, trade associations representing those air carriers, and individuals. The commenters are:

Air Europa Lineas Aereas, S.A.U
Air New Zealand Limited
Air Transport Association of Canada (ATAC)
Airtours International Airways Ltd.
American Airlines
Association of Asia Pacific Airlines (AAPA)
Aviation Assembly
British Airways PLC
Corsair
Deutsche Lufthansa A.G.
Eric A. Jackson
Iberia Lineas Aereas De Espana
International Air Carrier Association (IACA)

International Air Transport Association (IATA)
International Business Aviation Council, Ltd.
Japan Airlines Company, Ltd.
John R. Bell II
Joseph A. Beaudoin (on behalf of the ATAC)
KLM Royal Dutch Airlines
KPMG LLP (on behalf of the ATAC)
Long Haul Charter Carriers of Italy
LTU-Lufttransport-Unternehmen GmbH. (LTU)
Michael Jengo, Jr. (on behalf of Air New Zealand and other air carriers)
Monarch Airlines Limited
National Business Aviation Association, Inc. (NBAA)
Qantas Airways Limited
Richard Henrikson
Societe Air France

Summary of Comments and Disposition

As stated earlier, many of the commenters agree that the FAA has the right to charge fees for Overflights; however, those commenters disagree with several elements of the FAA's approach to determining those fees. Generally, commenters raise numerous detailed issues on the Interim Final Rule, a number of which have been repeated by several commenters. Therefore, for clarity, the FAA has grouped most of the comments. The following list identifies the major substantive issues raised by the commenters:

- The cost of providing air traffic control and related services to Overflights versus non-Overflights in the Enroute and Oceanic environments,
- The inclusion of fixed and common costs in the Overflight Fee cost pool,
- Whether Overflight Fees are subsidizing other costs or services,
- The definition of fees ''directly related'' to costs as used by the Act,
- Lack of consultation,
- Violation of the Administrative Procedure Act (APA),
- Violation of international agreements,
- Violation of International Civil Aviation Organization (ICAO) guidelines,
- Accounting and charging for services provided by air traffic controllers at Enroute Centers before having the cost of Terminal Services,
- Accounting for costs incurred in the transitional airspace between Oceanic and Enroute Services,
- How the FAA determines the cost of providing services to Overflights,
- Individual fees for each service delivery point (SDP),
- Alternative methods to assign costs to users, and
- Requests for additional information.

These comments, and all others received, are addressed below.

1. The Cost of Providing Air Traffic Control and Related Services to Overflights Versus Non-Overflights in the Enroute and Oceanic Environments

Many commenters suggest that Overflights cost less than non-Overflights for various reasons. Several air carriers give specific examples of the difference between costs of providing service to Overflights versus non-Overflights. British Airways states that the FAA incurs a higher level of labor costs for ATC services to aircraft at lower altitudes. The following are additional examples that express the same concern.

According to the Air Transport Association of Canada (ATAC), the FAA assumes that the level of service it provides to each flight is the same regardless of the degree of congestion in the airspace transited by the flight. That is, the FAA assumes that the labor costs required for controllers to maintain proper separation in congested airspace are the same as the labor costs required in sparsely used airspace. The ATAC states that the FAA fees rely on this assumption, even though ATAC notes that the FAA itself acknowledges on page 2 of its original Fee Development Report (Docket item 4), that ''the level of air traffic service provided to Overflights depends, in part, on the portions of U.S.-controlled airspace transited by such flights.''

The ATAC also states, ''the FAA assumes that the level of services provided to each flight is the same on a per-mile basis regardless of the number of sectors transited by the flight. This assumption ignores the costs incurred by the FAA when a flight is handed off from one sector to another. Such costs will differ among flights with the same number of GCD miles but transiting different numbers of sectors.''

Qantas Airways opines that ''one of the main assumptions underlying the FAA's fee calculations is that the ATC services provided to Enroute and Oceanic Overflights, respectively do not differ from ATC services provided to other Enroute or Oceanic flights.'' Qantas notes that the FAA provides no information to show the validity of this assumption.

Joseph A. Beaudoin, a former air traffic controller, states, in comments submitted on behalf of the ATAC, that Overflights represent a ''miniscule percentage'' of total Enroute traffic, and that the vast majority of Enroute traffic is either (1) flights operating at lower altitudes (below 18,000 feet) the entire time they are in the Enroute environment, or (2) flights transitioning through the lower altitude airspace on their way to or from the Terminal environment or high altitude sectors (18,000 feet and above). Mr. Beaudoin maintains that these low altitude and transitional flights require a much higher level of controller attention and contact than do the Overflights, and provides several pages of narrative explaining in great detail what he believes is involved in providing ATC services to each type of flight in the Enroute environment. His conclusion is that Overflights require much less time and effort on the part of the controller, and that Overflights require much less in the way of services and equipment than low altitude and transitional flights.

In subsequent comments, Mr. Beaudoin also asserts that the controller manpower required to service Overflights and non-Overflights is not common since controllers generally are not simultaneously providing services to Overflights and non-Overflights. Mr. Beaudoin further comments that the FAA's labor costs are not fixed; rather the number of controllers providing services varies, depending on the volume of aircraft operating within the particular geographical area or sector and the nature of those aircraft operations.

Michael Jengo, Jr., a former air traffic controller, submits, on behalf of Air New Zealand and other air carriers, another comment on the ATC services offered in the Oceanic environment, stating, ''There is a significant difference in the level of ATC services provided to an Overflight that traverses oceanic non-radar airspace and a flight that lands or departs a U.S. airport.''

The consulting firm of KPMG, which submitted several detailed comments on behalf of the ATAC, states that by using Average All-Aircraft Cost as a surrogate for Average Overflight Cost, the FAA ensures that the Overflight fees in the Enroute environment are not ''directly related'' to the FAA's costs of providing ATC services to Overflights.

KPMG further argues that Low Altitude and Transitional Flights require a high level of FAA controller attention and contacts with radar facilities because they occur within airspace: (1) in which aircraft are constantly requesting or requiring clearance to change altitude; (2) that is often congested; and (3) which is frequently affected by weather problems and airport delays.

KPMG concludes that because most flights are non-Overflights, the Average Cost used by the FAA is close to the

average cost to provide services to non-Overflights, and the substantial differences in costs between provision of ATC services to Overflights and non-Overflights results in a large disparity between the Overflight Fees and the actual costs of providing ATC services to Overflights.

FAA Response: The FAA disagrees with these comments. The FAA believes its Overflight Fee development approach is a reasonable one, consistent with the Act, and that it fairly assesses fees for the provision of ATC and related services. The FAA did not seek to differentiate between Overflights and non-Overflights for the following reasons: (1) The FAA incurs the vast majority of costs by making its comprehensive ATC system available to all flights (regardless of the type of aircraft and its equipment and capabilities); (2) the FAA's marginal cost, including labor cost, for providing services to any flight is close to zero; (3) the majority of FAA's costs are common and fixed costs; and (4) the controllers' responsibilities for Overflights are not fundamentally any different than for non-Overflights.

In the statute requiring the Fees (49 U.S.C. 45301), Congress provided:

> [The FAA] shall ensure that each of the fees required by subsection 'a' is directly related to the Administration's costs of providing the service rendered. Services for which costs may be recovered include the cost of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States.

The FAA incurs a significant amount of costs simply by making services *available*, as Congress specifically authorized (as quoted above), since the same ATC infrastructure is used to provide services to Overflights and non-Overflights. Also, the benefits all flights receive flow mainly from the ATC system, not the individual ATC actions related to an individual flight.

The FAA ATC system is designed to service and benefit all flights by providing for safe passage for all flights all the time. Overflights can be anywhere in the ATC system at any point in time for any amount of time, and can use any of the available services, regardless of the type of flight, user, aircraft, or the aircraft equipment and capabilities. Overflights are provided, have made available, or use the extensive ATC and related services because of weather deviations, aircraft type and equipment, radar vectors, traffic congestion, flight stability/comfort, merging routes/crossing routes, transitioning from one ATC environment or servicing point to another, as well as many emergency services such as diverting to alternate airports. No matter where an aircraft is in U.S.-controlled airspace, the FAA makes available an extensive and full offering of services to that aircraft to facilitate safe air transportation. As a conservative estimate, the burden each flight imposes on the FAA is determined by the number of miles flown by that flight in each ATC environment. Therefore, each Overflight is charged an appropriate fee based on its Great Circle Distance (GCD) mileage traveled in the Enroute airspace and its GCD mileage flown in the Oceanic airspace.

The FAA agrees with the conclusions presented by Capital Economics in its report (Docket item 99), which supports the FAA's fee methodology with respect to Enroute and Oceanic Services (in section IIIA, Enroute, pages 8–10):

> The marginal cost of servicing any particular flight in the Enroute environment is very small. This is due to several factors. The Enroute airspace environment is not capacity constrained. System constraints do exist, but they are in other environments, such as Terminal Radar Approach Control Facility (TRACON) and Terminal Operations. In addition, for safety purposes, the air traffic control system has significant built-in redundancy, with multiple overlapping components. Also, in providing air traffic control services, the FAA incurs costs by making services available (e.g., radio navigation aids and broadcast weather services) regardless of whether any particular flight uses the services. These services are always available in full supply to any and all users that need to use them. Once an aircraft enters U.S.-controlled airspace, the U.S. ATC system is immediately engaged, and the entire ATC infrastructure and full scope of services are available, regardless of the type of flight, user or aircraft. The requirements of providing full and constant availability of services to all users are designed into the system and result in real costs incurred in the provision of air traffic control services.
>
> These factors ensure that no additional physical assets would be required to service an additional flight. In addition, the level of service utilization does not directly impact on those costs that in many other contexts are considered variable, such as labor costs. Consider the following:
>
> (1) An air traffic controller is paid the same amount regardless of whether he or she has to monitor a particular aircraft across his or her screen or communicate directly with that aircraft. Similarly, a controller is paid the same regardless of whether he or she has to communicate with an aircraft once or a dozen times. A controller is also paid the same regardless of whether he or she works during hours when the airspace is quiet or hours when the airspace is busy.
>
> (2) Controllers have to be trained to provide all Enroute air traffic control services and meet all air traffic situations regardless of whether or not they encounter all air traffic situations. The cost of training does not vary depending on how much service is delivered.
>
> (3) Enroute radar and navigation equipment have to be operational at all times regardless of how many flights are in the airspace. It is not possible to shut off one or more radar or navigational aids at any point in the day in order to reduce the overall cost of the radar system.
>
> (4) Telecommunications capability and capacity have to be available at all times during the day regardless of whether any, or how many, transmissions are made. Telecommunication services are procured on a fixed lease basis, similar to renting a pipeline, whereby costs do not increase with small additions to traffic.
>
> Thus, in addition to the fact that the entire ATC system is built to provide a level of service to all users, regardless of whether they actually utilize all the services, the lumpy (fixed over substantial output ranges) nature of input costs traditionally considered to be variable, such as labor or communications, means that the additional cost of servicing an additional flight is very small.
>
> This is not to say that there are no differences in the marginal costs of servicing one type of Enroute flight versus another. It is to say however that both costs are very small and are swamped by the allocation of fixed and common costs that must be made in order to cover the costs of ATC services.

The Capital Economics report states further, with respect to Oceanic Services (in section IIIB, Oceanic, page 12):

> The marginal cost of servicing any Overflight or non-Overflight in the Oceanic environment is very small. In fact, there may be no difference in the marginal costs between the two types of flight as the same types of procedural controls are generally used for non-Overflights as for Overflights. The services they receive are very similar, if not identical, while in the Oceanic environment. But, more importantly, any marginal cost differences that do exist are swamped by the large fixed and common costs that must be allocated.

2. The Inclusion of Fixed and Common Costs in the Overflight Fee Cost Pool

Several commenters state that the FAA should not have included fixed and common costs in the Overflight Fee cost pool. They argue that the FAA should have included only the marginal cost of Overflights in order to meet the statutory requirement that fees be ''directly related'' to costs. Specific comments on this issue were received from ATAC, which states that the FAA makes the assumption that all Enroute or Oceanic costs not categorized as ''overhead'' are costs that should be included in determining fees directly related to FAA's costs of providing

services to Overflights. Furthermore, ATAC comments that by failing to remove all fixed costs, the FAA overstates the costs directly related to providing services to Overflights.

Lufthansa and KPMG assert that the FAA should remove from the total costs attributable to Overflights all costs that would have been incurred, even if the FAA provided no services to Overflights. They state that the overhead amounts removed by the FAA from the Overflight Fee cost base clearly do not include all FAA fixed costs of providing ATC services; they believe that all fixed costs should have been removed.

FAA Response: The FAA disagrees with these comments. All users of the ATC system benefit by being in the system, and all should bear the costs. The FAA developed a unit cost for providing air traffic and related services in the Enroute and Oceanic environments to provide a mechanism for apportioning fairly among all users the overwhelmingly large common and fixed costs of the ATC system. The FAA derived the unit costs by dividing the total costs of providing ATC services, less overhead, in each environment, Oceanic and Enroute, by total miles flown in that particular airspace. The use of mileage allows tailoring of the costs to the individual user in a manner that is easy to administer but fair to the users.

As Capital Economics points out in its previously cited report, if the FAA were to charge only the marginal cost of the specific ATC and related services provided to Overflights, it would be unable to recover anywhere near the cost of the activity. Capital Economics notes (in section II, page 3), ''Faced with this situation, economists typically call for a fee system involving a marginal or incremental component plus a markup to cover fixed and common costs.'' This is essentially what the FAA has done. All directly related costs (including fixed and common costs) are derived from CAS data and apportioned among all flights, whether Overflights or non-Overflights.

In its January 1998 opinion (*Asiana Airlines* v. *the FAA,* 134 F. 3d 393 (D.C. Cir. 1998)), based on its review of FAA's previous Overflight Fees, the United States Court of Appeals for the District of Columbia Circuit recognized that provision of ATC and related services to Overflights entails fixed and common costs that must be allocated:

> The difficulty with determining the portion of fixed and common costs attributable to Overflights is that by definition these costs are shared among a great number of users besides Overflights and so, in a sense, do not directly relate to the quantity of services consumed. Thus, a method must be devised to apportion these costs among all the users who benefit from them, without violating the strictures of the statute.

Understanding the existence and nature of FAA's fixed costs, the Court also stated:

> There may be methods to reasonably determine an appropriate fraction of the FAA's fixed costs to assign to each Overflight, and if the FAA does not have enough information to precisely determine the burdens imposed by individual flights, it may proceed based on the best data available.

Because all users receive benefits from the ATC system, and because making ATC and related services available involves a significant amount of fixed and common costs, it is clearly consistent with the Act, as noted by the Court, that the FAA find a way to allocate those costs among all users who benefit from them. This is exactly what the FAA has done. It recognized the need to allocate fixed and common costs, and used an appropriate economic method based on the best available data. This does not mean that the unit cost methodology used by the FAA is the only way these costs could be apportioned. There may indeed be another way to do it—but Congress left it to the FAA to determine the methodology. The method chosen by the FAA is clearly reasonable and within the parameters specified by the Court. Indeed, as Capital Economics notes (in section II, pages 4–5):

> * * * there are many appropriate methodologies. This problem arises in practice in countless settings: virtually every business firm or government organization provides not just one service but several, and these services are often the joint product of the entity's operations. It may be possible to isolate the marginal or incremental costs of servicing a particular subgroup of customers, and this may be possible for each and every conceivable subset of customers. However, in the presence of fixed and common costs the sum of these marginal costs will fall below the total costs of serving all customers. In the extreme, but not uncommon, case of very large fixed and common costs, it is quite possible that the separate marginal or incremental costs of servicing any and all subgroups is virtually zero for each group. It is customary in these instances to allocate costs based on sales revenues, level of customer activity, level of production, or some other similar, conventional method. Examples of such allocation methods are ubiquitous.

3. Whether Overflight Fees Are Subsidizing Other Costs or Services

Commenters suggest that the FAA subsidizes other services or costs by treating Overflights the same as all other flights in the Enroute and Oceanic environments. Similarly, KPMG claims that because the FAA's costs for Overflights are substantially lower than for non-Overflights, the FAA's use of ''Average Cost'' as a surrogate for ''Overflight Cost'' means that the FAA is requiring Overflights to subsidize substantially FAA's provision of ATC services to non-Overflights. Based on this assumption, KPMG theorizes that Overflight fees are not ''directly related'' to FAA's costs to provide ATC services to Overflights.

FAA Response: The FAA disagrees. As previously explained, the FAA developed a unit cost of providing, or making available, ATC services in both the Enroute and Oceanic environments. The FAA then applied those unit costs to total miles flown to achieve a fair, as well as direct, allocation of costs between Overflights and non-Overflights in each environment that does not subsidize any user.

Commenters who allege or at least suggest the possible subsidization of Overflights by non-Overflights do not provide any convincing analysis to support their claims, whereas the Capital Economics analysis demonstrates that the Overflight Fees are subsidy-free.

Capital Economics states (in section II, page 6): ''Fees that are *subsidy-free* are widely regarded by economists to be preferable to those that are not. This is because *subsidy-free* fees prevent one service from subsidizing or from being subsidized by the other services offered.'' The Capital Economics analysis goes on to state that ''subsidy-free fees are defined as those that pass two tests: (1) Fee revenues from a service do not exceed the Stand Alone Costs (SAC) of that service; and (2) fee revenues for a service are never below the incremental cost of that service, measured as the total cost savings of not producing the service.''

The Capital Economics report states (in section IIIC, page 13) as follows:

> An FAA analysis of Enroute Overflights, attached to this report as Attachment 1, has determined that the stand-alone cost (SAC) of servicing these flights is at least $181M. The cost of servicing these Enroute Overflights (which underlies the current fee structure) is estimated to be approximately $30M, which is well below the upper bound, the SAC of serving these flights. Thus, the current fee structure quite easily passes the first of the subsidy-free tests outlined earlier—revenues for the service do not exceed the SAC of the service. In addition, as commenters have argued, the incremental cost of servicing Overflights is extremely low and perhaps nearly zero. Thus, the estimated $30M cost that serves as the basis for Enroute Overflight fees under the current fee structure easily passes the second test for subsidy-free pricing—the costs recovered by the fees are never lower than incremental costs.

An FAA analysis of Oceanic Overflights, included in Attachment 1 has determined that the stand-alone cost of these flights is at least $28M. As a result, the current fee structure easily passes the first of the subsidy-free tests outlined earlier. That is, the current fee structure is based on an estimate of approximately $19M to service these flights, which is well below the SAC of serving these flights. In addition, as commenters have argued, the incremental cost of servicing Overflights is very low. Thus, the estimated $19M in costs which underlies the current fee structure easily passes the second test for subsidy-free pricing: the costs recovered by the fees are never lower than incremental costs.

The system the FAA has developed does not subsidize any user. Costs that are incurred on behalf of users who are statutorily exempt from Overflight Fees (i.e., military and government aircraft), as well as the Canada-to-Canada flights, have not been assigned to other users. Costs incurred on behalf of those parties are borne by the FAA.

4. The Definition of Fees ''Directly Related'' to Costs as Used by the Act

Several commenters claim that Overflight Fees do not meet the Congressional requirement that the fees be ''directly related'' to FAA's costs of providing the ATC services to Overflights, and that the FAA does not provide a definition of ''directly related'' in the Interim Final Rule. One comment received on this issue is from the ATAC, which states, ''We understand that an issue may exist as to whether Congress intended the FAA to recover only incremental costs to providing ATC services to Overflights. To the extent that that was Congressional intent, the FAA makes the unwarranted assumption that all Enroute or Oceanic costs not categorized as ''overhead'' are costs that should be included in calculating costs directly related to FAA's costs of providing services to Overflights.'' Another commenter, LTU, states, ''While the words ''directly related'' are recited in the preamble and the Overflight Fee Development Report, these words are never interpreted nor explained. It seems the FAA does not accept the ''directly related'' language, either as used by Congress or by the Court of Appeals.''

FAA Response: The FAA disagrees with this comment. In the statute requiring the Fees (49 U.S.C. 45301), Congress provided:

(The FAA) shall ensure that each of the fees required by subsection ''a'' is *directly related* (emphasis added) to the Administration's costs of providing the service rendered. Services for which costs may be recovered include the cost of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States.

Congress did not define ''directly related'' for the FAA. As is common with many similar statutes, Congress left it to the FAA to reasonably interpret the Act to determine which costs are ''directly related'' and thereby useable in the derivation of the FAA's Overflight Fees. While some commenters may disagree, the FAA has chosen a reasonable and somewhat narrow definition of costs so that each fee (Enroute and Oceanic) is directly related to FAA's costs of making available the many services that could be, and are, used by Overflights. And, as Capital Economics states (in section II, page 2), ''There is no standard, or agreed upon, definition of 'directly related' in the accounting or economic fields.''

Overflight Fees are based on the FAA's actual costs, as required by the Act, and as determined by the new Cost Accounting System (CAS), derived directly from the costs of the many services made available. The CAS provides the total cost pools for the services provided in the Enroute and Oceanic environments. All costs that are traceable to these two environments are used in the fee development process. All costs attributable to the other two ATS Services, Terminal and Flight Services, are specifically excluded, even though some Overflights use these services.

Additionally, although directly traceable to specific services, the FAA excludes all overhead costs from the total cost pools used in deriving its Overflight Fees. This exclusion, as well as the exclusion of Terminal and Flight Service costs, is done through an abundance of caution to ensure compliance with the statutory provision that the fees must be ''directly related'' to the FAA's costs of the services provided, or made available, to Overflights. Within each cost pool (Enroute or Oceanic), costs are apportioned between Overflights and non-Overflights according to Overflight and non-Overflight miles. Then, to ensure that each Overflight is charged an amount that reflects the quantity of ATC and related services made available to it, a mileage-based fee structure is employed. The result is that each individual operator's fees are directly proportional to its number of Overflight miles flown, as measured by Great Circle Distance from point to point of U.S.-controlled airspace.

5. Lack of Consultation

Nearly every commenter complained that the FAA should have engaged affected parties in consultations before issuing the Interim Final Rule. Several commenters further requested the FAA to consult with them after the effective date of the Interim Final Rule, but before issuance of the Final Rule.

FAA Response: The FAA disagrees. The FAA did engage in consultation before the Interim Final Rule was issued. The FAA acknowledges that the nature of the consultation may have been different than that expected or desired by many commenters. It was as much as is allowable under U.S. law, and the FAA believes it was effective in making the views of the users known.

The FAA published the Fees for FAA Services for Certain Flights (commonly referred to as ''Overflight Fees'') Interim Final Rule on June 6, 2000. Although conducting rulemaking via an Interim Final Rule (IFR) is not the FAA's normal or necessarily preferred rulemaking practice, the FAA was directed by Congress in the Act to use the IFR process to establish Overflight Fees.

Since then, the FAA has received several affirmations of Congressional intent, including two letters from Congress (Docket items 23 and 28) as well as the subsequent legislation (Docket item 97) reaffirming the Congress's direction that the FAA establish Overflight Fees via the IFR process.

Since passage of the Act, the FAA has on several occasions met with user and aviation interest groups to listen to their concerns about fees. The FAA held a meeting with representatives from the European charter carriers, two meetings with the Washington Aviation Assembly, and a meeting with counsel from interested airlines. A summary of each of these meetings can be found in the docket of this rulemaking, items 11, 15, 16, and 22, respectively. The FAA held a public meeting on June 29, 2000, to provide information regarding the Interim Final Rule and to invite comments from interested parties.

Additionally, and separate from the Overflight Fee rulemaking, the FAA held two Cost Accounting ''Industry Day'' meetings (July 29, 1999 and June 30, 2000) to present and discuss Enroute and Oceanic costs for fiscal years 1998 and 1999, respectively. Finally, the docket of the current rulemaking was extended twice to allow additional comments for FAA's consideration prior to issuing a Final Rule. Several additional comments were submitted to

the docket even after the final closing of the comment period on December 26, 2000. The FAA has also considered and addressed those comments (in this section) in proceeding with the Final Rule.

Many commenters stated that the FAA violated international agreements and ICAO guidelines by not consulting with users prior to the implementation of the Overflight Fee Interim Final Rule. The FAA disagrees with the commenters on this issue. However, the agency has decided to take advantage of an option available to it to provide another forum for consultation. The FAA intends to form an Aviation Rulemaking Committee for Overflight Fees (pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5)) soon after publication of the Final Rule.

Aviation Rulemaking Committees were authorized under the 1996 FAA Reauthorization Act, and afford the FAA additional opportunities to obtain direct, firsthand information and insight from interested parties by meeting together and exchanging ideas with respect to proposed and existing rules. In this instance, the Aviation Rulemaking Committee's primary task will be to propose possible revisions to the Overflight Fees.

The FAA expects that the Overflight Fee Rulemaking Committee will serve as a forum for interaction among the FAA, the users, and the public. The Committee will be assigned specific tasks by the FAA Administrator or the Assistant Administrator for Financial Services.

The FAA intends to establish such a committee within 90 days after the issuance of this Final Rule. At that time, a Notice will be published in the **Federal Register** with specific details such as committee charter, membership, administration, and duration.

6. Violation of the Administrative Procedure Act (APA)

A significant number of commenters claim that the FAA violated the Administrative Procedure Act (APA) by issuing an IFR rather than a Notice of Proposed Rulemaking (NPRM). In addition, some commenters argue that the FAA should not have used an IFR for what they claim to be the ''second'' or ''supplemental'' fee schedule following the 1997 IFR.

The ATAC captured many commenters' opinions in its statement at the public meeting asserting that the 1998 Court of Appeals opinion required that any subsequent fee schedule issued under the Act would require an NPRM pursuant to the APA. The ATAC added that the APA calls for notice to and comment by affected parties before any rule may become effective and that the FAA acted improperly by setting the fees without prior notice and comment.

One commenter claims that APA notice and comment procedures may be waived in extreme circumstances and there does not appear to be any reason to employ extraordinary procedures in this case given that the FAA has been developing the fees for several years.

FAA Response: The FAA disagrees that it violated the APA. The FAA published its previous Overflight Fee IFR on March 20, 1997. This rulemaking was reviewed by the United States Court of Appeals for the District of Columbia. The Court rejected the petitioners' claims that (1) the FAA acted improperly in employing an expedited procedure before the effective date of the Interim Final Rule, and (2) the FAA violated the Administrative Procedure Act. Subsequently, the recent (July 13, 2001) decision by the Court of Appeals (referred to above) agreed with the FAA.

7. Violation of International Agreements

LTU, Lufthansa, Iberia Airlines, Japan Airlines, AAPA, British Airways, Air New Zealand, and others comment that the FAA violated international/bilateral agreements by not consulting with the affected parties before issuing the rule.

FAA Response: The FAA disagrees with these comments, as noted previously. The FAA did consult with all parties as required by both U.S. and international law.

The FAA provided an opportunity for foreign governments, foreign air carriers, and other interested parties to provide comments on the IFR for approximately two months before its effective date. In addition, the FAA met formally and informally with representatives from foreign governments and the user community to receive and provide information regarding the IFR. The FAA held a public meeting (on June 29, 2000) to allow interested parties yet another opportunity to voice their concerns regarding the rule. While this is not the type of consultation desired by the commenters, it is consistent with international and U.S. obligations of the FAA in this rulemaking.

Commenters further state that bilateral agreements and ICAO recommendations impose an obligation or a responsibility upon the United States to consult with other governments and their carriers prior to imposing user fees. To the extent possible, the FAA met with those governments that expressed an interest in meeting with the agency regarding the rule. Indeed, two informational meetings were held, in February of 1999 and 2000, with a number of members of the Washington Aviation Assembly, a group of Washington-based diplomats from a number of foreign Embassies, including specifically representatives of virtually all of the countries with carriers significantly affected by the Interim Final Rule.

In the previous litigation (*Asiana Airlines* v. *the FAA*, 134 F. 3d 393 (D.C. Cir. 1998)), the U.S. Court of Appeals agreed with the FAA's position on consultation. The Court's opinion stated:

> We agree with the FAA that its actions did not violate any duties actually imposed by international aviation agreements. Most of the agreements relied upon by petitioners speak of general aims, not specific obligations * * *. The petitioners have not cited any international agreement that comes close to imposing duty to consult. But even if such a duty could be found in an agreement only to encourage consultations, the record does not indicate that the FAA failed to consult with affected foreign users. Prior to the effective date of the IFR, FAA staff held informal meetings as well as public meeting with representatives of foreign airlines, provided copies of materials from the docket relevant to the IFR development, and accepted forty comments on the rule. Although these exchanges may not have influenced the content of the regulations made effective on May 19, 1997, the terms ''consultation'' and ''exchange of information'' in the cited international agreements do not import the full notice and comment apparatus of APA. The procedures adopted by the FAA cannot be said to have breached the terms of these international agreements.

The FAA's rulemaking and consultative procedures in the current IFR have been nearly identical to the previous rule. The FAA believes that there has been no violation of any international obligation of the U.S. As explained more fully under the previous comment on ''lack of consultation,'' the FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees to serve as a forum for interaction among the FAA, the users, and the public on matters relating to Overflight Fees.

8. Violation of International Civil Aviation Organization (ICAO) Guidelines

Lufthansa, Japan Airlines, AAPA, ATAC, Air New Zealand, and others claim the FAA violated ICAO guidelines by not consulting with affected parties prior to promulgation of the rule and by issuing an Interim Final Rule. AAPA indicates that the United States has an obligation to consult with users regarding any fees due to the large area of international airspace that has been designated to it by ICAO. Air New

Zealand asserts that the Interim Final Rule cites ICAO guidance for navigation charges in justifying its user fees, but ignores that the same document calls for prior consultations on fees.

FAA Response: The FAA disagrees with the commenters who allege that it violated ICAO guidelines. The ICAO principles they cite do not *require* authorities to conduct consultations prior to implementation of user fees. These principles—which at the time FAA issued the IFR and the comments were received—were set forth in paragraph 22 of ICAO Document 9082/5, Statements by the Council To Contracting States on Charges for Airports and Air Navigation Services (Docket item 7). They ''recognize the desirability of consultation with airport users before significant changes in charging systems or levels of charges are introduced.'' Further, ICAO Document 9082/5 goes on to state, in paragraph 44 that ''The principles enunciated with respect to consultation concerning changes in airport charges in paragraph 22 are applicable to changes in air navigation services charges.''

The ICAO guidance document indicates that there may be a need for more specific consultation with respect to air navigation charges, but then states, in paragraph 45, that ''consultation implies no more than discussions between users and providers in an attempt to reach general agreement on any proposed charges, and that failing such agreement, governments would continue to be free to impose the charges concerned.'' The Council continues in paragraph 45 with the recommendation that ''when any significant review of existing charges or the imposition of new charges is contemplated by a provider of air navigation services, appropriate prior notice should, so far as possible, be given at least two months in advance to the principal users.'' This (the 2-month advance notice) is what the FAA did in the current instance. When it issued the current Interim Final Rule, the FAA acknowledged its responsibility to conform to ICAO guidelines where possible; and (by giving 2-month advance notice, with opportunity to comment, before the fees went into effect, and holding the public meeting on June 29, 2000) did so to the maximum extent possible under U.S. law.

It should be noted that, subsequent to the issuance of the IFR and the receipt of public comment, ICAO in December 2000 issued a new Sixth Edition of the above cited guidance document. The new document, entitled ''ICAO's Policies on Charges for Airports and Air Navigation Services,'' has been placed in the docket (Docket item 119). While it includes some new material and a rearrangement of previous guidance, the language cited above is retained, almost verbatim, in paragraph 49 of the new document, the only difference of any consequence being a recommendation that 4-months advance notice be given for fee changes, vs. the 2-months that were recommended at the time FAA issued the Interim Final Rule.

9. Accounting and Charging for Services Provided by Air Traffic Controllers at Enroute Centers, Before Having Determined the Cost of Terminal Services

Air New Zealand, Lufthansa, Air France, Iberia Airlines, Japan Airlines, KPMG, and Joseph Beaudoin (on behalf of the ATAC), and others comment that the Overflight Fees might not be accurate because the FAA has not yet determined the cost of Terminal Services. Without having determined these costs, they question whether the FAA can properly account for services provided by Enroute Centers to aircraft taking off or landing at airports that lack an air traffic control tower.

FAA Response: The FAA acknowledges that the cost data for Terminal Services is not yet available in CAS at the service level. The FAA disagrees, however, that Terminal Service costs are required to calculate Overflight Fees. They simply are not. Since Overflights do not use Terminal Services, only the Enroute and Oceanic Service costs are needed. CAS has been providing Enroute and Oceanic costs since 1998.

Enroute controllers sometimes provide approach control services for airports that have no control tower; this occurs most commonly at island airports outside the U.S. Controllers are not actually scheduled on duty to provide this service exclusively; therefore, controller labor costs are not affected by assisting flights landing at these airports. Only very minor costs are associated with the provision of this particular service, compared with the significant amount of fixed and common costs that are incurred in providing multiple services. Thus, the impact on costs of providing services at airports that have no control tower is *de minimis*. This circumstance is addressed as follows in the Capital Economics report (see Capital Economics report, Docket item 99, Section IIIA, page 11):

> If we expand the analysis to consider the incremental cost of adding the entire block of Overflights as a group while holding all other services at their normal levels we must conclude that the change in total costs is still very small. That is, if we start with a system that handles only non-Overflights and then add all Overflight traffic to that system, the change in total costs would be negligible. But this is also true of any similarly sized subgroup of flights. Whether this subset be defined as 'Overflights' or 'all flights that are enroute to South Dakota,' the change in total costs from serving these subsets (holding all other services at their regular levels) is negligible. This is true of any system characterized by very large shared input costs. Moreover, to trace costs to specific services also has its costs. In such circumstances, a composite of services is usually priced as a group.

The incremental costs of Enroute controllers serving flights at non-tower airports would be very small and thus make essentially no difference in the overall cost pool. Therefore, it is not necessary to delay the implementation of Overflight Fees to be able to calculate the *de minimis* effect of Terminal costs on the fees.

10. Accounting for the Costs Incurred in the Transitional Airspace Between Oceanic and Enroute Services

Several commenters argue that the FAA did not account for the costs incurred in the transitional airspace between Oceanic and Enroute Services. Former controller Michael Jengo, arguing on behalf of Air New Zealand and several other international air carriers, cites the example of a Tokyo-to-San Francisco flight. At about 200 miles from San Francisco, this flight would be transferred from non-radar airspace to a radar transitional sector, which would then descend the flight from cruise altitude to about 13,000 feet into the Bay TRACON airspace. He states that an Oceanic Overflight does not normally receive such transitional service, and that, therefore, the flight landing or taking off will require more manpower and equipment than an Oceanic flight that only transits U.S. airspace.

The ATAC asserts that the FAA failed to provide sufficient information for the portion of FAA's total cost pool dedicated to providing ATC services to aircraft in the combined Enroute and Oceanic environments. And Air New Zealand points out that while there are costs involved in ''transitioning'' between Oceanic and Enroute Services, it is not clear where these transitional costs are allocated.

In a supplemental declaration, Mr. Jengo states, ''oceanic air traffic controllers are generally assigned on a given day to either oceanic procedural sectors or to the oceanic radar transitional sector * * * they do not

work both procedural and radar sectors at once.''

KPMG asserts that given this differentiation between procedural and radar transitioning sectors, and the fact that ''oceanic overflights are primarily procedural,'' and ''do not normally use radar transitioning sector,'' it also follows that neither controller manpower nor capital equipment in the Oceanic radar transition environment is common among Overflights and non-Overflights.

FAA Response: The FAA disagrees with these comments. The FAA has identified clear boundaries between where Oceanic airspace ends and Enroute begins for purposes of the Interim Final Rule. The IFR does not attempt to address and account individually for all local variations or nuances in the ATC system. Instead, the CAS uses carefully developed business rules that are generally consistent with the boundaries between Enroute and Oceanic, and tracks costs accordingly. Flights departing from or landing in the United States descend or ascend in airspace that is generally radar-controlled and thus fall under the ''Enroute'' cost and service category. Within Oceanic airspace, the FAA generally provides the same type of Oceanic procedural services to all flights. Overflights constitute only about 1.25 percent of all Enroute flights and a little more than 10 percent of all Oceanic flights, and it is impossible to meter the use of all services that an Overflight could use.

The comments that the costs of providing ATC services to non-Overflights in transitional airspace are significantly higher than the costs of providing such services to Overflights appear to reflect a misunderstanding of exactly how these costs are accounted for under the CAS. The airspace Mr. Jengo calls ''oceanic radar transitional sector'' is, by the FAA's CAS definitions, accounted for as Enroute airspace, because of the type of services (radar, communication, navigation, etc.) provided in that region. The CAS attempts to group services in logical categories, according to the type of services the FAA provides. Where there are variations in controller activities, these differences are mostly reflected in the CAS.

The commenters appear to be concerned that much greater costs are incurred in providing service to the non-Overflights, and that as a result the Oceanic Overflights are essentially being over-charged to provide this greater level of service to the non-Overflights. This is not the case, however, since, as explained in the two preceding paragraphs, the costs of services provided in the ''radar transitional sectors'' are generally assigned under Enroute, rather than Oceanic.

11. How the FAA Determines the Cost of Providing Services to Overflights

Many commenters argue that the FAA should determine the cost of providing services solely to Overflights. Some commenters state that the FAA could use other, more appropriate methods such as activity-based costing (ABC), to better allocate Enroute and Oceanic costs. The ATAC suggests that the FAA conduct an activity analysis associated with Overflights in both the Enroute and Oceanic environments, along with a cost-driver analysis indicating how best to allocate costs to each activity.

KPMG, in comments submitted on behalf of the ATAC, states that it is not reasonable for the FAA to rely solely on the Arthur Andersen Costing Methodology Report (Docket item 6) and FAA's own ''improper'' assumptions, given that the FAA could instead use the well-accepted ABC methodology to determine its actual costs to provide ATC services to Overflights. KPMG further indicates that ABC is a standard cost accounting method that apportions costs of resources to those specific activities that the resources support.

In additional comments submitted later (KPMG ''Report on New Materials Regarding FAA's Overflight Fees,'' Docket item 105), KPMG asserts that the FAA has the means to make a reasonable estimate of the portion of its labor costs that are attributable to Overflights. KPMG again argues that the FAA could have used ABC to determine its actual costs of providing ATC services to Overflights.

FAA Response: The FAA disagrees. The concept of ABC cannot be applied in a useful way to Overflights, because it would require a fundamentally different approach to Cost Accounting than the one that the FAA has been working to develop for several years. Massive amounts of specific, detailed data, not currently collected, on individual actions by each controller would be needed to implement an ABC approach. This type of approach was considered by the FAA early on in the development of the current CAS, but was rejected as being neither practicable nor particularly useful. The costs in time and dollars to gather and maintain detailed activity data would have been substantial and the data itself was not considered meaningful for managerial purposes. In addition, there would still be a need to allocate the overwhelming amounts of common and fixed costs, as is done under the current CAS, since these costs represent all but a minimal part of the overall costs of providing the ATC and related services. This is so because all of the FAA's ATC services must be available at all times to all flights (Overflights or non-Overflights) regardless of the amount of air traffic activity to ensure the safety of any flight. As noted in the Act:

> Services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States.

The FAA incurs a significant amount of cost by making ATC services *available*, whether or not such services are used by a specific flight at a particular time. The services rendered involve making available at all times the total system that facilitates the safe transportation of all aircraft. As noted by Capital Economics in their review (see the Capital Economics report, Docket item 99, Section III A, Page 8):

> These services are always available in full supply to any and all users that need to use them. Once an aircraft enters U.S.-controlled airspace, the U.S. ATC system is immediately engaged, and the entire ATC infrastructure and full scope of services are available, regardless of the type of flight, user or aircraft. The requirements of providing full and constant availability of services to all users are designed into the system and result in real costs incurred in the provision of air traffic control services.

See also the FAA's response to comments under the heading ''The cost of providing air traffic services to Overflights versus non-Overflights.'' In addition, the FAA recognizes that, while there may be very small differences in the marginal costs of providing services to one type of an Enroute flight versus another, these incremental costs are so small relative to fixed and common costs that total Enroute costs must be allocated to cover the full cost of the services provided. On this point, the Capital Economics analysis concludes (see Capital Economics report, Section III A, page 10):

> This is an absolutely crucial point that seems lost on commenters, who complain that activity-based costing or some other close examination of the production process would allow a more direct and complete relationship between costs and outputs to be established. In other words, they hold that while the costs may be difficult to trace back to individual outputs, it is in fact possible to do so and a careful study of the activities involved will shed light on how costs should

be assigned. This reveals a misunderstanding of common and joint costs, which are the primary feature of air traffic control costs in providing services to Overflights.

Consider an example of an input that is common to the production of two outputs, such as the fence that a farmer installs to contain his cows and sheep. The installation cost of the fence is clearly common to both the production of cows and of sheep. Commenters would suggest that studying the production process under activity based costing principles would allow for the cost of the fence to be attributed precisely between the cows and sheep. But in reality they cannot be so assigned regardless of how closely they are studied. They are shared costs.

Even inputs that are traditionally considered variable, such as labor, can be largely or completely common. Consider the case where all the wear and tear on the farmer's fence is due to aging. The farmer's time spent on fence mending is a cost that is common to both the production of cows and sheep, and no amount of scrutiny or activity based costing techniques will allow them to be assigned to one output versus the other. The farmer's fence-mending efforts are a common input into the production of both cows and sheep. In a similar vein, it is not at all clear that controller time used in providing ATC services to flights is separable or assignable to individual flights. The suggestion that monitoring contacts made with aircraft will allow one to do this ignores the fact that, in providing ATC services, a controller is by definition simultaneously monitoring and providing safe passage for all flights within his or her airspace, Overflights and non-Overflights included.

12. Individual Fees for Each Service Delivery Point (SDP)

Several commenters suggest that the FAA should have a unique fee for each SDP because each SDP has had its unique costs identified by the FAA's Cost Accounting System.

KPMG adds that the FAA failed to provide information on cost differences between SDPs, or an explanation of the reason why costs were not allocated between Overflights and U.S. originating/terminating flights at individual SDPs in order to capture differences in costs in different portions of U.S. airspace. In addition, KPMG argues that the cost differentials among the various SDPs do not solely reflect the differing number of flights encountered by each SDP. To the contrary, the differentials reflect different cost structures for each SDP (e.g., differing levels of costs for labor, telecommunications and other inputs based on local rates and charges for labor, electricity, telecommunications, etc., and/or the price, efficiency and/or characteristics of equipment). KPMG suggests that in order for each Overflight Fee to be ''directly related'' to the costs of providing ATC services for that Overflight, the FAA needed to make an adjustment to reflect the actual cost structure for the SDP(s) involved in servicing that Overflight.

Qantas Airways expresses its concern that the proposed Oceanic charge does not differentiate between the Atlantic and Pacific, although intuitively there would seem to be differing operational conditions in these two areas.

Air New Zealand and other commenters ask that the FAA provide data to support its derivation of its Oceanic unit rate for each segment (Atlantic or Pacific) of Oceanic airspace in terms of the numbers of aircraft movements and the distances flown.

FAA Response: The FAA agrees that it has a significant amount of cost data available by SDP and that the costs of providing Enroute and Oceanic Services differ by varying degrees from one SDP to another. The FAA disagrees, however, with the suggestion that it should have determined unique fees for each SDP for this rulemaking. As noted by Capital Economics (see Capital Economics report, Section III A, Page 14):

> Commenters complain that the FAA has acknowledged that its cost accounting system allows it to measure costs by Center. They argue that, therefore, Overflights should be charged based on the actual Centers crossed since costs may vary by Center.
>
> In the current fee determination, the FAA has opted for a simplified fee structure to minimize Overflight administration costs, particularly for the introduction of the fees. The present fee determination aggregates costs across Centers and charges a per-mile fee based on the total cost of all Centers. In effect, the fee is based on an average Center cost.
>
> The administrative burden of proving flight tracking, billing and collections, and customer service related to Center-based fees would be significant. Establishing fees by Center would mean additional workload that would include: setting up, maintaining, and monitoring an automated system to provide the necessary data; conducting quality control for billing and collections to ensure that each flight has been assigned the appropriate rate for each Center; and providing customer support for such detailed inquiries. All these costs would add to the overall cost of supplying ATC services to Overflights, which all Overflights would have to bear through higher fees. These administration costs could result in higher overall fees for all. In addition, there are some specific service costs that have been identified in total for all Centers, but a determination has not yet been made as to how best to attribute them to specific Centers. Thus, achieving Center-based pricing would require additional accounting work.

The FAA does not have SDP-specific data for all of its costs. Indeed, significant amounts of total costs at the 21 Centers (SDPs) are currently available only at aggregate levels that would need to be allocated among all SDPs if SDP-specific fees were to be adopted. More than 15 percent of Enroute costs and more than 45 percent of Oceanic costs are in this category. Allocation of those costs among the SDPs would require new accounting systems. While there may be differences between SDPs, the costs of measuring those differences would exceed any benefits that might result from greater precision in fee setting.

Meanwhile, the FAA continues to work to implement improvements and refinements in the CAS. Assuming that the system evolves to the point where all costs can be fairly and accurately assigned by SDPs, the FAA will again consider the option of charging fees by SDPs.

13. Alternative Methods To Assign Costs to Users

Commenters suggest that the FAA should consider other ''better'' measures, such as cost per activity, cost per flight hour, cost per handle, or some other appropriate method, for assigning costs to users. KPMG, for example states, ''The FAA also makes the unwarranted assumption that miles traveled is an appropriate measure of the cost incurred in providing ATC services. At the Industry Presentation, the FAA presented information on 'Cost per Flight Hour' and 'Cost per Activity' and stated that 'Cost per Activity' is a more meaningful measure of the costs incurred by the FAA at Enroute SDPs.'' KPMG also states ''The FAA has failed to provide any explanation of why the extensive flight data available was not used to determine a reliable allocation of costs, despite the statement in the Andersen Report that 'automation systems readily track events related to (ATS) services.' For example, a 'handle' is a measurable event tracked by automation systems at each service delivery point and can be considered a unit of service * * *.'' Air New Zealand suggests that using mileage as a denominator results in Oceanic Overflights picking up twice their share of costs, on a per-flight basis, compared to all Oceanic flights.

FAA Response: The FAA disagrees with these comments. Cost per Flight Hour and Cost per Activity are used globally in the FAA's cost measurement methodology for management purposes to ensure a well rounded approach to understanding the agency's costs and in gaining ATC managerial efficiencies. But these types of measurements are not internationally accepted, nor do systems exist to track Overflights on either a

Cost per Flight Hour or a Cost per Activity basis. FAA did, however, consider several other metrics before making its determination that using the average unit cost approach with Great Circle Distance (GCD) miles was most appropriate and most fair for the Overflight Fee IFR. Other metrics considered include the following:

- Cost per air traffic control handle (count of each time an aircraft is handed-off from one Sector to another, either within the same ATC Center or between different Centers), which is a type of Activity Based Costing system;
- By actual distance flown (as opposed to GCD);
- By amount of time flown within the ATC system; and
- By weight of aircraft type—together with various weight-based combinations such as square root of aircraft weight, GCD times square root of aircraft weight, and square root of GCD times aircraft weight.

Upon reviewing the above alternatives, the FAA concluded that average unit cost, coupled with GCD, has the following advantages:

- Widely used and accepted around the world (e.g. Eurocontrol, Airservices Australia, Airways Corporation of New Zealand, and NAV CANADA (enroute));
- Generally considered a good approximation of the level of services provided;
- Eliminates most of the effects of weather, winds, air traffic control instructions, as well as traffic volume and flow;
- Shortest possible distance between two points, giving the user the lowest possible charge based on distance.

The other options did not offer these advantages.

Overall, recognizing that the FAA is *precluded by statute from using any of the weight-based measures* (since weight is essentially a measure of value), the advantages of using Great Circle Distance appear to far outweigh those of any other usable metric.

Most importantly, the FAA found that cost-per-mile method is the most accurate and non-discriminatory (objective measure that can not be influenced by the FAA or users), and the least expensive measure to use. The Enhanced Traffic Management System (ETMS), which provides the flight data used to derive the fees and to determine the charge for an individual flight, is a proven and existing system. Any other method of measuring contacts or services (e.g., Activity Based Costing systems) would have to be separately and specifically developed, at considerable cost, for what represents less than 1.5 percent of total flight activity in U.S.-controlled airspace. Moreover, using flight-miles as the basis for setting fees is a widely accepted practice in international aviation (e.g., Eurocontrol, Airservices Australia, Airways Corporation of New Zealand, and NAV CANADA (enroute)). Congress left it up to the FAA to determine the most appropriate measure for the agency, regardless of practices around the world, so long as the metric chosen is permissible under the Act.

14. Cost of Overflight Billing and Collections

In several reports prepared on behalf of the ATAC and numerous international air carriers, KPMG questions the methodology used by the FAA to allocate billing and collection costs. For example, it states, ''The FAA has failed to provide any analysis of the costs associated with billing and collection of Overflight fees, or any discussion of the rationale for charging such fees on a per-mile basis.'' It further notes, ''The FAA fee schedule will result in the same billing and collection fees to a carrier who has one long Overflight as to a carrier with many shorter Overflights resulting in the same total mileage. The assumption that GCD miles are the appropriate basis for apportioning billing and collection costs is without explanation or foundation.''

FAA Response: The FAA acknowledges that it provided only a summary, rather than a detailed analysis of its billing and collections costs when it published the Interim Final Rule. The FAA has in fact done considerable analysis of its billing and collection costs. The FAA reviewed its billing and collection costs again in preparing the Final Rule and, as a result of that review, billing and collection costs have been reduced by nearly 17% in this rule. The following table presents a detailed, item-by-item comparison of the earlier estimate with the current one. Differences in the estimates are explained in the notes following the table.

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COMPARISON OF PREVIOUS (FY99) AND CURRENT (FY00/01) ESTIMATES OF OVERFLIGHT FEE DEVELOPMENT AND OPERATING COSTS

Functions	FY99 Development Costs	FY00/01 Development Costs	FY99 Operating Costs	FY00/01 Operating Costs
BILLING OPERATIONS:				
1. Staff support for Billing & Collections (Accounting, processing, billing, postage & customer relations)			$300,000	$230,000
2. Development and revalidation of Overflights Accounts Receivable Management Information System (OARMIS) for customer tracking, accounting & billing	$562,000	$582,000		
3. Overflight analysis and fee derivation	$75,000	$75,000		
SYSTEM SUPPORT:				
4. Air Traffic system operations, programming, data extraction & quality control			$530,000	$345,000
5. Accounting system operations support			$100,000	$100,000
6. Research & analysis	$100,000	$100,000		
7. Geographic Information System (GIS) setup and implementation (for mapping US airspace and developing flight tracks)	$510,000	$510,000		
8. Enhancement, revalidation and integration of GIS	$282,000	$182,000		
HARDWARE/SOFTWARE:				
9. Equipment upgrade and maintenance – new servers, computers, Air Traffic data laboratory support, etc.	$21,000	$21,000	$33,000	$50,000
TOTAL COSTS:	**$1,550,000**	**$1,470,000**	**$963,000**	**$725,000**

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Major differences between FY99 and current billing and collections costs: The changes from the previous cost estimate are the result of having more ''actuals'' rather than ''estimates'', including more than 8 months of actual operating experience under the IFR. Development costs dropped $80,000 due to removal of an estimated $100,000 to develop external web access (to be included later, when completed), offset by a $20,000 increase for OARMIS revalidation. Operating costs are substantially lower due to greater efficiencies realized in the operation of the air traffic data extraction and processing activities as well as the accounting and billing operations.

FY99 figures and calculation of Billing and Collections costs: The developmental costs of $1,550,000 were to be recovered over 2 years in equal annual amounts of $775,000. Operating costs were estimated to be $963,000 per annum. Thus, the annual recovery was $775,000 + $963,000, for a total of $1,738,000 for each of the initial two years.

Current figures and calculation of Billing and Collections costs: The developmental costs of $1,470,000 will be recovered over 2 years in equal annual amounts of $735,000. Operating costs are now estimated to be $725,000 per annum. Thus, the annual recovery will be $735,000 + $725,000, for a total of $1,460,000 for each of the initial two years.

The use of GCD miles flown to allocate billing and collection costs: The FAA chose an allocation methodology that reasonably and fairly allocates these costs among all users. There is significant variation in the number and length of flights from one operator to another. It is true, as KPMG notes, that one long flight might be charged the same amount of billing and collection costs as a large number of much shorter flights. It is far from clear, however, whether this is a problem or not. Alternative methods that might be considered include (a) a flat charge per bill; (b) charging on a per-flight basis; (c) some combination of (a) and (b); or (d) some combination of (a) or (b) with the current per-mile method. While the FAA has identified this issue for further study and discussion, it has nevertheless determined that the current system of allocating billing and collection costs on the per-mile basis is reasonable and appropriate, and consistent with the authorizing statute.

15. Increase in Costs of Providing Services From FY 1998 to FY 1999

Commenters express concern that the FAA's costs of providing services to Overflights increased significantly from FY 1998 to FY 1999. For example, the AAPA states, ''It is unclear why FAA's costs to provide service for Overflights jumped over fifty percent, a significant increase, from fiscal year 1998 to fiscal year 1999.'' KPMG notes ''During the Industry Presentation, the FAA revealed that its expenses for capital acquisition and implementation costs were substantially higher in FY 1999 than in FY 1998.''

FAA Response: The FAA acknowledges that the cost of providing Enroute and Oceanic Services increased from 1998 to 1999. When the FAA released its FY 1998 cost data, it acknowledged that its costs were understated. This was attributable to (1) FAA's failure to capitalize and subsequently depreciate a number of assets, and (2) a particularly conservative costing methodology used with the new Cost Accounting System. In FY 1999, as the CAS evolved further, the FAA was able to capitalize a significant amount of assets based on better data. The FAA also made accounting refinements in such areas as telecommunications costs, allowing more accuracy in cost reporting. These accounting refinements in telecommunications costs resulted in more accurate, but increased, allocations to certain services.

In addition, the FAA's costs of providing overall service increased in FY 1999 in both the Enroute and Oceanic environments. Acquisition costs increased significantly due to a continued focus on modernization efforts, such as the Display System Replacement and the Wide Area Augmentation System project.

16. The Possible ''Over-Allocation'' of Costs to the Oceanic Cost Pool

The AAPA asks for an explanation of why the Oceanic fees are approximately 54% of the Enroute fees, although total Oceanic costs of $94 million are only about 4% of total Enroute costs of $2.4 billion. They express concern that this might represent an over-allocation of FAA costs to the Oceanic environment.

FAA Response: The FAA disagrees that there may have been an over-allocation of costs to the Oceanic Service. The unit rates for Overflight Fees are determined by the number of miles flown in each separate environment (Oceanic and Enroute). The higher the number of miles flown in one environment, the greater the denominator when dividing costs by miles to calculate the unit rate. In FY 1999, the number of miles flown in the Oceanic environment was 483,522,588, while the number of miles flown in the Enroute environment was 6,619,138,872. This explains why the Oceanic fee is a higher percentage of the Enroute fee despite Oceanic costs being a significantly smaller number compared to Enroute costs.

The FAA does not believe that the facts of the situation provide any support for the concern that costs may have been over-allocated to the Oceanic Service due to the methodology the FAA used to develop its fees. The FAA uses the total cost (less overhead costs) of each of the two Services (Enroute and Oceanic) and the total miles flown in each respective environment to determine the unit rate for each. All data used in the calculation are actual figures. Since the two Services are very different, this methodology is quite reliable for allocating the costs. For the above reasons, the FAA's fee development methodology does not result in an over-allocation of costs to the Oceanic environment.

17. British Airways Asks the FAA To Provide a More Precise Definition of ''Flights'' and How Data on Flights and Miles Are Gathered

FAA Response: In the FAA's Enhanced Traffic Management System (ETMS) database, a flight is entered into the system when the operator of the aircraft files a flight plan, and/or the FAA receives its points of entry into, and exit from, U.S.-controlled airspace. Also, flights are generally confirmed by radio communication, contact reports, or radar detection. For the purposes of Overflight Fees, a flight is defined by when an aircraft transits U.S.-controlled airspace, but neither takes off from nor lands in the U.S.

In the Oceanic environment, when an aircraft reports its Oceanic position to the FAA, the position coordinates become part of ETMS. Similarly, in the case of Enroute traffic, radar systems provide aircraft coordinates that become part of the same database. These coordinates are then used to determine where the aircraft entered and exited the U.S.-controlled airspace. The Great Circle Distance for the flight is then calculated between the entry and exit points, and multiplied by the appropriate unit rate to determine the amount of the fee to be billed.

18. Qantas Airways Suggests That ''Search and Rescue'' Costs Should Not Be Included in the Overflight Fee Cost Base, According to ICAO Guidance

FAA Response: The FAA agrees. Search and Rescue costs have not been included in either the Enroute or the Oceanic cost pools.

19. A Better Explanation Is Needed of the Canada-to-Canada Domestic Flight Exemption

Commenters request a better explanation of the Canada-to-Canada exemption. For example, Air New Zealand expresses concern ''that the fees might be applied in a discriminatory fashion because Canada-to-Canada flights are exempt from the Overflight fees,'' thereby causing an estimated loss in revenue to the FAA of $9.7 million annually. The commenter notes further that this may be in violation of Article 15 of the Chicago Convention or the provision of ICAO Document 9082/5 (Docket item 7) that requires non-discriminatory treatment of foreign users.

FAA Response: U.S.-to-U.S. and Canada-to-Canada flights often transit the other country's airspace for any of several reasons, such as weather, volume of activity, equipment malfunction, more direct routing, pilot request, etc. Currently, the FAA and NAV CANADA have an agreement in place to mutually exempt from otherwise applicable Overflight fees for aircraft of any nation that transit one country's airspace but originate and land in the other country. The loss in revenue to each air traffic service provider is roughly equivalent, and the arrangement is beneficial to both in terms of the safer and more efficient operation of the joint ATC system serving high volumes of aircraft near the borders of the two countries.

The FAA was very cognizant of the various non-discriminatory provisions cited by the commenters when it was structuring the arrangement with NAV CANADA, and does not believe the agreement violates any of those provisions. The agreement exempts aircraft that take off from and land in the same country, regardless of nationality, and does not exempt aircraft belonging to or operated by a specific country. For example, when Air Canada flies from Vancouver to Toronto, a large portion of that flight often occurs in U.S.-controlled airspace near the U.S.-Canada border, yet there is no fee charged by the FAA. Aircraft of any country flying that same route would be equally exempt.

20. The Cost of the U.S.–NAV CANADA Agreement

Air New Zealand asks for more detailed cost data on the flights affected by FAA's agreement with NAV CANADA, as well as the specifics of the arrangement with NAV CANADA. Also, Qantas Airways asks whether the cost of providing services to Canadian traffic has been excluded from the calculation of Overflight Fees.

FAA Response: On December 6, 2000, the FAA placed three additional documents (see Docket No. FAA–00–7018; items 100–102) in the Overflight Fee docket relating to the agreement with NAV CANADA. These are as follows:

(1) Internal FAA Memo of April 12, 2000, providing ATC activity data for use in the FAA Overflight Fee Development Report (Item 4 in the Overflight Fee docket).

(2) An Addendum to the Overflight Fee Development Report showing the estimated fee collections with Canada-to-Canada flights excluded.

(3) The September 1999 Agreement between the FAA and NAV CANADA.

Collectively, these documents show that FAA's estimated costs of providing ATC services to the exempted Canada-to-Canada flights have been removed from the expected Overflight Fee billings. Thus, there is no cross-subsidization of the exempted flights. Those flights are now estimated to cost $9.7 million on an annual basis, and the amount to be billed annually by the FAA is that much less. While FAA's total costs related to Overflights are estimated at $43.2 million, Overflight Fee billings will amount to only an estimated $33.5 million. As noted in the IFR, the difference of $9.7 million represents the cost to the FAA of the mutual exemption arrangement with NAV CANADA. This cost will not be passed on to Overflight customers or to any other user; it will be borne by the FAA.

21. Requests for Additional Time Before Overflight Fees Are Implemented

The Long Haul Charter Carriers of Italy and other commenters request more time to factor the Overflight Fees into their costs of providing service.

FAA Response: The FAA denied this request for a number of reasons. As noted previously, in the Federal Aviation Reauthorization Act of 1996 (the Act), Congress directed the FAA to establish Overflight Fees expeditiously by the Interim Final Rule process. In spite of several opportunities to do so, Congress has chosen not to change this statutory direction, and even reaffirmed that point last year in the NTSB Authorization Act (see Docket item 97). Also, each year since 1997 EAS has been funded based on the assumption that fees were being collected. The FAA moved as expeditiously as possible to implement the new fees. This nevertheless took a long time to accomplish, due in large part to the FAA's decision to wait until it had sufficiently accurate cost data from which to derive the fees. This data was not available until after the Inspector General's audit of FAA's financial statements for FY 1999 was completed on March 1, 2000.

Throughout this process, however, the FAA has always indicated its intent to implement the new Overflight Fees via the Congressionally directed IFR process. (See the several meeting summaries in the docket for this rulemaking—items 11, 15, 16, and 22.) Even prior to those meetings, the FAA distributed an information paper (see Docket item 9) to more than 150 countries at an ICAO Conference in Montreal in September 1998, informing them that, ''FAA is working as expeditiously as possible to issue *another interim final rule* (emphasis added) that will reestablish overflight fees.''

Finally, about three months in advance of publication of the current IFR, the FAA sent a letter of notification to the aviation industry informing known Overflight operators of FAA's imminent plans to reestablish Overflight Fees by an IFR. (See Docket item 1). This letter also was published in the **Federal Register** of March 9, 2000.

In view of the above information and notification provided by the FAA over the past few years regarding its intent to issue another IFR on Overflight Fees, and in view of the fact that the IFR, when issued, provided another 2-month advance warning before the fees were effective, the FAA did not believe any additional delay in the effective date of the fees was necessary.

22. Air New Zealand Asks What Traffic Growth Assumptions the FAA Used in the Derivation of Its Overflight Fees

FAA Response: None. The FAA used only FY 1999 cost and flight data. The current Fees are based on the FAA's actual costs for FY 1999, as shown in the FAA's final audited financial statements. The FAA derived the unit rate by using these actual costs and the actual miles flown that year in each (Enroute and Oceanic) environment. No part of the Fee methodology is based on growth assumptions.

23. Exceptions From Fees for Emergencies

American Airlines comments that flights that are scheduled to either land in or take off from the U.S., but then have to make an unscheduled foreign stop for safety-related reasons (thereby becoming an Overflight) should not be charged Overflight Fees.

FAA Response: The FAA disagrees. Congress directed the FAA to establish

Overflight Fees for those flights that neither take off from, nor land in, the United States (except military and government aircraft of the United States and foreign governments). The FAA must enforce this Congressional direction in a nondiscriminatory manner. Regardless of whether the situation is considered an emergency, if any flight constitutes an Overflight, as defined by the Interim Final Rule and the Final Rule, the FAA is required by law to charge Overflight Fees to that flight.

24. Determining Total Costs Before Being Able To Calculate Overflight Fees

Some commenters suggest that the FAA must be able to determine its total costs before being able to calculate Overflight Fees accurately. KPMG, supported by several other commenters, asserts that the FAA did not explain how it determines its total costs pool, and that the FAA's failure to determine its total costs raises a fundamental issue of whether the FAA has obtained and used the information it needs to determine its costs of providing ATC services in the Enroute and Oceanic environments.

Japan Airlines, Iberia Airlines, and others assert that, since the CAS is not yet fully operational, the FAA cannot accurately state how much it spends on Overflights.

FAA Response: The CAS has been capable of determining the FAA's total cost pool since its initial implementation at the end of FY 1997. Currently, the Enroute, Oceanic, and Flight Services costs have been itemized and identified at the Service level. All other costs are captured at the FAA lines of business (LOB) level. To ensure that all costs have been captured, the FAA reconciles total costs in the CAS to total costs in the FAA's General Ledger Accounting System, the Departmental Accounting and Financial Information System (DAFIS). Also, on an annual basis, FAA produces a ''Statement of Net Costs,'' which reports overall agency expenses. This is one of six standard statements published each year as part of FAA's annual financial statements. Those statements can be found on the Internet at *http://www.faa.gov/aba/html_finance_manage/fin_state_ann_rep.html.*

The FAA disagrees that it did not discuss how it determines its total cost pool. As the Costing Methodology Report (Docket item 6, page iii, Executive Summary) states, ''The purpose of this report is to describe (1) how the Federal Aviation Administration's (FAA) Cost Accounting System captures costs for all FAA lines of business, and (2) how costs were assigned to the Enroute and Oceanic air traffic control (ATC) services.''

In addition, the Arthur Andersen Addendum to the Costing Methodology Report (Docket item 98, Section 3, page 6) states:

> The CM Report included a section (Section 3.0) that described the origin of CAS financial data. While the report focuses on how financial data, related to the Enroute and Oceanic services, were processed, the scope of the system covers all areas of FAA costs, including non-Enroute and Oceanic data. Arthur Andersen participated in the development of the reconciliation process and subsequent FAA enhancements to confirm that all costs are reconciled between the general ledger and the CAS. These procedures are in place and are routinely performed by FAA personnel.

The FAA, of course, does not dispute that the CAS has not yet been fully implemented. It is a work-in-progress, currently expected to be in place agency-wide by the end of FY 2002. But it is not needed agency-wide to derive Overflight Fees. All that is needed for that is the cost data for Enroute and Oceanic Services (since Overfights use only those two Services), and CAS has been providing that data since 1998.

25. The FAA Included Non-Recurring Costs in Enroute and Oceanic Cost Calculations

Several commenters, including Air New Zealand, British Airways, Lufthansa, LTU, KPMG, and others maintain that in the Enroute and Oceanic cost calculations, the FAA should not have included such non-recurring costs as those related to the Y2K computer problems.

KPMG complains further in its later comments (see KPMG ''Report on New Materials Regarding FAA's Overflight Fees,'' Docket item No. 105) that the Arthur Andersen Addendum (Docket item 98) does not address what it (KPMG) considers the overriding problem, i.e., that, even if the one-time Y2K costs were correctly ''expensed,'' rather than ''capitalized,'' for financial accounting purposes, it is improper to treat them as recurring expenses for purposes of the Overflight Fees.

FAA Response: The FAA disagrees. When determining its total costs, the FAA must include those costs that are ''expensed'' in their entirety in that year, as well as the applicable portion of ''capitalized costs'' that was expensed. Expenditures fall into one of these two categories. Some costs are expensed, meaning that the total cost is recognized as an expense in the period in which it is incurred, because the benefit of the incurred expense is also received in that period. Some costs, however, are capitalized, meaning that the entity expects to receive the benefit of the cost over more than one year. In these cases, a portion of the cost is expensed each year the benefit is received.

The FAA's Office of Financial Management publishes a desk guide that summarizes FAA's accounting practices for deciding the kinds of costs that are expensed versus those that are capitalized (see Arthur Andersen's discussion of this in the Costing Methodology Report Addendum, Docket item 98, pages 7–8). The desk guide indicates that software costs can be capitalized, but makes an exception for ''enhancements that merely correct a design flaw or extend the useful life of the software.'' The desk guide can be found on the Internet at *http://www.faa.gov/aba/html_finance_manage/asset__cap.html.*

The FAA's practice is in accordance with Statement of Federal Financial Accounting Standards (SFFAS) No. 10, ''Accounting for Internal Use Software'' issued by the Federal Accounting Standards Advisory Board (FASAB). This statement is effective in FY 2001, and the Board has encouraged its early implementation. SFFAS No. 10 advises expensing Y2K costs as they are incurred. The Board's advice in this instance is based on the fact that ''enhancement'' needs to be limited to instances where new capabilities are being added to the software. Since Y2K remediation did not add new capability, these costs were expensed in the year incurred.

In addition to Y2K costs, there are financial adjustments representing both costs and credits that are included in the Enroute and Oceanic cost pools. These include: value of inventory held primarily at the FAA Logistics Center, disposal of obsolete or retired supplies, disposal of certain inventory, value of inventory due to holding and repairs to damaged inventory, and correction of a prior year expense. Offsetting these adjustments to a large extent are several credits, for the over-expensing of certain environmental and capital investment costs in FY 1998. All of the costs in this cost category are directly related to the provision of Enroute and Oceanic Services. As stated clearly in the IFR, and again in the Final Rule, FAA intends to update and adjust its fees regularly to reflect changes in costs. Thus, whatever the net effect of these adjustments on the level of the Overflight Fees, it will not be an ongoing cost to users. In addition, while

this treatment of the prior year's non-recurring expenses and credits for the purposes of setting the current year's fees may introduce time-lag issues into the recovery of costs through fees, it is a treatment that can be expected to provide accurate cost recovery over time. That is, while hypothetically it is possible that last year's non-recurring costs are a poor indicator of the current year's non-recurring costs and is therefore likely to lead to somewhat inaccurate fees, over time there is no reason to believe that it will be systematically over or under the appropriate amount of costs incurred. In the long run, any incidental overcharges that occur can be expected to be at least largely, if not entirely, offset by instances of undercharges.

In addition if, as the petitioners suggest, the FAA were to attempt to resolve this timing issue by deviating from the standard cost classification rules outlined above, it would inject a highly subjective and arbitrary process concerning cost treatment into every round of rate setting.

26. The FAA Expensed Costs That Should Have Been Capitalized

Many commenters express concern that the FAA expensed costs should have been capitalized. Air New Zealand suggests that a better explanation of depreciation policies is needed, because a significant amount of capital costs appear to be expensed in the current year rather than being capitalized and depreciated over the life of the asset.

KPMG comments that FAA's capital cost categories are described as expensed costs that are related to implementation of capital systems, acquisitions, and research, engineering and development costs. KPMG says the FAA methodology assumes that these costs are directly related to flights occurring during the fiscal year in which they are expensed, and that the association of these costs with capital programs strongly suggests that this assumption is unwarranted. KPMG concludes that, even where expensing of capital investment costs for financial statement purposes is warranted, such costs should be spread over the period of the anticipated benefit for purposes of determining annual costs ''directly related'' to the ATC services provided.

KPMG complains that Arthur Andersen is silent with respect to other large costs that the FAA has improperly expensed for purposes of determining its costs ''directly related'' to Overflights. These include the $668 million—25% of total Enroute costs, and an additional $33 million—33% of the total Oceanic cost pool. KPMG argues that the benefits of NAS modernization programs extend over many years and for purposes of economic analysis, these costs must be spread throughout the period of the benefits rather than expensing them in the year initially incurred.

FAA Response: The FAA agrees in part. The FAA's capital investment appropriations, Facilities and Equipment (F&E) and Research, Engineering and Development (RE&D), are used both for acquisitions that are expensed as well as for acquisitions that are capitalized. Examples of valid expense items that may be paid from FAA's capital appropriations include training, maintenance, spare parts, and other consumables. In determining its depreciation policy, the FAA has followed Federal Accounting Standards. As noted previously, the FAA's Office of Financial Management publishes a desk guide that summarizes FAA capitalization and accounting practices. Chapter 2 of this desk guide instructs FAA personnel responsible for accounting for property, plant, and equipment, how to treat these items properly. This document provides the following guidance regarding capitalization of software and research and development costs, respectively:

- * * * *software* costs that are *not* eligible for capitalization include * * * enhancements that merely correct a design flaw or extend the useful life of the software.'' Y2K remediation expenses fall into this category.
- * * * Expense any costs incurred for a project before technological feasibility has been determined.'' This describes *research and development* projects as executed by the FAA.

This desk guide states that the procedures and policies on which the guide is based are in compliance with all relevant Federal Accounting Standard Advisory Board Statements as well as requirements of the Chief Financial Officers Act.

As part of the FAA's annual financial audit for FY 2000, which was completed on March 1, 2001, it was determined that certain costs that had been expensed in 1999 should have been capitalized. In particular, subsequent to publication of the FY 1999 Financial Statements, it was determined that some of the costs captured under the Enroute and Oceanic ''ARA Expensed F&E Labor/Non-Labor'' categories should have been capitalized instead of being expensed. As a result of this adjustment, the cost category entitled ''depreciation'' has increased slightly due to the additional costs now being capitalized and then depreciated over periods of up to 20 years. These costs were derived from various projects relating to the provision of Enroute and Oceanic air traffic services.

The net impact is the following:

ENROUTE SERVICE

	Original FY 1999 costs	Amended FY 1999 costs
ARA Expensed F&E Labor/Non-Labor	$668,351,218	$421,196,901
Depreciation	$208,296,479	$213,706,687
Net change due to adjustment	.....	($241,744,108)

OCEANIC SERVICE

	Original FY 1999 costs	Amended FY 1999 costs
ARA Expensed F&E Labor/Non-Labor	$33,186,457	$13,082,745
Depreciation	$5,182,602	$5,622,672
Net change due to adjustment	.....	($19,663,642)

Making such adjustments to the financial statements is a normal part of the financial review process, whether the statements are those of a private company or a public sector agency. These adjusted FY 1999 costs are the basis for the FAA's derivation and adjustment of its Overflight Fees for the Final Rule. As this adjustment in the Final Rule means that there have been overpayments under the Interim Final Rule, the FAA will promptly provide credits and refunds pursuant to 49 CFR part 89.

27. Expenses in the Capital Investment Category

Several commenters suggest that the FAA should not have included Airway Facilities (AF) Expensed F&E Labor/Non-Labor, ARA Expensed F&E Labor/Non-Labor, and ATS RE&D Expensed Labor/Non-Labor in the Capital Investment category. LTU comments that the FAA included many costs not associated with the burden of servicing each flight (e.g., ARA RE&D costs) and that many of these are unexplained.

FAA Response: The FAA disagrees. The full cost of a service should include expenses incurred in that year, including the applicable portions of capital costs that were expensed. In addition, the FASAB's Statement of Federal Financial Accounting Standards (SFFAS) No. 4, ''Managerial Cost Accounting Concepts and Standards,'' states that depreciation (current year portion of capitalized costs) should be included as a part of full cost.

FASAB's SFFAS No. 6, ''Accounting for Property, Plant and Equipment,'' states that costs for construction of assets not yet complete should not be included in full cost. These costs should be collected as ''work in process'' (WIP) and capitalized when the asset is placed in service.

The FAA's cost accounting methodology calculates the full cost of providing Enroute and Oceanic Services. The full cost does include capitalized costs as applicable and as outlined by the appropriate Federal Accounting Standards.

As noted in the discussion of the preceding comment (relating to the expensing of costs that should have been capitalized), it was determined in the course of the audit of FAA's financial statements for FY 2000 that the FAA had over-expensed certain costs during FY 1999. These particular costs should have been capitalized and depreciated instead over periods of up to 20 years. The costs used by the FAA to derive its Overflight Fees for the Final Rule reflect these adjustments.

28. Air New Zealand, KPMG, Lufthansa, and LTU Ask the FAA To Explain the ARA Expensed F&E Labor/Non-Labor Costs Under ''Capital Investment''

FAA Response: As noted above in the discussion of the two immediately preceding comments, the FAA has adjusted its costs for FY 1999 under the ARA Expensed F&E Labor/Non-Labor category as a result of the FY 2000 financial statement audit. The amended amount for the Enroute Service is $421,196,901, and the amended amount for the Oceanic Service is $13,082,745.

ARA Expensed F&E Labor/Non-Labor consists of projects that support the modernization of the National Airspace System. Project codes have been established in the CAS to capture the costs of these projects. These projects generally represent ''ATS products.'' An ATS product could be a piece of equipment or a capability used in the provision of ATC services, or an enhancement to an existing system or capability. Subject matter experts determined which of the four ATS Services each project benefits, and the costs associated with each project were assigned to the appropriate Service. In some cases, a project may benefit more than one Service. In such instances, subject matter experts familiar with these projects determine the appropriate percentage split between the Services.

There are a total of approximately 2,100 line items for Enroute and Oceanic Services combined. Examples of the types of projects included in this cost element are the following:

- For Enroute, examples include work on the Wide Area Augmentation System for the Global Positioning System, Display System Replacement, HOST Replacement, Y2K Date Change Program, LORAN-C, Long Range Radar Replacement, and Voice Switching Control System (VSCS).
- For Oceanic, examples include work on Oceanic Automation Systems, ARTCC Building/Plant Improvement, VSCS for Houston, and Remote Maintenance Monitoring.

The FAA has a complete list of these projects, and will make it available upon request. Contact Randall Fiertz in FAA's Office of Cost and Performance Management, (202) 267–7140, for further information.

29. The ATAC and KPMG Question the FAA's Assumption for Using Labor Costs as the Basis for Allocating Non-Labor Costs. They Also Question the FAA's Reliance on Staffing Standards To Allocate Certain Costs

FAA Response: The FAA disagrees that these assumptions are improper. The Arthur Andersen Costing Methodology Report Addendum (Docket item 98) addresses both (a) the use of labor costs to assign non-labor costs and (b) the use of staffing standards to allocate costs, stating as follows (see section 2, pages 4–5):

When designing the CAS, the FAA relied on the Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standard No. 4, Managerial Cost Accounting Concepts and Standards for the Federal Government (FASAB 4). FASAB 4 discusses the complexity of cost accounting processes to be employed by federal agencies but does not specify the degree of complexity or sophistication of any managerial cost accounting process. FASAB 4 instructs agencies to determine their own appropriate level of detail or complexity based on several factors. Two of these factors, key to the FAA's cost accounting design, include:

Relative precision desired and needed in cost information; and

Practicality of data collection and processing.

These two factors form the basis for the ''best available data'' concept adopted by the FAA. 'Best available data' as defined by the FAA refers to the use of data that is readily available from either automated or non-automated sources, that represent the most current and accurate source of data in any given business area. Often, the FAA had choices as to what data to use as the basis for an allocation. The FAA strived to choose the most accurate and readily available data source. Arthur Andersen concurs with the design decisions made based on both our public and private sector experience and our assessment of the sources of information for use in this phase of the CAS implementation. When faced with a decision between one source that is not readily available and another that is, FAA management made a determination as to the relative costs and benefits to select the appropriate source. The FAA relied on this approach, as reflected in the CM Report, to develop the following cost assignments:

Allocating Airway Facilities (AF) non-labor costs and Air Traffic (AT) and AF workers compensation claims to projects and Service Delivery Points (SDPs) based on labor costs; and

Allocating AF labor costs to projects and SDPs based on staffing standards.

The FAA's reason for allocating these costs to projects and SDPs, at the current time, is to accomplish full costing of Air Traffic Services (ATS) organization's services for Overflight Fee purposes. In the future, new business drivers, such as cost and performance management, may require these costs to be directly assigned. Arthur Andersen concurs with this initial design decision until direct tracing capabilities are available for the entire AF work force. AF non-labor costs represent approximately 1% of total Enroute costs. To directly assign AF non-labor costs the FAA would have to modify its legacy accounting system (currently scheduled for replacement in FY 2002) requiring an extensive system development effort beyond the current

project's scope. In addition, this change would impose a major process change on employees. Therefore, for the purposes of determining Overflight Fees, the FAA deemed the burden of the changes described above to outweigh any benefit that might be derived given the relative size of the cost pool at issue. Arthur Andersen agrees with the FAA's approach of deferring the implementation of direct assignment techniques for this small pool of costs.

As for workers compensation costs, AT generates the major share of the workers compensation liability. ATS believes it is reasonable, based on the nature of air traffic control work, that labor costs, used as a proxy for headcount, is a reasonable indicator for the accurate distribution of workers compensation claims (i.e., the more employees an SDP has, the higher their workers compensation bill). The FAA is working to improve this assignment by using actual workers compensation claims as the basis, an improvement planned for fiscal year 2001. Arthur Andersen concurs with this initial effort and the need to routinely reexamine the initial cost drivers.

In place of actual time recording, the FAA is relying on staffing standards to assign AF labor costs to projects and SDPs. This approach has been discussed with the IG. These discussions have resulted in agreement that staffing standards represent the best available data source for allocating these costs at the present time. This agreement comes with the understanding that ATS management works towards a more direct, time recording-based method of assigning these costs (the FAA recently provided a report to the IG outlining a plan to implement labor distribution agency-wide). Arthur Andersen supports the continual refinement of the labor reporting processes in use and planned by the FAA.

Since the December 1, 2000 issuance of the above-quoted Arthur Andersen Addendum, the FAA has experienced some slippage in its plans for handling Workers Compensation costs. The use of actual claims as the basis for distributing those costs is no longer planned for implementation in FY 2001. Instead, the FAA is continuing to examine alternative ways to assign these costs, with actual claims being one of the options under consideration.

30. Air New Zealand, Iberia Airlines, Japan Airlines, ATAC, KPMG, and Others Ask for an Explanation of Why the FAA Used the Ratio of Oceanic Sectors to Total Oceanic and Enroute Sectors To Allocate Certain Maintenance Costs

FAA Response: The FAA used a three-step approach in allocating maintenance costs to Oceanic:

- First, costs associated with equipment dedicated solely to the provision of Oceanic Service, e.g. ODAPS (Oceanic Display and Planning System) and DOTS (Dynamic Oceanic Tracking System) are assigned to the Oceanic Service.
- Second, for equipment that is shared between the Enroute and Oceanic Services, (e.g., building infrastructure and environmental equipment), sector ratio percentages (the percentage of Oceanic sectors in the total of Enroute plus Oceanic sectors) were applied as the allocation basis.
- Finally, no costs were included in Oceanic for equipment such as radars, certain navigational aids, and other equipment that provide no benefit to Oceanic users.

In the second step, where costs are shared between Enroute and Oceanic, the sector ratio percentages are considered the most appropriate basis to allocate maintenance costs. This determination was made because, of the various alternative methods considered, sector count appeared to most accurately reflect the actual workload of a technician. This is because the ability to generate and maintain sectors is a function of the number of ''suites'' of equipment available at that location. The number of suites of equipment correlates to the workload of a technician. The allocation percentages thus derived for each Oceanic SDP are shown in the table below. These percentages apply only to those programs shared between Enroute and Oceanic.

SDP	Basis amount (AF costs) (percent)
New York ARTCC	17
Oakland ARTCC	17
Houston ARTCC	5
Anchorage ARTCC	14

Three other bases were considered to allocate AF non-labor costs from Enroute to Oceanic. The table below describes each option and the reason why it was not used:

Aircraft Handled.	This measure does not have any correlation to the nature of an AF technician's work (i.e., number of facilities maintained).
F&E Funding.	This measure is considered inconsistent because funding can vary considerably by year and has no correlation to the nature of an AF technician's work.
Work Distribution.	AF Managers at specific SDP's were queried as to the distribution of technicians' work between Oceanic and Enroute systems. This approach was deemed unreliable (i.e., too subjective) and therefore inadequate.

31. The ATAC and KPMG Request a Discussion of the ATC Cost Centers Used To Assign ATC Costs

KPMG comments that the FAA has provided no discussion of the activities associated with each cost center that would permit evaluation of the reliability of the cost assignments to the four ATS Services. KPMG further states that the FAA has failed to provide information on the total pool of costs associated with each cost element, and the allocation of those cost elements across the four Services.

FAA Response: For cost accounting purposes, the FAA is comprised of more than 10,000 ''cost centers'' that designate the specific organization to which each employee is assigned. Cost centers identify organizations throughout the FAA, such as the FAA Administrator's Office, staff offices such as Human Resources, Civil Rights, Public Affairs, etc., as well as the operational LOBs such as Air Traffic Services (ATS), Regulation and Certification, Civil Aviation Security, etc. Since every organization within the FAA incurs costs, they are referred to as cost centers. Every time an organization incurs costs, its cost center code is identified with that cost in the cost accounting system.

Air Traffic Services has, by far, the largest number of cost centers within the agency. For example, each air route traffic control center (ARTCC) has a unique cost center code that identifies it. Air traffic controllers within each of the ARTCCs perform the activities associated with providing Enroute and/or Oceanic ATC services. Cost centers also uniquely identify other air traffic organizations that provide Terminal and Flight Service Station Services. Other cost center codes identify field maintenance organizations that are actively engaged in ensuring that the equipment used to provide various services such as navigation, communications, surveillance (radar), etc., are maintained in working order. Cost centers identify the System Support Centers and System Support Units (SSCs and SSUs) that perform the maintenance activities as well as the System Management Offices (SMOs) that manage each of the SSCs and SSUs.

Cost centers contribute to a better understanding of the FAA's costs. For

example, through the use of cost centers, the FAA is able to identify the organizations that perform flight inspections of the equipment used to provide air traffic services. Cost centers also allow the FAA to identify organizations outside of the Air Traffic Services organization that provide support necessary for ATS to function. One example is the Academy at the Mike Monroney Aeronautical Center in Oklahoma City. The Academy develops and provides training to air traffic controllers and the employees that maintain the equipment used to provide air traffic services. In summary, cost centers are invaluable elements that allow the FAA to identify every organization, and its associated costs, throughout the agency.

As for the cost elements (i.e., line items) for Enroute and Oceanic Services, the FY 1999 cost pools for each cost element are provided in the ''Overflight Fee Development Report, as Amended'' for the Final Rule. Each line item on page 6 of this report represents a cost element. The FAA did not provide the total pool of costs for the other two ATS Services, because the costs for Terminal and Flight Services were not yet available by each cost element in 1999.

32. British Airways, ATAC, KPMG, and Others Request That the FAA Provide Information Supporting the Apparent Presumption That All Labor Costs in an SDP That Provides Enroute and/or Oceanic Services Are Directly Related to the Provision of Such Services

FAA Response: The FAA used subject matter experts, who were part of the team of individuals who developed the original CAS design and methodology to cost out each service in CAS. These individuals performed the analysis of facilities, including the assignment of labor costs at those facilities, for each of the four ATS Services. All labor costs at SDPs were assigned by these subject matter experts, based on the function to which the costs contribute and the direct relationship of each function to the provision of the Enroute and Oceanic Services. The FAA will make available the documentation behind the assignment of costs to SDPs and ATS Services upon request. Contact Randall Fiertz in FAA's Office of Cost and Performance Management (202) 267–7140.

33. Commenters Request the FAA To Provide Adequate Information on the Allocation of Telecommunications Costs

FAA Response: The Air Traffic Services (ATS) organization maintains the Telecommunications Information Management System (TIMS) that tracks each circuit to a facility (Center, Tower, radar, navigational device, etc). Each facility has been assigned to one of the four Services. Based on this information, the cost of each leased line is assigned to a Service. The Costing Methodology Report (Docket item 6, Section 4.2.2.4, pages 28–29) includes an explanation of the process used to assign these costs.

In addition to leased telecommunications costs, there are certain non circuit-based telecommunications costs provided by contract support in the Oceanic airspace. The cost of these items were determined and assigned to the Oceanic Service based on actual invoices.

34. KPMG, Supported by Other Commenters, Requests the FAA To Provide Historical Data Regarding Workers Compensation Claims To Determine the Nature of Their Distribution Between the Services

FAA Response: The table below illustrates how the CAS allocated FAA's historical Workers Compensation costs in FY 1998 and FY 1999. The FAA began implementing the CAS in FY 1998; therefore, Workers Compensation costs were not allocated among the four ATS Services prior to that time. The Department of Labor (DOL) administers the Workers Compensation program for Federal agencies, and reports the amount of payments made on behalf of the FAA each fiscal year. The Office of Management and Budget requires Federal agencies to report a current year expense in the amount of the payments made each year by the DOL. This practice is in accordance with generally accepted accounting principles (accrual accounting) that requires the recognition of liabilities, and the corresponding expense, in the period in which they are incurred. Congress appropriates and makes the funds available to pay the accrued liability in the second subsequent year after the liability is recorded.

WORKERS' COMPENSATION COSTS

ATS service	FY 1997	FY 1998	FY 1999
Enroute	CAS was not in use in FY 1997	$28,700,281	$29,646,139
Oceanic		572,090	659,104
Terminal & Flight Services		40,699,213	40,927,320
Totals		69,971,584	71,232,563

The FAA will provide additional information regarding the statistical study to interested parties upon request. Contact Randall Fiertz in the FAA's Office of Cost and Performance Management, (202) 267–7140.

35. KPMG, Supported by Other Commenters Including Air New Zealand, Asks the FAA To Provide Sufficient Information To Determine the Validity of the Statistical Study Used To Establish the Ratios of Enroute to Oceanic On-Position Time

FAA Response: The FAA believes the statistical study to be valid. As stated in the Costing Methodology Report Addendum (Docket item 98, Section 4, page 7):

The FAA decided, subsequent to the release of the Costing Methodology Report (CM), that additional detail was necessary to more fully explain the treatment of certain cost pools with the CAS. The pools include Oceanic Air Traffic labor and capital costs.

As described in the CM Report (see Section 4.3), to assign AT labor costs between Enroute and Oceanic, the FAA conducted a statistical analysis of controller sign-in/sign-out (SISO) data. Arthur Andersen assisted the FAA in this statistical analysis to confirm the validity of the sampling techniques. This analysis was performed at the request of the DOT IG's office, which also reviewed the methodology and final results. This data, captured at the employee/controller level, represented the time each person spent ''on-position'' working either domestic enroute or oceanic air traffic (a single controller may be

certified to work both environments). Data was collected at each of the four Enroute Centers that provide Oceanic service for purposes of the CAS (New York, Houston, Oakland, and Anchorage).

The sampling strategy was designed to estimate the average Oceanic labor fraction of total controller labor at each Center to within a relative error of ±5%, with a 95% statistical confidence. A sample size of 40 days was calculated, which meets the FAA's relative error and confidence requirements. Forty random dates were then selected between February 19th and September 6th, 1999.

Following the IG's review of the statistical analysis, the resulting percentages were used in the CAS to assign a portion of the Enroute labor cost to the Oceanic Service at each of the four Enroute Centers that also provide Oceanic Service.

36. KPMG and Several Others Request the FAA To Provide Additional Information on the Use of a Single Set of On-Position Time Ratios To Allocate a Broad Spectrum of Costs Between the Enroute and Oceanic Environments

FAA Response: The single set of on-position time was a random sample intended to represent a full year. Labor makes up the vast majority of the costs allocated in this manner. The Costing Methodology Report (Docket item 6, Section 4.3, page 40) states:

For AT-related costs, historical Oceanic on-position time as a percentage of total ARTCC on-position time was considered the most appropriate basis. This is because this measure reflects the work effort required to provide the Oceanic service. To determine approximate Oceanic on-position time as a percentage of total on-position time, a statistically valid analysis [as explained in the previous response] was conducted on a sample of sign-in, sign-out time records logged by controllers in the normal course of performing their duties at each of the four Oceanic SDPs.

As indicated above in the FAA response to the comment that there may have been an ''over-allocation'' of costs to the Oceanic cost pool, the FAA believes it has used a reliable accounting methodology to reasonably allocate costs between the Enroute and Oceanic environments. To capture costs accurately in the CAS, the FAA performed a statistical analysis (see the Arthur Andersen Costing Methodology Report Addendum; Docket item 98, Section 4, page 7) to allocate labor costs between the Enroute and Oceanic Services. Since different systems are used to provide services in the Oceanic and Enroute environments, the task of allocating all other costs between these two Services was fairly straightforward. Where systems could be identified with provision of Oceanic Services only, those costs were assigned directly to Oceanic. Where systems could not be specifically identified with the provision of Oceanic Services only, costs were allocated on bases that represent the best available information. Labor data were used to allocate costs between the Oceanic and Enroute environments only in cases where no better information was available.

FASAB 4 states (in paragraph 124) that, ''In principle costs should be assigned to outputs in one of the methods listed below in the order of preference: (a) Directly tracing costs wherever economically feasible; (b) assigning costs on a cause-and-effect basis; and (c) allocating costs on a reasonable and consistent basis.'' It further states (in paragraph 128) that, ''Direct cost tracing often minimizes distortion and ensures accuracy in cost assignments. However, it can be a relatively costly process. It should be applied only to items that account for a substantial portion of the cost of an output and only when it is economically feasible.'' The FAA uses labor statistics to assign labor costs on a cause-and-effect basis. The FAA use of labor statistics to assign costs other than labor costs was deemed appropriate since these costs do not account for a substantial portion of the cost of Overflight services. In addition, development of bases to enable direct tracing was considered economically prohibitive.

37. KPMG, ATAC, and Other Commenters Request the FAA To Provide Further Information on the Allocation of Capital Investment Costs Based on Project or Program Coding, and the Assumptions Made in Making Such Allocations

FAA Response: FAA subject matter experts, who are familiar with the capital projects and the functions they are intended to support (e.g., Enroute surveillance, Terminal navigation, etc.), assigned each project to the appropriate Service. This method of assigning costs is referred to as ''direct tracing'' (see the Costing Methodology Report, Docket item 6, Section 4.1, page 20) and is the most preferred method to assign costs as described in FASAB 4. FASAB 4 indicates (in Paragraph 124) that, ''In principle costs should be assigned to outputs in one of the methods listed below in the order of preference: Directly tracing costs wherever economically feasible; Assigning costs on a cause-and-effect basis; and Allocating costs on a reasonable and consistent basis.''

38. KPMG, Supported by Other Commenters, Asks the FAA To Provide Documentation on the Percentages Used To Allocate Certain Individual Cost Elements, Such as Contract Maintenance

FAA Response: The FAA contracts-out the maintenance of several large systems. These contracts span multiple years but are funded yearly. Each contract is attributable to one and only one piece of equipment or system. Each piece of equipment or system has already been assigned to a Service (as described in the Costing Methodology Report, Docket item 6, Section 4.2.2.7, page 30 and Appendix B, Section B.12, page B–6). Percentages were then calculated to allocate actual costs incurred to pay for these maintenance contracts to the Services. The percentages were based on the anticipated funding of each contract. The work papers supporting the derivation of these percentages may be obtained upon request from Randall Fiertz in FAA's Office of Cost and Performance Management, (202) 267–7140.

39. The ATAC Requests an Explanation of How the FAA Will Ensure That Its Costing Methodology Is Consistent for All ATS Services and Other Lines-of-Business Within the FAA

FAA Response: The Costing Methodology Report Addendum (Docket item 98) refers to how Terminal and FSS Services will be assigned costs in the same manner as Enroute and Oceanic to ensure that costs are assigned to the proper Service. Additional information regarding the allocation of costs can be found in the Costing Methodology Report (Docket item 6, Sections 4.2.1.1, 4.2.1.2, 4.2.5.1, and 4.2.5.4) and the Costing Methodology Report Addendum (Docket item 98, Section 3, paragraphs 3 to 5).

The FAA currently uses a consistent costing methodology in allocating agency overhead costs. In so doing, the FAA determines each LOB's direct cost and allocated overhead on the basis of each LOB's direct cost to total FAA direct cost. This same methodology is used within the ATS. The FAA determines the cost and allocated overhead for each of the four ATS Services on the basis of each Service's cost to total ATS cost. In the future, the FAA intends to use this methodology to allocate agency overhead to each LOB as the CAS is implemented in that LOB.

The costing methodology used for other LOB-specific costs (i.e., costs other than overhead) will likely be very different, since the various LOBs and

Services are different (e.g., ATS versus Aircraft Certification services). Costing methodologies for all services do not have to be the same in CAS for the costs to be considered valid. The FAA is working to develop allocation methodologies for its various services in ways that respond to the specific manner in which each particular service is provided.

40. Air New Zealand and Other Commenters Ask What Assets Have Been Included in the Overflights Cost Base and What Were the Depreciation Policies Adopted

FAA Response: The location of FAA's capitalization policy was provided in the Costing Methodology Report Addendum, Section 4, page 7. According to FASAB No. 10, items that are typically depreciated are commonly referred to as Plant, Property, and Equipment, or PP&E. Based on FAA policy, PP&E is defined as real property (land, buildings, and other structures) and personal property (installed facilities equipment, spare parts, aircraft and aircraft engines, administrative information systems, and equipment furnished to others or Government Furnished Property and Contractor Acquired Property. FAA policy also requires depreciable items to have an estimated useful life of at least two years and a unit cost in excess of $25,000.

41. Lufthansa, ATAC, KPMG, British Airways, and Other Commenters Claim That the FAA Did Not Provide Sufficient Detail on the Overhead Costs Removed From the Overflight Fee Calculations, or Explain What Types of Costs Are Included in the Overhead Category

FAA Response: The FAA acknowledges that it needs to provide a fuller explanation of the excluded overhead costs; that information is provided in the two tables below. The CAS has the capability to identify and track the source and target of overhead costs. While the FAA has been able to link these costs directly to the specific cost categories or functions of the Air Traffic System they support, the agency has taken an extremely conservative approach in determining ''directly related'' costs by removing all overhead costs from the Overflight Fee calculations in addition to excluding all Terminal and Flight Service costs. The following tables show the extraction and removal of overhead costs:

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Enroute Costs (Fiscal Year 1999):

Cost Categories	Enroute Full Costs	Removal of Overhead Costs	Enroute Costs without Overhead
Air Traffic Operations			
Field Labor	$999,426,809	$0	$999,426,809
Field Non-Labor	$944,334	$0	$944,334
ATCSCC	$18,040,176	$1,086,159	$16,954,017
Contract Weather	$8,176,488	$0	$8,176,488
Contract Training	$10,814,599	$0	$10,814,599
Academy Training	$5,785,261	$0	$5,785,261
Aviation Medical	$7,060,379	$1,445,545	$5,614,833
Aviation Security	$3,219,936	$205,924	$3,014,011
Workers Compensation	$26,445,389	$0	$26,445,389
Subtotal	$1,079,913,370	$2,737,629	$1,077,175,741
Airway Facilities Operations			
SSC Field Labor	$172,510,218	$0	$172,510,218
SMO Field Labor	$35,322,498	$0	$35,322,498
Accruals & Adjusted Labor	$724,261	$0	$724,261
Nat'l Network Control Center	$7,753,579	$1,631,801	$6,121,779
Na'tl Maint. Command Center	$1,197,837	$52,492	$1,145,345
Field Non-Labor	$27,095,741	$0	$27,095,741
Telecommunications	$118,444,991	$0	$118,444,991
Flight Inspection	$14,948,854	$0	$14,948,854
Utilities	$24,260,336	$0	$24,260,336
Maintenance Contracts	$25,175,337	$179,658	$24,995,679
Logistics	$40,749,294	$785,737	$39,963,557
Academy Training	$15,095,316	$0	$15,095,316
Workers Compensation	$3,200,750	$0	$3,200,750
SMP/Compliance	$1,092,338	$0	$1,092,338
Subtotal	$487,571,351	$2,649,687	$484,921,664
Overhead Allocations			
ATS Regional Overhead	$77,116,590	$77,116,590	$0
ATS Headquarters Overhead	$119,896,795	$119,896,795	$0
FAA Regional Overhead	$30,967,716	$30,967,716	$0
FAA Headquarters Overhead	$69,467,114	$69,467,114	$0
Subtotal	$297,448,215	$297,448,215	$0
Capital Investment			
AF Exp F&E Lab/Non-Lab	$34,600,810	$0	$34,600,810
ARA Exp F&E Lab/Non-Lab	$421,196,901	$10,168,096	$411,028,805
ATS RE&D Exp Lab/Non-Lab	$33,123,471	$7,646,432	$25,477,039
Depreciation	$213,706,687	$0	$213,706,687
Subtotal	$702,627,869	$17,814,528	$684,813,340
Other Costs			
Gain/Loss	($79,279,026)	$0	($79,279,026)
Accrued Liabilities	($11,055,626)	$0	($11,055,626)
Subtotal	($90,334,652)	$0	($90,334,652)
Total	$2,477,226,152	$320,650,059	$2,156,576,094

Oceanic Costs (Fiscal Year 1999):

Cost Categories	Oceanic Full Costs	Removal of Overhead Costs	Oceanic Costs without Overhead
Air Traffic Operations			
Field Labor	$23,261,737	$0	$23,261,737
Field Non-Labor	$6,763	$0	$6,763
ATCSCC	($14)	$0	($14)
Contract Weather		$0	
Contract Training	$252,204	$0	$252,204
Academy Training	$225,914	$0	$225,914
Aviation Medical	$164,327	$33,644	$130,682
Aviation Security	$74,942	$4,793	$70,150
Workers Compensation	$615,503	$0	$615,503
Subtotal	$24,601,377	$38,437	$24,562,940
Airway Facilities Operations			
SSC Field Labor	$2,354,522	$0	$2,354,522
SMO Field Labor	$547,056	$0	$547,056
Accruals & Adjusted Labor	($3,200)	$0	($3,200)
Nat'l Network Control Center	$167,103	$374	$166,729
Nat'l Maint. Command Center	$11,186	$490	$10,695
Field Non-Labor	$367,806	$0	$367,806
Telecommunications	$24,356,126	$0	$24,356,126
Flight Inspection	$0	$0	
Utilities	$638,945	$0	$638,945
Maintenance Contracts	$2,272,851	$15,657	$2,257,194
Logistics	$117,783	$2,271	$115,512
Academy Training	$140,886	$0	$140,886
Workers Compensation	$43,601	$0	$43,601
SMP/Compliance	$2,741	$0	$2,741
Subtotal	$31,017,404	$18,793	$30,998,612
Overhead Allocations			
ATS Regional Overhead	$1,893,255	$1,893,255	$0
ATS Headquarters Overhead	$1,966,879	$1,966,879	$0
FAA Regional Overhead	$742,678	$742,678	$0
FAA Headquarters Overhead	$1,671,104	$1,671,104	$0
Subtotal	$6,273,915	$6,273,915	$0
Capital Investment			
AF Exp F&E Lab/Non-Lab	$515,536	$0	$515,536
ARA Exp F&E Lab/Non-Lab	$13,082,745	$0	$13,082,745
ATS RE&D Exp Lab/Non-Lab	$3,154,610	$728,232	$2,426,378
Depreciation	$5,622,672	$0	$5,622,672
Subtotal	$22,375,563	$728,232	$21,647,331
Other Costs			
Gain/Loss	($5,235,049)	$0	($5,235,049)
Accrued Liabilities	$2,484,921	$0	$2,484,921
Subtotal	($2,750,128)	$0	($2,750,128)
Total	$81,518,132	$7,059,377	$74,458,755

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For information on the types of costs included in the Overhead category, see Sections 4.2.4, 4.2.4.1, and 4.2.4.2 (pages 33–35) of the Costing Methodology Report (Docket item 6).

42. Lufthansa States That the FAA Did Not Explain the ''Unidentified F&E Projects'' That Are Part of Oceanic Costs

FAA Response: Unidentified F&E projects are projects that could be attributed to the ATS LOB based on their project coding structure in the CAS, but could not be attributed to any particular Service within the ATS LOB. In most cases, the ''Unidentified'' projects were a result of the FAA changing one or more of the known F&E project numbers to indicate a change in the project(s)' capitalization status. In order to account for these costs, the FAA developed the following methodology to allocate these costs to Enroute, Flight Service, or Terminal Services. Using two years of cost data (FY 1998 and 1999), the FAA computed the total cost of identified F&E projects for these three Services. The percentage of these projects' costs that were attributed to Enroute, Flight Services, and Terminal was then computed. These percentages were then applied to the total unidentified project cost to compute the unidentified project cost to be attributed to each of those three ATS Services. This method conforms to paragraph 124 of the Statement of Federal Financial Accounting Standard #4 ''Managerial Cost Accounting Standards,'' which states that such costs should be of allocated on a reasonable and consistent basis.

None of the costs of the unidentified projects have been allocated to the Oceanic Service. This is because the costs of only three types of ''Capabilities'' (as described in the Costing Methodology Report; Docket item 6, Section 2.2, page 13) are allocated to the Oceanic Service: Mission Support, Infrastructure, and Communications. None of the ''Unidentified'' projects are attributed to these Capabilities; therefore, none of the associated costs are allocated to the Oceanic Service.

The costs of these ''unidentified'' projects have very little impact on this rulemaking. Approximately $13 million, from the total of about $25 million of unidentified projects, were allocated to the Enroute Service. Overflights account for only approximately 1.23% of gross Enroute GCD miles. Therefore, the total ''Unidentified F&E Labor/Non-Labor'' costs attributable to Overflights are estimated to be about $160,000, which amounts to only about 2 cents per 100 nautical miles in the Enroute environment.

43. Japan Airlines, Iberia Airlines, and Others Comment That FAA's FY 1999 Costs Have Not Been Revalidated

FAA Response: The FAA disagrees with this comment. The Costing Methodology Report Addendum (Docket item 98, Section 2, paragraphs 1–3, page 4) provides information on this topic. The Addendum points out that the FAA's financial statements for FY 1999 were audited by the Department of Transportation Office of Inspector General prior to the FAA's publication of the Overflight Fee IFR in June 2000. The FAA received an unqualified or ''clean'' audit opinion (meaning no significant issues were identified) from the IG. The FAA believes that this constitutes more than sufficient ''revalidation'' of its FY 1999 cost data. This FY 1999 cost data was then used by the FAA to derive its Overflight Fees.

As noted previously in the Discussion of Comments section under the comment, ''The FAA expensed costs that should have been capitalized,'' it was discovered subsequent to issuance of the Overflight Fee IFR that certain FY 1999 costs that should have been capitalized and depreciated were in fact mistakenly ''expensed'' by the FAA. The FY 1999 cost data has been revised to correct these items, and the Overflight Fees, which are derived from this cost data, have been recalculated. The result is a reduction in the unit rate of the Overflight Fees (of approximately 10 percent for Enroute and approximately 20 percent for Oceanic, compared to the Interim Final Rule) in this Final Rule. The FAA will provide credits and refunds for this as detailed below.

44. Distribution of Costs Based on Staffing Standards

Japan Airlines and Iberia Airlines express concerns that the IG determined that the CAS had caused the FAA to rely on unreasonable proxies in allocating costs between Services. For example, the FAA assigned FY 1998 maintenance labor and other (non-labor) costs to Enroute and Oceanic Services based on labor standards rather than on an actual distribution of costs. The IG found those standards to be outdated and over-inflated.

FAA Response: The FAA disagrees with this comment. The FAA updates staffing standards for new equipment on a continuous basis. However, the FAA does acknowledge that it does not routinely update the staffing standards for existing equipment. The fact that the FAA does not routinely update staffing standards for existing equipment does not render them unreliable. The FAA conducts a significant amount of on-site research and analysis at the time its staffing standards are initially developed, and therefore does not need to reexamine them continuously.

When the IG reviewed the FAA's financial data in 1999, the IG acknowledged the staffing standards as the best available data. The Costing Methodology Report Addendum provides the following explanation in response to this comment (Docket item 98, Section 2, page 5):

> In place of actual time recording, the FAA is relying on staffing standards to assign AF labor costs to projects and SDPs. This approach has been discussed with the IG. These discussions have resulted in agreement that staffing standards represent the best available data source for allocating these costs at the present time.

This agreement came with the understanding that the FAA would update the staffing standards on a timely basis, and would work toward a more direct, time recording-based method of assigning these costs. The FAA recently provided a report to the IG outlining a plan to implement labor distribution agency-wide. This plan is available on the Internet at http://www.faa.gov/aba/html_performance/initiatives/ldr/files_doc/final_ldr_timeline_rpt.doc.

The FAA is working aggressively to implement this new Labor Distribution System for the entire agency. This system will eventually allow the FAA to capture the actual labor costs for all agency services. Both Airway Facilities and Air Traffic controller workforces are currently in an implementation status. The FAA expects to be collecting actual time from these workforces by the end of FY 2002.

Additional information regarding the use of staffing standards is provided in the Costing Methodology Report, Section 4.2.2.1 and Fig 4–2.

45. Several Commenters, Including Air New Zealand, Lufthansa, Iberia Airlines, Japan Airlines and Others, Request the FAA To Provide Additional Information on One or More of the Following Items: The Structure and Functioning of Its Air Traffic Control Centers, a Breakdown and Explanation of Activities Performed by Each of Those Centers, and the Number of People Working on Oceanic and Enroute Services, Their Salaries and Positions, the Optimal Staffing Numbers, and the Number of Hours They Work on Each Service

FAA Response: As explained in the Costing Methodology Report (Docket item 6), all Air Route Traffic Control Centers (ARTCCs), or SDPs, provide

Enroute Services. Of the 21 ARTCCs, there are four that provide Oceanic Services for purposes of the CAS and this Rulemaking. The following table shows which Centers provide only Enroute Services and which Centers also provide Oceanic Services.

Since the FAA uses aggregate, actual end-of-year labor costs to assign or allocate costs to the various ATS Services, it does not use the detailed information requested on the number of people working on Oceanic and Enroute Services, their salaries, positions, and optimal staffing numbers. The FAA believes it has chosen an appropriate methodology by using actual, end-of-year labor costs as the basis for cost assignment or allocation. The following table provides a list of SDPs, the type of services provided by each SDP, and actual AT and AF labor costs for FY 1999 for each SDP:

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SDP	Enroute Services	Oceanic Services	AT Labor FY 1999 Enroute (E) Oceanic (O)	AF Labor FY 1999 Enroute (E) Oceanic (O)
Albuquerque, NM	X		$39,546,131	$9,485,031
Anchorage, AK	X	X	E - $16,765,903 O - $977,671	E - $8,168,192 O - $583,099
Atlanta, GA	X		$61,586,983	$11,549,867
Boston, MA	X		$44,231,568	$9,673,354
Chicago, IL	X		$75,856,930	$11,025,329
Cleveland, OH	X		$63,023,016	$9,181,706
Denver, CO	X		$45,827,821	$10,545,404
Ft. Worth, TX	X		$57,852,633	$10,864,973
Houston, TX	X	X	E - $49,179,119 O - $1,500,105	E - $10,977,398 O - $232,195
Indianapolis, IN	X		$54,707,357	$8,703,799
Jacksonville, FL	X		$46,167,206	$9,655,958
Kansas City, KS	X		$52,696,351	$11,584,724
Los Angeles, CA	X		$44,456,401	$9,391,023
Memphis, TN	X		$48,674,960	$9,805,760
Miami, FL	X		$38,924,611	$8,416,043
Minneapolis, MN	X		$47,130,856	$11,533,501
New York, NY	X	X	E - $49,258,693 O - $11,637,206	E - $9,494,439 O - $1,113,836
Oakland, CA	X	X	E - $39,897,505 O - $9,146,754	E - $9,235,189 O - $969,248
Salt Lake City, UT	X		$31,145,586	$9,995,070
Seattle, WA	X		$32,210,096	$8,794,426
Washington, DC	X		$60,287,082	$10,475,791

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Functions Performed by ARTCCs for Purposes of the CAS and This Rulemaking

Enroute Services: Generally refers to ATC and related services provided to aircraft operating primarily under instrument flight rules in controlled airspace between airport terminal areas. In some cases, Enroute services may be provided to aircraft operating under visual flight rules. Enroute services are also provided to overflights that transit U.S.-controlled airspace. As shown above, 21 SDPs provide this service. The typical SDP has responsibility for more than 120,000 square miles of airspace.

Oceanic Services: ATC and related services provided in airspace where oceanic separation and procedures prescribed by ICAO are available. These services (with a few exceptions) are defined by specific designated Flight Information Region (FIR) boundaries and generally begin just prior to the limits of the radar coverage. Generally, within Oceanic FIR airspace, no radar service is available. Therefore, oceanic air traffic separation standards (position reports at selected time/geographic intervals) are used, rather than enroute separation standards (position reports based on radar/transponder activity—although, for some flights, such service is not practicable or appropriate).

Assignment of Controller Positions to Services

Because of the cost allocation methodology used to allocate labor costs, the FAA does not need the number of hours each employee works on each ATC service. For SDPs that provide only Enroute Services, all labor incurred at the SDP is attributed to Enroute. For SDPs that provide both Enroute and Oceanic Services, AT labor is allocated based on a percentage of actual on-position time worked by controllers (as explained previously in the discussion of the KPMG comments asking the FAA ''to provide sufficient information to determine the validity of the statistical study used to establish the ratios of Enroute to Oceanic on-position time'').

Other positions that are assigned at the SDP level are the positions that provide ATC maintenance services (provided by the Airway Facilities organization). As explained earlier, AF (ATC maintenance) labor costs are assigned to facilities based on staffing standards. Subject matter experts assign each facility to the Services based on the functionality of each facility. For the four SDPs that provide Oceanic Services, the FAA uses the ratio of Oceanic sectors to total sectors to allocate maintenance costs.

46. Labor for Oceanic Services

The AAPA comments that labor charges for Oceanic Services primarily reflect staffing in the four facilities located in Anchorage, Houston, New York, and Oakland and claims that the FAA provides no justification that these labor rates are identical in each facility.

FAA Response: The labor rates at each SDP are not identical. The labor costs allocated to Oceanic Services reflect staffing and Oceanic workload since on-position time was used as the basis. The Oceanic labor costs are assigned to each SDP based on the actual labor costs incurred at that particular SDP, and are not identical. Actual labor costs for each of the four Oceanic SDPs are shown in the table presented in the discussion of the preceding comment.

47. Use of a Weight-Based Formula To Determine Overflight Fees

The National Business Aircraft Association (NBAA) and the International Business Aviation Council, Ltd. (IBAC) ask that the FAA consider modifying its fee formula to account for aircraft weight, as is done in other countries. NBAA notes, ''In addition to ICAO, countries such as Canada, the United Kingdom, France, Germany, and other European Union states, ATC facilities charge users for the service provided. In determining the ATC charge, all of these countries use weight as a basis for determining fees.''

On a similar note, the IBAC expresses its concern that the U.S. does not use weight as a factor in the calculation of its Overflight Fees, stating its concern that ''failure by the United States to do so will encourage other States to do likewise, to the ultimate detriment of the interests of U.S. operators operating internationally.''

FAA Response: The FAA generally agrees with these comments. Indeed, as the NBAA and the IBAC point out, weight is widely used around the world as a factor in the setting of fees for ATC services. The FAA is statutorily constrained, however, from using weight, or any other measure of value, in the derivation of its Overflight Fees. The previously discussed requirement that the fees be ''directly related'' to the FAA's costs of providing the services has been interpreted by the Court of Appeals in the *Asiana* case (the prior Overflight Fee litigation) to preclude the use of any measure of value by the FAA in setting its fees.

48. KPMG Comments That FAA's Consultant, Capital Economics, Not Only Did Not Conclude That FAA's Fees Satisfied the Statutory Standard; It Apparently Never Considered the Question

FAA Response: The FAA agrees. Although Capital Economics' review (See the Capital Economics Report, ''A Review of FAA Overflight Fees,'' Docket item 99) touched on some aspects of the statute, the report was not intended to address the requirements of the law authorizing the Fees. Capital Economics focused its analysis on whether the fee development methodology was reasonable and within the guidelines of commonly accepted economic principles as applied in a practical, real-world setting. The other principal findings of the Capital Economics report are as follows:

- The FAA's reliance on a mileage-based fee structure complies with the requirement that the Overflight Fees be based on cost rather than value,
- Due to high metering costs of other alternative methods, the mileage-based metric is most likely the cheapest way to assign costs on an individual flight basis,
- There is no better alternative allocation mechanism than the mileage-based method, and
- The fee structure is ''subsidy-free,'' which many economists consider to be a desirable property.

The determination that these fees meet the statutory standard of being ''directly related'' to the FAA's cost of providing or making available the ATC and related services was made by the FAA and not by Capital Economics.

49. KPMG States That Capital Economics Gives No Empirical Basis for Its Assertion That Controller Time Is ''Largely (and Perhaps Completely) Common'' to Overflights and Non-Overflights

KPMG further expresses the view that Capital Economics offers no support from any air traffic control expert, either internal or external to the FAA. Moreover, KPMG states that there is no information in the Capital Economics report establishing that the firm is itself qualified to render an opinion as to how air traffic controllers perform their duties.

FAA Response: The Capital Economics report is based on discussions with FAA experts regarding the structure and functioning of the FAA, mainly the Air Traffic Services organization that provides ATC services. Through these discussions, Capital Economics received information

regarding, but not limited to, the services provided within each ATC environment, the treatment of fixed and common costs, ATC services provided to Overflights and non-Overflights, duties of air traffic controllers, and the treatment of specific costs associated with this rulemaking. Capital Economics also used information that is publicly available. This includes a book, *Fundamentals of Air Traffic Control* (M.S. Nolan, Fundamentals of Air Traffic Control. Second Edition, Wodsworth, Belmont, Calif., 1994), information contained in the docket of this rulemaking, the estimated stand-alone costs of Overflights provided as Attachment 1 of the Capital Economics report (docket item 99), and the FAA CAS service definitions provided as Attachment 2 of the same report. But ultimately any use of the Capital Economics report and its conclusions was determined by the FAA in its exercise of agency expertise in air traffic.

50. Joseph A. Beaudoin, on Behalf of the ATAC, Asserts, ''The Controller Manpower Required To Service Overflights and Non-Overflights Is Not 'Common' ''

He states that in the Enroute environment, the FAA divides its Air Route Traffic Control Centers (''Centers'') into low-altitude sectors, high-altitude sectors, and ultra-high-altitude sectors. He states that Overflights operate almost exclusively within the High-Altitude Sector, or the Ultra-High-Altitude Sector, where one exists. He asserts that, during any particular period of time, controllers normally will not be simultaneously handling aircraft in both or all three Sectors. Thus, Mr. Beaudoin states, ''there is a difference between the manpower requirements of the two types of flights. The typical non-Overflight requires far greater controller time than the typical overflight.''

KPMG, also on behalf of the ATAC, states, ''Of course, because both overflights and non-overflights use the high and ultra-high altitude sectors, it would be necessary to apportion controller time in those sectors between the two types of flights. This could be done based on the relative mileage flown by overflights vis-à-vis non-overflights in the high altitude sectors, as that would provide a reasonable estimate of the relative burden of the two types of flights on the controller work force in those sectors.''

FAA Response: The FAA disagrees. The FAA has determined that the costs incurred in servicing Overflights and non-Overflights are quite similar for the following reasons:

- The same ATS infrastructure is used to make services available to both Overflights and to non-Overflights.
- Overflights use many different altitudes where there are many other non-Overflight aircraft. Many flights departing or landing in the U.S. also reach such altitudes at some point during their flight. Air Traffic Controllers working those sectors have to manage non-Overflight and Overflight traffic just the same in providing safe air transportation in U.S.-controlled airspace.
- Controllers do not treat Overflights any differently than non-Overflights. Overflights can be anywhere in the ATC system at any given point requesting all ATC services to be available. The FAA doesn't provide services to Overflights based on their altitudes. The FAA does not in any way restrict or limit Overflights by altitude or by the level of services they receive while transiting through U.S.-controlled airspace. Also, the assertions of Mr. Beaudoin ignore the full spectrum of Overflights.
- The FAA acknowledges that although there may be a small difference in the marginal cost of making services available to Overflights and non-Overflights, this difference is negligible compared to the significant fixed and common costs incurred in making ATC and related services available to both Overflights and non-Overflights. Also, each flight is different in the services it uses. It cannot be said with certainty whether any given Overflight or non-Overflight will cost more or less.

See the first comment, ''The cost of providing air traffic services to Overflights versus non-Overflights'' for additional information on the FAA's rationale for treating all flights the same in a particular operational environment (i.e., either Enroute or Oceanic).

51. KPMG Disagrees With Capital Economics' Farm Analogy

KPMG says:

* * * this simple analogy is more analogous to the overflight fee situation if one supposes that the farmer has two pastures—high and low. A few sheep (overflights) graze in the high pasture, along with some cows (non-overflights). The high pasture is sparsely populated, however, and all the animals there are placid. As a result the high pasture fence needs little repair. The low pastures consist only of cows; it is heavily congested, and the cows there are ornery and active. Consequently the lower fence needs constant repair. It is clear that the farmer's mending costs must be primarily assigned to the cows. The fact that some cows are also in the upper pasture, and the same farmer does the mending of both fences (and needs the same training to do so), does not alter this conclusion.

FAA Response: The FAA disagrees. The FAA has acknowledged from the beginning that the marginal cost of serving Overflights versus non-Overflights may be slightly different. But the metering costs of identifying any such differences in marginal costs would be substantial for the very small number of Overflights compared to the total number of flights in U.S.-controlled airspace. In addition, due to the particular cost characteristics of providing Overflight service (as outlined in the earlier comments on ''The cost of providing air traffic services to Overflights versus non-Overflights''), it is the allocation of the large fixed and common costs that make up most of the costs upon which the Overflight Fees are based.

52. Based on the Declarations of Mr. Beaudoin and Mr. Jengo, KPMG States That the Labor Costs That FAA Incurs To Provide ATC Services Are Not ''Fixed''; Rather, They State That the Number of Controllers ''Varies Depending on the Volume of Aircraft Operating Within the Particular Geographical Area or Sector, and the Nature of Those Aircraft Operations'' (See Supplemental Declaration of Joseph Beaudoin, Docket Item 107, Paragraph 10)

Thus, KPMG asserts, if there are a large number of aircraft operating within a particular area, the FAA may need to assign additional controllers to handle the flights. Mr. Beaudoin adds, ''Generally speaking more controllers are necessary to handle a given number of flights in the lower-altitude sectors than are necessary to handle the same number of flights in the higher-altitude areas.'' Mr. Jengo similarly states that the ''number of controllers needed in a given sector varies according to the volume of traffic in that sector and the type of traffic.'' (See Declaration of Michael Jengo, Jr., Docket item 106.)

FAA Response: The FAA disagrees. The FAA has a set number of controllers to provide ATC services nationwide. Every SDP has a set number of controllers assigned to it to manage its workload. Every SDP also mostly has a set amount of overtime, training, and other such funding provided to it. These numbers do not change daily to manage an additional Overflight, or a non-Overflight. Controllers are assigned to sectors to manage all air traffic, not Overflights and non-Overflights separately. Overflights can be anywhere, at any altitude, in the ATC system at any given point in time. The FAA incurs a great deal of cost by simply making

services available to Overflights. Also, controllers do not treat Overflights any differently than non-Overflights. These factors support the analysis by Capital Economics that the marginal cost of serving an individual Overflight is nearly zero.

The FAA agrees with the Capital Economics analysis that the marginal cost of serving an additional flight is very small. This includes the labor costs involved in serving any particular additional flight. The rationale for this position is outlined in the previously cited discussion of the comment regarding ''The cost of providing air traffic services to Overflights versus non-Overflights.''

53. KPMG Disagrees With Capital Economics' Conclusion That the Absolute Difference Between the Costs of Servicing Overflights and Non-Overflights Is Small Compared to the Large Fixed and Common Costs That Must Be Allocated. KPMG Further Disagrees With Capital Economics' View That the FAA Acted Appropriately in ''Ignoring'' the Cost Differences Between Overflights and Non-Overflights

KPMG further states:

This argument is contrary to FAA's own data. According to the FAA's Fee Development Report, on which the overflight fees are based, 'Field Labor' assigned to 'Air Traffic Operations' accounts for 37 percent of the $2.7 billion in total costs FAA incurs to provide air traffic control services in the enroute environment, and 23 percent of the $101 million that FAA incurs in the oceanic environment. (Fee Development Report at page 8, Table 1.) In total, these controller costs amount to more than one billion dollars annually. Air traffic control experts Beaudoin and Jengo have submitted uncontradicted evidence that the per-hour controller manpower devoted to an overflight is much less than that devoted to a non-overflight.

FAA Response: The FAA disagrees. The KPMG comment simply restates the FAA's labor costs. These FAA numbers do not show a difference between the costs of providing services to Overflights versus non-Overflights. The FAA agrees with Capital Economics that the marginal cost of an Overflight is nearly zero, and the same is true of a non-Overflight. The FAA already has responded to both the Beaudoin and Jengo declarations, which do not characterize correctly the many types of flights that transit U.S.-controlled airspace without either taking off or landing in the United States (Overflights). The FAA's cost data cited by KPMG does not show any differences between the costs of providing services to Overflights versus non-Overflights, and the FAA's fee development methodology is reasonable and consistent with the Act.

54. KPMG Complains That the ''Stand-Alone Cost Test'' Conducted by Capital Economics Is Irrelevant Because It Does Not Establish That the Fees Are ''Directly Related'' to Costs. KPMG Argues That the FAA Has the Ability To Measure Actual Costs, and That Capital Economics' Use of ''Stand-Alone Costs'' As a Test for the FAA's Overflight Fees Simply Has No Relevance Under the Actual Cost Standard

FAA Response: The FAA disagrees. The ''stand-alone cost'' test is not a test of whether fees are directly related to costs. Capital Economics included the ''stand-alone cost'' test in their analysis to demonstrate that the fee structure is ''subsidy free.'' This means that there are no cross-subsidies between Overflights and non-Overflights in the fee structure. In fee development, this is widely considered to be a desirable property by economists. Capital Economics conducted a variety of analyses in examining whether the fees are within the guidelines of commonly accepted economic principles as applied in a practical, real-world setting. For additional information in response to this comment, see the earlier comments, ''The definition of fees ''directly related'' to costs as used by the Act,'' and ''Whether Overflight Fees are subsidizing other costs or services.''

55. KPMG Complains That the Arthur Andersen Addendum Does Not Attempt To Rebut the Statement That the FAA Incurs Substantially Greater Costs To Provide Air Traffic Services to a Typical Non-Overflight Than to a Typical Overflight

Instead, KPMG complains that the Addendum offers only general support for the FAA's use of ''best available data'' to make certain cost allocations, and the FAA's decision to ''expense'' rather than ''capitalize'' certain costs. KPMG elaborates that the Arthur Andersen Addendum asserts that FAA's decisions to expense rather than capitalize certain cost items conform to ''the relevant accounting standards.'' However, KPMG asserts that the Andersen Addendum ignores the statutory directive that each Overflight Fee must be ''directly related'' to the FAA's costs of providing air traffic control services for that Overflight.

FAA Response: The FAA agrees that the Arthur Andersen Addendum does not address the costs of Overflights and the statutory directive that the Fees must be ''directly related'' to the FAA's costs. Arthur Andersen's role related to the Overflight Fees was limited to assisting the FAA with development of a CAS that adheres to Federal accounting standards. The FAA then used the CAS data to derive the Overflight Fees.

The FAA, with Arthur Andersen's assistance, developed Enroute and Oceanic cost pools. Overflight Fees were derived based on these cost pools since Overflights use primarily Enroute and Oceanic Services. The FAA attributed an appropriate portion of these costs to Overflights based on miles flown in each (Enroute and Oceanic) environment. As noted previously, under the comment, ''The cost of providing air traffic services to Overflights versus non-Overflights,'' Capital Economics concluded that the FAA's methodology is a reasonable economic approach to setting fees when faced with the kind of cost characteristics confronting the FAA. Thus, the FAA has complied with the Act in establishing Overflight Fees that are directly related to the agency's costs, as determined by the CAS. The purpose of both the original Arthur Andersen Costing Methodology Report (Docket item 6) and the subsequent Addendum (Docket item 98) is to explain the FAA's decisions and methodology in assigning and allocating costs in the CAS.

56. Transparency of Fee Development Process and Data

According to a significant number of commenters, the FAA did not provide sufficient information to allow for a transparent process in charging Overflight Fees, and to allow interested parties to determine whether the Fees are ''directly related'' to FAA's costs.

In its later comments, KPMG points out that the Arthur Andersen Addendum states that allocations in CAS were made using the ''best available data'', but that the FAA almost never discloses the nature of the data available to it. KPMG complains that they and other commenters have no way of judging what information was available to the FAA when critical decisions were made, and therefore are unable to assess whether the ''best available data'' were in fact used.

FAA Response: The FAA has provided substantial evidence of its decisions herein, as well as throughout this rulemaking process, and believes it has been fully transparent in its Overflight Fee rulemaking. The FAA is required to clearly explain its reasoning in this rulemaking but not to obtain the users' agreement. Ultimately it is up to the agency, pursuant to Congress' direction in 49 U.S.C. 45301(b)(1)(A) and 49 U.S.C. 46110(c) to determine

what costs are in fact ''directly related'' for the purposes of Overflight Fees.

In addition, as explained more fully under the previous comment on ''lack of consultation,'' the FAA intends to pursue further contacts with the affected parties that will allow the FAA and the interested parties to have a dialogue regarding issues related to Overflight Fees to eliminate any remaining issue of transparency. The FAA hopes that, by taking this action, it will alleviate many concerns raised on the Interim Final Rule and continue to provide an opportunity to resolve issues in the future. The FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees, which will be implemented shortly after issuance of the Final Rule, and will further reconfirm the transparent process by which the FAA establishes its Overflight Fees.

57. IATA Requests Additional Information With This Rulemaking. IATA Is Providing the FAA With Standard Performance & Productivity Indicators (PPI) Forms To Fill Out, as a Normal Practice With Other Air Navigation Service Providers

FAA Response: The FAA has not completed the IATA forms as they are beyond the scope of this rulemaking. The FAA is not charging fees for providing, or making available, air navigation services to all users. These Fees apply only to Overflights. The FAA will be available to work with IATA in the future to determine how their information needs could be accommodated.

The Inspector General's Assessment of Cost Accounting

On February 28, 2001, the Department of Transportation's Office of Inspector General (IG) issued a report (titled, ''Status Assessment of FAA's Cost Accounting System and Practices,'' Report No. FI–2001–023; Overflight Fee Docket No. FAA–00–7018, item 111) assessing the FAA's Cost Accounting System (CAS). This report was prepared pursuant to requirements of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), which requires the IG to conduct an annual assessment of whether the FAA's methods for calculating and assigning costs to specific users are appropriate, reasonable, and understandable. The purpose of the IG report was to describe the status of CAS implementation, and to present the IG's findings to date in eight specific assessment areas required by AIR–21. The IG identifies several CAS-related issues in its assessment report. Because certain of these issues, as well as some criticisms of the CAS contained in the report, could be construed to have applicability to Overflight Fees, the FAA addresses the report below, and explains that the points raised in the IG report do not affect this rule.

As clarified in FAA's May 17, 2001, response to the report (Docket item 115), and in the IG's subsequent reply of June 4, 2001, to the FAA (Docket item 116), the central focus of the IG assessment was not on this rule but, rather, on the overall progress being made by the FAA in implementing the CAS on a phased basis throughout the agency. The report recommendations are aimed at accelerating the CAS implementation schedule, adding resources to assure the new implementation dates are met, and achieving efficiencies in the operation of the CAS.

The IG issued a separate audit report in December 1999 (titled, ''Cost and Flight Data for Aircraft Overflights,'' report # FE–2000–024; Docket item 10) for the explicit purpose of reviewing the implementation of the CAS within the Air Traffic Services (ATS) Line of Business (LOB), and the use of CAS data and aircraft flight activity data for the derivation of Overflight Fees. The FAA concurred with the IG findings and addressed the issues identified in that report prior to publication of the current Interim Final Rule on June 6, 2000. The FAA is using the same FY 1999 cost data for the Final Rule that were used for the Interim Final Rule, along with some accounting adjustments that result in reductions of approximately 10 percent in the Enroute fee and approximately 20 percent in the Oceanic fee.

The current IG assessment makes the following general statements regarding the CAS:

- ''The FAA's current cost accounting system, while capable of calculating cost agency-wide, will not produce accurate and reliable results for specific activities and services.'' (at 2, para 5).
- ''The cost accounting system will not be effective until the labor distribution system is operational.'' (at 8, para 4).
- ''* * * the cost accounting system will not be effective and credible without an adequate labor distribution system.'' (at 4, para 1).
- ''The cost accounting system should address the needs of FAA stakeholders such as the Congress, the aviation industry, and the taxpayers. If FAA is to become an effective results-oriented organization, the cost accounting system must produce cost information that satisfies the needs of external parties as well as FAA management.'' (at 11, para 3).

These statements in the IG report can easily be seen as affecting the basis of the FAA's Overflight Fees. Various references to the CAS as ''unreliable,'' ''inadequate,'' ''inaccurate,'' or ''not credible'' apply to specific issues within the CAS, and represent generalized opinions. For example, not having a detailed time reporting system in place at the employee level (Labor Distribution Reporting, or LDR) for certain ATS labor categories does not render the entire CAS unreliable or inadequate. The FAA is currently developing the LDR system to obtain actual labor costs directly from each employee, so that costs can soon be assigned to appropriate services.

The CAS has been under development within the FAA for several years now. It is being implemented on a phased basis throughout the agency, starting with the ATS LOBs. The FAA has stated repeatedly that, like all cost accounting systems, the FAA's CAS is an evolving and developing system, and that certain data elements, such as the LDR, will be improved and refined as implementation proceeds. In the meantime, as the CAS evolves, there are other ways, consistent with accepted accounting principles and practices, to reasonably allocate labor costs based on current capabilities. The FAA directly assigned much of the labor data; but where it could not, it used other methods as allowed under Federal Accounting Standards. For example, the FAA used a labor distribution system for the Research and Acquisitions organization and staffing standards for maintenance labor. In each instance, the FAA used the best available data to make such allocations. The IG, in fact, relied on such data in performing the fiscal year (FY) 1999 financial statement audit, and did not propose any adjustments to the financial statements related to the presentation of these costs.

Specific issues raised by the IG report are addressed as follows:

IG Statement: The IG report states, ''FAA's current cost accounting system, while capable of calculating cost agency wide, will not produce accurate and reliable results for specific activities and services. For example, FAA's actual cost for air traffic controller and airways facilities maintenance labor, estimated at $3.4 billion for FY 2001, cannot be tracked to specific activities and services, which would preclude FAA from developing potentially useful information such as the cost of a particular air traffic control or maintenance shift.'' (at 2, para 5). Further, the IG states, ''If FAA ever needs the actual cost of specific activities, and services, such as communication efforts related to En

Route and Oceanic services, the cost accounting system must be modified to accumulate cost at this level of detail. The system has not been designed to provide this type of information.'' (at 18, para 1).

FAA Response: This issue does not in any way affect the integrity of the CAS data for the costs upon which Overflight Fees are based. The IG concludes that the current CAS, while capable of calculating costs agency-wide, will not produce accurate and reliable results for specific ''activities and services'' at a level of granularity that the IG considers to be appropriate.

The FAA has defined the overall services provided by the ATS LOB as Enroute, Oceanic, Terminal, and Flight Services. While the CAS is designed to distribute the total costs of the ATS LOB among these four ''Services,'' it is not designed to determine the cost of a maintenance shift or an individual radio communication—which are actually individual activities within an overall Service. This is analogous to the case of an aircraft manufacturer, who may know the cost of installing an entire landing gear assembly for a particular aircraft but does not know the cost of installing one individual part. Similarly, while the FAA knows the cost of Enroute and Oceanic Services for the purposes of Overflight Fees, the CAS does not provide the costs of specific, individual activities.

The FAA uses the total cost of Enroute and Oceanic Services and the total miles flown in each ATC environment to derive unit rates for its Overflight Fees. The ATC and related services made available to all flights within each ATC environment are highly similar and are primarily characterized by the significant shared costs involved in the provision of such services. Therefore, the FAA charges the same unit rate to all Overflights within the Enroute environment and a single (lower) unit rate to all Overflights within the Oceanic environment.

The IG report states that the FAA should consider designing the CAS to provide useful management information, such as the cost of a particular air traffic control shift or an activity within a Service, such as the specific costs for providing communications as a stand-alone function. The FAA addressed this comment in its response (Docket item 115) to this report. The FAA said that the CAS is a tool designed to provide an understanding of the costs of providing ATC and related services at specified Service Delivery Points. When FAA began discussing system design of the CAS, careful consideration was given to what would be required of the system. In the process of determining the requirements of the CAS, including its use for Overflight Fees, things like the cost of a particular air traffic control shift and the cost of communications were carefully considered, but rejected, as they were too detailed to define and would have added a great deal of unnecessary complexity to the developing system—one that the IG's report already cites as being too complex. In addition, as stated earlier, this level of detail is not necessary for the derivation of Overflight Fees.

IG Statement: The IG finds that, ''FAA's cost accounting system does not track actual labor cost of activities and services for its Air Traffic Services line of business. The cost accounting system will not be effective until the labor distribution system is operational. For example, FAA was unable to accurately report more than $424 million of actual air traffic controller and airway facilities maintenance labor and related cost by activities and services. Controller labor cost was assigned based on limited summary data for a 2- to 3-day period, and airway facilities labor cost was assigned and estimated based on outdated labor standards.'' (at 8, para 4).

The IG further states, ''Since FAA labor cost is more than half its total cost, the cost accounting system will not be effective and credible without an adequate labor distribution system.'' (at 4, para 1).

FAA Response: The IG report noted, ''FAA initially planned to use only 2 or 3 days of data and outdated maintenance standards to distribute $424 million of air traffic controller and maintenance technician labor and related costs between En Route and Oceanic services.'' As stated in the FAA's response to the IG report (Docket item 115), ''We agreed with the Office of the Inspector General's concern that the 2–3 day sample was not of sufficient size to distribute costs between the enroute and oceanic services when the issue was first raised by the IG in December 1999. FAA subsequently improved its costing methodology by using a 40-day, statistically valid, sample of actual sign-in/sign-off data at each oceanic facility to further allocate $25M of air traffic controller labor cost (out of the $1.2 billion of directly assigned air traffic labor).'' Accordingly, the labor data used in FY 1999 for CAS was based on the 40-day sample, not the 2–3 day sample. The IG accepted this revised approach, noting in the audit report, ''Cost and Flight Data for Aircraft Overflights (see Docket item 10, page 6) that it ''should result in a more accurate representation of air traffic controller labor costs by activity and service.'' The FAA used this FY 1999 data to derive its Overflight Fees. Once the FAA's LDR system is implemented, the agency will no longer need to use such sampling. But for now, the FAA has determined that the accounting approach taken is sufficient for determining the costs used to derive Overflight Fees.

The FAA used staffing standards to allocate $219M of actual maintenance payroll to pieces of equipment in the Enroute and Oceanic Services. We note that the IG report contains references to ''outdated maintenance standards'' and to ''outdated labor standards'' in the sections on Labor Costs, and a similar reference under Assessment Area 5 on Internal Controls. The FAA is concerned that these references could lead to an erroneous conclusion. While the FAA has not routinely updated its staffing standards for existing equipment, this does not mean that the standards are therefore unreliable. FAA conducts a significant amount of on-site research and analysis at the time its staffing standards are initially developed, and does not believe they need to be revisited every year or two to remain valid. The FAA has discussed this topic at length with the IG, with the resulting agreement that the current staffing standards represent the best available data source for allocating AF labor costs at the present time.

The IG specifically stated in its December 1999 report (Docket item 10, page 7), ''While FAA's labor standards currently provide the best available data for assigning the airway facilities maintenance costs to services, the revised standards should improve the accuracy of these costs.

The equipment inventory will be updated and revised standards will be estimated based on existing technology, which should improve the accuracy of labor estimates. However, for the long term, a labor distribution system or work order system would provide a better and more appropriate method of accounting for maintenance labor.'' Thus while the FAA is working on improving this data, these labor costs used as the basis for Overflight Fees are adequate for this rulemaking.

Based on a recent decision by the FAA to track actual labor, the agency is working aggressively to implement its new Labor Distribution System for the entire agency. This system should allow the FAA to capture actual labor costs for all agency services. Both Airway Facilities and Air Traffic workforces are currently in an implementation status. The FAA expects to collect actual time from these workforces by the end of FY 2002. As noted in the rule, the FAA

expects to revise the rule in future years to reflect improvements such as this in the CAS.

IG Statement: The IG report states:

- ''FAA's cost accounting system does not properly collect costs associated with facilities and equipment projects within its Research and Acquisitions line of business. FAA improperly combined production overhead cost and general and administrative cost into one overhead cost pool. As a result, about $63 million annually would not have been properly added to facilities and equipment values had we not informed FAA of this problem.'' (at 4, para 3).
- ''We have not audited the overhead bases in all of FAA's lines of business; however, we found that the overhead cost in the Research and Acquisitions line of business was allocated to projects using inappropriate allocation basis. (at 4, para 4)'' ''For example, during the first quarter of FY 2000, the FAA allocated over $1 million to project 11270101, one of the Wide Area Augmentation System [satellite navigation system] projects, when it should have allocated only about $59,000 if the correct base for allocating overhead cost had been used.'' (at 10, para 2).

FAA Response: The FAA agreed with the IG that it should have more accurately allocated overhead costs to the Research and Acquisition LOB. The FAA has taken appropriate steps to ensure that its CAS will track these costs more accurately in the future. However, since the FY 1999 cost basis for calculating Overflight Fees does not include overhead costs, the net impact of these adjustments would have resulted in slightly higher costs and fees for Overflights. Based on the IG's information, the FAA made the necessary accounting adjustment, and implemented procedures to ensure proper accounting treatment on a continuing basis in the future.

IG Statement: The IG concludes that the ''FAA's systems for tracking assets are not reliable, resulting in a material internal control weakness. (at 15, para 2)'' ''For example, in our FY 1998 audit, in a test of 117 items, we found 4 items valued at $50 million that should be removed from property records, one of which was a building that had been demolished 10 years earlier.'' (at 15, para 3).

FAA Response: This issue, while appropriate to raise within the context of an assessment of the CAS overall, is not relevant to the calculation of the current Overflight Fees. The FAA fixed these problems between FY 1998 and FY 1999, resulting in an unqualified audit opinion (meaning no significant issues were identified) for FY 1999. For this reason, the FAA chose not to use its FY 1998 cost data and waited instead for its FY 1999 costs as a basis for both the Interim Final Rule and the Final Rule for Overflight Fees. To further improve this data, the FAA is implementing an automated fixed asset valuation system that will be used as the basis for the FY 2001 audit. This system is being implemented to further streamline the depreciation process and increase management controls.

IG Statement: The IG reports, ''Our audit of the design of Research and Acquisitions'' cost accounting system included an evaluation of the results produced by the pilot labor distribution system. Because FAA does not have an adequate system of policies, procedures, practices, or internal controls established to detect or prevent errors in assigning costs, we found that about 36 percent of the first quarter FY 2000 labor cost, or $16 million, could not be tracked to specific projects, activities and services. Our audit disclosed significant labor cost reported as 'no project.' The 'no project' cost could not be identified with specific projects by the Research and Acquisitions cost accounting system, which uses data from the pilot labor distribution system. FAA plans to resolve the no project problem by June 2001.'' (at 9, para 2).

The IG says, ''Internal controls over timekeeping were weak. FAA personnel charged their labor cost to incorrect projects. For example, employees charged about $245,000 in labor cost to a project for the first quarter of FY 2000 although the project was completed in FY 1997.'' (at 9, para 3).

FAA Response: As the IG states, this was a pilot project intended to test the new labor distribution system, which provides the FAA with actual labor costs to be allocated to services. The FAA acknowledges that there were inaccuracies in data collection. This pilot project was a test to detect such procedural problems and take steps to fix them before implementing the system agency-wide. As stated in the report, the FAA is addressing the problems identified in the IG report. The current target date for resolving these concerns is February 2002.

In any event, the issue of some costs having been assigned to ''no project'' has little, if any, effect on the current Overflight Fees. These inaccuracies would have benefited Overflights, since all of the ''no project'' costs were allocated as overhead costs. The Overflight Fees do not include overhead costs. Therefore, correcting this problem would have resulted in slightly higher fees. As indicated earlier, the FAA will continue to improve future CAS cost allocations.

In sum, after thorough and careful consideration and analysis of the recent IG report on the CAS, the FAA has determined that the report has no substantive effect on this rulemaking.

Discussion of the Final Rule

This Final Rule completes the statutory task given to the FAA by Congress in 1996. Changes to the Final Rule from the Interim Final Rule are minimal and clarifying, except for the fee rates, where accounting adjustments have resulted in lower fees. As stated in the Interim Final Rule, for the purpose of this rulemaking, U.S.-controlled airspace includes all U.S. airspace either directly owned by the United States or allocated to the United States by the International Civil Aviation Organization (ICAO) or by other countries. This can further be defined in general as Enroute and Oceanic airspace. Enroute airspace is generally defined, for the purpose of this rulemaking, as airspace where primarily radar-based air traffic services are available. Oceanic airspace is generally defined, for the purpose of this rulemaking, as airspace where primarily procedural air traffic services are available. (Some Enroute services are also provided in certain oceanic areas near islands such as Bermuda and The Bahamas.) It is acknowledged that this division of airspace does not perfectly reflect all types of airspace, but is a simplification to allow for reasonable costs in tracking and billing users, as well as for the assignment of costs under the CAS. A description of the U.S.-controlled airspace by latitude and longitude has been placed in the public docket for this rulemaking (Docket item 5).

The Final Rule remains the same as the Interim Final Rule with the exception of a reduction in the fees attributable to accounting adjustments, better billing and collection cost estimates, and clarification of the language of certain sections of the rule. Upon further review of the FY 1999 financial statements, the FAA determined that it had expensed certain costs that should have been capitalized and depreciated over a number of years. This caused expenses to be overstated and depreciation costs to be understated. The net impact has been a reduction in FY 1999 Enroute costs of some $242 million and a reduction in Oceanic costs of some $20 million. The specifics of these adjustments are explained in the previous Discussion of Comments section under the comment ''The FAA expensed costs that should have been capitalized.'' Also, billing and collection costs were reduced by approximately 17 percent, based on more than 8 months of actual

operational experience under the Interim Final Rule. This also is discussed previously. The net result of these cost adjustments is a reduction of approximately 10-percent in Enroute fees and approximately 20-percent in Oceanic fees. The new rates are $33.72 per 100 miles flown in Enroute airspace, and $15.94 per 100 miles flown in Oceanic airspace.

Effective upon publication of this Final Rule, the FAA will implement the updated fees. The FAA will recalculate previous bills under the Interim Final Rule and provide credits or refunds, as appropriate, to users under 49 CFR part 89. The rule does not apply to military and civil aircraft operated by the U.S. Government or by a foreign government, or to Canada-to-Canada flights.

Aviation Rulemaking Committee for Overflight Fees

As explained in the Discussion of Comments section under ''Lack of consultation,'' the FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees. The FAA anticipates publishing a Notice in the **Federal Register** within the next 90 days announcing details of this Committee. The purpose will be to provide a forum for information sharing between the FAA, the users, and the public on matters relating to the fees and to discuss future Overflight Fee rulemaking.

Canada-to-Canada Operations

Canada-to-Canada operations, as previously discussed, are defined for this rulemaking (hereafter ''Canada-to-Canada'') as flights conducted by any aircraft of any nationality that take off from and land in Canada without an intermediate stop outside of Canada that operate in U.S.-controlled airspace. Users are defined as operators of aircraft flights that neither depart from nor land in the United States.

Currently, many flights between two points in Canada transit U.S.-controlled airspace because of air traffic coordination between the United States and Canada. Routing through U.S.-controlled airspace by U.S. or Canadian ATC occurs because it is either the shortest route or it offers the most favorable flight conditions. This frequent and variable routing is done without regard to the border between Canada and the United States.

As stated in the Interim Final Rule, the FAA has a long-standing ATC relationship with the Canadian ATC authority known as NAV CANADA beginning with an exchange of notes between the U.S. and Canadian governments in 1963. The FAA has determined that assessing fees on Canada-to-Canada flights would be inconsistent with 49 U.S.C. 106(l), 40103, and 40105; and the FAA's agreements with Canada or its agent NAV CANADA (the most recent of which can be found in the docket, item 102). This determination gives maximum effect to all applicable statutes and agreements. Accordingly, the total potential annual billings of overflights are $43.2 million, but expected annual billings are approximately $33.5 million (the difference being attributed to the FAA's agreements with NAV CANADA). These totals reflect a reduction in fees from the Interim Final Rule of approximately 10 percent in Enroute airspace and 20 percent in Oceanic airspace. As discussed previously, the cost of fees not charged is being borne by the FAA.

The FAA has recently learned that NAV CANADA has sent invoices for enroute services covered by the agreement described above. These bills were accompanied by a letter from NAV CANADA that stated, ''Effective June 1, 2001, the NAV CANADA enroute charge will apply to flights between two points in the U.S. entering and exiting airspace controlled by NAV CANADA below 49°N, east of 95°W by turbojet aircraft in commercial service with maximum take-off weight (MTOW) of 20 metric tonnes or more.'' The FAA is currently considering the effect of this action on its agreement with NAV CANADA.

The Overflight Fee

The Fees for users (i.e., operators of flights meeting the definition of an Overflight) is calculated using the Great Circle Distance (GCD) for each segment of U.S.-controlled airspace that users transit, as follows:

$$R_{ij} = (DO_{ij} \times CO) + (DE_{ij} \times CE)$$

Where

R_{ij}= the fee charged to aircraft flying between entry point i and exit point j,

DO_{ij}= total GCD traveled in each segment of U.S.-controlled Oceanic airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment in Oceanic airspace,

CO = $15.94 per 100 nautical miles flown in Oceanic airspace,

DE_{ij} = total GCD traveled in each segment of U.S.-controlled Enroute airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment in Enroute airspace,

CE = $33.72 per 100 nautical miles flown in Enroute airspace.

This formula is based on entry and exit data available for individual flights in U.S.-controlled airspace. If actual data are not available, the FAA will use best available FAA flight data based on GCD within each type of airspace transited.

The fees have been derived in a logical and reasonable manner, and are directly related to the costs of the FAA services provided to Overflights. Also, the FAA has determined that the $250-per-month exemption, which was established in the Interim Final Rule, is still appropriate for the reasons detailed in that document. Therefore, no fee will be assessed unless the cumulative charges exceed $250 per calendar month, based on Greenwich Mean Time (GMT), by any particular user. The FAA intends to review this Final Rule at least once every 2 years and will issue an NPRM as needed.

The following table illustrates the fee schedule and its application to hypothetical flights.

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Origination	Destination	Enroute			Oceanic			Total	
		Rate 1/	Miles 2/	Charge	Rate 1/	Miles 2/	Charge	Miles 2/	Charge
Vancouver, Canada	Puerto Plata Dominican Republic	$33.72	2,582	$867	$15.94	- - - -	- - - -	2,582	$867
Tokyo, Japan	Vancouver, Canada	$33.72	1,899	$637	$15.94	433	$69	2,332	$706
Amsterdam, Netherlands	Montego Bay, Jamaica	$33.72	1,405	$472	$15.94	- - - -	- - - -	1,405	$472
London, England	Mexico City, Mexico	$33.72	1,365	$458	$15.94	- - - -	- - - -	1,365	$458
Seoul, South Korea	Sydney, Australia	$33.72	- - - -	- - - -	$15.94	1,092	$173	1,092	$173

1/ Rates are expressed per 100 nautical miles
2/ Miles are nautical miles

Notes:

1. This table is for illustrative purposes only.
2. Mileage will vary from flight to flight based on aircraft flight track.
3. Mileage is calculated on great circle distance between the entry and exit points in U.S. enroute and/or oceanic controlled airspace based on FAA data only. (For further details, see discussion under "The Overflight Fee.")

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Fee Collection Process and Enforcement

The FAA has established and maintains data from several sources, including but not limited to, flight plans and radar/radio data that identify the point of entry and exit, aircraft registration number, and the type of aircraft for all aircraft entering U.S.-controlled airspace. Information is extracted from the database and used, along with the fee formula, to compute each fee. The fee includes a charge to cover the cost of obtaining and processing the flight data, as well as the cost of billing and collection.

Under the Interim Final Rule, the FAA has been billing by sending a monthly statement to users pursuant to 49 CFR, part 89. Affected commercial users have been requested to designate and submit to the FAA the name and address of a U.S. agent for billing. Users not providing a billing address are billed at the address of record of the aircraft owner as maintained in the country where the aircraft is registered. If the FAA cannot identify a user, the registered owner of the aircraft is billed. This process will continue unchanged.

As provided in § 187.15(d), monthly remittance of fees of $1,000 or more are to be paid by electronic funds transfer. Monthly remittances of less than $1,000 may be paid by electronic funds transfer, check, money order, credit card, or draft. All payments must be in U.S. currency.

Invoices that become delinquent will be charged administrative charges and interest and will be collected according to 49 CFR, part 89. The FAA intends to pursue vigorously all delinquent balances to the extent provided by law. As noted above, the FAA will recalculate all bills under the Interim Final Rule and will give credits or refunds, as appropriate, for overpayment.

If any adjustments are necessary in the fees billed or collected, the FAA will follow the procedures in 49 CFR part 89 to settle debts of users. This includes issuing credits and refunds to users as appropriate and authorized by law.

Justification for Immediate Adoption

The Administrative Procedure Act (APA), 5 U.S.C. 553 *et. seq.*, requires that prior to the issuance of a final rule, an agency will give notice to the public and seek comment on a proposed rule. Also, when a rule is adopted immediately, justification is required under the APA. On June 6, 2000, the FAA published the Interim Final Rule without public notice, pursuant to specific Congressional authority (the Act, 49 U.S.C. 45301(b)(2)), which in itself has been recognized by the courts as a specific exception to the APA. At that time, the FAA sought comments, which are addressed in this document. Congress directed that after the FAA has obtained public comments, it should then issue a Final Rule. This Final Rule is issued, without further notice or request for comments, with immediate adoption because this action reduces fees and collection charges. No additional notice or request for comment is required by 49 U.S.C. 45301 or by the APA, since the only change in the rule is an administrative reduction of fees. To delay adoption would merely defer the reduction of the fees, and thereby increase the burden on the users. Furthermore, in light of the express direction from Congress, notice and comment would be inappropriate and not in the public interest.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the information collection requirements associated with this Final Rule were submitted to the Office of Management and Budget (OMB) for review and approval. The OMB control number associated with this collection is Number 2120–0618. There are no new requirements for the information collection associated with this Final Rule. Under the IFR, an estimated 300 to 600 aircraft operators were requested to provide the FAA the name, the address, and phone number of any operator obtaining Overflight services. This was a one-time collection unless the user needed to change any of the information provided to the FAA.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Economic Evaluation Summary

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only if the agency makes a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. section 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards. Where appropriate, agencies are directed to use those international standards as the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules. This requirement applies only to rules that include a Federal mandate on State, local or tribal governments or the private sector, likely to result in a total expenditure of $100 million or more in any one year (adjusted for inflation).

In conducting these analyses, the FAA has determined that this rule: (1) has benefits which do justify its costs, is a ''significant regulatory action'' as defined in the Executive Order, and is ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant impact on a substantial number of small entities; (3) reduces barriers to international trade; and (4) does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector. The FAA has placed these analyses in the docket (as part of the Regulatory Evaluation accompanying this Final Rule) and summarized them below.

Several benefits will be realized from the imposition of these fees. The fees establish a mechanism whereby the users pay for the cost of resources they use. These revenues (up to $50 million) will be made available to fund the Essential Air Service (EAS) program, as directed by Congress (49 U.S.C. 41742). For these reasons, charging Overflight Fees is expected to result in a more efficient allocation of scarce public resources. The more efficient allocation of resources will benefit the public at large because more resources will become available for other services demanded by the public and because EAS will be funded with fewer tax dollars.

The effect of the rule will be to collect the cost of providing and making available certain ATC services from the users of the services. The FAA estimates that the annual cost of billing and collections associated with this rule is $1.46 million. This includes a one-time development cost of $1.47 million

(which is being amortized over 2 years beginning with the implementation of the Interim Final Rule (IFR)) and an annual operating cost of approximately $725,000. This is a reduction from the IFR billing and collections costs.

The cost of billing and collections is expected to be reviewed at least once every 2 years and user fee rates will be subject to adjustment to reflect the current costs of providing Overflight services. The next review is expected no later than 2 years from the date of publication of the Final Rule.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and an regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Overflight Fees primarily affect foreign users. Since the RFA applies to domestic entities and does not apply to foreign entities, the FAA certifies that this rule will not have a significant economic impact on a substantial number of domestic small entities. In addition, the FAA believes that the effect of the Final Rule on small domestic operators will be negligible.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule. The Final Rule will primarily affect foreign users, generally commercial users. Most commercial aircraft are designed to operate more efficiently at altitudes above 18,000 feet. All operations at altitudes at or above 18,000 feet controlled by the United States must use ATC. The FAA believes that it is highly unlikely that foreign commercial users will alter their behavior to avoid using ATC and related services (although there are some questions about foreign non-commercial users). In addition, to some extent, commercial users are able to pass the Overflight Fees on to their passengers and cargo customers.

The Final Rule may have a favorable competitive impact on U.S. commercial operators. Prior to the implementation of the June 6, 2000, Overflight Fee IFR, U.S. commercial operators were at a possible comparative disadvantage with foreign counterparts when users (U.S. and foreign) paid user fees to transverse other countries' airspace while foreign users did not have to pay a fee to transverse U.S.-controlled airspace. The Final Rule could enhance the competitiveness of domestic commercial operators in international markets.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995, enacted as Pub. L. 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This Final Rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this Final Rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this Final Rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact Determination

The energy impact of the Final Rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Pub.L. 94–163, and FAA Order 1053.1. It has been determined that the Final Rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 187

Administrative practice and procedure, and Air transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 187 of title 14, Code of Federal Regulations as follows:

PART 187—FEES

1. The authority citation for part 187 continues to read as follows:

Authority: 31 U.S.C. 9701, 49 U.S.C. 106(g), 49 U.S.C. 106(l)(6), 40104–40105, 40109, 40113–40114, 44702.

2. In § 187.1, revise the last two sentences to read as follows:

§ 187.1 Scope.

* * * Appendix A to this part prescribes the methodology for computation of fees for certification services performed outside the United States. Appendix B to this part

prescribes the fees for certain aircraft flights that transit U.S.-controlled airspace.

3. In § 187.15, paragraph (d) is revised to read as follows:

§ 187.15 Payment of fees.

* * * * *

(d) The fees described in appendix B of this part are payable to the Federal Aviation Administration in U.S. currency. Remittance of fees of $1,000 or more are to be paid by electronic funds transfer. Remittance of amounts less than $1,000 may be paid by electronic funds transfer, check, money order, credit card, or draft.

4. In part 187, Appendix B is revised to read as follows:

Appendix B—Fees for FAA Services for Certain Flights

(a) *Applicability.* Except as provided in paragraphs (b) and (c) of this appendix, this appendix applies to any person who conducts a flight through U.S.-controlled airspace that does not include a landing or takeoff in the United States. U.S.-controlled airspace is defined as all U.S. airspace either directly owned by the United States or allocated to the United States by the International Civil Aviation Organization (ICAO) or by other countries. This is further defined, for this section only, as Enroute and Oceanic airspace. Enroute airspace is defined, for this section only, as airspace where primarily radar-based air traffic services are provided. Oceanic airspace is defined, for this section only, as airspace where primarily procedural air traffic services are provided.

(b) *Governmental flights.* This appendix does not apply to any military or civilian flight operated by the United States Government or by any foreign government.

(c) *Canada-to-Canada flights.* This appendix will not apply to any operator of a flight that takes off and lands in Canada, without an intermediate stop outside Canada, that operates in U.S.-controlled airspace.

(d) *Services.* Persons covered by paragraph (a) of this appendix must pay a fee for the FAA's rendering or providing certain services, including but not limited to the following:

(1) Air traffic management.

(2) Communications.

(3) Navigation.

(4) Radar surveillance, including separation services.

(5) Flight information services.

(6) Procedural control.

(7) Emergency services and training.

(e) *Methodology for the computation of fees.*

(1) For the services listed in paragraph (d) of this appendix, the fee is computed based on the distance flown in either enroute or oceanic airspace (U.S.-controlled airspace.) Distance flown is based on the great circle distance (GCD) for the point of entry and the point of exit of U.S.-controlled airspace based on FAA flight data. Fees are assessed using the methodology presented in paragraph (e)(2) of this appendix. Where actual entry and exit points are not available, the best available FAA flight data will be used to calculate the entry and exit points.

(2) A User (operator of an overflight) is assessed a fee for each 100 nautical miles (or portion thereof) flown in each segment and type of U.S.-controlled airspace. Separate calculations are made for transiting Enroute and Oceanic airspace. The total fee charged for an Overflight between any entry and exit points is equal to the sum of these two charges. This relationship is summarized as:

$$R_{ij} = \$15.94 * DO_{ij} + \$33.72 * DE_{ij},$$

Where

R_{ij} = the fee charged to aircraft flying between entry point i and exit point j,

DO_{ij}= total great circle distance traveled in each segment of U.S.-controlled oceanic airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of oceanic airspace.

DE_{ij} = total great circle distance traveled in each segment of U.S.-controlled enroute airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of enroute airspace.

(f) *Billing and payment procedures.*

(1) *Billing.* The FAA will send an invoice to each user that is covered by this appendix when fees are owed to the FAA. If the FAA cannot identify the user, then an invoice will be sent to the registered owner. No invoice will be sent unless the monthly (based on Greenwich Mean Time) fees for service equal or exceed $250. Users will be billed at the address of record in the country where the aircraft is registered, unless a billing address is otherwise provided.

(2) *Payment.* Payment must be made by one of the methods described in § 187.15(d).

(g) *Review of rule.* The rule prescribed in this appendix will be reviewed at least once every 2 years and adjusted to reflect the current costs of the services covered by this appendix.

Issued in Washington, DC, on August 13, 2001.

Jane F. Garvey,

Administrator.

[FR Doc. 01–20691 Filed 8–17–01; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Monday,
August 20, 2001

Part IV

Securities and Exchange Commission

17 CFR Part 200

Delegation of Authority to the Director of the Division of Market Regulation; Final Rule

17 CFR Parts 202, 240, and 249

Registration of National Securities Exchanges Pursuant to Section 6(g) of the Securities Exchange Act of 1934 and Proposed Rule Changes of Certain National Securities Exchanges and Limited Purpose National Securities Associations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–44691]

Delegation of Authority to the Director of the Division of Market Regulation

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending its rules to delegate authority to the Director of the Division of Market Regulation (''Director'') to publish notices of proposed rule changes filed pursuant to section 19(b)(7) of the Securities Exchange Act of 1934 (''Exchange Act'') relating to security futures products and to abrogate such proposed rule changes and require that they be refiled in accordance with section 19(b)(1) of the Exchange Act. This delegation of authority will facilitate the timely implementation of Rule 19b–7 and Form 19b–7 under the Exchange Act.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Cyndi Nguyen, Attorney, at (202) 942–4163, Office of Market Supervision, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

The Commission is adopting an amendment to Rule 30–3 of its Rules of Organization and Program Management governing Delegations of Authority to the Director.[1] The Commission is adding paragraph (a)(75) to Rule 30–3 [2] to authorize the Director to publish notices of proposed rule changes filed by self-regulatory organizations relating to security futures products pursuant to section 19(b)(7)(A) of the Exchange Act.[3] In addition, the Commission is adding new paragraph (a)(76) to Rule 30–3 [4] to authorize the Director to abrogate such proposed rule changes pursuant to section 19(b)(7)(C) of the Exchange Act [5] and require that they be refiled in accordance with section 19(b)(1) of the Exchange Act.[6]

To implement the Commodity Futures Modernization Act of 2000 (''CFMA''), the Commission today is adopting, in a separate release,[7] Rule 19b–7,[8] Form 19b–7,[9] and conforming amendments to Rule 19b–4 [10] and Form 19b–4 [11] to accommodate certain proposed rule changes submitted by national securities exchanges registered pursuant to section 6(g) of the Exchange Act (''Security Futures Product Exchanges'') [12] and national securities associations registered pursuant to section 15A(k) of the Exchange Act (''Limited Purpose National Securities Associations'').[13] Rule 19b–7 establishes the procedures for Security Futures Product Exchanges and Limited Purpose National Securities Associations when filing proposed rule changes that relate to certain matters, including higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such exchanges' and associations' obligations to enforce the securities laws. Pursuant to section 19(b)(7)(A) of the Exchange Act,[14] the Commission must promptly notice such proposed rule changes. Accordingly, the Commission is now adding new paragraph (a)(75) to Rule 30–3 to authorize the Director to publish notices of proposed rule changes relating to security futures products filed pursuant to section 19(b)(7)(A) of the Exchange Act.

The CFMA also added section 19(b)(7)(C) to the Exchange Act,[15] which grants to the Commission, after consultation with the Commodity Futures Trading Commission, the authority to summarily abrogate a proposed rule change that has taken effect pursuant to section 19(b)(7)(B) of the Exchange Act [16] if it appears to the Commission that such rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors.[17] In the event that this occurs, Security Futures Product Exchanges and Limited Purpose National Securities Associations would be required, pursuant to sections 6(g)(4)(B)(iii) [18] and 15A(k)(3)(C) [19] of the Exchange Act, respectively, to refile the proposed rule change pursuant to the requirements of section 19(b)(1) of the Exchange Act.[20] Accordingly, the Commission is adding new paragraph (a)(76) to Rule 30–3 to authorize the Director to abrogate a proposed rule change relating to security futures products and require that it be refiled in accordance with section 19(b)(1) of the Exchange Act.

These delegations of authority to the Director are intended to conserve Commission resources by permitting Division of Market Regulation staff to publish notices of proposed rule changes filed by Security Futures Product Exchanges and Limited Purpose National Securities Associations relating to security futures products and to abrogate such proposed rule changes and require that they be refiled in accordance with section 19(b)(1) of the Exchange Act. The Commission anticipates that the delegation of authority will facilitate the timely implementation of Rule 19b–7 and amendments to Rule 19b–4. Nevertheless, the staff may submit matters to the Commission for consideration as it deems appropriate.

The Commission finds, in accordance with section 553(b)(3)(A) of the Administrative Procedure Act,[21] that these amendments relate solely to agency organization, procedure, or practice, and do not relate to a substantive rule. Accordingly, notice, opportunity for public comment, and publication of the amendment prior to its effective date are unnecessary.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

[1] 17 CFR 200.30–3.

[2] 17 CFR 200.30–3(a)(75).

[3] 15 U.S.C. 78s(b)(7)(A).

[4] 17 CFR 200.30–3(a)(76).

[5] 15 U.S.C. 78s(b)(7)(C).

[6] 15 U.S.C. 78s(b)(1).

[7] *See* Securities Exchange Act Release No. 44692 (August 13, 2001). The Commission also is adopting Rule 6a–4, Form 1–N, and amendments to Rules 6a–2 and 6a–3 under the Exchange Act and Rule 202.3 of the Commission's procedural rules.

[8] 17 CFR 240.19b–7.

[9] 17 CFR 249.822.

[10] 17 CFR 240.19b–4.

[11] 17 CFR 249.819.

[12] 15 U.S.C. 78f(g).

[13] 15 U.S.C. 78o–3(k).

[14] 15 U.S.C. 78s(b)(7)(A).

[15] 15 U.S.C. 78s(b)(7)(C).

[16] 15 U.S.C. 78s(b)(7)(B). Pursuant to this Section, Commission action to abrogate a rule change will not affect the validity or force of the rule change during the period it was in effect.

[17] The Commission notes that it currently exercises similar abrogation authority pursuant to Section 19(b)(3)(C) of the Exchange Act, 15 U.S.C. 78s(b)(3)(C), with respect to proposed rule changes filed by the existing self-regulatory organizations that are immediately effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act, 15 U.S.C. 78s(b)(3)(A).

[18] 15 U.S.C. 78f(g)(4)(B)(iii).

[19] 15 U.S.C. 78o–3(k)(3)(C).

[20] 15 U.S.C. 78s(b)(1). Pursuant to Section 19(b)(7)(C) of the Exchange Act, 15 U.S.C. 78s(b)(7)(C), a self-regulatory organization cannot enforce a rule that has been abrogated by the Commission, unless the self-regulatory organization refiles the proposed rule change under Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and it is approved by the Commission.

[21] 5 U.S.C. 553(b)(3)(A).

Text of Amendment

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

1. The authority citation for Part 200, subpart A, continues to read, in part, as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.30–3 is amended by adding paragraphs (a)(75) and (a)(76) to read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(75) Pursuant to Section 19(b)(7)(A) of the Act, 15 U.S.C. 78s(b)(7)(A), to publish notices of proposed rule changes filed by self-regulatory organizations relating to security futures products.

(76) Pursuant to Section 19(b)(7)(C) of the Act, 15 U.S.C. 78s(b)(7)(C), to abrogate a change in the rules of a self-regulatory organization relating to security futures products and require that it be refiled in accordance with Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1).

* * * * *

By the Commission.

Dated: August 13, 2001.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–20734 Filed 8–17–01; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 202, 240, and 249

[Release No. 34–44692; File No. S7–10–01]

RIN 3235–AI20

Registration of National Securities Exchanges Pursuant to Section 6(g) of the Securities Exchange Act of 1934 and Proposed Rule Changes of Certain National Securities Exchanges and Limited Purpose National Securities Associations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; request for comments.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting Rule 6a–4 under the Securities Exchange Act of 1934 (''Exchange Act'') and registration Form 1–N prescribing the requirements for designated contract markets and derivative transaction execution facilities to register as national securities exchanges pursuant to section 6(g)(1) of the Exchange Act to trade security futures products. The Commission also is adopting conforming amendments to Rules 6a–2 and 6a–3 under the Exchange Act and Rule 202.3 of the Commission's procedural rules. In addition, the Commission is adopting Rule 19b–7, Form 19b–7, and amendments to Rule 19b–4 and Form 19b–4 to accommodate proposed rule changes submitted by national securities exchanges registered pursuant to section 6(g) of the Exchange Act and limited purpose national securities associations registered pursuant to section 15A(k) of the Exchange Act. These rules and forms, and amendments to existing rules and forms, are necessary to implement the Commodity Futures Modernization Act of 2000 (''CFMA''). In addition, the Commission is requesting public comment on whether the Commission should adopt changes to Rule 19b–7 and Form 19b–7 if the Commission were to adopt proposed Rule 19b–6 and proposed Form 19b–6.

DATES: *Effective Date:* August 20, 2001.

Comments Due: September 4, 2001.

ADDRESSES: All comments concerning whether the Commission should adopt changes to Rule 19b–7 and Form 19b–7 if the Commission were to adopt proposed Rule 19b–6 and proposed Form 19b–6, discussed below, should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–03–01; this file number should be included on the subject line if e-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet web site (*http://www.sec.gov*). Personal identifying information, such as names or e-mail addresses, will not be edited from electronic submissions. Submit only information you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Deborah Flynn, Assistant Director, at (202) 942–0075; Kelly Riley, Special Counsel, at (202) 942–0752; Michael Gaw, Special Counsel, at (202) 942–0158; and Cyndi Nguyen, Attorney, at (202) 942–4163, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

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I. Introduction

The CFMA authorizes the trading of futures on individual stocks and narrow-based stock indexes, including puts, calls, straddles, options, or privileges thereon (collectively, ''security futures products'').[1] Security futures products are ''securities'' under the Exchange Act,[2] the Securities Act of 1933,[3] the Investment Company Act of 1940,[4] and the Investment Advisers Act of 1940,[5] and are contracts of sale for future delivery under the Commodity Exchange Act (''CEA'').[6] Accordingly, the regulatory framework established by the CFMA for the markets and intermediaries trading security futures products provides the Commission and the Commodity Futures Trading Commission (''CFTC'') with joint jurisdiction.

Because security futures products are securities under the Exchange Act, any organization, association, or group of persons that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of security futures products must register with the Commission as a national securities exchange.[7] New subsection 6(g) of the Exchange Act[8] provides an expedited process for an exchange that lists or trades security futures products to register with the Commission as a national securities exchange if that exchange (i) is a board of trade that has been designated as a contract market or is registered as a derivative transaction execution facility; and (ii) does not act as a market place for transactions in securities other than security futures products (''futures markets'').[9]

In addition, the CFMA amended the Exchange Act to exempt exchanges registered pursuant to section 6(g) of the Exchange Act (''Security Futures Product Exchanges'')[10] and limited purpose national securities associations registered pursuant to section 15A(k) of the Exchange Act (''Limited Purpose National Securities Associations'')[11] from the requirement to file with the Commission proposed rule changes, except for certain specified types of rules, and to provide an expedited filing process for most of these rules.[12]

To implement the CFMA, the Commission proposed Rule 6a–4 and Form 1–N and proposed conforming amendments to Rules 6a–2, 6a–3, and Rule 202.3 of the Commission's procedural rules, which would establish the registration process for futures markets that wish to list and trade security futures products.[13] In addition, the Commission proposed Rule 19b–7, Form 19b–7, and amendments to Rule 19b–4 and Form 19b–4 to set forth the process for Security Futures Product Exchanges and Limited Purpose National Securities Associations to file proposed rule changes.[14]

In response to the Proposing Release, the Commission received four comment letters.[15] As discussed below, the Commission is adopting Rule 6a–4 and Form 1–N with slight modifications, and the amendments to Rules 6a–2 and 6a–3 and Rule 202.3 of the Commission's procedural rules substantially as proposed. In addition, the Commission is adopting Rule 19b–7, Form 19b–7, and amendments to Rule 19b–4 and Form 19b–4, with modifications, in response to recommendations made by commenters. Finally, the Commission is requesting public comment on whether the Commission should adopt changes to Rule 19b–7 and Form 19b–7 if the Commission were to adopt proposed Rule 19b–6 and proposed Form 19b–6.

II. Notice Registration of Security Futures Product Exchanges

A. Background

Section 6(g)(2)(A) of the Exchange Act[16] provides that an exchange required to register with the Commission only because it lists or trades security futures products may register with the Commission by filing a written notice in such form as the Commission may, by rule, prescribe as necessary or appropriate in the public interest or for the protection of investors. Such rule may require that the written notice contain the rules of the exchange and other information and documents concerning the exchange, comparable to the information and documents the Commission requires for national securities exchanges registered under section 6(a) of the Exchange Act.[17] Pursuant to section 6(g)(2)(B) of the Exchange Act,[18] such ''notice

[1] Pub. L. No. 106–554, Appendix E, 114 Stat. 2763.

[2] Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10).

[3] Section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. 77b(a)(1).

[4] Section 2(a)(36) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(36).

[5] Section 202(a)(18) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(a)(18).

[6] Section 1a(31) of the CEA, 7 U.S.C. 1a(31).

[7] *See* Section 5 of the Exchange Act, 15 U.S.C. 78e. *See also* Section 3(a)(1) of the Exchange Act for the definition of ''exchange.'' 15 U.S.C. 78c(a)(1).

[8] 15 U.S.C. 78f(g).

[9] Section 6(g)(1) of the Exchange Act, 15 U.S.C. 78f(g)(1).

[10] 15 U.S.C. 78f(g).

[11] 15 U.S.C. 78o–3(k). A futures association registered under Section 17 of the CEA shall be registered as a national securities association for the limited purpose of regulating the activities of broker-dealers registered pursuant to Section 15(b)(11) of the Exchange Act, 15 U.S.C. 78o(b)(11), with respect to their activities in security futures products.

[12] Sections 6(g)(4)(B) and 15A(k)(3) of the Exchange Act, 15 U.S.C. 78f(g)(4)(B) and 15 U.S.C. 78o–3(k)(3).

[13] *See* Securities Exchange Act Release No. 44279 (May 8, 2001), 66 FR 26978 (May 15, 2001) (''Proposing Release'').

[14] *Id.*

[15] *See* letters to Jonathan G. Katz, Secretary, Commission, from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, Inc., dated June 13, 2001 (''CBOE Letter''); Daniel J. Roth, Senior Executive Vice President, Chief Operating Officer, and General Counsel, National Futures Association, dated June 14, 2001 (''NFA Letter''); David J. Vitale, President and Chief Executive Officer, Chicago Board of Trade, dated June 14, 2001 (''CBOT Letter''); and Jerrold E. Salzman, Freeman, Freeman & Salzman, P.C., dated June 14, 2001 (''CME Letter'').

[16] 15 U.S.C. 78f(g)(2)(A).

[17] 15 U.S.C. 78f(a).

[18] 15 U.S.C. 78f(g)(2)(B).

registration'' would be effective contemporaneously with the submission of the written notice, unless the registration were subject to suspension or revocation by the CFTC.[19]

B. Discussion

1. Description of Proposed Rules

Consistent with these provisions, the Commission proposed Rule 6a–4 and Form 1–N, specifying the types of markets that could register as national securities exchanges, solely for the purposes of trading security futures products, and the information such markets would have to provide to the Commission. The Commission also proposed to amend Exchange Act Rules 6a–2 and 6a–3 [20] to exclude Security Futures Product Exchanges from the requirements of those rules. Finally, the Commission proposed to add a new provision to Rule 202.3 of its procedural rules [21] to indicate that Form 1–N filings would be routed to the Commission's Division of Market Regulation, which would be permitted to return a defective filing or hold it until corrected.

As discussed below, the Commission is adopting Rule 6a–4 and Form 1–N, with slight modifications, in response to concerns raised by commenters. The Commission also is adopting amendments to Exchange Act Rules 6a–2 and 6a–3,[22] and Rule 202.3 of the Commission's procedural rules,[23] substantially as proposed.

The Commission received two comment letters [24] regarding these proposals. Both commenters were critical of the Commission's proposal, arguing that it would not result in a level playing field between futures markets and securities markets. One commenter took the view that the process proposed by the Commission would be notice registration in name only, because it would require the same effort and expense as an application for registration as a national securities exchange.[25] This commenter further stated that the proposed requirements would require a wasteful duplication of information that futures markets have already filed with the CFTC, and urged the Commission to adopt the same standards and procedures proposed by the CFTC for its notice registration process. The second commenter added that the amount of information that the Commission would require from Security Futures Product Exchanges was unnecessary and unduly burdensome because the CFTC was the primary regulator of these entities.[26]

In proposing Rule 6a–4 and Form 1–N, the Commission was sensitive to the fact that markets trading security futures products would, pursuant to the regulatory framework set forth in the CFMA, be subject to the jurisdiction of both the Commission and the CFTC. However, as the second commenter acknowledges,[27] Section 6(g)(2)(A) of the Exchange Act specifically grants to the Commission the authority to require a Security Futures Product Exchange to provide information ''comparable to the information and documents required for national securities exchanges under Section 6(a)'' of the Exchange Act.[28] Accordingly, proposed Rule 6a–4 was closely modeled on Exchange Act Rules 6a–1, 6a–2, and 6a–3;[29] and Form 1–N was closely modeled on Form 1, the application used to register as a national securities exchange pursuant to Section 6(a) of the Exchange Act.[30] At the same time, Section 6(g)(2)(B) of the Exchange Act [31] requires that the registration of an eligible futures market as a Security Futures Product Exchange will become effective contemporaneously with the submission of the required notice. Thus, although the Commission may require futures markets to submit information ''comparable'' to that required to be provided by the securities markets, the Exchange Act expressly prohibits the Commission from instituting an approval process with respect to such information.

The two commenters compared the burden imposed on Security Futures Product Exchanges to notice register with the Commission with the burden imposed on securities exchanges to become notice designated by the CFTC.[32] The Commission believes, however, that a more appropriate comparison is between the requirements imposed by the Commission on Security Futures Product Exchanges and other national securities exchanges. In this regard, a futures market that wishes to become a national securities exchange pursuant to section 6(g) of the Exchange Act [33] would be expected to provide significantly less information than would a securities market that wishes to become a national securities exchange pursuant to section 6(a) of the Exchange Act.[34] Specifically, the Commission notes that a futures market that submits a Form 1–N would be required to provide information about its operations only to the extent that such information directly relates to its proposed trading of security futures products. Provided that all required information is filed with the Commission, the Security Futures Product Exchange's registration would be effective upon filing.

Furthermore, the Commission does not believe that its proposal would impose duplicative or unnecessary reporting requirements on Security Futures Product Exchanges. Section 6(g)(2)(A) of the Exchange Act [35] specifically provides that a futures market seeking to register with the Commission as a Security Futures Product Exchange may submit to the Commission copies of documents that it has already filed with the CFTC, to the extent that such documents contain information satisfying the Commission's informational requirements.[36] The Commission does not seek to dictate the form of filings made by futures markets, so long as the information required by the Commission is submitted. If a futures market has filed with the CFTC information required by the Form 1–N exhibits, discussed below, then the futures market may provide a copy of that filing to the Commission and identify the information relating to specified Form 1–N exhibit(s) that is included in the CFTC filing.[37]

For these reasons, the Commission has decided to adopt the procedures for notice registration of Security Futures Products Exchanges largely as proposed. However, in response to the comment letters, the Commission is modifying the original proposal, as discussed below, to further reduce the reporting burden on these entities.

2. Registration Requirements for Security Futures Product Exchanges Filing Form 1–N

The Commission is adopting paragraph (a) of Rule 6a–4 as proposed. Specifically, a ''board of trade,'' as defined in the CEA,[38] may register with

[19] Pursuant to its authority under the CEA, the CFTC may suspend or revoke the registration of boards of trade or other entities registered under the CEA. *See* 7 U.S.C. 7b.

[20] 17 CFR 240.6a–2 and 240.6a–3.

[21] 17 CFR 202.3.

[22] 17 CFR 240.6a–2 and 240.6a–3.

[23] 17 CFR 202.3.

[24] *See* CBOT Letter and CME Letter.

[25] *See* CME Letter.

[26] *See* CBOT Letter.

[27] *See* id.

[28] 15 U.S.C. 78f(g)(2)(A).

[29] 17 CFR 240.6a–1, 240.6a–2, and 240.6a–3.

[30] 15 U.S.C. 78f(a). Form 1 also may be used to apply for an exemption from exchange registration based on limited volume.

[31] 15 U.S.C. 78f(g)(2)(B).

[32] *See* CBOT Letter and CME Letter.

[33] 15 U.S.C. 78f(g).

[34] 15 U.S.C. 78f(a).

[35] *15 U.S.C. 78f(g)(2)(A).*

[36] The Commission is adopting this statutory provision in Rule 6a–4(b)(7), 17 CFR 240.6a–4(b)(7).

[37] However, information submitted in this manner would still, for most exhibits, have to be current within one month of the date that the futures market files its Form 1–N with the Commission. *See* Form 1–N.

[38] *See* 7 U.S.C. 1a(2).

the Commission pursuant to section 6(g) of the Exchange Act by filing Form 1–N if: (i) It has been designated a contract market by the CFTC or is registered as a derivative transaction execution facility under section 5a of the CEA; [39] (ii) such designation or registration is not suspended by the CFTC;[40] and (iii) such exchange does not serve as a market place for transactions in securities other than security futures products or futures on exempted securities or on groups or indexes of securities, or options thereon.[41]

The Commission also is adopting Form 1–N as proposed, with a modification to Exhibit G, in response to commenters' concerns, to clarify that the scope of information requested by the Commission is limited to that information which relates to the trading of security futures products.[42] Form 1–N is not an application, and the Commission is not required to publish the notice for comment or to make specific determinations as to whether an exchange's systems, rules, and policies are consistent with the Exchange Act. Instead, Form 1–N will serve as a notice to the Commission that the exchange seeks to trade security futures products and will provide to the Commission information it needs to exercise its regulatory responsibilities. As adopted, Form 1–N consists of an execution page and nine exhibits, lettered A through I. In response to commenters' concerns,

- Exhibit A requires a copy of an exchange's constitution, articles of incorporation or association with all subsequent amendments, and by-laws or corresponding rules.
- Exhibit B requires an exchange's written rulings, settled practices having the effect of rules,[43] and interpretations of its governing board or other committee with respect to its rules, by-laws, constitution, or trading practices that are not included in Exhibit A.
- Exhibit C requires basic information regarding any subsidiary, affiliate, or other related entity involved in the trading of security futures products.[44]
- Exhibit D requires a narrative description of how trading is carried out on the exchange's trading system.[45] Exhibit D also requires the exchange to submit a copy of the trading system users' manual.
- Exhibit E requires general information regarding an exchange's officers, governors, or persons performing similar functions during the previous year.[46]
- Exhibit F requires the exchange to provide certain information regarding an exchange's ownership.[47]
- Exhibit G requires a description of an exchange's criteria for membership, including conditions under which members may be subject to suspension or termination, and any procedures that would be involved in the suspension or termination of a member. Exhibit G applies only to the extent that the exchange has not provided such information pursuant to Exhibit A. As noted above, the Commission is modifying Exhibit G slightly from its proposal to clarify that the scope of information requested is limited to that information which relates to the exchange's members that trade security futures products.
- Exhibit H requires certain information relating to an exchange's members, participants, subscribers, or other users.[48] One commenter stated that it was unclear whether this proposed requirement would relate to all persons who have direct access to the exchange or to all customers, noting that in some instances these two categories of persons could be the same.[49] The commenter also noted that lists of registered terminal operators authorized to enter trades into electronic trading systems may be subject to frequent change, and that the Commission should not require such information in the first instance. In response to this comment, the Commission notes that Exhibit H does not seek to obtain information regarding customers. Instead, the Commission is requesting information only about members and other persons with whom the market has a contractual relationship. The Commission does not believe that it is necessary to modify Exhibit H and is adopting it as proposed.
- Exhibit I requires a schedule of the security futures products that the exchange proposes to list, indicating for each the name of the issuer and a description of the security.

An exchange filing Form 1–N is required to submit the information required by Exhibits A, B, C, F, and H current as of the latest date practicable within one month of the date that it files Form 1–N. In addition, if an exchange discovers that any information filed on Form 1–N was inaccurate when filed, it must promptly submit an amendment that corrects the inaccuracy.[50]

3. Filing of Periodic Amendments

a. *Amendments in Case of Inaccurate or Incomplete Information.* The Commission is adopting paragraph (b)(1) of Rule 6a–4 with slight modifications to the proposal.[51] As proposed, this provision would have required an exchange to file an amendment to Form 1–N if any action were taken that rendered inaccurate, or that caused to be incomplete, any information filed on the execution page of Form 1–N or any information filed as part of Exhibits C, E, F, or H. A Security Futures Product Exchange would have been required to file such an

[39] 7 U.S.C. 7a.

[40] *See* Section 6(g)(1)(A) of the Exchange Act, 15 U.S.C. 78f(g)(1)(A).

[41] 17 CFR 240.6a–4(a)(1).

[42] 17 CFR 249.10.

[43] For purposes of Exhibit B to Form 1–N, the Commission considers settled practices to be the policies of an exchange that are not otherwise covered in its written rulings.

[44] Specifically, Exhibit C requires for all such entities: the name and address of the organization; the form of the organization; the name of the state and statute citation under which organized; the date of incorporation in present form; a brief description of the nature and extent of affiliation; a brief description of business or functions; a copy of the constitution or articles of incorporation or association, including all amendments and existing by-laws or corresponding rules or instruments; the name and title of the present officers, governors, or persons performing similar functions; and an indication of whether such business or organization ceased to be associated with the exchange during the previous year and the reasons for such termination.

[45] This description must include: the means of access to the system; the procedures governing entry and display of quotations and orders in the system; the procedures governing the execution, reporting, clearance, and settlement of transactions in connection with the system; proposed fees; the procedures for ensuring compliance with system usage guidelines; the hours of operation of the system; and the date on which the exchange intends to commence operation of the system. The exchange is not required to submit technical specifications for the system.

[46] For such persons, the exchange is required to provide the name, title, dates of commencement and termination of term of office or position, and type of business in which each is primarily engaged.

[47] Exhibit F applies only to exchanges that have one or more owners, shareholders, or partners who are not also members of the exchange. An exchange that is a corporation is required to list each shareholder that directly owns 5% or more of any class of the exchange's voting securities. If the exchange is a partnership, it is required to list all general partners and those limited and special partners who have the right to receive upon dissolution, or have contributed, 5% or more of the partnership's capital. For these persons, the exchange is required to list the full legal name, title or status, the date the title or status was acquired, approximate ownership interest, and whether the person has control (as defined in the instruction to Form 1–N).

[48] Specifically, Exhibit H requires the following information: name; if such user is an individual, the name of the entity with which such individual is associated and the relationship of such individual to the entity; a brief description of the type of activities primarily engaged in by the member, participant, subscriber, or user; and the class of membership, participation, or other access.

[49] *See* CBOT Letter.

[50] Rule 6a–4(a)(2), 17 CFR 240.6a–4(a)(2).

[51] 17 CFR 240.6a–4(b)(1).

amendment within 10 days of the action in question.

One commenter argued, as a preliminary matter, that such amendments should be required only with respect to material inaccuracies.[52] The commenter further suggested that the 10-day period should instead be at least 30 days, because a 30-day timeframe would be consistent with the requirement that information filed in the Form 1–N need be current only within one month of the date of filing. Moreover, the commenter noted that, on designated contract markets where memberships are held in the name of individuals, the markets' membership lists may change multiple times each month. Similarly, lists of registered terminal operators authorized to enter trades into electronic trading systems may be subject to frequent change. The commenter argued, therefore, that it would be particularly burdensome for Security Futures Product Exchanges to update Exhibits F and H within 10 days, and that annual resubmission of Exhibits F and H should be sufficient. The commenter urged the Commission not to require piecemeal amendments every time one individual is added to, or removed from, one of the categories of information covered by the exhibits.

In response to this comment and to the general comments discussed above,[53] Rule 6a–4(b)(1) as adopted does not require Security Futures Product Exchanges to submit updates to Exhibits C, E, or H within 10 days after actions render such information inaccurate or incomplete. In addition, the Commission is adopting a 30-day time period in which Security Futures Product Exchanges must update information on Exhibit F. Specifically, Rule 6a–4(b)(1), as adopted, requires a Security Futures Product Exchange to submit to the Commission updates to the execution page within 10 days and to submit updates to the information provided in Exhibit F within 30 days, after any action renders it inaccurate or incomplete. While the Commission believes that 30 days, rather than 10 days, is an appropriate timeframe for an exchange to update information on Exhibit F, the Commission believes that it is essential to the Commission's ability to fulfill its obligations under the Exchange Act for the basic information on the execution page to be complete and accurate at all times.

Finally, because the Commission has determined not to require the information in Exhibits C, E, and H to be updated within 10 days of becoming inaccurate, the Commission instead is adopting a requirement that Security Futures Product Exchanges provide the information required in Exhibits C and E upon request by the Commission and the public.[54] Security Futures Product Exchanges must maintain records relating to changes in information in Exhibits C and E as of the latest practicable date but, at a minimum, such information must be up-to-date within 30 days.

b. *Other Periodic Updates.* The Commission received no comments on its proposed requirements that every Security Futures Product Exchange periodically file, as an amendment to Form 1–N, certain information, regardless of whether that information has changed since the previous filing, and is adopting them as proposed. Specifically, every Security Futures Product Exchange must file updates of Exhibits F, H, and I on or before June 30, 2002, and by June 30 every year thereafter,[55] and Exhibits A, B, C, and E on or before June 30, 2004, and by June 30 every three years thereafter.[56] The information must be current as of the latest date practicable within three months of the date the Security Futures Product Exchange files the amendment. These requirements are designed to ensure that the Commission receives accurate and updated information about Security Futures Product Exchanges so that it may carry out its regulatory responsibilities.

c. *Exemption from Requirement to File Paper Copies of All Exhibits.* The Commission is adopting Rule 6a–4(b)(5), which permits a Security Futures Product Exchange '' in lieu of providing paper amendments to Exhibits A, B, C, E, F, H, and I '' to meet the obligation to update this information through certain alternate means. Under this provision, a Security Futures Product Exchange may provide responsive information that was available in a publication that is issued on an annual or more frequent basis.[57] Another alternative available to a Security Futures Product Exchange is to make the responsive information available to the Commission and to the public upon request.[58] Finally, a Security Futures Product Exchange may make the responsive information available on a web site.[59]

The Commission received one comment relating to the proposed alternate means of updating information.[60] This commenter acknowledged that the Commission's proposals represented useful attempts to reduce the burden on Security Futures Product Exchanges of filing amendments to Form 1–N. However, the commenter stated that these provisions would not be helpful because much of the information required by the exhibits is generally not made available to the public through an exchange's web site, its publications, or otherwise.

The Commission believes, nevertheless, that these alternate means of providing updates of certain required information will relieve much of the burden faced by those exchanges that currently, or choose in the future to, make this information available through these alternative means. Notably, a Security Futures Product Exchange may never have to file paper updates of the exhibits to Form 1–N, provided it makes the information available by one of the alternate means discussed above. Moreover, the Commission notes that these provisions were originally developed to alleviate the burden on national securities exchanges as they update Form 1. The Commission is extending these provisions to Security Futures Product Exchanges that now must file and update Form 1–N to ensure that Security Futures Product Exchanges are permitted to rely upon alternate means of compliance to the same extent as other national securities exchanges.

4. Filing of Supplemental Material

a. *Material Issued to Members, Participants, or Subscribers.* The Commission is adopting Rule 6a–4(c)(1)[61] as proposed. Under this provision, a Security Futures Product Exchange is required to file with the Commission any material related to the

[52] *See* CBOT Letter.

[53] *See supra* notes 24–37 and accompanying text.

[54] Rule 6a–4(b)(2), 17 CFR 240.6a–4(b)(2).

[55] Rule 6a–4(b)(3), 17 CFR 240.6a–4(b)(3).

[56] Rule 6a–4(b)(4), 17 CFR 240.6a–4(b)(4).

[57] To avail itself of this option, the Security Futures Product Exchange must identify to the Commission the name of such publication; the name, address, and telephone number of the person from whom it may be obtained; and the publication's price. The exchange also must certify to the accuracy of such information as of its publication date. Rule 6a–4(b)(5)(i), 17 CFR 240.6a–4(b)(5)(i).

[58] To avail itself of this option, the Security Futures Product Exchange must certify that this information is kept up-to-date and is available to the Commission and to the public upon request. Rule 6a–4(b)(5)(ii), 17 CFR 240.6a–4(b)(5)(ii).

[59] To avail itself of this option, the Security Futures Product Exchange must control the web site and the responsive information must be continuously available on it. The Security Futures Product Exchange also must indicate to the Commission the location of the web site where the information may be found and certify that the information available there is accurate as of the date that the exchange submits such certification. Rule 6a–4(b)(5)(iii), 17 CFR 240.6a–4(b)(5)(iii).

[1] *See* CBOT Letter.

[61] 17 CFR 240.6a–4(c)(1).

trading of security futures products (including notices, circulars, bulletins, lists, and periodicals) that is issued or made generally available to members of, participants in, or subscribers to, the exchange. This material must be filed within 10 days after the Security Futures Product Exchange issues it or makes it generally available. In lieu of making a hardcopy submission, a Security Futures Product Exchange may comply with this requirement by indicating the location of an Internet web site where such information may be found and certifying that the information available at that location is accurate as of the date that the exchange submits such certification. To avail itself of this option, the Security Futures Product Exchange must control the web site and the responsive information must be continuously available on it.

One commenter stated that Security Futures Product Exchanges should not be required to provide the Commission with copies of all of these supplemental materials on a continuing basis.[62] This commenter added that, if the Commission insisted on requiring submission of these items, then Security Futures Product Exchanges should be allowed 30 rather than 10 days to report them. The commenter also suggested that Security Futures Product Exchanges be permitted to fulfill the supplemental information requirement by making such information available on a web site.

From its experience with requiring such information from existing national securities exchanges, the Commission does not believe that the 10-day requirement in which to provide the supplemental materials is unduly burdensome. Furthermore, the Commission notes that its proposal, as well as its final rule, permits Security Futures Product Exchanges to fulfill this requirement by making the supplemental material available on a web site. b.

b. *Trading Reports.* The Commission received no comments on Rule 6a–4(c)(2)[63] and is adopting it with minor changes to the language in the rule to clarify the information that must be reported. Rule 6a–4(c)(2) requires every Security Futures Product Exchange to file a report within 15 days after the end of each calendar month concerning the security futures products traded on that exchange during the previous calendar month. The report must include: (1) for each contract of sale for future delivery of a single security, the number of contracts traded on the exchange during the relevant calendar month and the total number of shares underlying such contracts traded; and (2) for each contract of sale for future delivery of a narrow-based security index, the number of contracts traded on the exchange during the relevant calendar month and the total number of shares represented by the index underlying such contracts traded.

5. Exemption From Requirement To Update Exhibit C

The Commission is adopting a proposed provision to permit a Security Futures Product Exchange to request an exemption from the requirement that it update Exhibit C to its Form 1–N with respect to one of its affiliates or subsidiaries if another national securities exchange lists that entity in Exhibit C to its Form 1 or Form 1–N. The Commission is adopting this provision as proposed.[64]

The Commission also is adopting a provision that permits a Security Futures Product Exchange to request an exemption from the requirement that it update Exhibit C to its Form 1–N with respect to an inactive subsidiary or affiliate if such subsidiary or affiliate has been inactive throughout the subsidiary's or affiliate's latest fiscal year.[65] As proposed, the exemption would have been available only to inactive *subsidiaries* of a Security Futures Product Exchange. The rule, as amended, makes the exemption available to inactive *affiliates,* as well. The Commission generally believes that no regulatory purpose would be served by requiring a Security Futures Product Exchange to file updates with respect to such inactive entities.

6. Proposed Amendments to Exchange Act Rules 6a–2 and 6a–3

Rules 6a–2 and 6a–3 under the Exchange Act[66] set forth the ongoing filing requirements for registered or exempted exchanges that file applications with the Commission to become national securities exchanges pursuant to Rule 6a–1.[67] Because the Commission is adopting new Rule 6a–4, which incorporates the relevant provisions of Rules 6a–2 and 6a–3 that relate to filing obligations of Security Futures Product Exchanges, the Commission is adopting amendments to Rules 6a–2 and 6a–3, as proposed, to exempt Security Futures Product Exchanges from the requirements of these rules.

7. Processing of Form 1–N

The Commission proposed to amend paragraph (b) of Rule 202.3 of the Commission's procedural rules[68] to accommodate proposed Form 1–N. Specifically, the Commission proposed to add a new paragraph (b)(3), which would provide that notices for registration as a national securities exchange filed with the Commission pursuant to section 6(g)(1) of the Exchange Act[69] would be routed to the Division of Market Regulation, which would examine them to determine whether all necessary information had been supplied and whether all required documents had been furnished in proper form. The proposed amendment also would provide that the Division of Market Regulation could return defective filings with a request for correction or hold them until they are corrected.

The Commission received no comments on its proposed amendment to Rule 202.3 and is adopting this amendment with only one minor, technical revision. In the proposed amendment to Rule 202.3, the Commission on two occasions referred to Form 1–N filings as ''applications.'' However, as noted above, Form 1–N is not an application and the Commission would not ''approve'' an exchange before it begins to trade security futures products. Therefore, new Rule 202.3(b)(3)[70] refers to these filings as ''notices.''

III. Procedures for Filing Proposed Rule Changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations

A. Background

Pursuant to section 19(b)(1) of the Exchange Act,[71] all self-regulatory organizations (''SROs'') are required to file with the Commission copies of any proposed rule, or any addition to or deletion from the rules of such SRO (''proposed rule change''). National securities exchanges registered pursuant to section 6(g) of the Exchange Act[72] and limited purpose national securities associations registered pursuant to Section 15A(k) of the Exchange Act[73] are SROs as defined by section 3(a)(26) of the Exchange Act.[74] Security Futures

[62] *See* CBOT Letter.

[63] 17 CFR 240.6a–4(c)(2).

[64] Rule 6a–4(b)(6)(i)(A), 17 CFR 240.6a–4(b)(6)(i)(A).

[65] Rule 6a–4(b)(6)(i)(B), 17 CFR 240.6a–4(b)(6)(i)(B).

[66] 17 CFR 240.6a–2 and 240.6a–3.

[67] 17 CFR 240.6a–1.

[68] 17 CFR 202.3(b).

[69] 15 U.S.C. 78f(g)(1).

[70] 17 CFR 202.3(b)(3).

[71] 15 U.S.C. 78s(b)(1).

[72] 15 U.S.C. 78f(g).

[73] 15 U.S.C. 78o–3(k).

[74] 15 U.S.C. 78c(a)(26).

Product Exchanges and Limited Purpose National Securities Associations are exempt from submitting proposed rule changes pursuant to section 19(b) of the Exchange Act,[75] except in the three circumstances described below.

1. Proposed Rule Changes that Relate to Margin

First, Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to submit to the Commission proposed rule changes that relate to margin, except for those that result in higher margin levels, under sections 19(b)(1) and (b)(2) of the Exchange Act.[76] These are the statutory provisions under which all SROs currently file proposed rule changes with the Commission. Section 19(b)(1) of the Exchange Act requires that proposed rule changes be accompanied by a concise general statement of the basis and purpose of the proposed rule change. Upon filing, the Commission is directed to publish notice of such proposed rule change, together with the terms of substance or description of the subjects and issues involved, and give interested persons the opportunity to submit comments on the proposed rule change. Finally, section 19(b)(1) of the Exchange Act states that proposed rule changes are not effective unless approved by the Commission or otherwise permitted in accordance with the provisions of section 19(b).[77] Section 19(b)(2) of the Exchange Act sets forth the standards by which the Commission must determine whether a proposed rule change submitted pursuant to section 19(b)(1) of the Exchange Act must be either approved or disapproved. Specifically, the Commission is directed to approve a proposed rule change if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such SRO or to disapprove a proposed rule change if it cannot make such a finding.

2. Other Proposed Rule Changes Related to Security Futures Products

Second, proposed rule changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations that relate to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such SRO's obligation to enforce the securities laws must be submitted to the Commission pursuant to new section 19(b)(7) of the Exchange Act.[78] Specifically, section 19(b)(7)(A) of the Exchange Act is similar to the current rule filing requirements, set forth in section 19(b)(1) of the Exchange Act, in that it requires that a proposed rule change filed pursuant to this section contain a concise general statement of the basis and purpose of the proposed change. Similarly, upon such filing, the Commission is required to promptly publish notice of such proposed rule change and provide interested persons with the opportunity to submit comments.

Section 19(b)(7)(B) of the Exchange Act sets forth the requirements according to which a proposed rule change that is submitted pursuant to section 19(b)(7)(A) of the Exchange Act[79] may take effect. Section 19(b)(7)(B) of the Exchange Act differs from the process that applies to existing SROs, set forth in Section 19(b)(2) of the Exchange Act, by requiring the concurrent submission of the proposed rule change to the CFTC. In addition, section 19(b)(7)(B) of the Exchange Act, instead of requiring Commission approval of a proposed rule change submitted pursuant to section 19(b)(7)(A) of the Exchange Act, provides that a proposed rule change, upon filing with the Commission and the CFTC, may take effect when: (i) A written certification has been filed with the CFTC under section 5c(c) of the CEA;[80] (ii) the CFTC determines that review of the proposed rule change is not necessary; or (iii) the CFTC approves the proposed rule change.

The CFMA also added Section 19(b)(7)(C) to the Exchange Act,[81] which grants to the Commission, after consultation with the CFTC, the authority to summarily abrogate a proposed rule change that has taken effect pursuant to section 19(b)(7)(B) of the Exchange Act[82] if it appears to the Commission that such rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors.[83] In the event that this occurs, Security Futures Product Exchanges and Limited Purpose National Securities Associations would be required, pursuant to sections 6(g)(4)(B)(iii)[84] and 15A(k)(3)(C)[85] of the Exchange Act, respectively, to refile the proposed rule change pursuant to the requirements of section 19(b)(1) of the Exchange Act.

3. Proposed Rule Changes that Have Been Abrogated

Finally, as just mentioned above, proposed rule changes that have been abrogated by the Commission must be refiled under section 19(b)(1) of the Act.[86] Section 19(b)(7)(D) of the Exchange Act[87] sets forth the Commission's timing requirements and standards for review of proposed rule changes that have been abrogated pursuant to section 19(b)(7)(C) of the Exchange Act and refiled pursuant to section 19(b)(1) of the Exchange Act. Specifically, the Commission must, within 35 days of the date of publication of notice of the filing of the proposed rule change, or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the SRO consents, either by order approve the proposed rule change or, after consultation with the CFTC, institute disapproval proceedings.[88]

The standard by which the Commission determines whether to approve a proposed rule change that has been abrogated pursuant to section 19(b)(7)(C) differs from the standard used by the Commission to consider

[75] 15 U.S.C. 78s(b).

[76] Sections 6(g)(4)(B)(ii), 15 U.S.C. 78f(g)(4)(B)(ii); 15A(k)(3)(B), 15 U.S.C. 78o–3(k)(3)(B); 15 U.S.C. 78s(b)(1) and (b)(2).

[77] Section 19(b)(3) of the Exchange Act sets forth the categories of proposed rule changes that may take effect upon filing with the Commission. 15 U.S.C. 78s(b)(3).

[78] Sections 6(g)(4)(B)(i), 15 U.S.C. 78f(g)(4)(B)(i), and 15A(k)(3)(A), 15 U.S.C. 780–3(k)(3)(A). Section 19(b)(7) of the Exchange Act grants to the Commission the authority to adopt rules regarding the filing of proposed rule changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations. 15 U.S.C. 78s(b)(7).

[79] 15 U.S.C. 78s(b)(7)(A).

[80] 7 U.S.C. 7a–2(c). Pursuant to Section 5c(c) of the CEA, a registered entity may elect to approve and implement any new rule or rule amendment by providing the CFTC with a written certification that the new rule or rule amendment complies with the CEA.

[81] 15 U.S.C. 78s(b)(7)(C).

[82] 15 U.S.C. 78s(b)(7)(B). Pursuant to this section, Commission action to abrogate a rule change will not affect the validity or force of the rule change during the period it was in effect.

[83] The Commission notes that it currently exercises similar abrogation authority pursuant to Section 19(b)(3)(C) of the Exchange Act, 15 U.S.C. 78s(b)(3)(C), with respect to proposed rule changes filed by the existing SROs that are immediately effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act, 15 U.S.C. 78s(b)(3)(A).

[84] 15 U.S.C. 78f(g)(4)(B)(iii).

[85] 15 U.S.C. 78o–3(k)(3)(C).

[86] 15 U.S.C. 78s(b)(1).

[87] 15 U.S.C. 78s(b)(7)(D).

[88] The Commission notes that this is similar to the system currently in place for SRO filings, except for the CFTC's role and the approval standard to be applied by the Commission.

whether a proposed rule change filed under section 19(b)(1) of the Exchange Act should be approved. Specifically, section 19(b)(7)(D)(ii) of the Exchange Act[89] states that the Commission must approve a proposed rule change that has been abrogated and refiled under section 19(b)(1) of the Exchange Act if the Commission finds that it does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors.

B. Discussion

1. Description of Proposed Rules

In the Proposing Release, the Commission proposed rules and forms, as well as amendments to existing rules and forms, to implement the CFMA's requirements regarding proposed rule changes filed by Security Futures Product Exchanges and Limited Purpose National Securities Associations. First, the Commission proposed to use Form 19b–4 for proposed rule changes that relate to margin, except for changes that result in higher margin levels. The Commission also proposed amendments to Rule 19b–4[90] and Form 19b–4[91] to establish procedures for the filing and approval of proposed rule changes that take effect under section 19(b)(7)(B) of the Exchange Act but are subsequently abrogated by the Commission, pursuant to section 19(b)(7)(C) of the Exchange Act.[92] Finally, the Commission proposed Rule 19b–7 and Form 19b–7 to establish procedures for filing proposed rule changes pursuant to section 19(b)(7) of the Exchange Act.

After carefully considering the comment letters,[93] the Commission has decided to adopt the amendments to Rule 19b–4 and Form 19b–4 as proposed. In addition, the Commission is adopting Rule 19b–7 and Form 19b–7 with modifications that respond to concerns raised by commenters and to make the rule and form more closely comparable to the current rule filing process.

In response to these proposals, all of the commenters noted the differences between the rule filing processes of the Commission and the CFTC.[94] One commenter argued that the rule filing process proposed by the Commission was significantly more time-consuming and detailed than the process for proposed rule changes filed with the CFTC.[95] This commenter argued that copies of submissions made to the CFTC under the CEA are sufficient to meet the requirements of Section 19(b)(7) of the Exchange Act and should be considered sufficient for filing with the Commission. This commenter recognized, however, that some of the more detailed requirements imposed by proposed Rule 19b–7 and proposed Form 19b–7 are dictated by the publication requirements that are imposed by the Exchange Act, but not the CEA, and therefore, the commenter did not object to the Commission's proposals.

The differences noted by the commenters between the Commission's SRO rule filing process and that of the CFTC are the direct result of the different statutory mandates under which each agency operates. Unlike Section 19(b) of the Exchange Act, Section 5c of the CEA does not direct the CFTC to publish or solicit comment on rules or rule amendments of registered entities.[96] Rather, section 5c(c)(1) of the CEA states that a registered entity *may* elect to approve and implement any new rule or rule amendment by providing the CFTC with a written certification that the new rule or rule amendment complies with the CEA. A registered entity *may*, pursuant to section 5c(c)(2)(A) of the CEA, seek prior approval from the CFTC of a new rule or rule amendment. Section 5c(c)(2)(B) of the CEA does require prior approval of new rules or rule amendments that materially change the terms and conditions of any contract of sale, if the amendment applies to contracts already listed for trading that have open interest. Moreover, section 5c(c)(3) of the CEA directs the CFTC to approve any new rule or rule amendment, unless it finds that such rule or rule amendment would violate the CEA.

Clearly, the requirements of Section 5c of the CEA differ from the requirements set forth in Section 19(b) of the Exchange Act, which specifically requires the Commission to review, publish, and approve or institute proceedings to disapprove virtually *all* proposed rule changes of its SROs. The Commission cannot ignore its statutory mandate. The Commission, however, recognizes the evolving competitive landscape of the marketplace and is continuing to review its rule filing process. Nevertheless, at this time, the Commission believes that information required in Form 19b–7, as discussed below, is necessary for the Commission to fulfill its statutory obligations to fully implement the CFMA.

2. Proposed Rule Changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations Related to Margin

The Commission has decided to use Form 19b–4, as proposed, for proposed rule changes that relate to margin, except for those that result in higher margin. Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to file these margin rule changes under sections 19(b)(1) and 19(b)(2) of the Exchange Act, which, as discussed above, are the statutory provisions under which existing SROs file proposed rule changes.[97] Thus, no changes to either Rule 19b–4 or Form 19b–4 are needed to accommodate these proposed rule changes filed by Security Futures Product Exchanges and Limited Purpose National Securities Associations.

3. Proposed Rule Changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations Required To Be Filed Under Section 19(b)(7) of the Exchange Act

The Commission is adopting Rule 19b–7 and Form 19b–7 to establish procedures for filing proposed rule changes pursuant to section 19(b)(7) of the Exchange Act.[98] In the Proposing Release, the Commission proposed to model Rule 19b–7 and Form 19b–7 on proposed Rule 19b–6 and proposed Form 19b–6[99] to incorporate the Commission's recent review of the SRO rule filing process. One commenter, however, questioned the appropriateness of using a process that only has been proposed for existing SROs and is still under consideration by

[89] 15 U.S.C. 78s(b)(7)(D)(ii).

[90] 17 CFR 240.19b–4.

[91] 17 CFR 249.819.

[92] 15 U.S.C. 78s(b)(7)(C). The Commission also proposed a technical amendment to paragraph (a) of Rule 19b–4 and Part A of Form 19b*ndash;4 to exclude from the requirement that SROs file proposed rule changes on Form 19b–4 those proposed rule changes submitted pursuant to Section 19(b)(7) of the Exchange Act.

[93] *See supra* note 15.

[94] *See supra* note 15.

[95] *See* NFA Letter.

[96] A registered entity is defined in Section 1a(29) as a board of trade designated as a contract market under Section 5 of the CEA; a derivatives transaction execution facility registered under Section 5a of the CEA; a derivatives clearing organization registered under Section 5b of the CEA; and a board of trade designated as a contract market under Section 5f of the CEA. 7 U.S.C. 1a.

[97] Sections 6(g)(4)(B)(ii) and 15A(k)(3)(B) of the Exchange Act, 15 U.S.C. 78f(g)(4)(B)(ii) and 78o–3(k)(3)(B).

[98] 15 U.S.C. 78s(b)(7).

[99] The Commission recently published a proposal to replace Rule 19b–4 and Form 19b–4 with proposed Rule 19b–6 and proposed Form 19b–6. *See* Securities Exchange Act Release No. 43860 (January 19, 2001), 66 FR 8912 (February 5, 2001) (''Rule 19b–6 Proposing Release'').

the Commission.[100] This commenter noted that proposed Rule 19b–7 and Form 19b–7 could subject Security Futures Product Exchanges and Limited Purpose National Securities Associations to a different standard than existing SROs. The commenter also criticized the proposed Rule 19b–6 process as adding many new requirements, delays, and conditions to proposed rule changes of existing SROs. In light of the fact that the Commission is still considering proposed Rule 19b–6 and Form 19b–6, the Commission has decided to modify Rule 19b–7 and Form 19b–7 to more closely resemble current Rule 19b–4 and Form 19b–4.

Section 19(b) of the Exchange Act [101] sets forth specific requirements for both the SROs and the Commission concerning proposed rule changes. As discussed above, Security Futures Product Exchanges and Limited Purpose National Securities Associations, upon notice registration with the Commission, become SROs for purposes of the Exchange Act. The CFMA, however, exempted Security Futures Product Exchanges and Limited Purpose National Securities Associations from submitting proposed rule changes pursuant to section 19(b) of the Exchange Act as other SROs are required to do, except in certain circumstances, and it established different rule filing requirements for certain proposed rule changes filed by these markets. The Commission believes that Rule 19b–7 and Form 19b–7, as adopted, reflect and implement the Exchange Act's requirements regarding proposed rule changes submitted to the Commission by Security Futures Product Exchanges and Limited Purpose National Securities Associations.

Specifically, Rule 19b–7 requires that proposed rule changes submitted to the Commission pursuant to section 19(b)(7) of the Exchange Act be made on Form 19b–7. In addition, Rule 19b–7 provides that a proposed rule change will not be deemed filed on the date it is received unless a completed Form 19b–7 is submitted and, in order to elicit meaningful comment, Form 19b–7 is accompanied by (i) a clear and concise statement of the basis and purpose of such rule change, including the impact on competition or efficiency, if any; and (ii) a summary of any written comments received by the SRO on the proposed rule change. The Commission notes that these requirements are substantially the same requirements that are required by Form 19b–4.[102] The Commission also has incorporated such language in the Form 19b–7. The Commission has decided to include these requirements in Rule 19b–7, as well as Form 19b–7, for clarity.

In addition, the Commission has added language to Rule 19b–7 to require Security Futures Product Exchanges and Limited Purpose National Securities Associations to retain at their principal places of business a file, available to interested persons for public inspection and copying, containing all filings made pursuant to Rule 19b–7 as well as all correspondence and other communications reduced to writing. This language is the same as language in Rule 19b–4 [103] and also is incorporated in Forms 19b–4 [104] and 19b–7.[105]

Because the Commission has decided that Form 19b–7 should closely mirror the current rule filing procedures and requirements set forth in Form 19b–4, the Commission has decided not to adopt the proposed certification requirement. Proposed Form 19b–7 would have required a senior member of an exchange's or association's management to certify that the proposed rule change satisfied a number of requirements. The Commission agrees with commenters that the proposed certification requirement should not be part of Form 19b–7 at this time because it is not currently part of the rule filing requirements for existing SROs.[106] Form 19b–7, however, requires the signature of a senior member of an exchange's or association's management, as is currently required by Form 19b–4, to represent that the information contained in Form 19b–7 is current, accurate, and complete.

In addition, the Commission is not adopting two requirements proposed in the *Purpose* section of proposed Form 19b–7. As adopted, Form 19b–7 does not require Security Futures Product Exchanges and Limited Purpose National Securities Associations to describe how the proposed rule change relates to any applicable provisions of the federal securities laws and the rules and regulations thereunder. Form 19b–7 also does not require a Security Futures Product Exchange or a Limited Purpose National Securities Association to identify the provisions of the federal securities laws that the SRO reasonably expects the proposed rule change to affect, or to describe the anticipated effect of the proposed rule change on each applicable provision of the federal securities laws. In response to the concerns raised by a commenter,[107] the Commission is not adopting these proposed provisions because they are not required of existing SROs in the current Form 19b–4.

Further, in response to a commenter,[108] the Commission is adding language to Form 19b–7 to reflect the three events upon which a proposed rule change submitted under section 19(b)(7) of the Exchange Act may take effect pursuant to section 19(b)(7)(B) of the Exchange Act. The Commission had proposed to address only written certifications filed with the CFTC under section 5c(c) of the CEA. Specifically, in the opening paragraph of the Form 19b–7 notice, and Item III of the Form 19b–7 notice, the Commission is adding language to reflect that proposed rule changes submitted pursuant to section 19(b)(7) of the Exchange Act may take effect upon: (1) The filing of a written certification with the CFTC under section 5c(c) of the CEA; [109] (2) a determination by the CFTC that review of the proposed rule change is not necessary; or (3) the CFTC's approval of the proposed rule change. In addition to Form 19b–7, a Security Futures Product Exchange or Limited Purpose National Securities Association is required to file with the Commission as Exhibit 5, discussed below, a copy of any written

[100] *See* CBOE Letter, which recommended ''the rules and forms for proposed rule changes should be identical for fully-registered national securities exchanges and 6(g) exchanges to the maximum extent possible.'' The CBOE also argued that the regulatory disparity between the rule filing processes imposed on the options exchanges, compared to those proposed for Security Futures Product Exchanges, would impose an unfair regulatory burden on the options exchanges. The CBOE noted that options exchanges are subject to a detailed Commission review process for virtually all proposed rule changes, while Security Futures Product Exchanges would be subject to Commission review only in specific enumerated circumstances, with most filings becoming effective upon filing. The CBOE recommended that the Commission modernize its SRO rule review process to reflect the rapidly changing, competitive, and global marketplace, including the regulatory disparity between futures exchanges and national securities exchanges. *See also*, CME Letter, incorporating by reference the comments in the CBOE Letter.

[101] 15 U.S.C. 78s(b).

[102] *See* Form 19b–4, *General Instructions*, B. *Need for Careful Preparation of the Completed Form, Including Exhibits*; *Information to Be Included in the Completed Form*; Item 3, *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*; and Item 5, *Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*.

[103] *See* Rule 19b–4(i), 17 CFR 240.19b–4(i).

[104] *See* Form 19b–4, *Exhibit 1*, Item II, *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*; and Item IV, *Solicitation of Comments*.

[105] *See* Form 19b–7 Notice, Item II, *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*; and Item IV, *Solicitation of Comments*.

[106] *See* CBOE Letter.

[107] *See* CBOE Letter.

[108] *See* NFA Letter.

[109] 7 U.S.C. 7a–2(c).

certification filed with the CFTC pursuant to section 5c(c) of the CEA; a copy of any request submitted to the CFTC for a determination that review of the proposed rule change is not necessary and any indication from the CFTC that it has determined that review of the proposed rule change is not necessary; or a copy of any request submitted to the CFTC for approval of the proposed rule change and any indication received from the CFTC that the proposed rule change has been approved.

The Commission notes that it is adopting a shortened format of Form 19b–4 for Form 19b–7. Specifically, Security Futures Product Exchanges and Limited Purposed National Securities Associations are required to prepare a cover page, five exhibits, and a **Federal Register** notice. The cover page includes the requirement, taken from Form 19b–4, that a senior member of the SRO's management sign the filing, to represent that the information contained in Form 19b–7 is current, accurate, and complete. The five exhibits each contain information that currently is required to be submitted in Form 19b–4. Exhibit 1 requires information to be submitted regarding comment letters received by the SRO, including the actual comment letters. Exhibit 2 requires copies of any form, report or questionnaire that the SRO proposes to use to help implement or operate the proposed rule change. Exhibit 3 requires the SRO to submit a statement that describes the procedures that have been taken with regard to the proposed rule change, including any vote of the SRO's board of directors or members. Exhibit 3 also requires the names and telephone numbers of the staff of the SRO who are prepared to respond to questions and comments on the proposed rule change. Exhibit 4 requires that the SRO file the text of the proposed rule change. Finally, Exhibit 5 requires that a Security Futures Product Exchange or Limited Purpose National Securities Association submit copies of any certification, request for review, or request for approval filed with the CFTC concerning the proposed rule change, and any responses received from the CFTC. These documents are necessary for the Commission to determine the effectiveness of a proposed rule change in order to calculate the date by which the Commission must decide whether to abrogate a proposed rule change. The Commission believes that the shortened format adopted today reduces the filing burden on Security Futures Product Exchanges and Limited Purpose National Security Associations, while satisfying the requirements of the Exchange Act.

One commenter suggested that Form 19b–7 be modified to limit the comment letters that are required to be submitted with the form to only substantive comments and communications regarding the version of the proposal that is filed with the Commission.[110] According to the commenter, its rulemaking process can generate a number of drafting or editing comments from its members, and the commenter believes that providing comments on earlier drafts of proposed rules would not only be burdensome, but also, would be of little value to the Commission. In response to the commenter, the Commission clarifies that comments that address editing changes of earlier drafts of proposed rule changes need not be filed with the Commission.

4. Proposed Rule Changes Abrogated by the Commission and Refiled by a Security Futures Product Exchange or Limited Purpose National Securities Association

As discussed above, the Commission has the authority to abrogate a proposed rule change that has become effective pursuant to Section 19(b)(7)(B) of the Exchange Act if, after consultation with the CFTC, it appears to the Commission that the proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors.[111] The Commission is adopting amendments, as proposed, to Rule 19b–4 [112] and Form 19b–4 to implement procedures to be used by Security Futures Product Exchanges and Limited Purpose National Securities Associations when filing proposed rule changes that were abrogated by the Commission and are being refiled pursuant to Section 19(b)(1) of the Exchange Act.[113]

C. Solicitation of Comments

As discussed above, the Commission recently published a proposal to replace Rule 19b–4 and Form 19b–4 with proposed Rule 19b–6 and proposed Form 19b–6.[114] The Commission seeks comment on whether the Commission should adopt changes to Rule 19b–7 and Form 19b–7 if the Commission were to adopt proposed Rule 19b–6 and proposed Form 19b–6. Specifically, if the Commission were to adopt proposed Rule 19b–6 and proposed Form 19b–6, should Rule 19b–7 and Form 19b–7 be amended to mirror some or all of the requirements of Rule 19b–6 and Form 19b–6? What differences, if any, should remain between Form 19b–7 and Form 19b–6? In the alternative, should all rule filings required to be made pursuant to Rule 19b–7 on Form 19b–7 be made, instead, on Form 19b–6? If so, the Commission seeks comment as to the modifications, if any, to Rule 19b–6 or Form 19b–6 that would be required.

IV. Administrative Procedure Act

Section 553(d) of the Administrative Procedure Act [115] generally provides that, unless an exception applies, a substantive rule may not be made effective less than 30 days after notice of the rule has been published in the **Federal Register**. One exception to the 30-day requirement is an agency's finding of good cause for providing a shorter effective date.

The CFMA provides that principal-to-principal transactions between certain market participants in security futures products may commence on August 21, 2001. For futures markets to be able to trade such products, they must first register as exchanges with the Commission and file with the Commission listing standards for security futures products. In addition, for trading to commence on August 21, 2001, a Limited Purpose National Securities Association must have filed with the Commission proposed rule changes to satisfy the requirements set forth in section 15A(k)(2) of the Exchange Act.[116] Prior to the passage of the CFMA, there was no need for the Commission to have rules providing for the expedited registration of futures markets and process for filing of rule changes by futures markets and Limited Purpose National Securities Associations that the Commission is adopting today.

Since the passage of the CFMA, the Commission has moved quickly to propose and adopt rules that would allow futures markets to register as national securities exchanges with the

[110] *See* NFA Letter.

[111] Section 19(b)(7)(C) of the Exchange Act, 15 U.S.C. 78s(b)(7)(C).

[112] The Commission also is adopting a technical amendment to paragraph (a) of Rule 19b–4 and Part A of Form 19b–4 to exclude from the requirement that SROs file proposed rule changes on Form 19b–4 those proposed rule changes submitted pursuant to Section 19(b)(7) of the Exchange Act. *See* Rule 19b–4 and Form 19b–4.

[113] Section 19(b)(1), 15 U.S.C. 78s(b)(1). Pursuant to Section 19(b)(7)(C) of the Exchange Act, 15 U.S.C. 78s(b)(7)(C), an SRO cannot enforce a rule that has been abrogated by the Commission, unless the SRO refiles the proposed rule change under Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and it is approved by the Commission.

[114] *See* Rule 19b–6 Proposing Release, *supra* note 99.

[115] 5 U.S.C. 553(d).

[116] 15 U.S.C. 78o–3(k)(2).

Commission and allow futures markets and Limited Purpose National Securities Associations to file proposed rule changes with the Commission. The CFMA became law on December 21, 2000. The Commission proposed these rules, forms, and amendments to existing rules and form on May 15, 2001. The comment period for the rules, forms, and amendments to the existing rules and form expired on June 14, 2001. The Commission, after reviewing and considering the comments received, is now adopting the rules, forms, and amendments to the existing rules and form that would allow futures markets to register as national securities exchanges with the Commission and allow such exchanges and Limited Purpose National Securities Associations to file proposed rule changes with the Commission as required by the Exchange Act, as amended by the CFMA. By allowing certain principal-to-principal transactions to commence on August 21, 2001, Congress, in essence, established a statutory deadline for the adoption of the additional registration and listing rules. If the effective date is delayed for 30 days, the Commission will not have a rule filing process in place and, consequently, the National Futures Association, currently the only Limited Purpose National Securities Association, will be unable to file its proposed rule changes with the Commission before August 21, 2001.

The primary purpose of the 30-day delayed effectiveness requirement is to give affected parties a reasonable period of time to adjust to the new rules. Here, parties that must comply with the rules, forms, and amendments to the existing rules and form—the futures exchanges and the National Futures Association—would not be harmed by immediate effectiveness of the rules, forms, and amendments to the existing rules and form. The futures exchanges are familiar with the proposed rules, forms, and amendments to the existing rules and form, and the rules, forms, and amendments to the existing rules and form as adopted are similar to the proposals, which were published for comment. Moreover, the 30-day delay in effectiveness could interfere with the goals of the CFMA. For these reasons, the Commission finds that good cause exists for the rules, forms, and amendments to the existing rules and form to be immediately effective upon publication.

V. Paperwork Reduction Act

Certain provisions of the new rules and forms contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[117] Accordingly, the Commission submitted them to the Office of Management and Budget (''OMB'') in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission proposed to create a new collection of information titled ''Rule 6a–4 and Form 1–N.'' OMB approved the new collection and assigned it OMB Control No. 3235–0554. The Commission proposed a second new collection of information titled ''Rule 19b–7 and Form 19b–7.'' OMB approved this new collection and assigned it OMB Control No. 3235–0553. Finally, the Commission proposed to revise a collection of information titled ''Rule 19b–4 and Form 19b–4,'' which already had been assigned OMB Control No. 3235–0045. OMB approved this revision. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

In the Proposing Release, the Commission solicited comments on these collection of information requirements.[118] The Commission received no comments that specifically addressed the PRA portion of the Proposing Release. The Commission continues to believe that its estimates of the information collection burdens associated with the new rules and rule amendments are appropriate. These estimates are provided below, as are any changes to estimates resulting from modifications to the proposed rules.

A. Rule 6a–4 and Form 1–N

1. Summary of Collection of Information

As discussed above, Rule 6a–4 sets forth procedures pursuant to which futures markets that meet certain criteria and wish to trade security futures products may ''notice register'' with the Commission. Under Rule 6a–4, a futures market that wishes to trade security futures products must file a Form 1–N with the Commission to become a national securities exchange. Form 1–N requires information regarding, among other things, how the exchange operates, its criteria for membership, its subsidiaries and affiliates, its rules and procedures, and the security futures products it intends to trade.

2. Proposed Use of Information

The information obtained pursuant to Rule 6a–4 and Form 1–N would provide the Commission with basic information about a futures market that wishes to trade security futures products. This information will assist the Commission in fulfilling its regulatory obligations.

3. Respondents

The Commission estimates that seven respondents will seek to become Security Futures Product Exchanges by filing notices on Form 1–N.

4. Total Annual Reporting and Recordkeeping Burden

a. *One-time Costs.* Rule 6a–4 requires each entity wishing to become a Security Futures Product Exchange to file a Form 1–N. The Commission estimates that a Form 1–N submission will take approximately 31 hours to complete at a cost of approximately $3,000 (representing approximately 20 hours of legal work at $128/hour,[119] 11 hours of clerical work at $31/hour,[120] and $100 for miscellaneous clerical expenses). As the Commission believes that seven entities will file to become Security Futures Product Exchanges, the Commission estimates that the total burden on all respondents for filing Form 1–Ns will be approximately 217 hours (7 respondents x 31 hours/respondent), for a total cost of approximately $21,000 (7 responses x $3,000/response). The Commission received no comments on these estimates.

b. *Annual Costs.* After an entity becomes a Security Futures Product Exchange by properly filing the initial Form 1–N, it will be subject to ongoing responsibilities to file: (1) Amendments to the Form 1–N in the event of material changes to the information provided in the Form 1–N; (2) periodic updates of certain information provided in the Form 1–N; (3) certain supplemental information, such as information that is provided to the exchange's members; and (4) a monthly report summarizing the exchange's trading of security futures products.

In response to the comments received, the Commission made minor modifications to Rule 6a–4 and Form 1–N relating to the ongoing reporting requirements of Security Futures Product Exchanges. Specifically, the Commission: (1) Changed the time period within which respondents must report amendments to Exhibit F to Form 1–N from 10 days to 30 days; (2) removed the requirement that

[117] 44 U.S.C. 3501 *et seq.*

[118] *See* Proposing Release, *supra* note 13.

[119] SIA Management and Professional Earnings, Table 107 (Attorney, New York), plus a 35% differential for bonus, overhead, and other expenses. The same estimate for the cost of legal work has been used throughout this section.

[120] SIA Management and Professional Earnings, Table 012 (Secretary) plus a 35% differential for bonus, overhead, and other expenses. The same estimate for the cost of clerical work has been used throughout this section.

respondents provide amendments to Exhibits C, E, and H to Form 1–N within 10 days; (3) established Rule 6a–4(b)(2),[121] which requires respondents to maintain the information relating to Exhibits C and E and to provide such information to the Commission only on request; and (4) modified Exhibit G slightly to clarify that the scope of information required is limited to that information which relates to the trading of security futures products.

The Commission believes that these modifications will reduce the burdens on respondents in a general sense, but not for purposes of collection of information calculations required by the PRA. For example, respondents will incur the same costs and devote the same amount of time preparing amendments Exhibit F, but they will have 30 days rather than 10 days, as originally proposed, to submit such amendments. Similarly, respondents will have to devote the same amount of resources to maintaining the information relating to Exhibits C and E, but Rule 6a–4(b)(2) relieves them of performing the ministerial task of delivering this information to the Commission whenever it is updated. Finally, the Commission notes that alternate means of updating information provided in the Form 1–N are available and encourages respondents to use these means to reduce their reporting burdens. These alternate means were present in the Commission's proposal and, as such, were accounted for when the Commission prepared its initial estimates of the burden on respondents under the PRA.

Therefore, the Commission continues to estimate that each Security Futures Product Exchange will have to file one amendment or periodic update per year, resulting in a burden of approximately 15 hours and a total cost of approximately $1,438 (representing approximately 9 hours of legal work at $128/hour, 6 hours of clerical work at $31/hour, and $100 of miscellaneous clerical expenses). The Commission estimates that the total annual burden for all respondents to provide the required amendments and updates will be approximately 105 hours (15 hours/respondent per year × 7 respondents), for a total cost of approximately $10,066 ($1,438/response × 7 responses/year).

The Commission estimates that each year each Security Futures Product Exchange will file supplemental information 13 times and make 12 monthly reports. The Commission believes that, to meet these requirements, each respondent will be required only to copy and send documents likely to be prepared for its own internal uses. Accordingly, the Commission estimates that each of these 25 filings will impose a burden of approximately .5 hours and approximately $21 (0.5 hours of clerical work at $31/hour and $5 for miscellaneous clerical expenses). The Commission estimates that the total annual burden for the collection of the supplemental information and monthly reports will be approximately 87.5 hours (25 filings/respondent × 7 respondents × 0.5 hours/response), for a total cost of approximately $3,675 (25 filings/respondent per year × 7 respondents × $21/response).

Therefore, the Commission concludes that the total annual paperwork burden for all Security Futures Product Exchanges (not including the one-time cost of filing the Form 1–N) will be approximately 192.5 hours (105 + 87.5), for a total cost of approximately $13,741 ($10,066 + $3,675).

The Commission received no comments on these estimates.

5. Record Retention Period

As set forth in Rule 17a–1 under the Exchange Act,[122] a national securities exchange is required to retain records of the collection of information for at least five years, the first two years in an easily accessible place. However, for purposes of the Commission's recordkeeping requirements, Security Futures Product Exchanges must retain only those records relating to persons, accounts, agreements, contracts, and transactions involving security futures products.[123]

6. Collection of Information Is Mandatory

This collection of information is mandatory for any futures market that is required by the Exchange Act to notice register with the Commission because it wishes to list or trade security futures products.

7. Confidentiality

Any information collected pursuant to Rule 6a–4 and Form 1–N will be made publicly available.

B. Proposed Rule 19b–7 and Proposed Form 19b–7

1. Summary of Collection of Information

Rule 19b–7 requires a Security Futures Product Exchange or Limited Purpose National Securities Association that proposes to add, delete, or amend its rules relating to certain subjects[124] to submit such proposed rule change to the Commission on Form 19b–7. Form 19b–7 requires the respondent: (1) To state the purpose of the proposed rule change; (2) to state the authority and statutory basis for the proposed rule change; (3) to describe the proposal's impact on competition; and (4) to provide a summary of any written comments on the proposed rule change received by the Security Futures Product Exchange or Limited Purpose National Securities Association.

2. Proposed Use of Information

The Commission will use the information obtained on Form 19b–7 to review proposed rule changes of Security Futures Product Exchanges and Limited Purpose National Securities Associations and to provide notice of these proposals to the public. The Commission will rely on the information provided in Form 19b–7, as well as public comment regarding such proposals, in determining whether it would be appropriate to abrogate a proposed rule change.

3. Respondents

As noted above, the Commission expects that seven futures markets will become Security Futures Product Exchanges by filing Form 1–N. Upon doing so, these entities will become subject to the requirement to file Form 19b–7 with respect to most proposed rule changes relating to security futures products.[125] In addition, the Commission anticipates that one Limited Purpose National Securities Association will be required to file certain rule changes relating to security futures products on Form 19b–7. Therefore, the Commission estimates that there will be eight respondents.

4. Total Annual Reporting and Recordkeeping Burden

The Commission estimates that each respondent will submit, on average, 15 proposed rule changes per year on Form 19b–7. Although the Commission receives approximately 20 to 100 proposed rule changes on Form 19b–4 per year from each of the existing SROs, the Commission notes that these Form 19b–4 filings cover a wide range of subject areas, including trading, membership, dispute resolution, exchange governance, and fees. By

[121] 17 CFR 240.6a–4(b)(2).

[122] 17 CFR 240.17a–1.

[123] *See* 15 U.S.C. 78q(b)(4)(B).

[124] *See* 15 U.S.C. 78f(g)(4)(B)(i) and 78o–3(k)(3)(A).

[125] Security Futures Product Exchanges and Limited Purpose National Security Associations are required to file certain proposed rule changes pursuant to Rule 19b–4 rather than Rule 19b–7. *See infra* notes 97, 111–113 and accompanying text.

contrast, Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to file on Form 19b–7 proposed rule changes relating only to security futures products. Given the limited types of rule changes that the proposed Form 19b–7 filings will cover, the Commission continues to believe that 15 filings per respondent per year is a reasonable estimate.

As noted above, based on the comments received, the Commission has modified proposed Rule 19b–7 and proposed Form 19b–7 to more closely resemble Rule 19b–4 [126] and Form 19b–4.[127] The Commission has decided, among other things, not to adopt the following proposed requirements: (1) That Security Futures Product Exchanges and Limited Purpose National Securities Associations describe how the proposed rule change relates to any applicable provisions of the federal securities laws and the rules and regulations thereunder; (2) that a Security Futures Product Exchange or a Limited Purpose National Securities Association identify its rules and the provisions of the federal securities laws that the SRO reasonably expects the proposed rule change to affect, or to describe the anticipated effect of the proposed rule change on each applicable provision of the federal securities laws and applicable rules of the SRO; and (3) that a senior member of the management of the Security Futures Product Exchange or Limited Purpose National Securities Association certify that the proposed rule change satisfies a number of requirements.

The Commission believes that the net effect of the changes to Rule 19b–7 will result in a slight decrease from the burden originally estimated. The Commission is reducing its estimate of the time required to complete a Form 19b–7 from 16.5 hours to 15.5 hours, with the cost required to complete a Form 19b–7 decreasing from approximately $1,824 to approximately $1,696 (representing 11.5 hours of legal work at $128/hour, 4 hours of clerical work at $31/hour, and $100 for miscellaneous clerical expenses). The Commission estimates that the total annual burden for all respondents to file proposed Form 19b–7 would now be approximately 1,860 hours (representing 15 filings/year per respondent × 8 respondents × 15.5 hours/filing), for a total cost of approximately $203,520 ($1,696/filing × 15 filings/year per respondent × 8 respondents).

The Commission received no comments on the accuracy of its initial estimates.[128]

5. Record Retention Period

As set forth in Rule 17a–1 under the Exchange Act,[129] a national securities exchange or national securities association is required to retain records of the collection of information for at least five years, the first two years in an easily accessible place. However, for purposes of the Commission's recordkeeping requirements, Security Futures Product Exchanges and Limited Purpose National Securities Associations must retain only those records relating to persons, accounts, agreements, contracts, and transactions involving security futures products.[130]

6. Collection of Information Is Mandatory

The collection of information requirements imposed by Rule 19b–7 and Form 19b–7 are mandatory for Security Futures Products Exchanges and Limited Purpose National Securities Associations.

7. Confidentiality

Any information collected pursuant to Rule 19b–7 and Form 19b–7 will be made publicly available.

C. Proposed Amendments to Rule 19b–4 and Form 19b–4

1. Summary of Collection of Information

Section 19 of the Exchange Act [131] establishes procedures whereby national securities exchanges and national securities associations (collectively, ''SROs'') must file with the Commission proposals to add, delete, or amend their rules. Rule 19b–4 [132] implements this procedure and requires SROs to file proposed rule changes on Form 19b–4. Certain proposals submitted on Form 19b–4 require the approval of the Commission before they may take effect.

Although Security Futures Product Exchanges and Limited Purpose National Securities Associations generally will file proposed rule changes on Form 19b–7, there are two circumstances in which such entities will be required to file Form 19b–4: (1) a proposed rule change that relates to margin, except for a change that results in higher margin levels; and (2) a proposed rule change originally filed on Form 19b–7 that has been abrogated by the Commission because it appears that the proposal unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. A proposed rule change that is filed on Form 19b–7 but subsequently abrogated by the Commission must be refiled on Form 19b–4.[133]

2. Proposed Use of Information

The Commission uses the information obtained under Rule 19b–4 to review proposed rule changes by SROs and to provide notice of these proposals to the public. The Commission relies on the information provided in Form 19b–4, as well as public comment regarding such proposals, in taking any action with respect to proposed rule changes. This information will assist the Commission in fulfilling its regulatory obligations.

3. Respondents

Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to comply with Rule 19b–4 and file proposed rule changes on Form 19b–4 in the two circumstances described above. The Commission believes that there will be seven Security Futures Product Exchanges and one Limited Purpose National Securities Association (the National Futures Association). In addition, all other SROs are currently required to comply with Rule 19b–4 and file proposed rule changes on Form 19b–4.

4. Total Annual Reporting and Recordkeeping Burden

The Commission estimates that the amendments to Rule 19b–4 adopted today will result in an additional eight filings per year on Form 19b–4. The Commission estimates that respondents devote, on average, approximately 35 hours to the filing of each Form 19b–4, at a cost of approximately $3,660 per filing (representing 25 hours of legal work at $128/hour, 10 hours of clerical work at $31/hour and $150 for miscellaneous clerical expenses). Therefore, the Commission estimates that the total annual burden for all respondents resulting from the amendments to Rule 19b–4 and Form 19b–4 will be approximately 280 hours (8 filings × 35 hours/filing), for a total cost of approximately $29,280 (8 filings

[126] 17 CFR 240.19b–4.

[127] *See supra* notes 98–110, and accompanying text.

[128] However, one commenter noted that, while the Commission originally estimated that an average Form 19b–7 filing would require approximately 12.5 hours of legal work and four hours of clerical work to complete, it estimated that a typical rule filing submitted to the CFTC would require less than a third of that time. *See* NFA Letter.

[129] 17 CFR 240.17a–1.

[130] *See* 15 U.S.C. 78q(b)(4)(B).

[131] 15 U.S.C. 78s.

[132] 17 CFR 240.19b–4.

× $3,660/filing).[134] The Commission received no comments on these estimates.

5. Record Retention Period

As set forth in Rule 17a–1 under the Exchange Act,[135] SROs are required to retain records of the collection of information for at least five years, the first two years in an easily accessible place. However, for purposes of the Commission's recordkeeping requirements, Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to retain only those records relating to persons, accounts, agreements, contracts, and transactions involving security futures products.[136]

6. Collection of Information Is Mandatory

The collection of information requirements imposed by Rule 19b–4 and Form 19b–4 are mandatory for all SROs, including Security Futures Products Exchanges and Limited Purpose National Securities Associations.

7. Confidentiality

Any information collected pursuant to Rule 19b–4 and Form 19b–4 is made publicly available.

VI. Costs and Benefits of Final Rules

In response to the mandate of the CFMA,[137] which requires the Commission to prescribe, by rule, the process for notice registration to be used by designated contract markets and derivative transaction execution facilities to register as national securities exchanges pursuant to Section 6(g)(1) of the Exchange Act [138] (''Security Futures Product Exchanges''), the Commission is adopting Rule 6a–4 under the Exchange Act [139] and Form 1–N. Rule 6a–4 and Form 1–N prescribe the requirements for Security Futures Product Exchanges to list and trade futures on individual stocks and narrow-based stock indexes, including puts, calls, straddles, options, or privileges thereon. The Commission also is adopting conforming amendments to Rules 6a–2 and 6a–3 under the Exchange Act [140] and Rule 202.3 of the Commission's procedural rules.[141] Furthermore, the Commission is adopting Rule 19b–7,[142] Form 19b–7, and conforming amendments to Rule 19b–4 [143] and Form 19b–4 to accommodate certain proposed rule changes that will be submitted by Security Futures Product Exchanges and Limited Purpose National Securities Associations registered pursuant to Section 15A(k) of the Exchange Act.[144] Under Rule 6a–4, Security Futures Product Exchanges will submit information and documents that are comparable to the requirements applicable to national securities exchanges registered pursuant to Section 6(a) of the Exchange Act.[145] In addition, Rule 19b–7 [146] and Form 19b–7 establish the procedures to be used by Security Futures Product Exchanges and Limited Purpose National Securities Associations when filing proposed rule changes that relate to certain matters, including higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such Security Futures Product Exchanges' and Limited Purpose National Securities' obligations to enforce the securities laws. The conforming amendments to Rule 19b–4 [147] and Form 19b–4 apply to proposed rule changes relating to margin, except for changes that result in higher margin levels, and proposed rule changes that have been abrogated pursuant to Section 19(b)(7)(C) of the Exchange Act [148] and refiled under Section 19(b)(1) of the Exchange Act.[149]

A. Comments

In the Proposing Release,[150] the Commission requested comment on all aspects of the costs and benefits of the adopted rules, forms, and conforming amendments to existing rules and forms, including identification of additional costs and benefits of the changes. In addition, the Commission encouraged commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs or benefits.

Although there were no comments that specifically addressed the Costs and Benefits Analysis in the Proposing Release, there were comments that may apply generally to the costs and benefits of the adopted rules, forms, and amendments to existing rules and forms. Accordingly, the Commission anticipates that the rules, forms and conforming amendments to existing rules and forms adopted today will generate the costs and benefits described below and has incorporated the general comments into the applicable discussion.

B. Costs and Benefits of Rule 6a–4, Form 1–N, and Conforming Amendments to Rules 6a–2 and 6a–3 under the Exchange Act and Rule 202.3 of the Commission's Procedural Rules

As discussed above, the Commission is adopting Rule 6a–4 and Form 1–N, with slight modifications, in response to concerns raised by commenters. The Commission also is adopting amendments to Exchange Act Rules 6a–2 and 6a–3 [151] and Rule 202.3 of the Commission's procedural rules,[152] substantially as proposed.

Rule 6a–4 requires an exchange registering pursuant to Section 6(g) of the Exchange Act [153] to file Form 1–N [154] with the Commission.[155] Once registered, a Security Futures Product Exchange must file with the Commission written notice of actions that create new information or render inaccurate information filed on the Form 1–N.[156] A Security Futures Product Exchange also must file with the Commission an amendment to Form 1–N setting forth the nature and effective date of the action taken that creates new information or renders inaccurate information filed on the execution page within 10 days after such action is taken,[157] or as part of Exhibit F of its Form 1–N within 30

[134] These estimates do not include burdens associated with filings that propose wholesale additions or amendments to an SRO's rules. Such filings could result, for example, from the development of a new trading system. Past experience has demonstrated that about 1% of Form 19b–4 filings are of this sort. Because these filings typically represent so few of the total number of Form 19b–4 filings and the scope of these filings may vary greatly from one filing to the next, the Commission has omitted them from the computation of the average cost associated with the respondents' reporting burden. Moreover, because proposed rule changes filed with the Commission by Security Futures Products Exchanges and Limited Purpose National Securities Associations will relate only to security futures products, the Commission does not anticipate that any of these filings will be among the 1%.

[135] 17 CFR 240.17a–1.

[136] *See* 15 U.S.C. 78q(b)(4)(B).

[137] Pub. L. No. 106–554, Appendix E, 114 Stat. 2763

[138] 15 U.S.C. 78f(g)(1).

[139] 17 CFR 240.6a–4.

[140] 17 CFR 240.6a–2 and 240.6a–3.

[141] 17 CFR 202.3.

[142] 17 CFR 240.19b–7.

[143] 17 CFR 240.19b–4.

[144] 15 U.S.C. 78o–3(k).

[145] 15 U.S.C. 78f(a).

[146] 17 CFR 240.19b–7.

[147] 17 CFR 240.19b–4.

[148] 15 U.S.C. 78s(b)(7)(C).

[149] 15 U.S.C. 78s(b)(1). Pursuant to Section 19(b)(7)(C) of the Exchange Act, 15 U.S.C. 78s(b)(7)(C), an SRO cannot enforce a rule that has been abrogated by the Commission, unless the SRO refiles the proposed rule change under Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and it is approved by the Commission.

[150] *See* Proposing Release, *supra* note 13.

[151] 17 CFR 240.6a–2 and 240.6a–3.

[152] 17 CFR 202.3.

[153] 15 U.S.C. 78f(g).

[154] 17 CFR 249.10.

[155] 17 CFR 240.6a–4(a)(1).

[156] 17 CFR 240.6a–4(a)(2).

[157] 17 CFR 240.6a–4(b)(1)(i).

days after such action is taken.[158] Rule 6a–4(b)(2) also requires a Security Futures Product Exchange to maintain records relating to changes in information required in Exhibits C and E that are up-to-date within 30 days and available to the Commission upon request.[159] A Security Futures Product Exchange also has to file as an amendment, on or before June 30, 2002 and by June 30 every year thereafter, Exhibits F, H, and I, which are required to be up-to-date as of the latest date practicable within three months of the date the amendment was filed.[160] In addition, a Security Futures Product Exchange must file, as an amendment to its Form 1–N, on or before June 30, 2004 and by June 30 every three years thereafter, complete Exhibits A, B, C, and E, which are required to be up-to-date as of the latest date practicable within three months of the date the amendment was filed.[161] However, Rule 6a–4(b)(5) allows a Security Futures Product Exchange to meet the obligations of Rule 6a–4(b)(3) and (b)(4) through certain alternate means. First, pursuant to proposed Rule 6a–4(b)(5)(i), a Security Futures Product Exchange could provide responsive information that was available in a publication that is issued on an annual or more frequent basis.[162] Second, pursuant to proposed Rule 6a–4(b)(5)(ii), a Security Futures Product Exchange could make the responsive information available to the Commission and to the public upon request by certifying that this information is kept up-to-date and is available to the Commission and to the public upon request.[163] Third, pursuant to proposed Rule 6a–4(b)(5)(iii), a Security Futures Product Exchange could make the responsive information continuously available on a web site that the exchange controls.[164]

The Commission is adopting Rule 6a–4(c)(1)[165] and 6a–4(c)(2)[166] as proposed. Rule 6a–4(c)(1) requires a Security Futures Product Exchange to file with the Commission any material related to the trading of security futures products (including notices, circulars, bulletins, lists, and periodicals) that is issued or made generally available to members of, participants in, or subscribers to, the exchange within 10 days after issuing it or making it generally available. A Security Futures Product Exchange, in lieu of making a hardcopy submission, could comply with this requirement by indicating the location of a web site where such information may be continuously found and certifying that the information available at that location is accurate as of the date that the exchange submits such certification.[167] Furthermore, Rule 6a–4(c)(2) requires every Security Futures Product Exchange to file a report within 15 days after the end of each calendar month that includes: (1) For each contract of sale for future delivery of a single security, the number of contracts traded on the exchange during the relevant calendar month and the total number of shares underlying such contracts traded; and (2) for each contract of sale for future delivery of a narrow-based security index, the number of contracts traded on the exchange during the relevant calendar month and the total number of shares represented by the index underlying such contracts traded.[168]

The conforming amendments to Rules 6a–2 and 6a–3 exclude respondents from the requirements of these rules, and, therefore, the Commission believes that there would be no costs imposed on, nor benefits accruing to, the respondents arising from the conforming amendments. Finally, Rule 202.3 of the Commission's procedural rules provides that notice forms for registration as a national securities exchange filed with the Commission are routed within the Commission to the Division of Market Regulation, and, therefore, the Commission believes that there would be no costs imposed on, nor benefits accruing to, the respondents arising from the conforming amendment.

1. Benefits

Rule 6a–4 provides for an expedited process for a market to become notice-registered with the Commission as a Security Futures Product Exchange. Notably, Form 1–N is not an application that requires an approval from the Commission. Because an exchange registering with the Commission pursuant to section 6(g) of the Exchange Act[169] is also subject to the CFTC's application and reporting requirements, Form 1–N requests only limited, basic information the vast majority of which the respondents are likely to compile for their internal use. The Commission estimates that the amount of time required to complete Form 1–N will be one-third less than the amount of time currently required to complete Form 1, the application used to register as a national securities exchange or to apply for an exemption from exchange registration based on limited volume pursuant to section 6(a) of the Exchange Act.[170] Furthermore, pursuant to section 6(g)(2)(A) of the Exchange Act,[171] in those instances in which the market has filed information with the CFTC and to the extent that such documents contain information satisfying the Commission's informational requirements, copies of such documents could be filed with the Commission in lieu of submitting those exhibits to the Form, therefore reducing a market's burden of compiling information.[172] Pursuant to section 6(g)(2)(B) of the Exchange Act,[173] such notice registration will be effective contemporaneously with the submission of Form 1–N, unless the registration is subject to suspension or revocation by the CFTC. The information provided by markets filing Form 1–Ns will be required to be up-to-date as of 1 month of the date of filing, which will provide the markets with additional flexibility in the preparation of the required documents.

As a mechanism to further reduce the filing burdens on Security Futures Product Exchanges, the Commission is allowing such exchanges to comply with the requirements for filing amendments and supplemental materials by maintaining the information on an Internet web page and providing the location of such web site to the Commission.[174] Instead of filing amendments in paper form, a Security Futures Product Exchange also is permitted to refer to materials published by, or in cooperation with, the exchange that contain the required information or to make the information available upon request at its office.[175] Permitting respondents to use the Internet as a means of compliance will reduce expenses associated with clerical time, postage, and copying and increase the speed, accuracy, and availability of information beneficial to investors and financial markets.

Furthermore, the Commission is exempting a Security Futures Product Exchange from filing the required amendments for any affiliate or subsidiary listed in Exhibit C of the

[158] 17 CFR 240.6a–4(b)(1)(ii).

[159] 17 CFR 240.6a–4(b)(2). A Security Futures Product Exchange need not file with the Commission updates of this information on an event–specific basis.

[160] 17 CFR 240.6a–4(b)(3).

[161] 17 CFR 240.6a–4(b)(4).

[162] 17 CFR 240.6a–4(b)(5)(i).

[163] 17 CFR 240.6a–4(b)(5)(ii).

[164] 17 CFR 240.6a–4(b)(5)(iii).

[165] 17 CFR 240.6a–4(c)(1).

[166] 17 CFR 240.6a–4(c)(2).

[167] 17 CFR 240.6a–4(c)(1)(ii).

[168] 17 CFR 240.6a–4(c)(2).

[169] 15 U.S.C. 78f(g).

[170] 15 U.S.C. 78f(a).

[171] 15 U.S.C. 78f(g)(2)(A).

[172] 17 CFR 240.6a–4(b)(7).

[173] 15 U.S.C. 78f(g)(2)(B).

[174] 17 CFR 240.6a–4(b)(5)(iii) and (c)(1)(ii).

[175] 17 CFR 240.6a–4(b)(5)(i) and (ii).

exchange's notice registration that either is listed in Exhibit C to the form for registration or notice registration of one or more other national securities exchanges, or was an inactive affiliate or subsidiary throughout the affiliate's or subsidiary's latest fiscal year.[176] This will limit the information required to be provided to that information that is relevant to the Security Futures Product Exchange's trading of security futures products.

The new rules also provide a mechanism by which entities that wish to notice register with the Commission may do so. By providing a mechanism for notice registration, the new rules will provide additional markets with the opportunity to trade security futures products, thereby enhancing competition. The rules also provide legal certainty and implement the statutory mandate imposed by the CFMA.

The new rules and forms will enhance the Commission's ability to oversee the exchanges trading security futures products, which is critical to the continued integrity of the markets, while enabling the Commission to fulfill its statutory obligations under the CFMA. The Commission believes that its oversight, in conjunction with that of the CFTC, over trading activities in security futures products will benefit the public and the markets generally by helping to prevent fraud and manipulation.

2. Costs

Rule 6a–4 and Form 1–N will require the respondents to comply with the notice and amendment requirements, which will require some effort in gathering the information to file with the Commission. The respondents have gathered most of this information, and currently provide it to the CFTC. The exchanges may provide copies of existing documents provided to the CFTC to the Commission in lieu of completing Form 1–N, to the extent that such documents contain information satisfying the Commission's informational requirements.[177] Therefore, the Commission believes that the costs incurred by the proposed rules and forms have been minimized. As discussed above, the Commission estimates that the average paperwork cost for each registration would be approximately $3,000 for each respondent.[178]

One commenter, however, felt that Form 1–N is notice registration only in the sense that the Commission does not approve the application.[179] Otherwise, this commenter felt that the proposed procedure requires the same effort and expense as a standard application for registration as a national securities exchange. The same commenter urged the Commission to not require a ''wasteful duplication of information that is on public file with the CFTC, [but instead] * * * to adopt the same standards and procedures proposed by the CFTC.'' The commenter, however, did not offer specific data or support calculating the amount of effort and expense believed to be incurred by completing Form 1–N. The Commission notes that Section 6(g)(2)(A) of the Exchange Act expressly states that exchanges that wish to register with the Commission may file written notice ''in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents concerning such exchange, comparable to the information and documents required for national securities exchanges * * *.'' The Commission continues to believe that Form 1–N not only implements the statute, but also, provides an expedited process of notice registration because, to the extent that information has been compiled for a market's internal use or for submission to the CFTC, copies of such documents may be provided to the Commission in lieu of submitting newly-prepared exhibits to Form 1–N.

Another commenter stated that the requirements in completing Form 1–N are unreasonably burdensome and there is a huge disparity when compared to the requirements that the CFTC imposes upon securities exchanges desiring to become designated contract markets in security futures products.[180] As a result, the commenter felt that it would be much more difficult to notice register with the Commission than it would be with the CFTC, since the Commission requires much more information than is routinely filed by a designated contract market with the CFTC. Because the CFTC is the primary regulator of the Security Futures Product Exchanges, the commenter stated that it is not necessary or appropriate in the public interest or for the protection of investors for the Commission to impose substantially similar filing requirements on Security Futures Product Exchanges as those imposed on other securities exchanges. The commenter urged the Commission to modify its Rule 6a–4 and Form 1–N to be consistent with the more moderate approach taken by the CFTC. The Commission believes, however, that the differences in approach proposed by the two agencies reflect the different statutory frameworks under which each agency operates. In addition, the Commission notes that contrary to the commenter's views, although permissible under section 6(g)(2)(A) of the Exchange Act, the Commission is not imposing substantially similar filing requirements on Security Futures Product Exchanges as are imposed on other securities exchanges. Instead, the Commission has limited the information required to information directly related to the Security Futures Product Exchanges' trading of security futures products. Finally, the Commission believes that the required information is necessary for the Commission to fulfill its regulatory responsibilities.

As discussed above, the conforming amendments to Rules 6a–2 and 6a–3 [181] will exclude Security Futures Product Exchanges from the costs associated with these rules. However, Rule 6a–4 will require respondents to provide periodic amendments to their initial notice registration. As discussed above, the Commission estimates that the average paperwork cost for each amendment and periodic update would be approximately $1,438.[182] Because the Commission expects that the exchanges will prepare the requested information for their internal use, the Commission anticipates that paperwork costs would be the only costs associated with this requirement.

One commenter stated that the Commission should adopt the CFTC's less burdensome approach given the fact that the Security Futures Product Exchanges remain subject to the primary jurisdiction of the CFTC.[183] In addition, the commenter suggested that the Commission, at the very least, require that amendments regarding new information or to correct information that has become inaccurate should be limited to material inaccuracies, and that the 10-day timeframe be changed to a minimum of 30 days. The commenter also noted that it would be particularly burdensome to require information pertaining to the addition of new, or the withdrawal of old, owners, members, participants, subscribers, or other users be provided within 10 days since these would be subject to frequent change. The commenter suggested that Exhibits F and H be submitted annually to meet the Commission's need for this information instead of requiring

[176] 17 CFR 240.6a–4(b)(6).

[177] 17 CFR 240.6a–4(b)(7).

[178] *See supra* Section V.A.4.a.

[179] *See* CME Letter.

[180] *See* CBOT Letter.

[181] 17 CFR 240.6a–2 and 240.6a–3.

[182] *See supra* Section V.A.4.b.

[183] *See* CBOT Letter.

piecemeal amendments every time an individual is added or removed from one of these categories.

The Commission notes that the addition of new, or the withdrawal of old, owners, members, participants, subscribers, or other users would not constitute a material change requiring an update within 10 days. In addition, much of the required information will not change frequently, and the option of posting information on an Internet web site will encourage more frequent updating of current information and reduce the cost of filing the amendments on paper. The Commission also is retaining the requirement that a Security Futures Product Exchange submit updates to the information provided in Exhibit F.

However, in response to the commenter's concerns, the Commission has slightly modified the filing requirements for respondents under Rule 6a–4. Specifically, the Commission changed the time period within which respondents must report amendments to Exhibit F to Form 1–N from 10 days to 30 days and removed the requirement that respondents provide amendments to Exhibits C, E, and H to Form 1–N within 10 days. The Commission believes that 30 days, rather than 10 days, would be an appropriate timeframe, particularly in light of the fact that these entities will be subject to the primary regulation of the CFTC. In addition, the Commission is adopting a new provision, Rule 6a–4(b)(2),[184] that requires Security Futures Product Exchanges to provide the information required in Exhibits C and E only upon request of the Commission. Under the rule, a Security Futures Product Exchange must maintain records relating to changes in information required in Exhibits C and E as of the latest practicable date, but, at a minimum, be up-to-date within 30 days, but need not file with the Commission updates of this information on an event-specific basis. Furthermore, periodic updates to Exhibits F, H, and I under Rule 6a–4(b)(3) and Exhibits A, B, C, and E under Rule 6a–4(b)(4) could be accomplished by using the alternate means discussed above, and, consequently, the modifications to the Commission's proposal should alleviate the burden on Security Futures Product Exchanges in preparing the amendments. These amendments also will help to ensure that the Commission receives accurate and updated information about Security Futures Product Exchanges so that it may carry out its regulatory responsibilities.

Finally, paragraph (c) of Rule 6a–4 requires Security Futures Product Exchanges to furnish to the Commission copies of all materials related to the trading of security futures products (including notices, circulars, bulletins, lists, and publications) issued or made available to members of, participants in or subscribers to, the exchange.[185] Exchanges will be permitted to make the information available on an Internet web site and provide the Commission with the location of the web site.[186] Paragraph (c) of Rule 6a–4 also requires Security Futures Product Exchanges to file transaction reports within 15 days after the end of each calendar month containing, for each security futures product traded on such exchange, the number of contracts traded, and the type of security underlying such contract.[187] As discussed above, the Commission estimates that each respondent will incur an average paperwork cost of $21 for each filing.[188] Because the Commission expects that the exchanges will prepare the requested information for their internal use, the Commission anticipates that paperwork costs would be the only costs associated with this requirement.

One commenter believed that the Commission's proposal to allow certain requirements to be met by maintaining the information on an Internet web page, by referring to materials published by the exchange, or by making the information available upon request at the exchange's office are ineffective attempts at limiting the filing burden since a significant portion of the required information is information generally not made available to the public.[189] The same commenter also felt that the requirement to file copies of any materials related to the trading of security futures products that would be provided to their members, participants, or subscribers within 10 days of their provision should either not be adopted or be increased to within a timeframe of at least 30 days.

The Commission does not believe that the 10-day requirement in which to provide the supplemental materials is unduly burdensome and believes that providing alternate means, such as web sites or publications, for Security Futures Product Exchanges to provide updates of certain required information can relieve some of the burden imposed on the exchanges. In addition, the Commission believes that there should not be a discrepancy between the time periods in which Security Futures Product Exchanges and other national securities exchanges must revise inaccurate or incomplete information provided in their filings.

C. Costs and Benefits of Rule 19b–7 and Form 19b–7 and Conforming Amendments to Rule 19b–4 and Form 19b–4

Rule 19b–7 requires the Commission to promptly publish Security Futures Product Exchanges' and Limited Purpose National Securities Associations' proposed rule changes that were filed pursuant to section 19(b)(7) of the Exchange Act[190] on Form 19b–7.

Pursuant to section 19(b)(1) of the Exchange Act,[191] all self-regulatory organizations (''SROs'') are required to file with the Commission copies of any proposed rule, or any addition to or deletion from the rules of such SRO (''proposed rule change''). The CFMA exempted Security Futures Product Exchanges and Limited Purpose National Securities Associations from submitting proposed rule changes pursuant to section 19(b) of the Exchange Act,[192] except in three circumstances. First, pursuant to sections 6(g)(4)(B)(i)[193] and 15A(k)(3)(A)[194] of the Exchange Act, proposed rule changes that relate to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such SRO's obligation to enforce the securities laws must be submitted to the Commission pursuant to new Section 19(b)(7) of the Exchange Act.[195] Second, pursuant to sections 6(g)(4)(B)(ii)[196] and 15A(k)(3)(B)[197] of the Exchange Act, Security Futures Product Exchanges and Limited Purpose National Securities Associations are required to submit proposed rule changes that relate to margin, except for those that result in higher margin levels, under sections

[184] 17 CFR 240.6a–4(b)(2).

[185] 17 CFR 240.6a–4(c)(1)(i).

[186] 17 CFR 240.6a–4(c)(1)(ii).

[187] 17 CFR 240.6a–4(c)(2).

[188] *See supra* Section V.A.4.b.

[189] *See* CBOT Letter.

[190] 15 U.S.C. 78s(b)(7).

[191] 15 U.S.C. 78s(b)(1).

[192] 15 U.S.C. 78s(b).

[193] 15 U.S.C. 78f(g)(4)(B)(i).

[194] 15 U.S.C. 78o–3(k)(3)(A).

[195] Section 19(b)(7) of the Exchange Act grants to the Commission the authority to adopt rules regarding the filing of proposed rule changes by Security Futures Product Exchanges and Limited Purpose National Securities Associations. 15 U.S.C. 78s(b)(7).

[196] 15 U.S.C. 78f(g)(4)(B)(ii).

[197] 15 U.S.C. 78o–3(k)(3)(B).

19(b)(1) and (b)(2) of the Exchange Act.[198] Finally, pursuant to sections 6(g)(4)(B)(iii)[199] and 15A(k)(3)(C)[200] of the Exchange Act, proposed rule changes that have been abrogated by the Commission pursuant to new section 19(b)(7)(C) of the Act[201] must be refiled under section 19(b)(1) of the Act.[202]

After carefully considering the comment letters,[203] the Commission has decided to adopt the amendments to Rule 19b–4 and Form 19b–4 as proposed and to adopt Rule 19b–7 and Form 19b–7 with modifications in response to concerns raised by commenters to make the rule and the form more closely comparable to the current rule filing process.

1. Benefits

Pursuant to the statutory mandate, the Commission will not be approving proposed rule changes submitted pursuant to Rule 19b–7.[204] Instead, a proposed rule change filed on Form 19b–7 will become effective upon: (i) An exchange's filing of a written certification with the CFTC under Section 5c(c) of the CEA;[205] (ii) a determination by the CFTC that review of the proposed rule change is not necessary; or (iii) approval of the proposed rule change by the CFTC. The Commission is adding language to Form 19b–7 to reflect the three events[206] upon which a proposed rule change submitted under to section 19(b)(7) of the Exchange Act[207] may take effect pursuant to Section 19(b)(7)(B) of the Exchange Act.[208] A Security Futures Product Exchange or Limited Purpose National Securities Association will be required to file with the Commission, along with Form 19b–7, a copy of any written certification filed with the CFTC pursuant to Section 5c(c) of the CEA.[209] As discussed above, if a proposed rule change is effective because of a CFTC determination not to review such proposal or because the CFTC has approved the proposal, the Securities Futures Product Exchange or Limited Purpose National Securities Association will be required to so state in the Form 19b–7.

In addition, Rule 19b–7 states that a proposed rule change will not be deemed filed on the date it is received unless a completed Form 19b–7 is submitted. To elicit meaningful comment, Rule 19b–7 requires proposed rule changes to include (i) A clear and concise statement of the basis and purpose of such rule change, including the impact on competition or efficiency, if any, and (ii) a summary of any written comments received by the SRO on the proposed rule change. The Commission notes that these requirements are substantially the same as are required to be submitted in Form 19b–4 for existing SROs[210] and should provide clarity to the filing requirements for proposed rule changes submitted under section 19(b)(7) of the Exchange Act.[211]

The Commission also has decided not to adopt proposed paragraph (c) to proposed Rule 19b–7, which stated that the effectiveness of a proposed rule change submitted pursuant to section 19(b)(7) of the Exchange Act[212] would not create an inference of whether the proposed rule change was in the public interest, including whether it had an impact on competition. The Commission notes that this language was proposed in proposed Rule 19b–6 and, therefore, it is not currently applicable to existing SROs.

The Commission also added language to Rule 19b–7 to require SROs to retain at their principal place of business a file, available to interested persons for public inspection and copying, containing all filings made pursuant to Rule 19b–7 as well as all related correspondence and other communications reduced to writing. This language mirrors Rule 19b-4[213] and also is incorporated in Forms 19b–4[214] and 19b–7.[215]

Further, the Commission has decided not to adopt the requirement that a senior member of an exchange's or association's management certify that the proposed rule change satisfied a number of requirements. In response to one commenter[216] the Commission agrees that the proposed certification requirement should not be imposed on Security Futures Product Exchanges and Limited Purpose National Securities Associations at this time because existing SROs are not currently subject to such a requirement. Form 19b–7, however, will require the signature of a senior member of an exchange's or association's management, as currently is required by Form 19b–4.

The adopted Form 19b–7 also will not require Security Futures Product Exchanges and Limited Purpose National Securities Associations to describe how the proposed rule change relates to any applicable provisions of the federal securities laws and the rules and regulations thereunder, to identify its rules and the provisions of the federal securities laws that the SRO reasonably expects the proposed rule change to affect, or to describe the anticipated effect of the proposed rule change on each applicable provision of the federal securities laws and applicable rules of the SRO. In response to the concerns raised by a commenter,[217] the Commission has decided not to adopt these proposed provisions because they are not required of existing SROs in the current Form 19b–4.

Proposed rule changes filed with the Commission will be required to be filed concurrently with the CFTC. However, pursuant to the CFMA, only the Commission is required to publish notice of the proposed rule change for comment. Consequently, although respondents must file certain proposed rule changes with two agencies, there will, in effect, be only one effort in the collection and compilation of information.

The Commission believes that Rule 19b–7 and Form 19b–7 and amendments to existing Rule 19b–4 and Form 19b–4 are designed to provide information sufficient to permit interested persons to submit meaningful comment on the proposals. By providing an opportunity for the public and market participants, including investors, to comment on proposed rule changes, the rule and the form should enhance the Commission's ability to

[198] 15 U.S.C. 78s(b)(1) and (b)(2).

[199] 15 U.S.C. 78f(g)(4)(B)(iii).

[200] 15 U.S.C. 78o–3(k)(3)(C).

[201] 15 U.S.C. 78s(b)(7)(C).

[202] 15 U.S.C. 78s(b)(1). Pursuant to Section 19(b)(7)(C) of the Exchange Act, 15 U.S.C. 78s(b)(7)(C), and SRO cannot enforce a rule that has been abrogated by the Commission, unless the SRO refiles the proposed rule change under section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and it is approved by the Commission.

[203] *See supra* note 15.

[204] *See* Section 19(b)(7)(B) of the Exchange Act, 15 U.S.C. 78s(b)(7)(B).

[205] 7 U.S.C. 7a–2(c)

[206] In the Proposing Release, the Commission proposed to address only written certifications filed with the CFTC under Section 5c(c) of the CEA. See Proposing Release, *supra* note.

[207] 15 U.S.C. 78s(b)(7).

[208] 15 U.S.C. 78s(b)(7)(B).

[209] *Id.*

[210] *See* Form 19b–4, *General Instructions,* B. *Need for Careful Preparation of the Completed Form, Including Exhibits; Information to Be Included in the Completed Form,* Item 3, *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change;* and Item 5, *Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others.*

[211] 15 U.S.C. 78s(b)(7).

[212] *Id.*

[213] See Rule 19b–4(i), 17 CFR 240.19b–4(i).

[214] See Form 19b–4, *Exhibit 1*, Item II, *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*; and Item IV, *Solicitation of Comments.*

[215] *See* Form 19b–7 Notice, Item II, *Self-Regulatory Organization's Statement of the Purpose of, yand Statutory Basis for, the Proposed Rule Change;* and Item IV, *Solicitation of Comments.*

[216] *See* CBOE Letter.

[217] *Id.*

better assess the anticipated impact of such rule proposals. In addition, Rule 19b–7 and Form 19b–7 are intended to inform the Commission's consideration of whether a proposed rule change should be abrogated because it unduly burdens competition or efficiency, conflicts with securities laws, or is inconsistent with the public interest or the protection of investors. Accordingly, Rule 19b–7 and Form 19b–7 and amendments to Rule 19b–4 and Form 19b–4 should enable the Commission to carry out its statutorily-mandated oversight functions, including helping to ensure that SROs carry out their regulatory functions as well as protect the integrity of the markets, investors, and the public interest.

2. Costs

One commenter noted that the submission requirements proposed by the Commission are significantly more time consuming and detailed than those of the CFTC.[218] The commenter estimated that the time to file an individual rule proposal with the CFTC is less than a third of the time required with the Commission. The commenter, however, did not offer data to support this statement and noted that it did not keep records of the time spent on individual rule filings. This commenter also suggested that the expedited review provisions of Section 19(b)(7) could be met by sending the Commission a copy of the same rule filing sent to the CFTC. In addition, with respect to the requirement of providing the Commission with a summary of any written comments received by the Security Futures Product Exchange or Limited Purpose National Securities Association relating to the proposed rule change, the commenter stated that providing copies of communications that relate to earlier versions of the proposal would be both burdensome and of little value to the Commission, and suggested that the summary be limited to substantive comments and communications about the proposed rule change. Despite the suggestions, the commenter acknowledged that some of the more detailed requirements imposed by Rule 19b–7 and Form 19b–7 are dictated by the publication requirements imposed by the Exchange Act, but not by the CEA, and therefore, the commenter did not object to Rule 19b–7 and Form 19b–7.

In response, the Commission notes that the comment letters that the Commission receives relating to a given proposed rule change are beneficial in that they provide an understanding of the issues involved in a proposed rule change and its anticipated impact on market participants. The Commission also notes that comment letters that address editing changes of earlier drafts of proposed rule changes need not be filed with the Commission.

Two commenters stated that Rule 19b–7 and Form 19b–7 do not substantially expedite the rule filing process and would increase the regulatory burden on respondents.[219] For instance, the commenters felt that it would cost an SRO substantially more staff resources and legal fees to complete the new form then it does to complete current Form 19b–4. As a whole, these commenters felt that the costs in complying with the new requirements of the proposal may outweigh the benefits. They suggested that the Commission retain a shortened Form 19b–4 instead of using Form 19b–7, adopt a simple certification process like that proposed by the CFTC, remove legal uncertainty about the effectiveness of a rule filing being deemed filed based upon its completeness, and delete the assertion that the Commission will not necessarily make a final determination on whether a proposed rule change filed pursuant to Rule 19b–7 is in the public interest, including whether it has an impact on competition.[220] Furthermore, the commenters stated that Form 19b–7 contains numerous unnecessary, vague, and overwhelming information requirements that would increase the burden on respondents exponentially.[221] The commenters also stated that the conditions attached to a proposal being ''properly filed'' would create legal uncertainty for a respondent and cause respondents to spend a tremendous amount of additional staff and legal time on every proposed rule change.[222] The commenters also felt that the requirement that a senior official of a respondent file a detailed certification as part of a proposed rule change is ''completely unrealistic and unworkable.'' [223] The commenters recommended that the Commission instead require a simple certification that the official has reviewed the proposed rule change, without the detailed requirements, and state that the certification does not subject the official to liability if the certification was later found to be inconsistent with the securities laws.

The Commission has carefully considered the concerns raised by the commenters and, in response, has modified Rule 19b–7 and Form 19b–7 to more closely mirror the current rule filing process. Specifically, the Commission has decided not to adopt the certification requirement, nor the requirements that the filing describe how the proposed rule change relates to applicable provisions of the federal securities laws and the SRO rules. The Commission also has decided not to adopt the provision which stated that the effectiveness of a proposed rule change submitted pursuant to Section 19(b)(7) of the Exchange Act [224] would not create an inference of whether the proposed rule change was in the public interest, including whether it had an impact on competition. The Commission notes that the differences observed by the commenters between the Commission's SRO rule filing process and that of the CFTC is, in large part, the direct result of the different statutory mandates under which each agency operates. As discussed above, the requirements of Section 5c of the CEA differs markedly from the requirements set forth in Section 19(b) of the Exchange Act, which specifically requires the Commission to review and publish all proposed rule changes of the Security Futures Product Exchanges and Limited Purpose National Securities Associations, and the Commission must follow this statutory mandate.

Moreover, the Commission continues to believe that the costs associated with filing rule changes are predominately paperwork costs. As discussed above, the Commission estimates that the average paperwork cost per proposed rule change submitted on Form 19b–7 will be approximately $1,696.[225] The Commission estimates each respondent will file 15 proposed rule changes per year and incur an annual average burden of 232.5 hours for a total annual average cost of approximately $25,440. The Commission also estimates that the average paperwork cost per respondent to file proposed rule changes that relate to margin, except for changes that result in higher margin levels, or that have been abrogated pursuant to Section

[1] *See* NFA Letter.

[219] *See* CBOE Letter and CME Letter. One commenter applied its views of the Commission's proposed Rule 19b–6 and Form 19b–6 to Rule 19b–7 and Form 19b–7 due to the virtually identical wording of the proposed rules and forms. *See* CBOE Letter. The other commenter adopted this commenter's view of Rule 19b–7 and Form 19b–7. *See* CME Letter.

[220] *See* CBOE Letter and CME Letter.

[221] The commenters stated that the new form would require an SRO to conduct a comprehensive review of the federal securities laws, its own rules, prior filings relating to the proposed rule, and prior Commission action impacting the proposed rule.

[222] The commenters recommended that every rule filing be deemed filed when submitted to the Commission unless it is severely incomplete.

[223] *See* CBOE Letter and CME Letter.

[224] 15 U.S.C. 78s(b)(7).

[225] *See supra* Section V.B.4.

19(b)(7)(C) of the Exchange Act [226] and refiled under Section 19(b)(1) of the Exchange Act,[227] will be approximately $3,660.[228] In addition, the Commission estimates that the time associated with refiling an abrogated 19b–7 filing will delay the filing process by 30 days.

The Commission continues to believe that the rule filing process adopted today for Security Futures Product Exchanges and Limited Purpose National Securities Associations will enable the Commission and the markets to fulfill their statutory obligations and responsibilities, while imposing the minimum amount of burden necessary to fulfill the directives of the Exchange Act. As discussed above, the Commission has modified Rule 19b–7 and Form 19b–7 from the proposal to address concerns raised by commenters.

VII. Consideration of the Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [229] requires the Commission, whenever it is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act [230] requires the Commission, when promulgating rules under the Exchange Act, to consider the impact any such rules would have on competition. Section 23(a)(2) further provides that the Commission may not adopt a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, in the Proposing Release, the Commission requested comment on these issues.[231]

Two comments were received that specifically addressed the proposal's effect on competition. The Commission has considered these comments and reviewed the proposed rules in light of the standards set forth in sections 3(f) and 23(a)(2) of the Exchange Act.[232]

The first commenter asserted that a competitive disparity would result because options exchanges and Security Futures Product Exchanges, although direct competitors, will be subject to different rule filing processes.[233] The commenter noted that, currently, the options exchanges are subject to Rule 19b–4,[234] pursuant to which they must file proposed rule changes and many of these filings are subject to Commission approval. By contrast, Security Futures Product Exchanges would, under the Commission's proposal, file the vast majority of their proposed rule changes pursuant to Rule 19b–7, pursuant to which these rule changes would be effective on filing and would not require Commission approval. The commenter urged the Commission to eliminate this disparity in the rule filing process.

The Commission does not believe that the rule filing process for Security Futures Product Exchanges and Limited Purpose National Securities Associations will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. First, the statute provides for different procedures for rules filed by Security Futures Product Exchanges as compared to exchanges registered pursuant to section 6(a) and national securities associations registered pursuant to section 15A(a) of the Exchange Act. Second, in response to concerns raised by commenters, Rule 19b–7 and Form 19b–7 have been modified to parallel existing Rule 19b–4 and Form 19b–4, respectively. Third, the Exchange Act provides that most proposed rule changes filed by Security Futures Product Exchanges pursuant to Rule 19b–7 [235] may become effective without Commission approval, although this is not the case for many proposed rule changes submitted by the existing options exchanges pursuant to Rule 19b–4.[236] Thus, the Commission believes that adopting Rule 19b–7 in the manner that it has furthers the purposes of the Exchange Act in a manner consistent with competitive considerations. The Commission continues to study means by which to streamline the rule filing process for existing national securities exchanges and national securities associations, but adopting Rule 19b–7 will, in itself, have no adverse effects on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The second commenter asserted that, if the Commission's proposed rules with regard to notice registration were adopted, it would be more difficult for a futures market to notice register with the Commission than it would be for a securities market to become notice-designated by the CFTC. This commenter concluded that a competitive disparity would thereby result.[237]

The Commission does not believe that the notice registration process as adopted will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Exchange Act, as amended by the CFMA, specifically contemplates a notice registration process for futures markets that desire to register as Security Futures Product Exchanges, and gives the Commission the authority to require them to provide information ''comparable to the information and documents required for national securities exchanges.'' [238] The Commission believes that the notice registration process as adopted furthers the purposes of the Exchange Act in an appropriate manner. Moreover, Security Futures Product Exchanges will be subject to fewer reporting burdens imposed by the Commission than the existing securities exchanges, their direct competitors in the market for security futures products. Form 1–N (for Security Futures Product Exchanges) requires fewer exhibits than Form 1 (for other national securities exchanges), and, more importantly, Form 1–N is effective upon filing and does not require Commission approval, unlike Form 1. In addition, although the notice and amendments required by Rule 6a–4 [239] entail certain legal and clerical costs, these requirements have been carefully tailored to minimize the costs. The Commission concludes, therefore, that the anticompetitive effects of the notice registration process for Security Futures Product Exchanges—if any—would be minimal.

The Commission received no comments specifically relating to capital formation and one comment relating to efficiency.[240] This commenter described the rule filing process currently imposed by the CFTC on entities that will become Security Futures Product Exchanges and Limited Purpose National Securities Associations, and recommended that the Commission ultimately accept these CFTC filings,

[226] 15 U.S.C. 78s(b)(7)(C).

[227] 15 U.S.C. 78s(b)(1).

[228] *See supra* Section V.C.4.

[229] 15 U.S.C. 78c(f).

[230] 15 U.S.C. 78w(a)(2).

[231] *See* Proposing Release, *supra* note .

[232] 15 U.S.C. 78c(f) and 78w(a)(2).

[233] *See* CBOE Letter. A second commenter, although not commenting on proposed Rule 19b–7 itself, expressed concurrence with the views regarding proposed Rule 19b–7 expressed in the CBOE Letter. *See* CME Letter.

[234] 17 CFR 240.19b–4.

[235] 17 CFR 240.19b–7.

[236] 17 CFR 240.19b–4.

[237] *See* CBOT Letter. Another commenter, although not specifically discussing competitive considerations, stated that the Commission's proposal regarding notice registration would ''require a wasteful duplication of information that is on public file with the CFTC.'' CME Letter.

[238] 15 U.S.C. 78f(g)(2)(A).

[239] 17 CFR 240.6a–4.

[240] *See* NFA Letter.

with minor modifications, to satisfy the Commission's need to be informed of such entities' proposed rule changes. The commenter noted, however, that it ''is aware of the short deadlines that the CFMA imposes and recognizes that, given the time constraints SEC staff is working under, it may be more efficient in the short-term for the SEC to work from the model [for proposed rule changes] that it already has in place.'' The commenter also stated that it understood that some of the more detailed requirements imposed by proposed Rule 19b–7 and proposed Form 19b–7 were dictated by publication requirements imposed by the Exchange Act but not the Commodities Exchange Act. On this basis, the commenter stated that it would not object to the Commission's proposed Rule 19b–7 and proposed Form 19b–7.

The Commission continues to believe that the proposed rules will have a minimal effect on efficiency and capital formation. The Commission acknowledges that there are certain legal and clerical costs involved in notice registering and filing proposed rule changes with the Commission. The resources employed to meet these costs will not otherwise be available to Security Futures Product Exchanges and Limited Purpose National Securities Associations for other uses. Nevertheless, because filings made pursuant to Rules 6a–4 and 19b–7 [241] are effective on filing and do not require Commission approval, the Commission believes that the requirement to make these filings will have no substantial effect on efficiency.

VIII. Summary of Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act,[242] the Acting Chairman of the Commission certified that the adopted rules, forms, and conforming amendments would not have a significant economic impact on a substantial number of small entities. This certification, including the reasons therefore, was attached to the Proposing Release No. 34–44279 (May 8, 2001) as Appendix A. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

IX. Statutory Authority

The Commission is adopting the rules pursuant to its authority under Exchange Act sections 3(b), 5, 6, 11, 11A, 15A, 17(a) and (b), 19, and 23(a).

List of Subjects

17 CFR Part 202

Administrative practice and procedure, Securities.

17 CFR Part 240

Brokers-dealers, Fraud, Issuers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

Text of the Rules

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 202—INFORMAL AND OTHER PROCEDURES

1. The authority citation for part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 78d–1, 78u, 78w, 78*ll*(d), 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, and 80b–11, unless otherwise noted.

* * * * *

2. The authority citation following § 202.3 is removed.

3. Section 202.3 is amended by adding paragraph (b)(3) to read as follows:

§ 202.3 Processing of filings.

* * * * *

(b)(1) * * *

(3) Notice forms for registration as national securities exchanges pursuant to Section 6(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(g)(1)) filed with the Commission are routed to the Division of Market Regulation, which examines these notices to determine whether all necessary information has been supplied and whether all other required documents have been furnished in proper form. Defective notices may be returned with a request for correction or held until corrected before being accepted as a filing.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, and 80b–11, unless otherwise noted.

* * * * *

5. The authority citations following §§ 240.6a–2 and 240.6a–3 are removed.

6. Section 240.6a–2 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 240.6a–2 Amendments to application.

* * * * *

(e) The Commission may exempt a national securities exchange, or an exchange exempted from such registration based on limited volume, from filing the amendment required by this section for any affiliate or subsidiary listed in Exhibit C of the exchange's application for registration, as amended, that either:

(1) Is listed in Exhibit C of the application for registration or notice of registration, as amended, of one or more other national securities exchanges; or

(2) Was an inactive subsidiary throughout the subsidiary's latest fiscal year. Any such exemption may be granted upon terms and conditions the Commission deems necessary or appropriate in the public interest or for the protection of investors, provided however, that at least one national securities exchange shall be required to file the amendments required by this section for an affiliate or subsidiary described in paragraph (e)(1) of this section.

(f) A national securities exchange registered pursuant to Section 6(g)(1) of the Act (15 U.S.C. 78f(g)(1)) shall be exempt from the requirements of this section.

7. Section 240.6a–3 is amended by adding paragraph (c) to read as follows:

§ 240.6a–3 Supplemental material to be filed by exchanges.

* * * * *

(c) A national securities exchange registered pursuant to Section 6(g)(1) of the Act (15 U.S.C. 78f(g)(1)) shall be exempt from the requirements of this section.

8. Section 240.6a–4 is added to read as follow:

§ 240.6a–4 Notice of registration under Section 6(g) of the Act, amendment to such notice, and supplemental materials to be filed by exchanges registered under Section 6(g) of the Act.

(a) *Notice of registration.* (1) An exchange may register as a national securities exchange solely for the purposes of trading security futures products by filing Form 1–N (§ 249.10 of this chapter) (''notice of registration''), in accordance with the instructions contained therein, if:

[241] 17 CFR 240.6a–4 and 240.19b–7.

[242] 5 U.S.C. 605(b).

(i) The exchange is a board of trade, as that term in defined in the Commodity Exchange Act (7 U.S.C. 1a(2)), that:

(A) Has been designated a contract market by the Commodity Futures Trading Commission and such designation is not suspended by order of the Commodity Futures Trading Commission; or

(B) Is registered as a derivative transaction execution facility under Section 5a of the Commodity Exchange Act (7 U.S.C. 7a) and such registration is not suspended by the Commodity Futures Trading Commission; and

(ii) Such exchange does not serve as a market place for transactions in securities other than:

(A) Security futures products; or

(B) Futures on exempted securities or on groups or indexes of securities or options thereon that have been authorized under Section 2(a)(1)(C) of the Commodity Exchange Act (7 U.S.C. 2a).

(2) Promptly after the discovery that any information filed on Form 1–N (§ 249.10 of this chapter) was inaccurate when filed, the exchange shall file with the Commission an amendment correcting such inaccuracy.

(b) *Amendment to notice of registration.* (1) A national securities exchange registered pursuant to Section 6(g)(1) of the Act (15 U.S.C. 78f(g)(1)) (''Security Futures Product Exchange'') shall file an amendment to Form 1–N (§ 249.10 of this chapter), which shall set forth the nature and effective date of the action taken and shall provide any new information and correct any information rendered inaccurate, on Form 1–N (§ 249.10 of this chapter), within:

(i) Ten days after any action is taken that renders inaccurate, or that causes to be incomplete, any information filed on the Execution Page of Form 1–N (§ 249.10 of this chapter), or amendment thereto; or

(ii) 30 days after any action is taken that renders inaccurate, or that causes to be incomplete, any information filed as part of Exhibit F to Form 1–N (§ 249.10 of this chapter), or any amendments thereto.

(2) A Security Futures Product Exchange shall maintain records relating to changes in information required in Exhibits C and E to Form 1–N (§ 249.10 of this chapter) which shall be current of as of the latest practicable date, but shall, at a minimum, be up-to-date within 30 days. A Security Futures Product Exchange shall make such records available to the Commission and the public upon request.

(3) On or before June 30, 2002, and by June 30 every year thereafter, a Security Futures Product Exchange shall file, as an amendment to Form 1–N (§ 249.10 of this chapter), Exhibits F, H, and I, which shall be current of as of the latest practicable date, but shall, at a minimum, be up-to-date within three months as of the date the amendment is filed.

(4) On or before June 30, 2004, and by June 30 every three years thereafter, a Security Futures Product Exchange shall file, as an amendment to Form 1–N (§ 249.10 of this chapter), complete Exhibits A, B, C, and E, which shall be current of as of the latest practicable date, but shall, at a minimum, be up-to-date within three months as of the date the amendment is filed.

(5)(i) If a Security Futures Product Exchange, on an annual or more frequent basis, publishes, or cooperates in the publication of, any of the information required to be filed by paragraphs (b)(3) and (b)(4) of this section, in lieu of filing such information, a Security Futures Product Exchange may satisfy this filing requirement by:

(A) Identifying the publication in which such information is available, the name, address, and telephone number of the person from whom such publication may be obtained, and the price of such publication; and

(B) Certifying to the accuracy of such information as of its publication date.

(ii) If a Security Futures Product Exchange keeps the information required under paragraphs (b)(3) and (b)(4) of this section up-to-date and makes it available to the Commission and the public upon request, in lieu of filing such information, a Security Futures Product Exchange may satisfy this filing requirement by certifying that the information is kept up-to-date and is available to the Commission and the public upon request.

(iii) If the information required to be filed under paragraphs (b)(3) and (b)(4) of this section is available continuously on an Internet web site controlled by a Security Futures Product Exchange, in lieu of filing such information with the Commission, such Security Futures Product Exchange may satisfy this filing requirement by:

(A) Indicating the location of the Internet web site where such information may be found; and

(B) Certifying that the information available at such location is accurate as of its date.

(6)(i) The Commission may exempt a Security Futures Product Exchange from filing the amendment required by this section for any affiliate or subsidiary listed in Exhibit C to Form 1–N (§ 249.10 of this chapter), as amended, that either:

(A) Is listed in Exhibit C to Form 1 (§ 249.1 of this chapter) or to Form 1–N (§ 249.10 of this chapter), as amended, of one or more other national securities exchanges; or

(B) Was an inactive affiliate or subsidiary throughout the affiliate's or subsidiary's latest fiscal year.

(ii) Any such exemption may be granted upon terms and conditions the Commission deems necessary or appropriate in the public interest or for the protection of investors, provided however, that at least one national securities exchange shall be required to file the amendments required by this section for an affiliate or subsidiary described in paragraph (b)(6)(i) of this section.

(7) If a Security Futures Product Exchange has filed documents with the Commodity Futures Trading Commission, to the extent that such documents contain information satisfying the Commission's informational requirements, copies of such documents may be filed with the Commission in lieu of the required written notice.

(c) *Supplemental material to be filed by Security Futures Product Exchanges.* (1)(i) A Security Futures Product Exchange shall file with the Commission any material related to the trading of security futures products (including notices, circulars, bulletins, lists, and periodicals) issued or made generally available to members of, participants in, or subscribers to, the exchange. Such material shall be filed with the Commission within ten days after issuing or making such material available to members, participants, or subscribers.

(ii) If the information required to be filed under paragraph (c)(1)(i) of this section is available continuously on an Internet web site controlled by an exchange, in lieu of filing such information with the Commission, such exchange may:

(A) Indicate the location of the Internet web site where such information may be found; and

(B) Certify that the information available at such location is accurate as of its date.

(2) Within 15 days after the end of each calendar month, a Security Futures Product Exchange shall file a report concerning the security futures products traded on such exchange during the previous calendar month. Such a report shall:

(i) For each contract of sale for future delivery of a single security, the number

of contracts traded on such exchange during the relevant calendar month and the total number of shares underlying such contracts traded; and

(ii)For each contract of sale for future delivery of a narrow-based security index, the number of contracts traded on such exchange during the relevant calendar month and the total number of shares represented by the index underlying such contracts traded.

9. Section 240.19b–4 is amended by revising paragraph (a) to read as follows:

§ 240.19b–4 Filing with respect to proposed rule changes by self-regulatory organizations.

(a) Filings with respect to proposed rule changes by a self-regulatory organization, except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) of the Act (15 U.S.C. 78s(b)(7)), shall be made on Form 19b–4 (§ 249.819 of this chapter).

* * * * *

10. Section 240.19b–7 is added to read as follows:

§ 240.19b–7 Filings with respect to proposed rule changes submitted pursuant to Section 19(b)(7) of the Act.

(a) Filings with respect to proposed rule changes required to be submitted pursuant to Section 19(b)(7) of the Act (15 U.S.C. 78s(b)(7)), shall be made on Form 19b–7 (§ 249.822 of this chapter). The Commission will promptly publish a notice of filing of such proposed rule change.

(b) A proposed rule change will not be deemed filed on the date it is received by the Commission unless:

(1) A completed Form 19b–7 (§ 249.822 of this chapter) is submitted; and

(2) In order to elicit meaningful comment, it is accompanied by:

(i) A clear and accurate statement of the basis and purpose of such rule change, including the impact on competition or efficiency, if any; and

(ii) A summary of any written comments (including e-mail) received by the self-regulatory organization on the proposed rule change.

(c) Self-regulatory organizations shall retain at their principle place of business a file, available to interested persons for public inspection and copying, of all filings made pursuant to this section and all correspondence and other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning such filing, whether such correspondence and communications are received or prepared before or after the filing of the proposed rule change.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

12. Section 249.10 and Form 1–N are added to read as follows:

Note: Form 1–N is attached as Appendix A to this document. Form 1–N will not ppear in the Code of Federal Regulations.

§ 249.10 Form 1–N for notice registration as a national securities exchange.

This form shall be used for notice, and amendments to the notice, to permit an exchange to register as a national securities exchange solely for the purposes of trading security futures products pursuant to Section 6(g) of the Act (15 U.S.C. 78f(g)).

13. Section 249.819 is revised to read as follows:

§ 249.819 Form 19b–4, for filings with respect to proposed rule changes by all self-regulatory organizations, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934.

This form shall be used by all self-regulatory organizations, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)), to file proposed rule changes with the Commission pursuant to Section 19(b)(1) of that Act (15 U.S.C. 78s(b)(1)) and Rule 19b–4 (17 CFR 240.19b–4) thereunder.

14. Form 19b–4 (referenced in § 249.819) is amended by:

a. In General Instruction A, ''Use of the Form,'' revise the first sentence;

b. In General Instruction C, ''Documents Comprising the Completed Form,'' revise the last sentence;

c. In General Instruction E, ''Completion of Action by the Self-Regulatory Organization on the Proposed Rule Change,'' revise the last two sentences;

d. In General Instruction F, ''Signature and Filing of Completed Form,'' revise the first sentence;

e. In Information to Be Included in the Completed Form, item 3 ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change,'' revise the second and third sentences of the introductory text and paragraph (b);

f. In Information to Be Included in the Completed Form revise item 6, ''Extension of Time Period for Commission Action;''

g. In Information to Be Included in the Completed Form, item 7, ''Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2),'' revise the title and paragraph (d); and

h. In Exhibit 1, Information to Be Included in the Completed Notice, add two undesignated paragraphs to the end of Item III, ''Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action.''

The revisions and additions read as follows:

Note: Form 19b–4 and these amendments do not appear in the Code of Federal Regulations.

Form 19b–4

* * * * *

General Instructions

A. Use of the Form

This form shall be used for filings of proposed rule changes by all self-regulatory organizations pursuant to Section 19(b) of the Securities Exchange Act of 1934 (the ''Act'') except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) of the Act. * * *

* * * * *

C. Documents Comprising the Completed Form

* * * Each filing shall be marked on the facing sheet with the initials of the self-regulatory organization, the four-digit year, and the number of the filing for the year.

* * * * *

E. Completion of Action by the Self-Regulatory Organization on the Proposed Rule Change

* * * Nevertheless, proposed rule changes (other than proposed rule changes that are to take, or to be put into, effect pursuant to Section 19(b)(3) of the Act) may be initially filed before the completion of all such action if the self-regulatory organization consents, under Item 6 of this form, to an extension of the period of time specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act until at least thirty-five days after the self-regulatory organization has filed an appropriate amendment setting forth the taking of all such action. If a proposed rule change to be filed for review under Section 19(b)(2) or Section 19(b)(7)(D) of the Act is in preliminary form, the self-regulatory organization may elect to file initially Exhibit 1 setting forth a description of the subjects and issues expected to be involved.

F. Signature and Filing of the Completed Form

Nine copies of Form 19b–4, nine copies of Exhibit 1, four copies of Exhibits 2 and 3, and two copies of Exhibit 4 shall be filed with, in the case of filings by securities exchanges, the Assistant Director for Derivatives and Exchange Oversight; in the case of filings by securities associations or the Municipal Securities Rulemaking Board, the Assistant Director for NMS and OTC; and in the case of filings by clearing agencies, the Assistant Director for Securities Processing, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001; in the case of filings by securities exchanges registered pursuant to Section 6(g)(1) of the Act and national securities associations registered pursuant to Section 15A(k) of the Act, the Assistant Director for Security Futures Products, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1003. * * *

* * * * *

Information To Be Included in the Completed Form

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

* * * With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act, except for proposed rule changes that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding under Section 19(b)(2) of the Act that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding under Section 19(b)(7)(D) of the Act that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. * * *

* * * * *

(b) With respect to proposed rule changes filed pursuant to both Sections 19(b)(1) and 19(b)(2) of the Act, explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient. With respect to proposed rule changes filed pursuant Section 19(b)(1) of the Act that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, explain why the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest and the protection of investors, in accordance with Section 19(b)(7)(D) of the Act. A mere assertion that the proposed rule change satisfies these requirements is not sufficient. In the case of a registered clearing agency, also explain how the proposed rule change will be implemented consistently with the safeguarding of securities and funds in its custody or control or for which it is responsible. Certain limitations that the Act imposes on self-regulatory organizations are summarized in the notes that follow.

* * * * *

6. Extension of Time for Commission Action

State whether the self-regulatory organization consents to an extension of the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act and the duration of the extension, if any, to which the self-regulatory organization consents.

Note. The self-regulatory organization may elect to consent to an extension of the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act until it shall file an amendment which specifically states that the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act shall begin to run on the date of filing such amendment.

* * * * *

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

* * * * *

(d) If accelerated effectiveness pursuant to Section 19(b)(2) or Section 19(b)(7)(D) of the Act is requested, provide a statement explaining why there is good cause for the Commission to accelerate effectiveness.

* * * * *

Exhibit 1

* * * * *

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

* * * * *

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved.

* * * * *

15. Section 249.822 and Form 19b–7 are added to read as follows:

Note: Form 19b–7 is attached as Appendix B to this document. Form 19b–7 will not appear in the Code of Federal Regulations.

§ 249.822 Form 19b–7, for filings with respect to proposed rule changes by all self-regulatory organizations, pursuant to Section 19(b)(7)(A) of the Securities Exchange Act of 1934.

This form shall be used by all self-regulatory organizations, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)), to file proposed rule 77 changes with the Commission pursuant to Section 19(b)(7) of that Act (15 U.S.C. 78s(b)(7)) and Rule 19b–7 (17 CFR 240.19b–7) thereunder.

Dated: August 13, 2001.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

BILLING CODE 8010–01–U

Appendix A

Note: Appendix A to the preamble will not appear in the Code of Federal Regulations.

Form 1-N

OMB APPROVAL
OMB Number: 3235-0554
Expires: .....July 31, 2004
Estimated Average
burden hours per form: 31

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM AND AMENDMENTS FOR NOTICE OF REGISTRATION AS A NATIONAL SECURITIES EXCHANGE FOR THE SOLE PURPOSE OF TRADING SECURITY FUTURES PRODUCTS PURSUANT TO SECTION 6(g) OF THE EXCHANGE ACT

FORM 1-N INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form 1-N is the form for notice of registration as a national securities exchange for the sole purpose of trading security futures products ("Security Futures Product Exchange") pursuant to Section 6(g) of the Securities Exchange Act of 1934 ("Exchange Act").

2. **UPDATING** - A Security Futures Product Exchange must file amendments to Form 1-N in accordance with Exchange Act Rule 6a-4.

3. **CONTACT EMPLOYEE** - The individual listed on the Execution Page (Page 1) of Form 1-N as the contact employee must be authorized to receive all contact information, communications, and mailings and is responsible for disseminating such information within the Security Futures Product Exchange's organization.

4. **FORMAT**
- Attach an Execution Page (Page 1) with original manual signatures.
- Please type all information.
- Use only the current version of Form 1-N or a reproduction.

5. If the information called for by any Exhibit is available in printed form, the printed material may be filed provided it does not exceed 8 1/2 X 11 inches in size.

6. If any Exhibit required is inapplicable, a statement to that effect shall be furnished in lieu of such Exhibit.

7. An exchange that is filing Form 1-N may not satisfy the requirements to provide certain information by means of an Internet web page. All materials must be filed with the Commission in paper.

8. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and two copies of Form 1-N to: Securities and Exchange Commission, Division of Market Regulation, Office of Market Supervision, 450 Fifth Street, NW, Washington, DC 20549.

9. **PAPERWORK REDUCTION ACT DISCLOSURE**
- Form 1-N requires an exchange registering as a national securities exchange, for the sole purpose of trading security futures products, pursuant to Section 6(g) of the Exchange Act, to provide the Securities and Exchange Commission ("SEC" or "Commission") with certain information regarding its operation. If documents containing information satisfying the Commission's information requirements have been filed with the Commodity Futures Trading Commission, copies of such documents may be filed with the Commission. Security Futures Product Exchanges are also required to update certain information filed on Form 1-N on a periodic basis.

- An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Sections 3(a)(1), 5, 6(a), and 23(a) of the Exchange Act authorize the Commission to collect information on this Form 1-N. *See* 15 U.S.C. §§ 78c(a)(1), 78e, 78f(a), and 78w(a).

- Form 1-N is designed to enable the Commission to determine whether a Security Futures Product Exchange is in compliance with the Exchange Act.

- It is estimated that an exchange will spend approximately 31 hours completing the initial application on Form 1-N pursuant to Rule 6a-4. It also is estimated that each Security Futures Product Exchange will spend approximately 15 hours to prepare each amendment to Form 1-N pursuant to Rule 6a-4.

- Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

- It is mandatory that an exchange seeking to operate as a national securities exchange for the sole purpose of trading security futures products file a Form 1-N with the Commission. It is also mandatory that Security Futures Product Exchanges file amendments to Form 1-N under Rule 6a-4.

- No assurance of confidentiality is given by the Commission with respect to the responses made in Form 1-N. The public has access to the information contained in Form 1-N.

- This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records are set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

Form 1-N Page 1 Execution Page	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 FORM AND AMENDMENTS FOR NOTICE OF REGISTRATION AS A NATIONAL SECURITIES EXCHANGE FOR THE SOLE PURPOSE OF TRADING SECURITY FUTURES PRODUCTS PURSUANT TO SECTION 6(g) OF THE EXCHANGE ACT	Date filed (MM/DD/YY):

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of a national securities exchange would violate the federal securities laws and may result in disciplinary, administrative or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

❁ APPLICATION ❁ AMENDMENT

1. State the name of the exchange: _____

2. Provide the Security Futures Product Exchange's primary street address (Do not use a P.O. Box):

_____

_____

3. Provide the exchange's mailing address (if different):

_____

_____

4. Provide the business telephone and facsimile number:

_____

(Telephone) (Facsimile)

5. Provide the name, title and telephone number of a contact employee:

_____

(Name) (Title) (Telephone Number)

6. Provide the name and address of counsel for the exchange:

_____

_____

7. Provide the date that the exchange's fiscal year ends: _____

8. Indicate legal status of the exchange: ☐ Corporation ☐ Sole Proprietorship ☐ Partnership

☐ Limited Liability Company ☐ Other (specify): _____

If other than a sole proprietor, indicate the date and place where the exchange obtained its legal status (e.g., state where incorporated, place where partnership agreement was filed, or where the Security Futures Product Exchange entity was formed):
(a) Date (MM/DD/YY): _____ (b) State/Country of formation: _____

(c) Statute under which the exchange was organized: _____

EXECUTION:

The exchange consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the exchange's activities may be given by registered or certified mail or confirmed telegram to the exchange's contact employee at the main address, or mailing address if different, given in Items 2 and 3. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said exchange. The undersigned and the exchange represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date: _____ _____
(MM/DD/YY) (Name of Exchange)

By: _____ _____
(Signature) (Printed Name and Title)

Subscribed and sworn before me this _____ day of _____, _____ by _____
(Month) (Year) (Notary Public)

My Commission expires _____ County of _____ State of _____

This page must always be completed in full with original, manual signature and notarization.
Affix notary stamp or seal where applicable.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form 1-N Page 2	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 FORM AND AMENDMENTS FOR NOTICE OF REGISTRATION AS A NATIONAL SECURITIES EXCHANGE FOR THE SOLE PURPOSE OF TRADING SECURITY FUTURES PRODUCTS PURSUANT TO SECTION 6(g) OF THE EXCHANGE ACT	OFFICIAL USE	OFFICIAL USE ONLY

EXHIBITS

File all Exhibits with: a form for notice of registration as a national securities exchange for the sole purpose of trading security futures products pursuant to Section 6(g) of the Exchange Act and Rule 6a-4, or amendments to such forms pursuant to Rule 6a-4. For each exhibit, include the name of the filing exchange, the date upon which the exhibit was filed, and the date as of which the information is accurate (if different from the date of the filing). If any Exhibit required is inapplicable, a statement to that effect shall be furnished in lieu of such Exhibit.

Exhibit A As of the latest date practicable within one (1) month of the date Form 1-N is filed, a copy of the constitution, articles of incorporation or association with all subsequent amendments, and existing by-laws or corresponding rules or instruments, whatever the name, of the filing exchange.

Exhibit B As of the latest date practicable within one (1) month of the date Form 1-N is filed, a copy of all written rulings, settled practices having the effect of rules, and interpretations of the Governing Board or other committee of the exchange in respect of any provisions of the constitution, by-laws, rules, or trading practices of the filing exchange which are not included in Exhibit A.

Exhibit C As of the latest date practicable within one (1) month of the date Form 1-N is filed, for each subsidiary or affiliate of the filing exchange that will be involved in the trading of security futures products, and for any entity with whom the exchange has a contractual or other agreement relating to the operation of an electronic trading system to be used to effect transactions in security futures products on the exchange ("System"), provide the following information:

1. Name and address of organization.
2. Form of organization (e.g., association, corporation, partnership, etc.).
3. Name of state and statute citation under which organized. Date of incorporation in present form.
4. Brief description of nature and extent of affiliation.
5. Brief description of business or functions. Description should include responsibilities with respect to operation of the System and/or execution, reporting, clearance (including the controls that will be implemented to ensure the safety of held funds or securities), or settlement of transactions in connection with operation of the System.
6. A copy of the constitution.
7. A copy of the articles of incorporation or association including all amendments.
8. A copy of existing by-laws or corresponding rules or instruments.
9. The name and title of the present officers, governors, or persons performing similar functions.
10. An indication of whether such business or organization ceased to be associated with the Security Futures Product Exchange during the previous year, and a brief statement of the reasons for termination of the association.

Exhibit D Describe the manner of operation of the System involving trading of security futures products. This description should include the following:

1. The means of access to the System.
2. Procedures governing entry and display of quotations and orders in the System.
3. Procedures governing the execution, reporting, clearance, and settlement of transactions in connection with the System.
4. Proposed fees.
5. Procedures for ensuring compliance with System usage guidelines.

Form 1-N Page 3	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 FORM AND AMENDMENTS FOR NOTICE OF REGISTRATION AS A NATIONAL SECURITIES EXCHANGE FOR THE SOLE PURPOSE OF TRADING SECURITY FUTURES PRODUCTS PURSUANT TO SECTION 6(g) OF THE EXCHANGE ACT	OFFICIAL USE	OFFICIAL USE ONLY
	6. The hours of operation of the System, and the date on which the exchange intends to commence operation of the System. 7. Attach a copy of the users' manual.		
Exhibit E	A list of the officers, governors, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year, indicating the following for each: 1. Name. 2. Title. 3. Dates of commencement and termination of term of office or position. 4. Type of business in which each is primarily engaged.		
Exhibit F	This Exhibit is applicable only to filing exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange and should be current as of the latest date practicable within 1 month of the date Form 1-N is filed. If the exchange is a corporation, please provide a list of each shareholder that directly owns 5% or more of a class of a voting security of the Security Futures Product Exchange. If the exchange is a partnership, please provide a list of all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of the partnership's capital. For each of the persons listed in the Exhibit F, please provide the following: 1. Full legal name. 2. Title or Status. 3. Date title or status was acquired. 4. Approximate ownership interest. 5. Whether the person has control, a term that is defined in the instructions to this Form.		
Exhibit G	To the extent not covered in an exchange's rules submitted under Exhibit A, describe the Security Futures Product Exchange's criteria for membership. Describe conditions under which members may be subject to suspension or termination for infractions relating to the trading of security futures products. Describe any procedures that will be involved in the suspension or termination of a member for such infractions.		
Exhibit H	As of the latest date practicable within 1 month of the date Form 1-N is filed, provide an alphabetical list of all members, participants, subscribers, or other users, including the following information: 1. Name. 2. If member, participant, subscriber, or other user is an individual, the name of the entity with which such individual is associated and the relationship of such individual to the entity (e.g., partner, officer, director, employee, etc.). 3. Brief description of the type of activities primarily engaged in by the member, participant, subscriber, or other user. A person shall be "primarily engaged" in an activity or function for purposes of this item when that activity or function is the one in which that person is engaged for the majority of their time. When more than one type of person at an entity engages in activities or functions, identify each type and state the number of members, participants, subscribers, or other users in each. 4. The class of membership, participation, subscription, or other access.		
Exhibit I	Provide a schedule of the security futures products proposed to be listed by the filing exchange, or for amendments to the Form 1-N the security futures products listed by the exchange, indicating for each the name of the issuer and a description of the security.		

BILLING CODE 8010–01–C

Appendix B

Note: Appendix B to the preamble will not appear in the Code of Federal Regulations.

OMB Approval

OMB Number: 3235–0553
Expires: July 31, 2004
Estimated average burden hours 15.5

FORM 19b–7

File No. SR _____
Amendment No. _____
(If Applicable)*

Securities and Exchange Commission, Washington, DC 20549, Form 19b–7

Proposed Rule Change by

_____
(Exact Name of Self-Regulatory Organization)*

Pursuant to Rule 19b–7 Under the Securities Exchange Act of 1934

*(Do not include parenthetical material in completed form)

Pursuant to the requirements of the Securities Exchange Act of 1934, the self-regulatory organization has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Self-Regulatory Organization)

By: _____
(Signature. Print name and title of signer below signature.)

General Instructions

When Should This Form Be Used?

This form must be used for filings of proposed rule changes by all self-regulatory organizations (''SROs'') that are required to submit proposed rule changes pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''). National securities exchanges registered pursuant to Section 6(g) of the Act, and limited purpose national securities associations registered pursuant to Section 15A(k) of the Act, are SROs for purposes of this form.

Terms

Unless the context clearly indicates otherwise, terms used in this form have the meaning ascribed to them in the Act, as amended, and Rule 19b–7 thereunder.

Format Requirements

The Notice section of this Form 19b–7 must comply with the guidelines for publication in the **Federal Register**. The Office of the Federal Register (''OFR'') [http://www.nara.gov/fedreg] offers guidance on *Federal Register* publication requirements in the *Federal Register Document Drafting Handbook,* October 1998 Revision. For example, all references to the federal securities laws and the Commodity Exchange Act (''CEA'') must include the corresponding cite to the United States Code in a footnote. All references to the Securities and Exchange Commission (''SEC'' or ''Commission'') and Commodity Futures Trading Commission (''CFTC'') rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases and CFTC decisions, orders, or letters must include the release number, release date, **Federal Register** cite, **Federal Register** date, and corresponding file number (*e.g.,* SR–[SRO]–xxxx–xx). In addition, the OFR's *Drafting Legal Documents* is a general style guide to clear and concise legal writing.

When Is a Proposed Rule Change Considered Filed?

To be considered filed, an SRO must include with its proposed rule change: A completed Form 19b–7 that includes the cover sheet, Notice, and applicable Exhibits. Each cover sheet, Notice and Exhibit must include a file number that is assigned by the SRO, which includes the initials of the SRO, the 4-digit year and the number of the filing for that year (SR–[SRO]–XXXX–XX). The proposed rule change will be considered filed on the date that the Commission receives it if the filing complies with all requirements of this form and the requirements of Rule 19b–7. Any filing that does not comply with all of the requirements of this form will not be considered filed with the Commission and will be returned to the SRO.

The SRO must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal. This information also is necessary for the Commission to determine whether abrogation of the proposal is appropriate because it unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. It is the responsibility of the SRO to prepare Items I, II, and III of the Notice.

What Other Information Must an SRO Include When Filing a Proposed Rule Change?

Exhibit 1

(a) Copies of all notices issued by the SRO soliciting comment on the proposed rule change.

(b) Copies of all written comments on the proposed rule change received by the SRO, even if the SRO did not solicit comments. All comments should be presented in alphabetical order, together with an alphabetical listing of the commenters.

(c) Any transcript of comments on the proposed rule change made at any public meeting or, if a transcript is not available, a summary of comments on the proposed rule change made at any meeting.

(d) Any correspondence or other communications reduced to writing (including comment letters and e-mails) concerning the proposed rule change prepared or received by the SRO. All correspondence or other communications should be presented in alphabetical order together with an alphabetical listing of the authors.

(e) If after the proposed rule change is filed but before the Commission takes final action on it, the SRO prepares or receives any correspondence or other communications reduced to writing (including comment letters and e-mails) concerning the proposed rule change, copies of the communications must be filed as previously instructed in paragraph (b) above.

Exhibit 2

Copies of any form, report, or questionnaire that the SRO proposes to use to help implement or operate the proposed rule change, or that is referred to in the proposed rule change.

Exhibit 3

A statement of the SRO that describes the procedures of the SRO taken with regards to the proposed rule change. Such statement must include:

(a) A description of the action taken on the proposed rule change by the members or board of directors or other governing body of the SRO.

(b) The name(s) and telephone number(s) of the persons on the staff of the SRO prepared to respond to questions and comments on the proposed rule change.

Exhibit 4

Text of the proposed rule change. Indicate new language by underscoring and language to be deleted by brackets. If the proposed rule change will have any direct effect, or significant indirect effect, on the application of any other rule of the SRO, set forth the designation or title of any such rule and describe the anticipated effect of the proposed rule on the application of such other rule. If the proposed rule change amends an existing rule of the SRO, set forth the file numbers for any prior filings with respect to the existing rule.

Exhibit 5

A copy of any certification submitted to the CFTC pursuant to Section 5c(c) of the Commodity Exchange Act; a copy of any request submitted to the CFTC for a determination by the CFTC that review of the proposed rule change is not necessary and any indication from the CFTC that it has determined that review of the proposed rule change is not necessary; or a copy of any request submitted to the CFTC for approval of the proposed rule change and any indication received from the CFTC that the proposed rule change has been approved.

What To Do if There Is an Amendment to the Proposed Rule Change

If information on the Form 19b–7 Notice or any applicable Exhibit is or becomes inaccurate or incomplete before the proposed rule change becomes effective, the SRO must file correcting amendments. Nine copies of amendments, including one manually signed copy, must be provided. If an amendment alters the text of the proposed rule change as it appeared prior to the amendment, the amendment must mark the text, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of this requirement is to permit the staff to immediately identify any changes made to the previous version of the rule text.

Where and How To File

Nine copies of Form 19b–7 and all applicable exhibits must be filed with the Office of Market Supervision, Division of

Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549–1003. The chief executive officer, general counsel, or other officer or director of the SRO that exercises similar authority must manually sign at least one copy of the completed Form 19b–7. Please note that any information filed by the SRO requesting confidential treatment must be filed on paper with the Commission.

FORM 19b–7 NOTICE

Securities and Exchange Commission
(Release No. 34–; File No. SR–)
Self-Regulatory Organization; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by [Name of Self-Regulatory Organization] Relating to [brief description of proposed rule change]

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on [date [3]], the [name of self-regulatory organization] filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. [Name of self-regulatory organization] also has filed the proposed rule change with the Commodity Futures Trading Commission (''CFTC''). (Section 19(b)(7)(B) of the Act provides that a proposed rule change may take effect upon the occurrence of one of three events. The self-regulatory organization should include one of the following sentences, whichever is applicable.)

The [name of self-regulatory organization] filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act on [date]; *or*

The [name of self-regulatory organization], on [date], has requested that the CFTC make a determination that review of the proposed rule change of the [self-regulatory organization] is not necessary. The CFTC has [made such determination on [date]]; or [has not made such determination]; *or*

The [name of self-regulatory organization], on [date] submitted the proposed rule change to the CFTC for approval. The CFTC [approved the proposed rule change on [date]]; or [has not approved the proposed rule change].

I. Self-Regulatory Organization's Description of the Proposed Rule Change

(Supply a brief statement of the terms of substance of the proposed rule change. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate the changes in the rule by brackets for words to be deleted and underscoring for words to be added.)

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

[Name of self-regulatory organization] has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(Provide a statement of the purpose of the proposed rule. The statement must:

- Describe the text of the proposed rule change in a sufficiently detailed and specific manner as to permit interested persons to submit comments;
- Describe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will resolve those problems, the manner in which the proposed rule change will affect various market participants, and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change;
- Describe how the proposed rule change relates to existing rules of the self-regulatory organization.)

2. Statutory Basis

(Provide a statement of the proposed rule change's basis under the Act and the rules and regulations under the Act applicable to the self-regulatory organization.)

B. Self-Regulatory Organization's Statement on Burden on Competition

(The information required by this section must be sufficiently detailed and specific to support the premise that the proposed rule change does not unduly burden competition. In responding to this section, the self-regulatory organization must:

- State whether the proposed rule change will impose or relieve any burden on, or promote, competition;
- Specify the particular categories of persons and kinds of businesses that will be burdened and the ways in which the proposed rule change will affect them;
- Set forth and respond in detail to written comments addressing significant impacts or burdens on competition; and
- Explain why any burden on competition is not undue; or, if the self-regulatory organization does not believe that the burden on competition is significant, explain why.)

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

(State whether or not comments were solicited or received. Summarize all comments received (solicited or unsolicited) and respond in detail to any significant issues raised about the proposed rule change.

If an issue is summarized and responded to in detail elsewhere in this notice, that response need not be duplicated if an appropriate cross-reference is made to the place where the response can be found.)

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

(The self-regulatory organization must include the following with the applicable phrase on the proposed rule change's effectiveness:)

The proposed rule change has become effective on [insert date of filing of written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act; or the date of determination by the CFTC that review of the proposed rule change is not necessary; or the date of approval of the proposed rule change by the CFTC]; *or*

The proposed rule change is not effective because the CFTC [has not determined that review of the proposed rule changes is not necessary] or [has not approved the proposed rule change].

Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change conflicts with the Act. Persons making written submissions should file nine copies of the submission with the Secretary, Securities and Exhange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically to the following e-mail address: *rule-comments@sec.gov*. 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 these filings also will be available for inspection and copying at the principal office of the [name of self-regulatory organization]. Electronically submitted comments will be posted on the Commission's Internet website (http://www.sec.gov). All submissions should refer to File No. [insert file number] and should be submitted by [insert date 21 days from date of publication in the **Federal Register** [4]].

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] To be completed by the Commission. This date will be the date on which the Commission receives the proposed rule change filing if the filing complies with all requirements of this form. *See* General Instructions.

[4] To be completed by the **Federal Register** when the notice is submitted for publication.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

[5] 17 CFR 200.30–3(a)(75).

[Insert name of Secretary]
Secretary

[FR Doc. 01–20735 Filed 8–17–01; 8:45 am]

BILLING CODE 8010–01–U

Federal Register

Monday,
August 20, 2001

Part V

Department of Education

Student Assistance General Provisions, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Leveraging Educational Assistance Partnership, and William D. Ford Federal Direct Loan; Notice

DEPARTMENT OF EDUCATION

[CFDA Nos. 84.007, 84.032, 84.033, 84.038, 84.063, 84.069, and 84.268]

Student Assistance General Provisions, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Leveraging Educational Assistance Partnership, and William D. Ford Federal Direct Loan; Notice of Deadline and Submission Dates for Receipt of Applications, Reports, and Other Documents for the 2001–2002 Award Year

SUMMARY: The Secretary announces the deadline and submission dates for receiving documents from institutions and applicants for assistance under the Federal Perkins Loan, Federal Work-Study (FWS), Federal Supplemental Educational Opportunity Grant (FSEOG), Federal Family Education Loan (FFEL), William D. Ford Federal Direct Loan (Direct Loan), Federal Pell Grant, and Leveraging Educational Assistance Partnership (LEAP) programs for the 2001–2002 award year.

The FSEOG (84.007), FFEL (84.032), FWS (84.033), Federal Perkins Loan (84.038), Federal Pell Grant (84.063), LEAP (84.069), and Direct Loan (84.268) programs, administered by the U.S. Department of Education (Department), provide assistance to students attending eligible institutions of higher education to help them pay for their educational costs.

Deadline and Submission Dates: See Tables A and B at the end of this notice.

Table A provides deadline dates for application processing and receipt of Student Aid Reports (SARs) or Institutional Student Information Records (ISIRs).

Table B provides the earliest submission and deadline dates for submitting Federal Pell Grant Disbursement Records to the Department's Recipient Financial Management System (RFMS). Any disbursement record received prior to the earliest submission date is rejected. The Secretary may initiate an adverse action, such as a fine or other penalty, for an institution's failure to submit a Federal Pell Grant disbursement record within the required 30-day timeframe. That failure may also result in an audit or program review finding for an institution.

In general, an institution must submit a Federal Pell Grant disbursement record no later than 30 days after disbursing a Federal Pell Grant to a student. The Secretary considers a disbursement of Federal Pell Grant funds to occur on the earlier of the date that the institution: (a) Credits those funds to a student's account in the institution's general ledger or any subledger of the general ledger, or (b) pays those funds to a student directly. The Secretary considers a disbursement to have occurred even if institutional funds are used in advance of receiving the program funds from the Department (34 CFR 668.164(a)).

Table B also provides the latest date an institution may request Year-To-Date records and administrative relief.

Proof of Delivery

The Secretary accepts as proof of delivery if the documents were submitted by mail or by non-U.S. Postal Service courier, one of the following:

(1) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(2) A legibly-dated U.S. Postal Service postmark.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method of proof of mailing, check with the post office at which the submission was mailed. The Secretary strongly encourages the use of First Class Mail.

(3) A dated shipping label, invoice, or receipt from a commercial courier.

(4) Other proof of mailing or delivery acceptable to the Secretary.

Other Sources for Detailed Information on the Application and Automated Processes

A more detailed discussion of the student application process for the Federal Pell Grant Program is contained in the Department's following publications:

- *2001–2002 Student Guide.*
- *Funding Your Education.*
- *2001–2002 High School Counselor's Handbook.*
- *A Guide to 2001–2002 SARs and ISIRs.*
- *2001–2002 Federal Student Financial Aid Handbook.*

A more detailed discussion of the institutional reporting requirements for the Federal Pell Grant Program is also contained in the *Federal Student Financial Aid Handbook.* These materials may be found at the Information for Financial Aid Professionals web site at: http://www.ifap.ed.gov.

Applicable Regulations: The following regulations apply: (1) Federal Pell Grant Program, 34 CFR part 690, (2) Student Assistance General Provisions, 34 CFR part 668, and (3) Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR part 600.

FOR FURTHER INFORMATION CONTACT: Jacquelyn C. Butler, Program Specialist, U.S. Department of Education, Office of Student Financial Assistance Programs, 400 Maryland Avenue, SW., ROB–3, room 3045, Washington, DC 20202–5447. Telephone: (202) 708–8242.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: http://www.ed.gov/legislation/FedRegister.

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area, at (202) 512–1530.

You may also view this document in text or PDF at the following site: *http://www.ifap.ed.gov.*

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://www.access.gpo.gov/nara/index.html.

Program Authority: 20 U.S.C. 421–429, 1070a, 1070b–1070b–3, 1070c–1070c–4, 1071–1087–2, 1087a, and 1087aa–1087ii; 42 U.S.C. 2751–2756b.

Dated: August 14, 2001.

Greg Woods,

Chief Operating Officer, Student Financial Assistance.

TABLE A.—DEADLINE DATES FOR APPLICATION PROCESSING AND RECEIPT OF STUDENT AID REPORTS (SARS) OR INSTITUTIONAL STUDENT INFORMATION RECORDS (ISIRS)

Who submits?	What is submitted?	Where is it submitted?	What is the deadline date for receipt?
Student	Free Application for Federal Student Aid (FAFSA) on the Web, Renewal FAFSA on the Web, or FAFSA Express electronic application.	Electronically to the Department's Central Processing System (CPS).	July 1, 2002.[1]
	Signature Page (if required)	The address printed on the signature page.	August 21, 2002.
Student through an Institution	An electronic original or renewal application.	Electronically to the Department's CPS.	July 1, 2002.[1]
Student	A paper original Free Application for Federal Student Aid (FAFSA) or paper Renewal FAFSA.	The address printed on the FAFSA, Renewal FAFSA, or envelope provided with the form.	July 1, 2002.
Student	Correction on the Web	Electronically to the Department's CPS.	August 16, 2002.[1]
	Signature Page (if required)	The address printed on the signature page.	August 21, 2002.
Student through an Institution	Electronic corrections and duplicate requests.	Electronically to the Department's CPS.	August 27, 2002.[1]
Student	Corrections submitted using Part 2 of an SAR.	The address printed on Part 2 of the SAR.	August 16, 2002.
Student	Change of address, change of institutions, and duplicate requests.	The address printed on Part 2 of the SAR.	August 16, 2002.
		The Federal Student Aid Information Center by calling 1–800–433–3243.	August 27, 2002.
Student	Valid SAR	Institution	The earlier of:
Student through the Department's CPS.	Valid ISIR[4]	Institution receives ISIR from the Department's CPS.	—The student's last date of enrollment; or —September 3, 2002.
Student	Verification documents	Institution	The earlier of:[2] —90 days after the student's last date of enrollment; or —September 3, 2002.
Student	Valid SAR after verification	Institution	The earlier of:[3]
Student through the Department's CPS.	Valid ISIR after verification.[4]	Institution receives ISIR from the Department's CPS.	—90 days after the student's last date of enrollment; or —September 3, 2002.

[1] The deadline for electronic transactions is 12 midnight (Central Time) on the deadline date. Transmissions must be completed and accepted by 12 midnight to meet the deadline. If transmissions are started before 12 midnight but are not completed until after 12 midnight, those transmissions will not meet the deadline. In addition, an transmission picked up on or just prior to the deadline date that gets rejected may not be able to be reprocessed because the deadline will have passed by the time the user gets the information notifying him/her of the reject.

[2] Although the Secretary has set this deadline date for the submission verification documents to the institution, if corrections are required, the earlier deadline dates for submission of paper or electronic corrections must still be met.

[3] The institution must have already received an SAR or ISIR with an eligible EFC while the student was enrolled and eligible for payment. Students completing verification while no longer enrolled will be paid based on the higher of the two EFCs.

[4] For this purpose, the date the ISIR transaction was processed by CPS is considered to be the date the institution received the ISIR. The CPS process date is on the 2001–2002 ISIR record layout, field 163. It is also printed on the first page of the SAR and ISIR.

TABLE B.—EARLIEST SUBMISSION AND DEADLINE DATES FOR SUBMITTING FEDERAL PELL GRANT DISBURSEMENT RECORDS

Who submits?	What is submitted?	Where is it submitted?	What is the earliest submission and deadline date for receipt?
Institution	At least one acceptable disbursement record must be submitted for each. Federal Pell Grant recipient at the institution by: Electronic Data Exchange (EDE)[1]	To RFMS using EDE or custom software: Student Air Internet Gateway (SAIG) (formerly Title IV Wide Area Network)	An institution may submit disbursement records as early as June 21, 2001, but can not submit a disbursement record any earlier than: (a) 30 calendar days prior to the disbursement date under the Advance payment method; (b) 5 calendar days prior to the disbursement date under the Just in-time payment method; or (c) The date of disbursement under the Reimbursement or Cash Monitoring payment methods.

TABLE B.—EARLIEST SUBMISSION AND DEADLINE DATES FOR SUBMITTING FEDERAL PELL GRANT DISBURSEMENT RECORDS—Continued

Who submits?	What is submitted?	Where is it submitted?	What is the earliest submission and deadline date for receipt?
			An institution is required to submit a disbursement record not later than the earlier of: (1) 30 calendar days after the institution —Makes a disbursement; or —Becomes aware of the need to make an adjustment to previously reported disbursement data; or (b) September 30, 2002. After September 30, 2002, an institution may submit a disbursement record only: (a) For a downward adjustment of a previously reported award; or (b) Based upon a program review or initial audit finding per 34 CFR 690.83.
	Requests for Year-To-Date Records.	1. Pell Grant User Support Hotline: 1–800–474–7268 2. http://www.pellgrantsonline.ed.gov. 3. SAIG.	August 16, 2002.[2]
	Request for administrative relief based on a natural disaster or other unusual circumstances, or an administrative error made by the Department or Departmental contractors.	1. U.S. Department of Education, Office of Student Financial Assistance, Schools Channel/Pell Operations, P.O. Box 23781, Washington, DC 20026–0781. 2. http://www. pellgrantson line.ed.gov. 3. by email: *sfa. administrative. relief@ed.gov*.	January 31, 2003.

[1] An institution must ensure that its transmission of disbursement records is completed before midnight (local time at the institution's EDE destination point) on September 30, 2002.

[2] Year-To-Date records may be requested after this date, however, there may not be sufficient time for institutions to receive the file, create a disbursement record batch and submit to the Secretary by the September 30, 2002 deadline date for receipt of all 2001–2002 requests for payment.

Note: RFMS must accept a student origination record for a student from an institution before it accepts a disbursement record from the institution for that student. An institution may submit an origination and a disbursement record for a student in the same transmission.

[FR Doc. 01–20855 Filed 8–17–01; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Monday,
August 20, 2001

Part VI

Department of Agriculture

Cooperative State Research, Education, and Extension Service

Notice of Listening Sessions; Notice

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Solicitation of Input From Stakeholders on Agricultural Research, Extension, and Education Grant Programs Administered by the Cooperative State Research, Education, and Extension Service

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Notice of listening sessions.

SUMMARY: Section 102(b) of the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA) (7 U.S.C. 7612) requires the Cooperative State Research, Education, and Extension Service (CSREES) in establishing priorities for agricultural research, extension, and education activities conducted or funded by CSREES to solicit and consider input and recommendations from persons who conduct or use agricultural research, extension, or education. CSREES is in the process of conducting listening sessions in four different geographic locations in the United States to solicit stakeholder input. The notice for the first two listening sessions was published in the **Federal Register** on June 25, 2001 [66 FR 33826–33828]. They were held in Lancaster, Pennsylvania, on July 12, 2001, and in Minneapolis, Minnesota, on July 25, 2001. The third and fourth listening session will be held in Fresno, California, on October 3, 2001, and in New Orleans, Louisiana, on October 25, 2001. As part of this stakeholder input process, CSREES also will be soliciting input and comments on the effectiveness of existing agricultural research, education, and extension programs administered by CSREES in meeting current and future challenges to the United States' food and agriculture system.

DATES AND ADDRESSES: The third listening session will be held on Wednesday, October 3, 2001, from 8:30 a.m. to 5 p.m. at the Picadilly Inn University; 4961 N. Cedar Avenue; Fresno, CA 93726. Attendees must make their own hotel arrangements. A block of sleeping rooms at a conference rate is being held until September 10, 2001, listed under the name of USDA. Rooms can be reserved by calling the hotel directly at 559–224–4200.

The fourth listening session will be held on Thursday, October 25, 2001, from 8:30 a.m. to 5 p.m. at Agricultural Research Service, USDA; Southern Regional Research Center; 1100 Robert E. Lee Boulevard; New Orleans, LA 70124. A block of sleeping rooms at a conference rate is being held at The Iberville Suites; 910 Iberville Street; New Orleans, LA 70112; until October 5, 2001, listed under the name of USDA. Attendees must make their own hotel arrangements. Rooms can be reserved by calling the hotel directly at 504–523–2400.

To aid participants in scheduling their attendance, the following schedule is anticipated for each listening session.

- 8:30 a.m.–9 a.m.—Introductory Remarks and Background
- 9 a.m.–2 p.m.—Scheduled 5-Minute Comment Periods
- 2 p.m.–3 p.m.—Roundtable Discussion Group Meetings
- 3 p.m.—Reports from Roundtable Discussion Group Meetings

FOR FURTHER INFORMATION CONTACT: Persons wishing to present oral comments at these meetings are requested to pre-register by contacting Ms. Mary H. Humphreys at (202) 720–2667, by fax at (202) 720–2750 or by e-mail to mhumphreys@reeusda.gov. CSREES is particularly interested in receiving comments during the 5-minute comment periods that address one or more of the topics listed in the ''Topics to Address'' section below. When making a reservation for a 5-minute comment period, participants should provide a title for their presentation. More time may be available in the comment session, depending on the number of people wishing to make a presentation. Reservations will be confirmed on a first-come, first-served basis. Although pre-registration is not required to attend the listening sessions, it is strongly recommended to ensure that adequate accommodations are available. Written comments also may be submitted for the record by mailing to: Ms. Mary Humphreys; Office of the Administrator; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; STOP 2201; 1400 Independence Avenue, SW.; Washington, DC 20250–2201. Please provide three copies of the comments. Comments also may be faxed or sent via e-mail to Ms. Humphreys.

The sessions will follow the same general format as the first two listening sessions and comments will be compiled and considered. All written comments from the October 3 and October 25 sessions must be received by December 1, 2001, to be considered. Information gathered from the Listening Sessions will be available for review on the CSREES web page (http://www.reeusda.gov). Participants who require a sign language interpreter or other special accommodations should contact Ms. Humphreys as directed above.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Section 102(b) of AREERA requires that CSREES, in establishing priorities for agricultural research, extension, and education activities conducted or funded by CSREES, solicit and consider input and recommendations from persons who conduct or use agricultural research, extension, or education. As part of these listening sessions, CSREES simultaneously will be soliciting input and comments on the effectiveness of the existing agricultural research, education and extension programs administered by CSREES in meeting current and future challenges in the food and agricultural sciences.

Section 1402 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (NARETPA), 7 U.S.C. 3101, specifies that the purposes of agricultural research, extension, and education are to (1) enhance competitiveness of the United States agriculture and food industry in an increasingly competitive world environment; (2) increase the long-term productivity of the United States agriculture and food industry while maintaining and enhancing the natural resource base on which rural America and the United States agricultural economy depend; (3) develop new uses and new products for agricultural commodities, such as alternative fuels, and develop new crops; (4) support agricultural research and extension to promote economic opportunity in rural communities and to meet the increasing demand for information and technology transfer throughout the United States agriculture industry; (5) improve risk management in the United States agriculture industry; (6) improve the safe production and processing of, and adding value to, United States food and fiber resources using methods that maintain the balance between yield and environmental soundness; (7) support higher education in agriculture to give the next generation of Americans the knowledge, technology, and applications necessary to enhance the competitiveness of United States agriculture; and (8) maintain an adequate, nutritious, and safe supply of food to meet human nutritional needs and requirements.

Section 1404 of NARETPA, 7 U.S.C. 3103, defines ''Food and Agricultural

Sciences'' as meaning basic, applied, and developmental research, extension, and teaching activities in food and fiber, agricultural, renewable natural resources, forestry, and physical and social sciences, including activities relating to the following: (1) Animal Health, production, and well-being; (2) Plant health and production; (3) Animal and plant germ plasm collection and preservation; (4) Aquaculture; (5) Food safety; (6) Soil and water conservation and improvement; (7) Forestry, horticulture, and range management; (8) Nutritional sciences and promotion; (9) Farm enhancement, including financial management, input efficiency, and profitability; (10) Home economics; (11) Rural human ecology; (12) Youth development and agricultural education, including 4–H clubs; (13) Expansion of domestic and international markets for agricultural commodities and products, including agricultural trade barrier identification and analysis; (14) Information management and technology transfer related to agriculture; (15) Biotechnology related to agriculture; and (16) The processing, distributing, marketing, and utilization of food and agricultural products.

CSREES currently supports agricultural research, extension, and education activities through a broad array of programs which includes both formula funded and competitively awarded grant programs. The formula funded programs include the agricultural research programs authorized under the Hatch Act (7 U.S.C. 361a *et seq.*) for the State Agricultural Experiment Stations; section 1445 of NARETPA (7 U.S.C. 3222) for the 1890 Land-Grant Institutions including Tuskegee University; McIntire-Stennis Cooperative Forestry Act (16 U.S.C. 582a *et seq.*); and section 1433 of NARETPA (7 U.S.C. 3195) for the Animal Health and Disease Research program. The agricultural extension programs are funded under section 3 of the Smith-Lever Act (7 U.S.C. 343) for the cooperative extension services at the 1862 Land-Grant Institutions; section 3(d) of the Smith-Lever Act (7 U.S.C. 343(d)) for targeted, national programs; and section 1444 of NARETPA (7 U.S.C. 3221) for the 1890 Land-Grant Institutions including Tuskegee University. West Virginia State College also receives funding for agricultural research and extension programs. Section 534(a) of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note) authorizes funding for the 1994 Institutions to strengthen their teaching programs in food and agricultural sciences.

The CSREES competitive grant programs include the National Research Initiative authorized under section 2(b) of the Competitive, Special, and Facilities Research Grant Act (7 U.S.C. 450i); Initiative for Future Agriculture and Food Systems authorized under section 401 of AREERA (7 U.S.C. 7621); Integrated Research, Education, and Extension Competitive Grants Program authorized under section 406 of AREERA (7 U.S.C. 7626); Food and Agricultural Sciences National Needs Graduate Fellowship Grants Program authorized under section 1417(b)(6) of NARETPA (7 U.S.C. 3152(b)(6)); Higher Education Challenge Grants Program authorized under section 1417(b)(1) of NARETPA (7 U.S.C. 3152(b)(1)); Secondary Agriculture Education Challenge Grants Program authorized under section 1417(j) of NARETPA (7 U.S.C. 3152(j)); and Hispanic-Serving Institutions Education Grants Program authorized under section 1455 of NAREPTA (7 U.S.C. 3241). In addition, sections 535 and 536 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note) authorize competitive capacity building and research grant programs for the 1994 Institutions. Further information about CSREES grant programs is available through the CSREES web page at http://www.reeusda.gov as the above list of CSREES grant programs is not exhaustive.

A majority of the agricultural research, extension, and education activities funded by CSREES are conducted through the 1862 Land-Grant Institutions which were established under the First Morrill Act (7 U.S.C. 301 *et seq.*); the 1890 Land-Grant Institutions under the Second Morrill Act (7 U.S.C. 321 *et seq.*); and the 1994 Institutions under the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note).

Topics To Address

To ensure that Federally-supported agricultural research, extension, and education activities remain effective in addressing priorities in United States food and agriculture, CSREES specifically is requesting input and recommendations on the following topic areas from persons who conduct or use agricultural research, extension, and education. However, comments are not limited to these topics.

(1) The use of agricultural research, extension, and education programs to generate the science and educational programs necessary to address challenges facing United States food and fiber production.

(2) The development of human capacity (e.g., scientists, educators, and extension agents and specialists) in the food and agricultural sciences.

(3) The changes which should and could be made, if any, in the current funding mechanisms (i.e., formula funded and competitive grants) to more efficiently and effectively engage the agricultural research, extension, and education system in meeting the modern challenges to United States food and fiber production.

(4) The most effective methods for ensuring that agricultural research, education, and extension programs address the highest priority needs of the United States food and fiber system.

(5) The best means by which agricultural research, education, and extension programs can quickly respond to rapidly emerging challenges to the United States food and fiber system.

(6) The coordination of agricultural research, education, and extension activities with the activities of other Federal agencies to use scientific advances in other fields (e.g., health, information technology, geospatial, and sociological research) as well as disseminate information through educational and outreach programs.

(7) The application of agricultural research, education, and extension programs to economic development and revitalization needs of rural America.

Written comments should be submitted as directed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Roundtable Discussion Group Meetings

CSREES will conduct a Roundtable Discussion Group Meeting at the remaining two sessions in the afternoon in the following specific subject areas: (1) Developing 21st Century Plant, Animal, and Forest Production System; (2) Revitalizing Rural America; (3) Managing and Conserving Natural Resources; (4) Linking Agriculture, Nutrition, and Health; (5) Improving Opportunities for Family and Youth Development; and (6) Developing Human Capacity in Agricultural Research, Extension, and Education for the 21st Century. The Roundtable Discussion Group Meetings will provide an opportunity for participants to address the above topics in relation to specific issues related to the food and agricultural sciences. A summary will be developed for the official record.

Done at Washington, DC, this 15th day of August 2001.

Ralph A. Otto,

Acting Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 01–20905 Filed 8–17–01; 8:45 am]

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- California; published 7-19-01

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  - National priorities list update; published 6-21-01

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S. 468/P.L. 107–23

To designate the Federal building located at 6230 Van Nuys Boulevard in Van Nuys, California, as the ''James C. Corman Federal Building''. (Aug. 3, 2001; 115 Stat. 198)

H.R. 1954/P.L. 107–24

ILSA Extension Act of 2001 (Aug. 3, 2001; 115 Stat. 199)

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2000, through January 1, 2001. The CFR volume issued as of January 1, 2000 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2001. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 1999, through July 1, 2000. The CFR volume issued as of July 1, 1999 should be retained..