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SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

RIN 3245–AE97

Disaster Loan Program—Disaster Mitigation Act of 2000

AGENCY: Small Business Administration (SBA).

ACTION: Interim final rule with request for comments.

SUMMARY: Under the Disaster Mitigation Act of 2000, enacted on October 30, 2000, (''Act'') the Individual and Family Grant Assistance Program is replaced by the Assistance to Individuals and Household Program (''IHP''). Under this interim final rule, SBA will implement its disaster loan program when the President declares a major disaster, or declares an emergency, and activates the IHP in an emergency disaster declaration. Under the Act, if the President declares a major disaster that includes, or is limited to, public assistance, a private nonprofit facility which provides non-critical services must first apply for disaster loan assistance from SBA before it could seek grant assistance for permanent repairs and/or replacements from the Federal Emergency Management Agency (''FEMA''). SBA is also implementing this legislative change, and is making certain technical changes.

DATES: *Effective Date:* This rule is effective on October 15, 2002.

Applicability Date: This rule is applicable for major disasters declared on or after October 15, 2002.

Comment Date: Comments must be received on or before December 20, 2002.

ADDRESSES: Address all comments concerning the interim rule to Herbert L. Mitchell, Associate Administrator, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416

FOR FURTHER INFORMATION CONTACT: Becky Brantley, Loan Specialist, Office of Disaster Assistance, 202–205–6734.

SUPPLEMENTARY INFORMATION: Section 206 of the Disaster Mitigation Act of 2000 (Public Law 106–390) (''Act'') replaces the Individual and Family Grant Assistance Program (''IFG'') with the Assistance to Individuals and Household Program (''IHP''). Under this interim final rule, SBA will implement its disaster loan program when the President declares a major disaster, or declares an emergency, and activates the IHP. SBA is revising § 123.3(a)(1) of its regulations to reflect the statutory changes.

Section 205 of the Act amends section 5172 of Title 42, United States Code. Under the Act, if the President declares a major disaster that includes, or is limited to public assistance, a private nonprofit facility (''PNP'') which provides non-critical services (of a governmental nature) must first apply to SBA for a disaster loan for permanent repairs and/or replacement work, before it can seek grant assistance from the Federal Emergency Management Agency (''FEMA'') with respect to such non-critical services. If SBA determines that the PNP non-critical facility is ineligible for a disaster loan or the PNP has obtained the maximum amount for which the SBA determines the facility is eligible, the PNP may then apply to FEMA for grant assistance for permanent repairs for its unmet disaster-related needs. Such PNPs may apply directly to FEMA for emergency repairs.

Owners of facilities that provide critical services (of a governmental nature) may apply directly to FEMA for grant assistance for both emergency and permanent repairs. Section 205 of the Act defines ''critical services'' to include power, water, sewer, wastewater treatment, communications, and emergency medical care. It is the responsibility of FEMA to provide guidelines with respect to these services.

PNPs which operate both critical and non-critical facilities (that provide essential services of a governmental nature) will have to make separate applications to FEMA and SBA. Currently, SBA rules allow only for the activation of its disaster loan program in the event of a major disaster declaration by the President that includes individual assistance (the Individuals and Family Grant Program). In such case, all PNP facilities are eligible to apply for SBA disaster loan assistance.

Under this interim final rule, SBA is amending § 123.3 of its regulations to provide that SBA would activate its disaster loan program for PNPs that provide essential services of a governmental nature when the President declares a major disaster that does not include individual assistance but is limited to, or includes, public assistance. SBA would use FEMA's guidelines to ascertain if a PNP was seeking assistance for its delivery of such services.

In this interim final rule, SBA is amending § 123.4 of its regulations to preclude businesses in contiguous counties from being eligible for SBA economic injury disaster loans in circumstances described above. Thus, if the President makes a major disaster declaration that does not include individual assistance but includes, or is limited to, public assistance, and PNPs are eligible for disaster loan assistance from SBA, the interim final rule would not allow small businesses in counties contiguous to the declared disaster area to be eligible for SBA economic injury loans. This is because the authorized public assistance is limited to the counties identified in the declaration.

SBA is amending § 123.101(c) of its regulations by inserting the new ''Individuals and Household Program'' in lieu of the old ''Individual and Family Grant Program.''

SBA is making technical corrections in § 123.501 of its regulations, relating to the eligibility of a business for a military reservist economic injury disaster loan (EIDL). The purpose of the regulatory change is to clarify that the business must be small at the time the essential employee is called to active duty. A business that was not small at that time would fall outside the parameters of SBA regulations, and this regulatory change would make that clear. SBA is adding the same criteria to military reservist EIDL as now applies to regular EIDL: the business, its affiliates and 20% or more owners have used all reasonably available funds and that it is unable to obtain credit elsewhere. These are the same requirements prescribed in § 123.300(b) with respect to regular EIDL assistance.

Justification for Publication as an Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act (APA) and SBA regulations, 5 U.S.C. 553 and 13 CFR 101.108. The APA provides for an exception to this standard rule-making process, however, where an Agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 555(b)(3)(B). The good cause requirement is satisfied when prior public participation is impractical, unnecessary, or contrary to the public interest. Under such circumstances, an Agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations might arise where an Agency must issue a rule without written public participation. On January 23, 2002, FEMA published proposed rules to implement the Act for Federal disaster assistance to individuals and households (67 FR 3411). FEMA anticipates issuing an interim final rule about the same time that SBA publishes its interim final rule. Under FEMA's regulation, three important changes will occur:

(1) The ''Individual and Family Grant Program'' (''IFG'') will not be in existence for disasters declared on or after October 15, 2002.

(2) FEMA has renamed their program as ''Assistance to Individuals and Households Program'' (''IHP'').

(3) FEMA's rule would include the flexibility for the President to activate IHP when the President issues an emergency declaration.

These changes have a direct effect on SBA since § 123.3(a)(1) of SBA's regulations presently states that SBA disaster operations are activated when ''the President declares a Major Disaster and authorizes Federal assistance, including individual assistance (temporary housing and Individual and Family Grant Assistance).'' Therefore, under current rules, SBA's disaster assistance can only be activated when IFG is being offered. Since, under FEMA's rule, IFG will no longer exist, SBA's IFG reference is no longer applicable.

If a Presidential major disaster declaration activates FEMA's IHP, SBA's programs must be amended to reflect the existence of IHP in its regulations. SBA's concern is that disasters can be declared at any time, and its regulations must be amended to incorporate the Act's changes so that SBA's disaster programs can be appropriately activated when a major disaster occurs. Any delay in the adoption of these changes to SBA's regulations could cause serious harm to victims of disasters declared by the President since IFG assistance no longer exists.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to make disaster loans available to individuals and homeowners when the President declares a major, or emergency, disaster declaration that authorizes Federal assistance to Individuals and Households. SBA needs to coordinate its disaster rules with the revised FEMA program which should be effective at the same time that this rule is effective.

Justification for Immediate Effective Date of Interim Final Rule

The APA requires that ''publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this interim final rule effective for major disasters declared on or after October 15, 2002.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in Justification for Publication as an Interim Final Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA has an obligation, under section 4(d) of the Small Business Act, to act in the public interest in offering disaster loan assistance to victims of declared disasters. Pursuant to that statutory authority, SBA has determined that it is in the public interest to give immediate effect to the changes in the activation of SBA's disaster loan program and that it would be impractical to delay such implementation. SBA also notes that the failure to adopt this rule immediately would work to the detriment of many disaster victims.

Although this rule is being published as an interim final rule, comments are hereby solicited from the public. These comments must be received by December 20, 2002. SBA will consider these comments in making any necessary revisions to these regulations.

Compliance With Executive Orders 12866, 12988, 13132, the Regulatory Flexibility Act (15 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

OMB has determined that this rule does not constitute a significant rule within the meaning of Executive Order 12866. The rule conforms SBA rules to the requirements of the Act and FEMA's implementing regulations. The rule is not likely to have an annual effect on the economy of $100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the U.S. economy.

SBA has determined that this rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

For the purposes of Executive Order 13132, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

SBA has determined that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in paragraph 3 of that Order.

List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs—business, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR part 123 as follows:

PART 123—DISASTER LOAN PROGRAM

1. The authority citation for part 123 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(b), 636(c); Pub. L. 102–395, 106 Stat. 1828, 1864; Pub. L. 103–75, 107 Stat. 739; Pub. L. 106–50, 113 Stat. 245.

2. Amend § 123.3 by revising paragraph (a)(1), redesignating paragraphs (a)(2), (a)(3), and (a)(4) as paragraphs (a)(3), (a)(4), and (a)(5), respectively, and adding a new paragraph (a)(2) to read as follows:

§ 123.3 How are disaster declarations made?

(a) * * *

(1) The President declares a Major Disaster, or declares an emergency, and authorizes Federal Assistance, including

individual assistance (Assistance to Individuals and Households Program).

(2) If the President declares a Major Disaster limited to public assistance only, a private nonprofit facility which provides non-critical services under guidelines of the Federal Emergency Management Agency (FEMA) must first apply to SBA for disaster loan assistance for such non-critical services before it could seek grant assistance from FEMA.

* * * * *

3. Amend § 123.4 by revising the fourth sentence to read as follows:

§ 123.4 What is a disaster area and why is it important?

* * * In major disasters, economic injury disaster loans may be made for victims in contiguous counties or other political subdivisions, provided, however, that with respect to major disasters which authorize public assistance only, SBA shall not make economic injury disaster loans in counties contiguous to the disaster area.

* * *

4. Amend § 123.101 by revising paragraph (c) to read as follows:

§ 123.101 When am I not eligible for a home disaster loan?

* * * * *

(c) Your damaged property can be repaired or replaced with the proceeds of insurance, gifts or other compensation, including condemnation awards (with one exception), these amounts must either be deducted from the amount of the claimed losses or, if received after SBA has approved and disbursed a loan, must be paid to SBA as principal payments on your loan. You must notify SBA of any such recoveries collected after receiving an SBA disaster loan. The one exception applies to amounts received under the Individuals and Household Program of the Federal Emergency Management Agency solely to meet an emergency need pending processing of an SBA loan. In such an event, you must repay the financial assistance with SBA loan proceeds if it was used for purposes also eligible for an SBA loan;

* * * * *

5. Amend § 123.501 by revising paragraph (a), removing ''and'' at the end of paragraph (c), removing the period at the end of paragraph (d) and adding '', and'' in its place, and adding a new paragraph (e) to read as follows:

§ 123.501 When is your business eligible to apply for a Military Reservist Economic Injury Disaster Loan?

* * * * *

(a) It is a small business as defined in 13 CFR part 121 when the essential employee was called to active duty,

* * * * *

(e) You and your affiliates and principal owners (20% or more ownership interest) have used all reasonably available funds, and you are unable to obtain credit elsewhere (see § 123.104).

Hector V. Barreto,

Administrator.

[FR Doc. 02–26403 Filed 10–18–02; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–59–AD; Amendment 39–12913; AD 2002–21–07]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Model S–76A, S–76B and S–76C Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Sikorsky Aircraft Corporation (Sikorsky) model helicopters that requires removing and inspecting each main rotor spindle attachment bolt (bolt) to ensure that the correct bolts are installed. This amendment is prompted by the discovery of improper bolts installed on a helicopter during its production. The actions specified by this AD are intended to detect installation of incorrect bolts, which could result in reduced hub or bolt fatigue life, separation of the main rotor blade at the spindle attachment, and subsequent loss of control of the helicopter.

DATES: Effective November 25, 2002.

FOR FURTHER INFORMATION CONTACT: Kirk Gustafson, Aviation Safety Engineer, Boston Aircraft Certification Office, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7190, fax (781) 238–7170.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for Sikorsky Model S–76A, S–76B and S–76C helicopters was published in the **Federal Register** on June 20, 2002 (67 FR 41875). That action proposed to require removing and inspecting each bolt to ensure that the correct bolts are installed.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule with one change. A ''note'' has been added following paragraph (b)(3) referencing the alert service bulletin that pertains to the subject of the AD. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

The FAA estimates that 165 helicopters of U.S. registry will be affected by this proposed AD, that it will take approximately 6 work hours per helicopter to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $240 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $99,000, assuming all 40 bolts (per helicopter) are replaced.

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, 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 a new airworthiness directive to read as follows:

2002–21–07 Sikorsky Aircraft Corporation: Amendment 39–12913. Docket No. 2001–SW–59–AD.

Applicability: Model S–76A, S–76B and S–76C helicopters, except those having a serial number of 760501, or 760506 through 760515, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters 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 within 1,250-hours time-in-service or 2 years, whichever comes first, unless accomplished previously.

To detect installation of an incorrect main rotor spindle attachment bolt (bolt), which could result in reduced hub or bolt fatigue life, separation of the main rotor blade at the spindle attachment, and subsequent loss of control of the helicopter, accomplish the following:

(a) Remove and measure each bolt to ensure that the length is 1.181 ±.015 inches. There are 10 bolts per rotor spindle and 40 bolts per helicopter that require inspection.

(1) If 1 or 2 bolts are found on any spindle that are longer than 1.196 inches (1.181 inches + .015-inch permissible tolerance), visually inspect the main rotor hub internal threads for distortion and the hole-bottoms for scoring.

(i) If thread distortion or hole-bottom scoring is found, remove the rotor hub from service.

(ii) If no thread distortion or hole-bottom scoring is found, replace all 10 bolts with new airworthy bolts.

(2) If 3 or more bolts that exceed 1.196 inches are found on any spindle, remove and replace the main rotor hub with an airworthy main rotor hub.

(3) If any bolt is found that is shorter than 1.166 inches (1.181 inches − .015 permissible tolerance), replace it with a new airworthy bolt.

(b) Report the results of the inspections of the main rotor hubs whenever the bolts exceed 1.196 inches in length, within 5 calendar days of the inspection, to the Manager, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: (781) 238–7150; fax: (781) 238–7170. Include the following information in the report:

(1) Serial number of the helicopter.

(2) Quantity of incorrect bolts.

(3) Description of thread distortion or hole-bottom scoring caused by each bolt.

Information collection requirements contained in this AD have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

Note 2: Sikorsky Aircraft Corporation Alert Service Bulletin No. 76–65–52 (321), dated July 24, 2001, pertains to the subject of this AD.

(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, Boston Aircraft Certification Office, Engine and Propeller Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Boston Aircraft Certification Office.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Boston Aircraft Certification Office.

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

(e) This amendment becomes effective on November 25, 2002.

Issued in Fort Worth, Texas, on October 4, 2002.

Eric D. Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–26590 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–08–AD; Amendment 39–12914; AD 2002–21–08]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Model PC–6 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Pilatus Aircraft Ltd. (Pilatus) Model PC–6 airplanes. This AD requires you to inspect the aileron assembly for correct configuration and modify as necessary. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. The actions specified by this AD are intended to correct improper aileron assembly configuration, which could result in failure of the aileron mass balance weight. Such failure could lead to loss of control of the airplane.

DATES: This AD becomes effective on December 6, 2002.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of December 6, 2002.

ADDRESSES: You may get the service information referenced in this AD from Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 63 19; facsimile: +41 41 619 6224; or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–08–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What Events Have Caused This AD?

The Federal Office for Civil Aviation (FOCA), which is the airworthiness authority for Switzerland, recently notified FAA that an unsafe condition may exist on certain Pilatus Model PC–6 airplanes. The FOCA reported an instance where unapproved mass balance weights and an improper aileron configuration were found on a Model PC–6 airplane. The FOCA determined the cause as improper configuration control and tracking.

What Is the Potential Impact if FAA Took No Action?

This condition, if not corrected, could result in failure of the aileron mass

balance weights. Such failure could lead to loss of control of the airplane.

Has FAA Taken Any Action to This Point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Pilatus Model PC–6 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 19, 2002 (67 FR 53761). The NPRM proposed to inspect the aileron assembly for correct configuration and modify as necessary.

Was the Public Invited to Comment?

The FAA encouraged interested persons to participate in the making of this amendment. We did not receive any comments on the proposed rule or on our determination of the cost to the public.

FAA's Determination

What Is FAA's Final Determination on This Issue?

After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Provide the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How Many Airplanes Does This AD Impact?

We estimate that this AD affects 35 airplanes in the U.S. registry.

What is the Cost Impact of This AD on Owners/Operators of the Affected Airplanes?

We estimate the following costs to accomplish the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 workhour × $60 per hour = $60	No parts required	$60	$60 × 35 = $2,100.

We estimate the following costs to accomplish any necessary modifications that would be required based on the results of the inspection. We have no way of determining the number of airplanes that may need such modification:

Labor cost	Parts cost	Total cost per airplane
16 workhours × $60 = $960	$419	$419 + $960 = $1,379.

Compliance Time of This AD

What Will Be the Compliance Time of This AD?

The compliance time of this AD is ''within the next 30 days after the effective date of this AD.''

Why Is the Compliance Time Presented in Calendar Time Instead of Hours Time-in-service (TIS)?

This unsafe condition is not a result of the number of times the airplane is operated. The chance of this situation occurring is the same for an airplane with 10 hours time-in-service (TIS) as it would be for an airplane with 500 hours TIS. For this reason, the FAA has determined that a compliance based on calendar time should be utilized in this AD in order to assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Regulatory Impact

Does This AD Impact Various Entities?

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.

Does This AD Involve a Significant Rule or Regulatory Action?

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 copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by adding a new AD to read as follows:

2002–21–08 Pilatus Aircraft Ltd.: Amendment 39–12914; Docket No.2002–CE–08–AD.

(a) *What airplanes are affected by this AD?* This AD affects Model PC–6 airplanes, all manufacturer serial numbers (MSN) up to and including 939, that are certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to correct improper aileron assembly configuration, which could result in failure of the aileron mass balance weight. Such failure could lead to loss of control of the airplane.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) Inspect the aileron assembly for proper configuration.	Within the next 30 days after December 6, 2002 (the effective date of this AD), unless already accomplished.	In accordance with Pilatus Service Bulletin No. 62B, dated May 1967, as in Pilatus PC–6 Service Bulletin No. 57–001, dated December 20, 2001.
(2) If the aileron assembly configuration incorporates aileron part number (P/N) 6106.10.xxx or P/N 6106.0010.xxx modifying the assembly in accordance with Pilatus Service Bulletin No. 62B, dated May 1967, and install a placard.	Prior to further flight after the inspection required in paragraph (d)(1) of this AD, unless already accomplished.	Modify in accordance with Pilatus Service Bulletin No. 62B, dated May 1967. Install the placard in accordance with Pilatus PC–6 Service Bulletin No. 57–001, dated December 20, 2001.
(3) If the aileron assembly configuration differs from that specified in Pilatus Service Bulletin No. 62B, dated May 1967, or if the part numbers are missing and cannot be verified: (i) obtain a repair scheme from the manufacturer through the FAA at the address specified in paragraph (f) of this AD; and (ii) incorporate this repair scheme.	Prior to further flight after the inspection required in paragraph (d)(1) of this AD, unless already accomplished.	In accordance with Pilatus PC–6 Service Bulletin No. 57–001, dated December 20, 2001.
(4) Do not install any aileron assembly unless the inspection, modification, placard, and repair requirements (as applicable) of paragraphs (d)(1), (d)(2), (d)(3), (d)(3)(i), and (d)(3)(ii) of this AD are accomplished.	As of December 6, 2002 (the effective date of this AD).	In accordance with Pilatus PC–6 Service Bulletin No. 57–001, dated December 20, 2001.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Standards Office Manager, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Standards Office Manager.

Note 1: This AD applies to each airplane identified in paragraph (a) of this AD, 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 you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with Pilatus Service Bulletin No. 62B, dated May 1967, and Pilatus PC–6 Service Bulletin No. 57–001, dated December 20, 2001. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You may get copies from Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 6319; facsimile: +41 41 619 6224; or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040. You may view copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in Swiss AD HB 2002–001, dated February 8, 2002.

(i) *When does this amendment become effective?* This amendment becomes effective on December 6, 2002.

Issued in Kansas City, Missouri, on October 9, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–26589 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 15

RIN 3038–AB91

Reporting Levels for Large Trader Reports; TRAKRS

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is amending its rules to establish a reporting level for TRAKRS futures contracts traded on the Chicago Mercantile Exchange (CME). The reporting level is 25,000 contracts. This rule will help ensure that the Commission receives adequate information to carry out its market surveillance program.

EFFECTIVE DATE: November 20, 2002.

FOR FURTHER INFORMATION CONTACT: Gary J. Martinaitis, Deputy Associate Director, Market Surveillance Section, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5260. E-mail: [*GMartinaitis@cftc.gov*.]

SUPPLEMENTARY INFORMATION: On December 21, 2000, the President signed into law the Commodity Futures Modernization Act of 2000 (CFMA), Public Law 106–554, which extensively revises the Commodity Exchange Act (Act). Among other things, the CFMA

facilitated the introduction of new futures products by the exchanges. In August 2002, the CME introduced a series of new products, called TRAKRS, which are low notional value futures contracts based on broad based indices of stocks, bonds, currencies, or other financial instruments. The first TRAKRS futures contract (the long-short technology TRAKRS), which began trading in August 2002, has traded between $26 and $22.[1]

TRAKRS, like all other commodities traded on Commission-designated markets, are subject to the Commission's large trader reporting rules. Those rules require futures commission merchants, members of contract markets and foreign brokers to report to the Commission position information of the largest futures and options traders and, upon special call by the Commission, require the traders themselves to file reports with the Commission. Reporting levels are set in the designated futures and option markets under the authority of sections 4i and 4c of the Act to ensure that the Commission receives adequate information to carry out its market surveillance programs. These market surveillance programs are designed to detect and to prevent market congestion and price manipulation and to enforce speculative position limits. They also provide information regarding the overall hedging and speculative use of, and foreign participation in, the futures markets and other matters of public interest.

On August 5, 2002, the Commission proposed establishing a reporting level for TRAKRS futures contracts of 25,000.[2] The proposed reporting level was based on the Commission's experience in administering a large trader reporting system that is designed to provide adequate market coverage in light of positions traded or expected to be traded. The Commission did not receive any comments on its proposal.

The Commission is adopting a reporting level of 25,000 contracts for TRAKRS futures contracts as proposed. The Commission intends to review this level over time to determine whether it provides adequate coverage. Furthermore, since the reporting level is significantly influenced by the relatively low value of the initial TRAKRS contract (in the mid-$20 range), the Commission intends to reconsider this reporting level if new TRAKRS contracts are introduced at a substantially higher price or any TRAKRS contract begins to trade at a substantially higher price.

As noted in the proposed rule,[3] the low value of TRAKRS contracts could result in very large positions being reported. Due to current limitations in the Commission's large trader record format,[4] and similar limitations in the CME's own large trader reporting system, the final rule provides for TRAKRS positions to be reported under 17 CFR part 17 only after they have been rounded down to the nearest 1000 and then divided by 1000. For example, a position of 27,955 contracts would be rounded down to 27,000, divided by 1000 and reported as 27.[5]

The Commission has granted no-action relief to futures commission merchants, members of contracts markets and foreign brokers that comply with the requirements of the proposed rule prior to its final adoption.[6] No-action relief was granted because, in its absence, the Commission's default reporting level of 25 contracts would apply to TRAKRS contracts. The Commission is continuing the no-action relief for futures commission merchants, members of contracts markets and foreign brokers that comply with the requirements of the proposed rule prior to the time this final rule becomes effective. Accordingly, the Commission will not bring any enforcement action against any futures commission merchant, member of a contract market or foreign broker who complies with the proposed rule (which is identical to the final rule being adopted today).

Cost Benefit Analysis

Section 15 of the Act requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, section 15 does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, section 15 simply requires the Commission to ''consider the costs and benefits'' of the subject rule.

Section 15(a) further specifies that the costs and benefits of the proposed rule shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission's proposed rule contained an analysis of its consideration of these costs and benefits and solicited public comment thereon.[7] The Commission specifically invited commenters to submit any data that they may have quantifying the costs and benefits of the proposed rules. The Commission did not receive any comments on its proposal.

After considering the costs and benefits of these revisions to part 15, the Commission has decided to adopt them as discussed above.

Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that federal agencies, in proposing rules, consider the impact of those rules on small entities. The Commission has previously determined that large traders and FCMs are not ''small entities'' for purposes of the RFA.[8] These amendments to the Commission's reporting requirements primarily impact FCMs. Similarly, members of contract markets and foreign brokers report only if carrying or holding reportable, *i.e.*, large positions. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (PRA), which imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to this rule. As noted in the proposed rule, the Commission believes that the rule amendment does not contain information requirements which require the approval of the Office of

[1] Securities broker-dealers and their registered representatives may offer and sell TRAKRS futures contracts pursuant to a no-action letter issued by Commission staff on July 11, 2001. *See* CFTC Letter 02–22, Division of Trading and Markets, CFTC (July 11, 2001), available on the Commission's Web site at *http://www.cftc.gov.*

[2] 67 FR 50608.

[3] 67 FR at 50609.

[4] *See* 17 CFR 17.00(g)(1).

[5] Contract markets should continue to report under 17 CFR part 16, the actual TRAKRS position without regard to the reporting convention applied for reports under part 17.

[6] 67 FR at 50609.

[7] 67 FR at 50609.

[8] 47 FR 18618—20 (Apr. 30, 1982).

Management and Budget. The purpose of this rule is to establish a specific reporting level for TRAKRS.

List of Subjects in 17 CFR Part 15

Brokers, Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Act, and in particular sections 4g, 4i, 5, 5a and 8a of the Act, 7 U.S.C. 6g, 6i, 7, 7a and 12a, as amended, the Commission hereby amends part 15 of Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 15—REPORTS—GENERAL PROVISIONS

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

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000); 5 U.S.C. 552 and 552(b).

2. Section 15.03 is amended by revising paragraph (b) to read as follows:

§ 15.03 Reporting levels.

* * * * *

(b) The quantities for the purpose of reports filed under parts 17 and 18 of this chapter are as follows:

Commodity	Number of contracts
Agricultural:	
Wheat	100
Corn	150
Oats	60
Soybeans	100
Soybean Oil	200
Soybean Meal	200
Cotton	50
Frozen Concentrated Orange Juice	50
Rough Rice	50
Live Cattle	100
Feeder Cattle	50
Lean Hogs	100
Sugar No. 11	400
Sugar No. 14	100
Cocoa	100
Coffee	50
Natural Resources:	
Copper	100
Gold	200
Silver Bullion	150
Platinum	50
No. 2 Heating Oil	250
Crude Oil, Sweet	350
Unleaded Gasoline	150
Natural Gas	175
Financial:	
Municipal Bond Index	300
3-month (13-Week) U.S. Treasury Bills	150
30-Year U.S. Treasury Bonds	1,000
10-Year U.S. Treasury Notes	1,000
5-Year U.S. Treasury Notes	800
2-Year U.S. Treasury Notes	500
3-Month Eurodollar Time Deposit Rates	1,000
30-Day Fed Funds	300
1-month LIBOR Rates	300
3-month Euroyen	100
Major-Foreign Currencies	400
Other Foreign Currencies	100
U.S. Dollar Index	50
S&P 500 Stock Price Index	1,000
E-Mini S&P Stock Price Index	300
S&P 400 Midcap Stock Index	100
Dow Jones Industrial Average Index	100
New York Stock Exchange Composite Index	50
Amex Major Market Index, Maxi	100
NASDAQ 100 Stock Index	100
Russell 2000 Stock Index	100
Value Line Average Index	50
NIKKEI Stock Index	100
Goldman Sachs Commodity Index	100
Security Futures Products:	
Individual Equity Security	1,000
Narrow-Based Index of Equity Securities	200
TRAKRS	[1] 25,000
All Other Commodities	25

[1] For purposes of part 17, positions in TRAKRS should be reported by rounding down to the nearest 1000 and dividing by 1000.

Issued in Washington, DC, this 15th day of October, 2002, by the Commission.

Catherine D. Dixon,

Assistant Secretary of the Commission.

[FR Doc. 02–26714 Filed 10–18–02; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 47

[T.D. ATF—484]

RIN 1512–AC86

Delegation of Authority

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

ACTION: Treasury decision, final rule.

SUMMARY: This final rule places all ATF authorities contained in its Importation of Arms, Ammunition and Implements of War regulations with the ''appropriate ATF officer.'' Consequently, this final rule removes the definitions of, and references to, specific officers subordinate to the Director. This final rule also requires that persons file documents required by these regulations with the ''appropriate ATF officer'' or in accordance with the instructions on the ATF form. Concurrently with this Treasury Decision, ATF is issuing ATF Order 1130.34, which will be made available as specified in this rule. Through this order, the Director delegates all of the authorities to the appropriate ATF officers and specifies the ATF officers with whom applications, notices, and other reports, which are not ATF forms, are filed.

EFFECTIVE DATE: This rule is effective October 21, 2002.

FOR FURTHER INFORMATION CONTACT: Robert Ruhf, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue NW., Washington, DC 20226 (telephone 202–927–8210 or e-mail *alctob@atfhq.atf.treas.gov).*

SUPPLEMENTARY INFORMATION:

Background

Pursuant to Treasury Order 120–01 (formerly 221), dated June 6, 1972, the Secretary of the Treasury delegated to the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF), the authority to enforce, among other laws, the provisions of chapter 52 of the Internal Revenue Code of 1986 (IRC). The Director has subsequently redelegated certain of these authorities to appropriate subordinate officers by way of various means, including by regulation, ATF delegation orders, regional directives, or similar delegation documents. As a result, to ascertain what particular officer is authorized to perform a particular function under such provisions, each of these various delegation instruments must be consulted. Similarly, each time a delegation of authority is revoked or redelegated, each of the delegation documents must be reviewed and amended as necessary.

ATF has determined that this multiplicity of delegation instruments complicates and hinders the task of determining which ATF officer is authorized to perform a particular function. ATF also believes these multiple delegation instruments exacerbate the administrative burden associated with maintaining up-to-date delegations, resulting in an undue delay in reflecting current authorities.

Accordingly, this final rule rescinds all authorities of the Director in Title 27, Code of Federal Regulations, Part 47, Importation of Arms, Ammunition and Implements of War, that were previously delegated and places those authorities with the ''appropriate ATF officer.'' Also, all of the authorities of the Director that were not previously delegated are placed with the ''appropriate ATF officer.'' Along with this final rule, ATF is publishing ATF Order 1130.34, Delegation of the Director's Authorities in 27 CFR Part 47, Importation of Arms, Ammunition and Implements of War, which delegates certain of these authorities to the appropriate organizational level. The effect of these changes is to consolidate the Director's delegations of authority for part 47 into one delegation instrument. This action both simplifies the process for determining what ATF officer is authorized to perform a particular function and facilitates the updating of delegations in the future. As a result, delegations of authority will be reflected in a more timely and user-friendly manner.

This final rule also eliminates all references in the regulations that identify the ATF officer with whom an ATF form is filed. This is because ATF forms will indicate the officer with whom they must be filed. Similarly, this final rule also amends part 47 to provide that the submission of documents other than ATF forms (such as letterhead applications, notices and reports) must be filed with the ''appropriate ATF officer'' identified in ATF Order 1130.34. These changes will facilitate the identification of the officer with whom forms and other required submissions are filed.

In addition, this final rule makes the following conforming changes in 27 CFR part 47:

- In Subpart D—Administrative Provisions, section 47.41 is amended to provide that the instructions for an ATF form identify the ATF officer with whom it must be filed.
- In Subpart F—Miscellaneous Provisions, section 45.58 is added to recognize the authority of the Director to delegate regulatory authorities in part 47 and to identify ATF Order 1130.34 as the instrument making such delegations.

ATF has made or will make similar changes in delegations of authority to all other parts of Title 27 of the Code of Federal Regulations through separate rulemakings.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. A copy of this final rule was submitted 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

It has been determined that this rule is not a significant regulatory action because it will not: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Administrative Procedure Act

Because this final rule merely makes technical amendments and conforming changes to improve the clarity of the regulations, it is unnecessary to issue this final rule with notice and public procedure under 5 U.S.C. 553(b). Similarly 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 Robert Ruhf, Regulations Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 47

Administrative practice and procedure, Arms and munitions, Imports, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures.

Authority and Issuance

Title 27, Code of Federal Regulations is amended as follows:

PART 47—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

Paragraph 1. The authority citation for part 47 continues to read as follows:

Authority: 22 U.S.C. 2778.

Par. 2. Amend § 47.11 by removing the definitions of ''ATF officer'' and ''Regional director (compliance)'' and adding the definition of ''Appropriate ATF officer'' to read as follows:

§ 47.11 Meaning of Terms.

* * * * *

Appropriate ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) specified by ATF Order 1130.34, Delegation of the Director's Authorities in 27 CFR Part 47, Importation of Arms, Ammunition and Implements of War.

* * * * *

Par. 3. Section 47.31 is revised to read as follows:

§ 47.31 Registration requirement.

Persons engaged in the business, in the United States, of importing articles enumerated on the U.S. Munitions Import List must register by making an application on ATF Form 4587.

Par. 4. Revise paragraph (a) and the second sentence of paragraph (c) of § 47.32 to read as follows:

§ 47.32 Application for registration and refund of fee.

(a) Application for registration must be filed on ATF Form 4587 and must be accompanied by the registration fee at the rate prescribed in this section. The appropriate ATF officer will approve the application and return the original to the applicant.

* * * * *

(c) * * * A request for a refund must be submitted to the appropriate ATF officer at the Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226, prior to the beginning of any year for which a refund is claimed.

* * * * *

§§ 47.33; 47.42; 47.43, 47.44; 47.45; 47.51; and 47.52 [Amended]

Par. 5. Remove the words ''Director'' or ''Director's'' each place they appear and adding, in substitution, the words ''appropriate ATF officer'' or ''appropriate ATF officer's'', respectively, in the following places:

a. Section 47.33;

b. Section 47.42(a)(2)(i);

c. Section 47.43(c);

d. Section 47.44;

e. The second sentence of § 47.51; and

f. The introductory text of paragraph (b) and the last two sentences of paragraph (f) of § 47.52.

Par. 6. Revise the first and second sentences of § 47.34(b) to read as follows:

§ 47.34 Maintenance of records by persons required to register as importers of Import List articles.

* * * * *

(b) Registrants under this part engaged in importing articles on the U.S. Munitions Import List subject to the permit procedures of subpart E of this part must maintain for a period of 6 years records bearing on such articles imported, including records concerning their acquisition and disposition, including Forms 6 and 6A. The appropriate ATF officer may prescribe a longer or shorter period in individual cases as such officer deems necessary. * * *

* * * * *

Par. 7. Amend § 47.35 by removing the word ''Director'' and adding, in substitution, the words ''appropriate ATF officer'' from the first sentence of paragraph (a), and adding a sentence at the end of paragraph (a) and revising paragraph (b) to read as follows:

§ 47.35 Forms prescribed.

(a) * * * The form will be filed in accordance with the instructions for the form.

(b) Forms may be requested from the ATF Distribution Center, P.O. Box 5950, Springfield, Virginia 22150–5950, or by accessing the ATF Web site *http://www.atf.treas.gov/.*

§ 47.41 [Amended]

Par. 8. Amend § 47.41(a) and (b) by removing the phrase ''issued by the Director''.

§ 47.42 [Amended]

Par. 9. Amend the first sentence of the introductory text of § 47.42(a)(1) by removing the commas and phrase '', in triplicate, with the Director''.

Par. 10. Amend the first sentence of the introductory text of § 47.45(a) by removing the phrase ''from the Director'' and revise § 47.45(a)(1) to read as follows:

§ 47.45 Importation.

(a) * * *

(1) In obtaining the release from Customs custody of an article imported pursuant to a permit, the permit holder will prepare and file Form 6A according to its instructions.

* * * * *

§ 47.51 [Amended]

Par . 11. Amend the third sentence of § 47.51 by removing the phrase ''to the Director''.

Par. 12. Revise the second sentence of § 47.52(f) to read as follows:

§ 47.52 Import restrictions applicable to certain countries.

* * * * *

(f) * * * The certification statement will be prepared in letter form, executed under the penalties of perjury, and should be submitted with the application for an import permit. * * *

Par. 12. Add a new section to Subpart F—Miscellaneous Provisions to read as follows:

§ 45.58 Delegations of the Director.

The regulatory authorities of the Director contained in this part are delegated to appropriate ATF officers. These ATF officers are specified in ATF O 1130.34, Delegation of the Director's Authorities in 27 CFR Part 47. ATF delegation orders, such as ATF O 1130.34, are available to any interested party by mailing a request to the ATF Distribution Center, PO Box 5950, Springfield, VA 22150–5950, or by accessing the ATF Web site *http://www.atf.treas.gov/.*

Signed: August 26, 2002.

Bradley A. Buckles,

Director.

Approved: September 17, 2002.

Timothy E. Skud,

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

[FR Doc. 02–26680 Filed 10–18–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD08–02–028]

Drawbridge Operation Regulation; Three Mile Creek, Mobile, AL

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Alabama State Docks Terminal Railway railroad swing span drawbridge across Three Mile Creek, mile 0.7, at Mobile, Alabama. This deviation allows the draw of the railroad swing span bridge to remain closed to navigation from 7 a.m. until 5 p.m. from October 19, 2002 until October 28, 2002; except that, the bridge will open on signal between noon and 12:30 p.m. daily if at least two hours advanced notification is given. This temporary deviation is necessary to allow for the replacement of all rail, railway timbers and bridge joints.

DATES: This deviation is effective from 7 a.m. on Saturday, October 19, 2002 until 5 p.m. on Monday, October 28, 2002.

ADDRESSES: Materials referred to in this notice are available for inspection or copying at the office of the Commander (obc), Eighth Coast Guard District, 501 Magazine Street, New Orleans, Louisiana, 70130–3396 between the hours of 7 a.m. and 3 p.m. Monday through Friday except Federal holidays. The Bridge Administration Branch, Eighth District (obc), maintains the public docket for this notice.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: The Alabama State Docks Terminal Railway railroad swing span drawbridge across Three Mile Creek, Baldwin County, Alabama has a vertical clearance in the closed-to-navigation position of 4 feet above mean high water. The bridge provides unlimited vertical clearance in the open-to-navigation position. Navigation on the waterway consists of tugs with tows. Presently, the draw opens on signal for the passage of vessels as required by 33 CFR 117.5.

Alabama State Docks Terminal Railway requested a temporary deviation for the operation of the drawbridge to accommodate maintenance work. The work involves replacement of all rails, railway timbers and bridge joints on the bridge. This work is essential for continued safe operation of the draw span of the bridge.

This deviation allows the draw of the railroad swing span bridge to remain closed to navigation from 7 a.m. until 5 p.m. from October 19, 2002 until October 28, 2002; except that, the bridge will open on signal between noon and 12:30 p.m. daily if at least two hours advanced notification is given. The draw will open on signal between 5 p.m. and 7 a.m. The draw will be opened for emergencies but delays of up to one hour may occur during repair operations. The telephone number to call to request an opening during this repair work is 251–441–7300.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 9th, 2002.

Roy J. Casto,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 02–26551 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

43 CFR Part 2

RIN 1090–AA61

Revision of the Freedom of Information Act Regulations and Implementation of the Electronic Freedom of Information Act Amendments of 1996

AGENCY: Department of the Interior.

ACTION: Final rule.

SUMMARY: This document amends the Department of the Interior's (DOI or Agency) regulations implementing the Freedom of Information Act (FOIA). The FOIA regulations have been completely rewritten in plain language, question and answer format. The regulations also contain new provisions implementing the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA). Additionally, the regulations have been updated to reflect changes in the Department's policies and procedures, developments in case law, cost figures for calculating and charging fees, and organizational changes within DOI. As a result, the public will have a clearer understanding of DOI's policies and procedures implementing the FOIA.

EFFECTIVE DATE: November 20, 2002.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Department of the Interior, 1849 C Street, NW, Room 5323, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Alexandra Mallus by telephone at (202) 208–5342, by fax at (202) 501–2360, or by e-mail at *alexandra_mallus@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 16, 2001, the Department of the Interior published a proposed rule that revised its existing regulations under the FOIA and added new provisions implementing the Electronic FOIA Amendments. See 66 FR 36966, July 16, 2001. Interested persons were afforded an opportunity to participate in the rulemaking through submission of written comments on the proposed rule. The Department received three responses to its proposed rule. The Department has adopted several of the modifications suggested by the commenters and has made other revisions to its proposed rule for clarity as well.

The revision of Part 2, Subparts A and B, incorporates changes to the language and structure of the regulations and adds new provisions to implement the E-FOIA (Public Law 104–231). New provisions implementing the amendments are found at § 2.4(c) (electronic reading rooms), § 2.9 (format of disclosure), § 2.12 (timing of responses), § 2.14 (expedited processing), § 2.21(a) (electronic searches), § 2.21(c) (marking deletions), § 2.21(d)(3) (volume estimation), and § 2.26 (multitrack processing).

Subpart B now describes information that is routinely available to the public through the agency reading rooms and the Internet. Requesters are encouraged to use these resources first before filing a FOIA request. Subpart E is added to include information on DOI's FOIA annual report.

Section 2.3(t) has been revised to clarify that the term ''review'' includes the time spent by bureau staff and attorneys considering any formal objection to disclosure made by a submitter under § 2.23(f).

In light of the decision in Public Citizen v. Department of State, 276 F.3d 634 (D.C. Cir. 2001), DOI has revised §§ 2.7(d) and 2.21(a) of the final rule. These sections now provide that in determining which records are responsive to a FOIA request, the bureau will consider any records in its

possession and control as of the date it begins its search.

Requesters now have 30 workdays, instead of 20 workdays, to file an appeal after the date of DOI's response or receipt of any records provided (§ 2.29(a)).

New sections have been added, such as: (1) § 2.24 concerning submitter designations; (2) § 2.25 regarding requests for Federally-funded research data; (3) § 2.27 on handling a request for information contained in a Privacy Act system of records; and (4) § 2.33 on providing notice to requesters and submitters concerning appeal decisions dealing with commercial or financial information.

Revisions to the Department's fee schedule may be found in Appendix C. The duplication charge will remain the same, at thirteen cents per page. Document search and review charges will increase to reflect the average hourly labor costs, plus 16 percent for benefits, of employees in the following three categories: Clerical, professional, and managerial. (The managerial category is new and designed to cover employees at the GS–13 level and above.) The average grade for the clerical and professional categories has been adjusted in the final rule to more accurately reflect the hourly labor costs for those categories and to clarify the employee grade levels that are covered by each category.

Also, the criteria for determining fee waivers have been clarified to make it clear that DOI decides fee waiver requests on a case-by-case basis and to ensure that requesters know that they must provide sufficient justification to support their fee waiver requests (§ 2.19 and Appendix D).

The new rule increases the dollar amount below which we will not bill a requester. Under the old regulations, we charged a fee only if it cost us more than $15 to process a FOIA request. Under the new regulations, we will charge a fee only if the cost is more than $30. The new fee provisions are located in § 2.16(b)(2).

Paragraphs (c)(3) and (c)(4) of Appendix F, Mineral Leasing Act and Mineral Leasing Act for Acquired Lands—Special Rules, have been revised to make them more consistent with the statutory provisions from which they are derived.

Because we have rewritten the FOIA regulations extensively, Subparts C through E of the old regulations will be redesignated as Subparts F through H in the final rule. While the final rule redesignates these three subparts, it does not revise Subparts G or H. Subpart F is revised to clarify that this Subpart applies to information pertaining to Federal coal resources on acquired lands, as well as to Federal coal leases on lands that are governed by the Mineral Leasing Act. The Mineral Leasing Act for Acquired Lands applies to acquired Federal lands; the Mineral Leasing Act applies to other Federal lands. Both have similar provisions. In Appendix F, paragraph (a)(3), the clause ''which fit within an exemption to the FOIA'' has been removed. The Mineral Leasing Act, 30 U.S.C. 201(b)(3), applies to information collected pursuant to that provision, regardless of whether the information is subject to an exemption under the FOIA. Therefore, the clause ''which fit within an exemption to the FOIA'' is not necessary.

The Department received three responses from commenters: the first, from a national trade association; the second, from a nonprofit consumer advocacy organization; and the third, from a statewide nonprofit public interest organization. Due consideration has been given to each of the comments received. A discussion of the comments follows.

Issue 1: One commenter suggested adding an amendment to the Department's final rule incorporating the requirements of Public Law 105–277 which directed OMB to amend Section__.36 of OMB Circular A–110. OMB's revised Circular A–110 articulates the procedures by which Federally-funded research data that were used by the Federal Government in developing an agency action may be made available to the public under the FOIA.

Our Response: This comment has been adopted by the Department. A new section has been added to DOI's final rule (§ 2.25) which provides procedures for handling FOIA requests for Federally-funded research data in the possession of a private entity.

Issue 2: One commenter indicated that the Department's regulations should retain the existing requirement to articulate a ''sound ground'' for a denial or partial denial of an information request. This commenter suggested that the bureau must not only cite legal authority for the denial but also must provide a brief explanation why, given the record(s) and exemption(s) at issue, it is appropriate for the bureau to invoke the exemption rather than exercise its discretion (except where prohibited by law) to waive the exemption and disclose the record(s) in accordance with guidance issued by the Attorney General in May 1997 and September 1999.

Our Response: Although the Department declines to adopt this commenter's suggestion, it has modified the proposed rule. The 1997 and 1999 guidance which this commenter references has been superseded by guidance issued by the Attorney General in October 2001. It is subject to further revision by this or subsequent administrations. There is nothing in the FOIA which requires the inclusion of the ''sound grounds'' language in the Department's FOIA regulations. In light of these considerations, the Department has changed the language to avoid conflicts with current and future Department of Justice (DOJ) guidance on this subject. DOI also has modified the language in § 2.21(d)(2) to make clear that the bureau's response should include an explanation of the reasons for the denial of the request. Finally, § 2.21(b)(2) of this rule has been revised to provide that a bureau may, consistent with Departmental policy, determine that a discretionary release is appropriate under the particular circumstances.

Issue 3: One commenter indicated that the availability of immediate judicial relief, without filing an appeal, was not clearly stated in the proposed rule, and suggested that the requester's right to sue be stated more explicitly throughout the regulations.

Our Response: DOI believes that it has given sufficient notice concerning a requester's right to file a lawsuit (see § 2.12(a), § 2.13(c), and § 2.31(b)) and, accordingly, has declined to adopt this commenter's suggestion.

Issue 4: DOI received several comments from one individual concerning the fee waiver criteria that are included in Appendix D of the proposed regulations. This commenter objected to the requirement that a requester submit detailed information to support a fee waiver request, claiming that the requester may not be able to provide ''detailed information'' without having seen the information in the requested records. According to this commenter, the criteria in Appendix D could unreasonably restrict the availability of fee waivers by making it unreasonably difficult to show that disclosure of the information ''is likely to contribute significantly to public understanding of the operations or activities of the government.'' This commenter also discussed the potential value of previously released information, and the definition of ''public at large'' as it relates to fee waivers. Finally, this commenter pointed out an error in paragraph numbering in Appendix D.

Our Response: The intent of the Department's regulations is not to demand ''detailed information'' about

the records being sought, but rather to clarify for the public the determinative factors that the Department considers when deciding whether to grant a fee waiver. Requesters then can adequately address these factors in their fee waiver requests. DOI has added the following language to the first paragraph of Appendix D in response to this commenter's concerns: ''You should explain the significance of the release of the information to the public's understanding of the Government's operations and activities based on your understanding of the type of information that your are requesting.''

DOI agrees with the comment on the potential value of previously released information. Confirmation or clarification of previously released information can be as important to public understanding of Government activities as the initial disclosure of information when it was new information. The Department has amended the regulations at paragraph (b)(3)(ii) of Appendix D to clarify this.

In response to another comment, DOI has added ''a reasonably broad audience of persons interested in the subject'' at the end of the initial question in paragraph (b)(2) (iv) of Appendix D. Finally, DOI has corrected the paragraph designation in Appendix D, Fee Waiver Criteria.

Issue 5: Two comments concerned expedited processing of requests. One commenter asked the Department to adopt an additional provision expediting the processing of records that are subject to multiple pending requests. This commenter also urged DOI to expand the criteria covering who may make a request for expedited processing to include organizations whose business includes disseminating information, even if disseminating information is not their primary business, *i.e.*, non-news media requesters when those entities have an urgent need to report on a Government activity.

Our Response: DOI has declined to adopt these comments. With regard to the first comment, while Congress did give agencies latitude to expand expedited processing to other categories, it also admonished agencies that being ''unduly generous'' in creating other categories for expedited processing ''would unfairly disadvantage other requesters.'' H.R. Rep. No. 104–795, at 26 (1996). Accordingly, the Department declines to create a fourth expedited processing category for records subject to multiple requests. In response to the second issue, the language in § 2.14(a)(2) has been modified to allow entities other than representatives of the news media to be considered for expedited processing. However, consistent with the language in the statute, their main professional activity or occupation must be information dissemination.

Issue 6: One commenter stated that while the bureaus should be allowed to develop their own standards for multitrack processing, these standards, once formulated, should be made available for public comment prior to implementation.

Our response: Prior to implementing a multitrack processing system, the Department will provide guidance in the **Federal Register** and/or on its FOIA website so that requesters will know how to draft their requests to qualify for a faster processing track (see amended language at § 2.26(b)).

Issue 7: One commenter pointed out that § 2.4(c)(iv) of the proposed rule contains an incomplete description of the records that should be in DOI's electronic reading rooms and thus does not comply fully with E–FOIA.

Our Response: The Department has adopted this comment and has revised the language in § 2.4(c)(1)(iv) of the final rule to read as follows: ''Copies of records that have been or are likely to become the subject of frequent requests under the FOIA and an index of those documents.'' DOI also has added a definition of ''frequently requested records'' under § 2.3(l) for clarification purposes.

Issue 8: One commenter recommended that the Department provide the same notice to requesters whose requests have been referred to other Federal agencies as those whose requests have been referred to other DOI bureaus.

Our Response: DOI has amended the language in § 2.22(b)(2) to provide for such notification in the event a bureau refers documents to another agency (the originating agency) for a release determination. However, if a bureau receives a request for records not in its possession, but which it believes may be in the possession of another Federal agency, it will return the request to the requester and advise him/her to submit it to the other agency directly.

Issue 9: One commenter indicated that if DOI receives a FOIA request for a record in its possession that originated with another agency (or with which another agency is substantially concerned), it should make the release determination after consulting with the originating agency. This commenter suggested that DOI should not refer the record to the originating agency if that agency has a backlog or the agency's policy on processing referrals will delay the response to the requester.

Our Response: The Department declines to adopt this comment. DOI must consider which agency is in a better position to make the proper release determination. Consideration of workload issues should not drive the determination of which agency is best suited to make the release determination. Use of workload considerations for this determination could result in improper releases.

Issue 10: Another commenter suggested that DOI should have a central location where all FOIA requests can be sent if the requester is not certain which bureau has the records he/she is seeking.

Our Response: DOI has not adopted this comment. The Department's FOIA regulations provide the public with sufficient notice on how requests will be processed. In response to another issue this commenter raised involving intra-bureau requests, § 2.10(b)(3) has been revised. Under § 2.10(b)(3), as revised, if the request states that it seeks records from unspecified offices within the same bureau, the FOIA Contact will send the request to the Bureau FOIA Officer, who will refer it to those offices which, to the best of his/her knowledge, have or are likely to have responsive records.

Issue 11: One commenter stated that the standard for starting the statutory time limits should be the same for ''regular mail and e-mailed'' requests/appeals, *i.e.*, the time period for an electronic request/appeal should begin when the request is received, not when it is opened.

Our Response: The Department has adopted this comment. Sections 2.12(b), 2.30(b), and 2.32(a) of this rule have been changed to provide that the time limit for an electronic request/appeal begins when the request is received, not when it is opened.

Regulatory Planning and Review (E.O. 12866)

DOI has determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and therefore is not subject to OMB review because it is not likely to:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments, or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees,

or loan programs or the rights or obligations of their recipients; or

(4) Raise novel legal or policy issues.

Regulatory Flexibility Act

DOI certifies that this regulation will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 606(b)). Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by DOI are nominal.

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 will not result in an annual effect on the economy of more than $100 million per year; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based enterprises. It deals strictly with implementation of the FOIA within DOI.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*)

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have any takings implications. It deals strictly with implementation of the FOIA within DOI. Therefore, a takings assessment is not required.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, this rule does not have Federalism implications as it deals strictly with implementation of the FOIA within DOI. Therefore, a Federalism assessment is not required.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and the requirements of §§ 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501–3520) is required.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act (42 U.S.C. 4321–4347) of 1969 is not required.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Classified information, Courts, Freedom of information, Government employees, Privacy.

Dated: October 2, 2002.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

Regulation Promulgation

For the reasons stated in the preamble, we amend Part 2 of Title 43 of the Code of Federal Regulations, as follows:

PART 2—RECORDS AND TESTIMONY: FREEDOM OF INFORMATION ACT

1. The authority citation for Part 2 is revised to read as follows:

Authority: 5 U.S.C. 301, 552 and 552a; 31 U.S.C. 9701 and 43 U.S.C. 1460–1461. Appendix F to Part 2 also is issued under 30 U.S.C. 201–209; 30 U.S.C. 351–360.

Subparts C Through E [Redesignated as Subparts F Through H]

2. Subparts C through E are redesignated as Subparts F through H.

3. Subparts A and B are revised in their entirety and redesignated as Subparts A through E to read as follows:

Subpart A—General Information

Sec.

2.1 What do the regulations cover?
2.2 What is DOI's policy regarding release of records under the FOIA?
2.3 What terms do I need to know?

Subpart B—Information Routinely Available to the Public Without Filing a FOIA Request

2.4 How do I obtain information routinely available to the public?
2.5 Does DOI maintain an index of its reading room materials?
2.6 Will the Department accept written requests, including fax, e-mail, or telephone requests, for routinely available information?

Subpart C—Requests for Records Under the FOIA

2.7 What do I need to know before filing a FOIA request?
2.8 What information do I include in my request?
2.9 May I specify the form or format of disclosure?
2.10 Where do I send my request?
2.11 Why is it important to send my request to the right office?
2.12 When can I expect the response?
2.13 When may the bureau take a time extension to respond to my request?
2.14 When can I get expedited processing?
2.15 Will I be charged fees?
2.16 How are fees determined?
2.17 How will my requester category affect the fees that I am charged?
2.18 How are fees assessed and collected?
2.19 When will bureaus waive fees?
2.20 When will bureaus grant discretionary fee waivers?
2.21 How will the bureau respond to my request?
2.22 What happens if a bureau receives a request for records it does not have or did not create?
2.23 How will a bureau handle a request for commercial or financial information that it has obtained from a person or entity outside the Federal Government?
2.24 Is a submitter required to designate information that is commercially or financially sensitive?
2.25 How will a bureau handle a request for Federally-funded research data in the possession of a private entity?
2.26 Does the bureau provide multitrack processing of FOIA requests?
2.27 How will a bureau handle a request for information that is contained in a Privacy Act system of records? (See DOI's Privacy Act regulations (Subpart G of this part) for additional information)

Subpart D—FOIA Appeals

2.28 When may I file an appeal?
2.29 How long do I have to file an appeal?
2.30 How do I file an appeal?
2.31 How will DOI respond to my appeal?
2.32 How long does DOI have to respond to my appeal?
2.33 How will the Department notify you and the submitter of commercial or financial information when it makes an appeal decision concerning such information?

Subpart E—FOIA Annual Report

2.34 Where can I get a copy of DOI's FOIA annual report?

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Subpart A—General Information

§ 2.1 What do the regulations cover?

(a) The regulations implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, and contain the procedures by which the public may inspect and obtain copies of Department of the Interior (DOI or Department) records through the FOIA or by other means.

(b) They apply to all agency records as defined in § 2.3(c).

(c) The policy and procedures set forth in these regulations apply to all bureaus and offices of the Department.

(d) Nothing in the regulations will entitle you to any service or any record that is not required to be provided under the FOIA.

(e) These regulations do not apply to records that fall under the law enforcement exclusions contained in 5 U.S.C. 552(c).

§ 2.2 What is DOI's policy regarding release of records under the FOIA?

It is our policy to make records of the Department available to the public consistent with the spirit of the FOIA and the Privacy Act.

§ 2.3 What terms do I need to know?

For the purposes of this part, the following definitions apply:

(a) *Act* and *FOIA* mean the Freedom of Information Act, 5 U.S.C. 552, as amended.

(b) *Agency* means any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Federal Government, or any independent regulatory agency.

(c) *Agency record* means any documentary material which is either created or obtained by an agency in the transaction of agency business and under agency control. See §§ 2.21 and 2.25.

(1) Agency records include:

(i) Books, papers, maps, charts, plats, plans, architectural drawings, photographs, and microfilm;

(ii) Machine-readable materials such as magnetic tape and disks;

(iii) Electronic records (including e-mail messages);

(iv) Audiovisual material such as still pictures, sound and video recordings; and

(v) All other documentary materials, regardless of physical form, format or characteristics.

(2) This definition generally does not cover records of an individual which are:

(i) Created and maintained primarily for an individual's convenience;

(ii) Not subject to agency creation or retention requirements; and

(iii) Not distributed to other agency employees for their official use.

(d) *Bureau* means any major component of the Department administering its own FOIA program. A list of these components is contained in Appendix A to this part.

(e) *Commercial-use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester falls into this category, the bureau will consider the identity of the requester and intended use of the records in addition to any other available information about the requester.

(f) *Direct costs* means those expenses that a bureau actually incurs in searching for and duplicating (and in the case of commercial-use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary and benefits of the employee performing the work and the cost of operating duplicating equipment. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(g) *Duplication* means making a copy of a record, or the information contained in it, to respond to a FOIA request. Copies can take the form of paper, microform, photographs, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others.

(h) *Educational institution* means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, which operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(i) *Expedited processing* means giving a FOIA request priority, and processing it ahead of other requests pending in the bureau because a requester has shown an exceptional need or urgency for the records (see § 2.14).

(j) *FOIA request* means a written request (this includes facsimile (fax) and electronic mail (e-mail)) made by any member of the public for Federal agency records.

(k) *Free-lance journalist* means a representative of the news media who is able to demonstrate a solid basis for expecting publication through a news organization, even though not actually employed by it. A publication contract or past record of publication, or evidence of a specific free-lance assignment from a news organization may indicate a solid basis for expecting publication.

(l) *Frequently requested documents* means documents that have been requested at least three times under the FOIA. It also includes documents the agency anticipates would likely be the subject of three or more requests.

(m) *Multitrack processing* means placing simple requests, requiring relatively minimal review, in one processing track and more voluminous and complex requests in one or more other tracks. Requests in each track are processed on a first-in/first-out basis.

(n) *Noncommercial scientific institution* means an institution that is not operated for commerce, trade or profit, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(o) *Privacy Act* request means a written request (paper copy with an original signature) made by an individual for information about himself or herself that is contained in a Privacy Act system of records. The Privacy Act applies only to U.S. citizens and aliens lawfully admitted for permanent residence. Therefore, only those individuals may make Privacy Act requests.

(p) *Published research findings* means research findings that are either:

(1) Published in a peer-reviewed scientific or technical journal; or

(2) Publicly and officially cited by a Federal agency in support of an agency action that has the force and effect of law.

(q) *Reading room materials* means records (paper or electronic) that are required to be made available to the public under 5 U.S.C. 552(a)(2), as well as other records that a bureau, at its discretion, makes available to the public

for inspection and copying without requiring the filing of a FOIA request.

(r) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that is (or would be) of current interest to the public. Examples of news media entities include, but are not limited to, newspapers, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. To be in this category, a requester must not be seeking the requested records for a commercial use. Further, a bureau normally will not consider requests for records involving news dissemination to be commercial-use requests.

(s) *Research data* means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not such things as trade secrets, commercial information, personnel and medical information and any similar information which is protected under law.

(t) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure, including routine consultation among bureau staff and attorneys regarding the applicability of exemptions; and time spent considering any formal objection to disclosure made by a submitter under § 2.23(f).

(u) *Search* means the process of looking for and retrieving agency records and information responsive to a request (manually or by automated means).

(v) *Submitter* means any person or entity outside the Federal Government from whom the Department directly or indirectly obtains commercial or financial information. The term includes, but is not limited to individuals, corporations, and state, local, tribal, and foreign governments.

(w) *Workday* means a regular Federal workday. It does not include Saturdays, Sundays, or Federal legal public holidays.

Subpart B—Information Routinely Available to the Public without Filing a FOIA Request

§ 2.4 How do I obtain information routinely available to the public?

A great deal of information is available to the public without filing a FOIA request. Examples are Departmental policies, procedures, and organizational descriptions. The following guidance will help you obtain this information. [**Note:** For copies of records that are not routinely available, you must submit a FOIA request to the DOI office where the records are located. Procedures for requesting records under the FOIA are provided in Subpart C of this part.]

(a) *General.*

(1) General information about DOI or one of its bureaus may be obtained by visiting DOI's home page (see Appendix B to this part for a list of Internet addresses) or by contacting the Office of Public Affairs/Communications for the appropriate bureau (see Appendix A to this part for a list of DOI contacts). Many documents are made available to the public through DOI's reading rooms. Some documents also may be available in DOI's electronic reading rooms on the Internet.

(2) Information on DOI's FOIA Program and a Reference Guide to assist you in obtaining various types of information are available in DOI's reading rooms, through the FOIA home page, or by contacting the Departmental FOIA Officer.

(3) To obtain information about specific records in DOI, you also may refer to:

(i) The index of documents frequently requested under the FOIA, which is available in DOI's reading rooms, through the FOIA home page, or by contacting one of the bureau FOIA Officers; and

(ii) The index and description of DOI's major information and record locator systems, which are available in DOI's reading rooms, through the FOIA home page, or by contacting one of the bureau FOIA Officers.

(4) Another source of information is DOI's Library, which contains over one million holdings dealing with a broad range of matters pertaining to the Department's mission. You may wish to visit the Library, which is located at the C Street entrance of the Main Interior Building, 1849 C Street, NW., Washington, DC 20240 (see Appendix A to this part). The Library is open to the public for on-site reference use from 7:45 a.m.–5:00 p.m., Monday–Friday (excluding Federal legal public holidays). Additional information regarding the Library's holdings and services may be obtained by visiting its home page (see Appendix B to this part).

(b) *Published information and rules.* Under 5 U.S.C. 552(a)(1), bureaus are required to publish certain information in the **Federal Register** for the guidance of the public, such as descriptions of their central and field organizations, functions, procedures, substantive rules, and statements of general policy.

(c) *Reading room materials.*

(1) Under 5 U.S.C. 552(a)(2), each bureau is responsible for making the information listed in paragraphs (c)(1)(i) through (v) of this section available for public inspection and copying unless the materials are promptly published and copies offered for sale. Bureaus must make any such records created on or after November 1, 1996, available by the Internet or by other computer telecommunication methods or electronic means as quickly as practicable.

(i) Final opinions rendered in the adjudication of cases.

(ii) Policy statements and interpretations which have been adopted by DOI and are not published in the **Federal Register**.

(iii) Administrative staff manuals and instructions affecting the public.

(iv) Copies of records that have been or are likely to become the subject of frequent FOIA requests and an index of those documents.

(v) A subject-matter index of its reading room records (see § 2.5).

(2) Bureaus may, at their discretion, make other records available for inspection and copying in reading rooms or via their home pages.

(d) *Inspection and copying of reading room materials.*

(1) Reading room materials are available for inspection and copying at the locations listed in Appendix A to this part and, in some cases, through the Internet; however, not all records may be available in all locations.

(i) If you need assistance in determining the location and availability of the records you are seeking, contact the appropriate reading room or FOIA Contact listed in Appendix A to this part.

(ii) If you file a FOIA request for reading room materials and the information you request is available on the Internet, the FOIA Contact should refer you to the appropriate Web site. If the reading room materials are not available electronically, the FOIA Contact may either send you the materials, or forward your request to the appropriate reading room and provide the name and telephone number of a

staff member you may contact. You may, nevertheless, ask the bureau to process your request as any other FOIA request.

(2) A bureau may delete exempt information from some records before making them available for inspection and copying in a reading room. (See § 2.21(c)). You may not appeal a bureau's decision to delete exempt information from a document it places in a public reading room. If you would like access to the entire record, you must submit a FOIA request under the procedures in Subpart C of this part. However, this does not guarantee that the entire record will be released. If you submit such a FOIA request and are not satisfied with the response, you may file an appeal as described in § 2.28.

(3) There is no charge to inspect reading room materials. Copying services will be provided at the fees specified in Appendix C to this part. However, other fees may apply where a bureau has a statute that specifically requires the bureau to set fees for particular types of records.

(4) If you submit a fee waiver request for information in a reading room, it will be processed under the procedures in § 2.19.

§ 2.5 Does DOI maintain an index of its reading room materials?

Each bureau will maintain and make available for public inspection and copying a current subject-matter index of its reading room materials (5 U.S.C. 552(a)(2)). The index will be available in the bureau's reading room(s) and in their electronic reading rooms on the Internet. Each index will be updated regularly.

§ 2.6 Will the Department accept written requests, including fax, e-mail, or telephone requests, for routinely available information?

Yes. Although a request for this type of information is not a FOIA request, the bureau will send you the requested information and charge you for the copies, according to the fee schedule in Appendix C to this part. While the bureau will attempt to respond to oral requests (those made by telephone or otherwise) for routinely available information, you should submit complex requests in writing to avoid any risk of misunderstanding.

Subpart C—Requests for Records under the FOIA

§ 2.7 What do I need to know before filing a FOIA request?

(a) If the records you are seeking are not routinely available as described in Subpart B of this part, you must submit a FOIA request to the FOIA Contact at the bureau office where you believe the records are maintained (see Appendix A to this part). FOIA requests must be submitted in writing (this includes fax and e-mail)—DOI does not accept oral FOIA requests. Before submitting a request, you may find it useful to contact the appropriate bureau FOIA Contact or the Departmental FOIA Officer for additional information concerning DOI's FOIA Program. You may find the Department's Reference Guide, which is available electronically through the FOIA home page and in paper form as well, helpful in making your request.

(b) The FOIA requires that we release records unless they are protected by one of nine exemptions (see Appendix E to this part).

(c) The Act does not require a bureau to answer questions that may be asked in a FOIA request.

(d)(1) In order for a record to be considered subject to your FOIA request, it must be in the bureau's possession and control at the time the bureau begins its search for responsive records. There is no obligation for the bureau to create or compile a record to satisfy a FOIA request (for example, by combining or compiling selected items from manual files, preparing a new computer program, calculating proportions, percentages, frequency distributions, trends and comparisons, or creating maps). Normally if a bureau is extracting information from an existing computer database, this would not constitute the creation of a new record. However, a bureau has the option of creating a new record if—

(i) Doing so will provide a more useful response to the requester,

(ii) It is less burdensome than providing the existing records, and

(iii) The newly created record is fully responsive to the request.

(2) The fee in this case will not be more than the fee for the individual records. Fees will be charged consistent with the schedule in Appendix C to this part.

§ 2.8 What information do I include in my request?

(a) Description of records.

(1) You must describe the requested records in enough detail to enable an employee familiar with the subject area of the request to locate the record(s) with a reasonable amount of effort. Be as specific as possible in describing the records you are seeking. For example, whenever possible:

(i) Identify the date, title or name, author, recipient, and the subject of the record; the office that created it, the present custodian of the record and the geographical location (*e.g.*, headquarters or a regional/field office); the timeframe for which you are seeking records; and any other information that will assist the bureau in locating the material.

(ii) If the request involves a matter in litigation, state the case name and docket number as well as the court in which the case was filed.

(2) The bureau will not begin processing your request until any issues regarding the scope or nature of your request are resolved. When a request is overly broad, unclear, involves an extremely voluminous amount of records, or a burdensome search, the bureau will contact you to identify and clarify the records you are seeking. It will work with you to define the subject matter, clarify terms that are used, or narrow the scope of your request.

(3) The time limit for responding to your request will not start until the bureau receives a request reasonably describing the records or clarifying the initial request. If the bureau asks you for additional clarification and does not hear from you within 20 workdays, it will assume that you are no longer interested in pursuing your request and will close the file on your request.

(b) Fee information.

(1) Unless you request a fee waiver (see paragraph (b)(2) of this section), you should state that you are willing to pay all fees associated with processing your request or that you are willing to pay up to a specified amount. The bureau will not begin processing your request until this written assurance has been received. If the bureau anticipates that the fees for processing your request exceed the amount you have indicated you are willing to pay, the bureau will notify you that it needs your assurance of payment of fees as high as are anticipated, or an advance payment (see § 2.18(b) and (c)). If the bureau does not hear from you within 20 workdays, it will assume that you are no longer interested in this matter and will close the file on your request.

(2) You may request a fee waiver. If you are seeking a fee waiver, you must provide sufficient justification to support your fee waiver request (see the criteria in § 2.19 and in Appendix D to this part). Failure to provide adequate justification will result in a denial of your fee waiver request. Remember that if you are requesting a fee waiver, the burden is on you to demonstrate in your request that you are entitled to it. The bureau will not begin processing your request until the fee issues are resolved. As an option, at the same time you request a fee waiver you may state your willingness to pay regardless of whether

a fee waiver is granted. This will permit the bureau to process your request for records at the same time it is considering the fee waiver request. If you are required to pay a fee, and it is later determined on appeal that you are entitled to a full or partial fee waiver, an appropriate refund will be made.

(3) You should indicate what fee category you are in, *i.e.*, if you are a commercial-use requester, news media, educational institution/noncommercial scientific institution, or other requester (see §§ 2.3 and 2.17(a)). If you submit a FOIA request on behalf of another person or organization (for example, if you are an attorney submitting a request on behalf of a client), it is the underlying requester's identity and intended use that determines the fee category. If your fee category is unclear to the bureau, the 20-workday statutory time limit for processing your request will not begin to run (see § 2.12(b)) until this matter has been resolved. If the bureau requests additional clarification and does not hear from you within 20 workdays, it will assume that you are no longer interested in this matter and will close the file on your request.

(c) Mailing address information: Your postal address is required for the bureau to mail any responsive documents to you.

(d) The following information will assist the bureau in processing your request:

(1) The words ''FOIA REQUEST'' (prominently displayed) on the request letter and the envelope, or subject line of a request sent via e-mail or fax, or ''PRIVACY ACT REQUEST'' when requesting records pertaining to yourself that you believe are covered by the Privacy Act, as well as citing the appropriate act in your letter;

(2) Your telephone number (where you can be reached during normal business hours), e-mail address and fax number, if available, in case the bureau, or the Department needs to communicate with you about your request. This information is very important.

(3) A list of all the bureau FOIA Contacts to which you are sending your request. For the quickest possible handling, you should address a separate copy of your request to each bureau FOIA Contact where you believe the records are maintained.

(4) When making a request for personal records about another individual, a written authorization from that individual and any other information required by the Privacy Act system of records notice; or proof that the individual is deceased (for example, a copy of a death certificate or an obituary) as the Privacy Act does not apply to a deceased individual. (**Note:** Information about a deceased individual may be subject to protection under exemption (6) of the FOIA if the release of the information could result in an invasion of the privacy of a living individual.)

§ 2.9 May I specify the form or format of disclosure?

Generally, you may choose the form or format of disclosure for records that you request under the FOIA (5 U.S.C. 552(a)(3)(B)). Bureaus must provide the record in the requested form/format if the office responding to the request can readily reproduce the record in that form/format with reasonable efforts. However, if the process of providing the information in the requested format would damage or destroy an original document, it may not be possible to honor your format request. Bureaus must make reasonable efforts to maintain their records in forms or formats that are reproducible. You may be charged the direct costs involved in converting information to the requested format if the bureau normally does not maintain the information in that format.

§ 2.10 Where do I send my request?

(a) DOI does not have a central location where you may submit your FOIA request nor does it maintain a central index or database of documents in its possession. DOI's files are decentralized and are maintained by various bureau offices throughout the country.

(b) Submit your request in writing to the FOIA Contact at the bureau office where you believe the records are maintained. If it is unclear where to send your request, seek assistance from the FOIA Contact of the bureau that manages the programs whose records you are requesting or the Departmental FOIA Officer. You may have to do a little research to find the proper office to handle your inquiry, but you will save time in the long run if you send your request directly to the FOIA Contact at the appropriate bureau office. The bureau will process your request as follows:

(1) A request to a bureau headquarters office may be presumed to seek only records from the headquarters office, unless the request specifies otherwise.

(2) A request to a regional/field office of a bureau may be presumed to seek only records at that office, unless the request specifies otherwise.

(3) If a request to a bureau states that it seeks records located at another specific office of the same bureau, the appropriate FOIA Contact will refer the request to the other office. If the request states that it seeks records from other unspecified offices within the same bureau, the FOIA Contact will send the request to the Bureau FOIA Officer who will refer it to those offices that, to the best of his/her knowledge, have or are likely to have responsive records.

(4) If a request to a bureau states that it seeks records of another specified bureau, the bureau will refer the request to the appropriate bureau for response. If the request states that it seeks records from other unspecified bureaus, the FOIA Contact will send the request to the Bureau FOIA Officer who will ensure that the request is referred to those bureaus which, to the best of his/her knowledge, have or are likely to have responsive records. In either case, the Bureau FOIA Officer will notify you of the referral in writing and provide the name of a contact in the other bureau(s) to which the referral was made.

§ 2.11 Why is it important to send my request to the right office?

The bureau and office FOIA Contacts listed in Appendix A to this part have primary responsibility for responding to FOIA requests. Failure to send your request to the FOIA Contact at the appropriate bureau office may delay processing, because the time limit for the bureau to respond will not begin to run until a request complying with §§ 2.8 and 2.10 is received by the bureau office where the records are maintained. The processing of your request may be delayed if you send it to the Secretary of the Interior (or other high-level officials), the Office of Public Affairs/Communications, the DOI FOIA Officer, or the Department/bureau's webmaster.

§ 2.12 When can I expect the response?

(a) *Basic time limit.* Ordinarily, a bureau has 20 workdays from the date of receipt to determine whether to grant or deny your FOIA request (see paragraph (b) of this section). The bureau will notify you immediately upon reaching its decision. If you have not received a response within 20 workdays, or 30 workdays if an extension has been taken (see § 2.13) (be sure to allow for mailing time), you may contact the bureau to ask about the delay (see Appendix A to this part). You also have the right to consider any nonresponse within these time limits as a denial of records and file a formal appeal (see § 2.28(a)(3)) or lawsuit. These time limits do not apply to requests for expedited processing (see § 2.14).

(b) *Running of basic time limit.* The 20 workday time limit begins to run when a request complying with the

procedures in §§ 2.8 and 2.10 is received by the FOIA contact at the bureau office that has the records you are seeking. This means that all issues regarding fees and the scope of your request must be resolved before the bureau will begin processing your request.

§ 2.13 When may the bureau take a time extension to respond to my request?

(a) The bureau may extend the 20-workday time limit for 10 more workdays when it needs to:

(1) Search for and collect the requested records from multiple offices; or

(2) Search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request or with one or more bureaus of the Department having substantial subject-matter interest in the request.

(b) If the bureau intends to take an extension under this subsection, it will notify you in writing and provide the reason for the extension and the date it expects to make a determination on your request.

(c) If an extension is necessary and the bureau is unable to respond to your request within 30 workdays, it will notify you in writing when you may expect a final response and advise you of your appeal rights. If an extension is taken and you have not received a response in 30 workdays, you may consider the request denied and file an appeal under § 2.28(a)(3) or file a lawsuit.

(d) A bureau may not take an extension of time to decide whether to grant a request for a fee waiver.

§ 2.14 When can I get expedited processing?

(a) When requested, a bureau will provide expedited processing if you demonstrate to the satisfaction of the bureau that the request involves:

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) An urgency to inform the public about an actual or alleged Federal Government activity if the request is made by a person primarily engaged in disseminating information. In most situations, a person primarily engaged in disseminating information will be a representative of the news media. The requested information must be the type of information which has particular value that will be lost if not disseminated quickly, and ordinarily refers to a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media deadline unrelated to breaking news; or

(3) The loss of substantial due process rights.

(b) A request for expedited processing should be submitted with your FOIA request. For a prompt determination, you must submit a request complying with the requirements of §§ 2.8 and 2.10 to the FOIA Contact at the bureau office that maintains the records you are seeking.

(c) If you are seeking expedited processing, you must submit a statement explaining in detail the basis for your request. You must certify in your letter that your need for expedited processing is true and correct to the best of your knowledge and belief. For example, a requester within the category of paragraph (a)(2) of this section, if not a full time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his/her sole occupation.

(d) Within 10 calendar days of receipt of your request, the bureau will notify you whether it will grant expedited processing. If expedited processing is granted, the bureau will give priority to that FOIA request and process the request as soon as practicable. If expedited processing is denied, the bureau will notify you of your right to appeal the decision on expedited processing. Appeals of denials of requests for expedited processing will be processed ahead of other appeals (see § 2.32(b)). If the bureau has not responded to your request for expedited processing within 10 calendar days, you have a right to file an appeal for nonresponse (see § 2.28(a)(7)).

§ 2.15 Will I be charged fees?

Bureaus will charge fees consistent with the provisions in §§ 2.16 and 2.17. The fee schedule in Appendix C to this part applies to all bureaus of the Department.

§ 2.16 How are fees determined?

(a) *Authority.* Bureaus are authorized to charge fees to recover the direct costs of searching for, reviewing (commercial-use requesters only) and duplicating documents to respond to a FOIA request. However, nothing in this subsection will supersede any statutory authority which requires the bureau to charge specific fees for certain types of records.

(b) *Policy.* (1) Unless waived under the criteria in §§ 2.19 or 2.20, bureaus will charge fees for responding to FOIA requests consistent with the provisions of this section and the fee schedule in Appendix C.

(2) A bureau normally will not charge a fee where the fee would be $30 or less. However, if the bureau has a reasonable basis to conclude that a requester or group of requesters has divided a request into a series of requests on a single subject or related subjects to avoid fees, the requests may be aggregated and fees charged accordingly. Bureaus may presume that multiple requests of this type that are made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, bureaus will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(3) Where a bureau responds to a request on behalf of more than one bureau, the fees that would be chargeable by all bureaus involved will be considered in determining whether the total FOIA processing fee is $30 or less. If a bureau is responding on behalf of more than one bureau, and you fall under one of the fee categories in § 2.17(a)(2) or (a)(3), you will be entitled to receive up to a total of 100 pages of duplication without charge (there is no charge for searching for responsive records). If a bureau is responding on behalf of more than one bureau, and you fall under the fee category in § 2.17(a)(4), you will be entitled to receive up to a total of 100 pages of duplication and two hours of search time without charge.

(4) If a bureau obtains research data solely in response to your FOIA request, it may charge you a reasonable fee equaling the full cost of obtaining the research data from the recipient.

(c) *Searches.* Searches will be conducted in the most efficient and least expensive manner, so as to minimize costs for both you and the bureau. Except where provided in §§ 2.17(a)(2) and (a)(3), bureaus will charge for time spent in the following search activities:

(1) Time spent in trying to locate records which come within the scope of the request, whether or not documents responsive to the request are located or the records located are exempt from disclosure; and

(2) Direct costs involving the use of computer time to locate requested records.

(d) *Reviews (Commercial-use requests only).* (1) Bureaus will charge commercial-use requesters (see § 2.17(a)(1)) for time spent by bureau staff and attorneys in reviewing requested records for releasability. (See § 2.3(e).)

(2) Review costs will be assessed even if a record ultimately is not disclosed.

(e) *Duplication.* Bureaus will charge duplication fees according to the fee schedule in Appendix C to this part.

(f) *Categories of requesters.* There are four categories of requesters for the purposes of determining fees—commercial-use, educational and noncommercial scientific institutions, news media, and all others. (See §§ 2.3 and 2.17.)

§ 2.17 How will my requester category affect the fees that I am charged?

(a) When you submit a FOIA request, you must specify your fee category. Based on the information you provide, the bureau office processing your request will decide your fee category and charge as follows:

(1) Commercial-use requesters are charged fees for costs incurred in document search, review, and duplication.

(2) Educational/noncommercial scientific institutions are charged for document duplication, except that the first 100 pages of paper copies (or the equivalent cost thereof if the records are in some other form) will be provided without charge. The bureau will not charge such requesters for document search and review.

(3) News media requesters are charged for document duplication, except that the first 100 pages of paper copies (or the equivalent cost thereof if the records are in some other form) will be provided without charge. The bureau will not charge such requesters for document search and review.

(4) Requesters not covered by paragraphs (a)(1) through (a)(3) of this section—''other requesters'' are charged fees for document search and duplication, except that they are entitled to the first two hours of search time and the first 100 pages of paper copies without charge (or the equivalent cost thereof if the records are in some other form). The bureau will not charge such requesters for document review.

(b) If you do not submit sufficient information in your FOIA request for the bureau to determine your fee category (see paragraphs (a)(1) through (a)(4) of this section), the bureau may ask you to provide additional clarification. This applies to all requesters. The bureau will notify you promptly when additional information is needed. In these circumstances, the 20-workday statutory time limit for responding to your request will not begin to run until you provide sufficient information. If the bureau requests additional clarification and does not hear from you within 20 workdays, it will assume that you are no longer interested in this matter and will close the file on your request.

(c) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
Commercial Use	Yes	Yes	Yes
Educational Institution. Non-Commercial Scientific Institution	No	No	Yes (100 pages free)
News Media. All Other	Yes (2 hours free)	No	Yes (100 pages free)

§ 2.18 How are fees assessed and collected?

(a) *Threshold for charging fees.* Except in those situations covered by § 2.16(b)(2), the bureau will not charge you if the fee is $30 or less.

(b) *Notice of anticipated fees.* (1) Unless you have been granted a fee waiver or have previously agreed to pay all the fees associated with your request, or the anticipated fee is $30 or less, the bureau will:

(i) Promptly notify you of the estimated costs and ask you to provide written assurance of payment of all fees or fees up to a designated amount; and

(ii) Give you an opportunity to modify your request at that time to reduce the fee.

(2) After the bureau begins processing your request, if it finds that the actual cost will exceed the amount you previously agreed to pay, the bureau will:

(i) Stop processing your request;

(ii) Promptly notify you of the higher amount and ask you to provide written assurance of payment; and

(iii) Give you an opportunity to modify your request to reduce the fee.

(c) *Advance payment.* (1) The bureau will require advance payment when the estimated fee is over $250 and—

(i) You have never made a FOIA request to DOI requiring you to pay fees; or

(ii) You did not pay a previous FOIA fee promptly.

(2) If you have previously failed to pay a fee within 30 calendar days of the date of billing, the bureau will require you to:

(i) Pay the full amount owed plus any applicable interest penalties (see paragraph (g) of this section) and to make an advance payment of the full amount of the estimated fee of the new request; or

(ii) Demonstrate that you have, in fact, paid the prior fee.

(3) At the same time the bureau notifies you that an advance payment is due, it will give you an opportunity to modify your request to reduce the fee.

(d) *Resolving the fee issue.* The bureau will not start processing your request until the fee issue has been resolved (see §§ 2.8(b) and 2.12(b)). If the bureau seeks clarification from you about a fee issue and does not hear from you within 20 workdays, it will assume that you are no longer interested in this matter and will close the file on your request.

(e) *Billing procedures.* If you are required to pay a fee associated with your request, the bureau that processes your request will send you a bill for collection.

(f) *Form of payment.* You should submit a check or money order made payable to the ''Department of the Interior'' or the bureau furnishing the information. The term United States or the initials ''U.S.'' should not be included on the check or money order. Where appropriate, the official responsible for handling a request may require that payment by check be made in the form of a certified check. Some bureaus accept payment by credit card. Contact the bureau to determine what forms of payment it accepts.

(g) *Failure to pay fees.* The bill for collection or the response letter will include a statement that interest will be charged in accordance with the Debt

Collection Act of 1982, as amended (31 U.S.C. 3717) and implementing regulations, if the fees are not paid within 30 calendar days of the date of the bill. This requirement does not apply if the requester is a state, local, or tribal government.

§ 2.19 When will bureaus waive fees?

(a) Fees for processing your request may be waived if you meet the criteria listed in paragraph (b) of this section and Appendix D to this part. The burden is on you to justify entitlement to a fee waiver. Requests for fee waivers are decided on a case-by-case basis. The fact that you have received a fee waiver in the past does not mean you are automatically entitled to a fee waiver for every request you may submit, because the essential element of any fee waiver determination is whether the release of the particular documents sought in the request will likely contribute significantly to public understanding of the operations or activities of the Government. The bureau will rely on the fee waiver justification you have submitted in your request letter. If you do not submit sufficient justification, your fee waiver request will be denied. The bureau may, at its discretion, communicate with you to request additional information if necessary. However the bureau must make a determination on the fee waiver request within the statutory time limit, even if the agency has not received such additional information. In certain circumstances, a partial fee waiver may be appropriate, if some, but not all, of the requested records are likely to contribute significantly to public understanding of the operations and activities of the Government.

(b) Bureaus will waive fees (in whole or part) if disclosure of all or part of the information is in the public interest because its release—

(1) Is likely to contribute significantly to public understanding of the operations or activities of the Government; and

(2) Is not primarily in the commercial interest of the requester.

(c) If a bureau denies your request for a fee waiver, it will notify you, in writing, of the following:

(1) The basis for the denial, including a full explanation of why your fee waiver request did not meet DOI's fee waiver criteria (see paragraph (b) of this section and Appendix D to this part);

(2) The name(s) and title(s) or position(s) of each person responsible for the denial;

(3) The name and title of the Office of the Solicitor attorney consulted; and

(4) A statement that the denial may be appealed within 30 workdays after the date of the denial letter to the FOIA Appeals Officer (see Appendix A to this part) under the procedures in § 2.30.

§ 2.20 When will bureaus grant discretionary fee waivers?

(a) A bureau may waive fees at its discretion if a request involves:

(1) Furnishing a copy of a document that the bureau has reproduced for free distribution;

(2) Furnishing one copy of a personal document (*e.g.*, a birth certificate) to a person who has been required to furnish it for retention by the Department;

(3) Furnishing one copy of the transcript of a hearing before a hearing officer in a grievance or similar proceeding to the employee for whom the hearing was held;

(4) Furnishing records to donors with respect to their gifts;

(5) Furnishing records to individuals or private nonprofit organizations having an official, voluntary or cooperative relationship with the Department to assist the individual or organization in working with the Department;

(6) Furnishing a reasonable number records to members of the U.S. Congress, state, local, and foreign governments, public international organizations, and Indian tribes, when to do so without charge is an appropriate courtesy, or when the recipient is carrying on a function related to that of the Department and to do so will help to accomplish the work of the Department;

(7) Furnishing records when to do so is in conformance with generally established business custom (*e.g.*, furnishing personal reference data to prospective employers of former Department employees); or

(8) Furnishing one copy of a single record in order to assist the requester in obtaining financial benefits to which he or she may be entitled (*e.g.*, veterans or their dependents, employees with Government employee compensation claims).

(b) You cannot appeal the denial of a discretionary fee waiver.

§ 2.21 How will the bureau respond to my request?

(a) After all the criteria in §§ 2.8 and 2.10 have been met, the bureau will make a reasonable effort to search for records responsive to your request. In determining which records are responsive to your request, the bureau will include any records in its possession and control as of the date it begins its search. This will include searching for records in an electronic form/format, except where it would interfere significantly with the bureau's automated information systems.

(b) In response to your request, the bureau will do one of two things:

(1) Include the requested records with the response letter or notify you of how, when, and where the records will be made available; or

(2) Deny part or all of your request, except that the bureau may, consistent with Departmental policy, determine that a discretionary release is appropriate under the particular circumstances. Your request will be denied or partially denied only if one of the nine statutory exemptions listed in Appendix E to this part applies to all or part of the records you have requested.

(c) Where a document contains both exempt and nonexempt material, the bureau will generally separate and release the nonexempt information. When disclosing a record in part, the bureau will indicate on the released portion of the record how much information was deleted, unless doing so would harm an interest protected by the exemption used to withhold the information. Further, if technically feasible, the amount of information deleted and the exemption used to withhold the information will be indicated where the deletion is made. If the nonexempt material is so intertwined with the exempt material that disclosure of it would leave only meaningless words and phrases, the entire portion may be withheld.

(d) If a bureau denies your request for records in whole or in part, the bureau's response will include:

(1) A reference to the specific exemption or exemptions authorizing the withholding;

(2) An explanation of the reason(s) for the denial;

(3) An estimate of the volume of information being withheld. The bureau will make a reasonable effort to estimate the volume of any records denied, or portions of records (*e.g.*, 100 pages, 4 Federal Record Center boxes, 1,000 kilobytes, etc.), unless such an estimate would harm an interest protected by the exemption used to withhold the information.

(4) The name(s) and title(s) of the person(s) responsible for the denial;

(5) The name and title of the Office of the Solicitor attorney consulted; and

(6) A statement that the denial may be appealed to the FOIA Appeals Officer (see Appendix A to this part), within 30 workdays of the date of the denial letter or 30 workdays after the records have been released under the procedures in § 2.30.

(e) If records do not exist within DOI, cannot be located, are not reasonably described, or if a procedural issue remains unresolved (*e.g.*, a fee issue), the bureau will respond to you in writing, including the following information, as applicable:

(1) An explanation of the basis of the decision;

(2) The name(s) and title(s) of the person(s) responsible for the decision; and

(3) A statement that the matter may be appealed within 30 workdays of the date of the response, to the FOIA Appeals Officer under the procedures in § 2.30.

(f) The bureau must consult with the Office of the Solicitor if it is considering withholding a requested record or denying a fee waiver.

(g) If any fees are due, the bureau will notify you in writing of the amount.

(h) All bureau responses will include the name and telephone number of a contact person in case you have questions concerning the response.

(i) Requests for information concerning coal under the Mineral Leasing Act or the Mineral Leasing Act for Acquired Lands are subject to special rules (see Appendix F to this part).

§ 2.22 What happens if a bureau receives a request for records it does not have or did not create?

(a) *Consultations/referrals within DOI.* (1) If a bureau receives a request for records not in its possession, but which it knows another bureau has or is likely to have, it will refer the request to that bureau(s) for response. It also will notify you of the referral in writing and provide the name of a contact in the other bureau(s) to which the referral was made. The time limit for responding to your request starts when the request reaches the bureau office that has the records.

(2) If a bureau (other than the Office of Inspector General) receives a request for records in its possession that another bureau created or is substantially concerned with, it will consult with the other bureau before deciding whether to release or withhold the records. As an alternative, the bureau may refer the request along with the records to that bureau for direct response. It will notify you of the referral in writing and provide the name of a contact in the other bureau(s) to which the referral was made. Such a referral does not restart the statutory time limit for responding to your request.

(b) *Consultations/referrals with agencies outside DOI.* (1) If a bureau receives a request for records not in its possession, but which the bureau believes may be in the possession of another Federal agency, the bureau will return your request and advise you to submit it directly to the other agency. If you still believe that the records exist within DOI, you should notify the bureau FOIA contact of any additional information which leads you to believe the records exist and where they might be found. Alternatively, you may treat such a response as a denial of records and file an appeal.

(2) If, in response to a request, a bureau locates documents that originated with another Federal agency, it will refer the request, along with any responsive document(s), to that agency for a release determination and direct response. If the bureau refers the documents to another agency, it will notify you of the referral in writing and provide the name of a contact at the other agency. However, in the following situations, the bureau will make the release determination, after consulting with the originating agency:

(i) When the record is of primary interest to DOI (a record is of primary interest to DOI if it was developed or prepared according to DOI regulations or directives, or in response to a DOI request);

(ii) If DOI is in a better position than the originating agency to assess whether the record is exempt from disclosure;

(iii) If the originating agency is not subject to the FOIA; or

(iv) When it is more efficient or practical depending on the circumstances.

(3) If a bureau receives a request for records which have been classified by another agency under Executive Order 12958, Classified National Security Information, or superseding Executive order, it must refer the request to that agency for response.

§ 2.23 How will a bureau handle a request for commercial or financial information that it has obtained from a person or entity outside the Federal Government?

(a) If a bureau receives a FOIA request for records containing commercial or financial information submitted by a person or entity outside the Federal Government, under Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information, or superseding Executive order, the bureau must provide the submitter with prompt written notice of the request, except as provided in paragraph (h) of this section, whenever:

(1) The submitter has designated the information as confidential commercial or financial information, or

(2) The bureau has reason to believe that the information may be protected under exemption (4).

(b) The notice to the submitter will—

(1) Include a copy of the FOIA request.

(2) Describe the information requested or include copies of the pertinent records.

(3) Advise the submitter of the procedures for objecting to the release of the requested material and specify the time limit for responding.

(4) Give the submitter no less than 10 workdays, from receipt (or publication as set forth in paragraph (c) of this section) of the bureau's notice, to object to the release and to explain the basis for the objection, if any.

(5) Advise the submitter that:

(i) Information contained in his/her objections may be subject to disclosure under the FOIA if the bureau receives a FOIA request for it; and

(ii) If the submitter's objections contain commercial or financial information and a requester asks for the objections under the FOIA, the notification procedures of this subsection will apply.

(6) Advise the submitter that it is the bureau, rather than the submitter, that is responsible for deciding whether the information will be released or withheld.

(7) If the submitter designated the material as confidential commercial or financial information 10 or more years before the request, request the submitter's views on whether he/she still considers the information to be confidential.

(c) Where a large number of submitters is involved, the bureau may, rather than providing written notice to each submitter, publish a notice in a manner reasonably calculated to reach the attention of the submitters (*e.g.*, in newspapers/newsletters, the bureau's Web site, or the **Federal Register**).

(d) Whenever a bureau notifies a submitter that he/she may be required to disclose information in response to a FOIA request, it also will notify you that it is giving the submitter an opportunity to review and comment on the material.

(e) If the submitter has any objection to disclosure he/she must submit a detailed written statement including the following:

(1) The justification for withholding any portion of the information under any exemption of the FOIA. In the case of exemption (4), there must be a specific and detailed discussion of:

(i) Whether the Government required the information in question to be submitted, and if so, how substantial

competitive or other business harm would likely result from release; or

(ii) Whether the submitter provided the information voluntarily and, if so, how the information in question fits into a category of information that the submitter customarily does not release to the public.

(2) A certification that the information is confidential, has not been disclosed to the public by the submitter, and is essentially non-public because it is not routinely available to the public from other sources.

(3) If not already provided, a telephone number (where the submitter can be reached during normal business hours, an e-mail address and a fax number (if available). This information is very important to help the bureau or Department communicate with the submitter.

(f) The bureau will review and consider all objections to release that are received within the time specified in the notice to the submitter. However, it is the bureau, rather than the submitter, that is responsible for deciding whether the information should be released or withheld. If a submitter fails to respond to the bureau within the time limits specified in the notice, the bureau will presume that the submitter has no objection to disclosure of the information.

(g) If the bureau decides to release records over the submitter's objections, it will inform the submitter and you in writing. The notice to the submitter will be sent by certified mail, return receipt requested, to the submitter's last known address and will include copies of the records the bureau intends to release and the bureau's reasons for deciding to release them. The notice also will inform the submitter that it intends to release the records 10 workdays after receipt of the notice by the submitter.

(h) The bureau will not consult with the submitter if:

(1) The bureau responsible for the decision determines that the information is exempt from disclosure;

(2) The information has been lawfully published or otherwise made available to the public, such as in response to an earlier FOIA request or if the submitter has made the information public;

(3) Disclosure of the information is required by statute (other than the FOIA) or regulation (other than this subpart);

(4) Disclosure of the information is prohibited by statute; or

(5) The designation of confidentiality made by the submitter appears obviously frivolous. However, the bureau will notify the submitter of any final decision to disclose the information 15 workdays prior to releasing it.

(i) The bureau will inform the submitter within 10 workdays of the Department's receipt of a court complaint if you file a lawsuit for access to any of the withheld records. Similarly, the bureau will notify you within 10 workdays of the Department's receipt of a court complaint if the submitter files a lawsuit to prohibit the bureau from disclosing the records.

(j) If the bureau determines that the requested information is protected from release by exemption (4) of the FOIA, the bureau has no discretion to release the information as doing so would violate the Trade Secrets Act, a criminal provision found at 18 U.S.C. 1905.

§ 2.24 Is a submitter required to designate information that is commercially or financially sensitive?

No. If in the course of responding to a FOIA request, a bureau cannot readily determine whether the information obtained from a person is commercially or financially sensitive information, the bureau will obtain and consider the views of the submitter of the information and provide the submitter an opportunity to object to any decision to disclose the information.

§ 2.25 How will a bureau handle a request for Federally-funded research data in the possession of a private entity?

When published research findings are produced under a grant or other Federal assistance, and the findings are used by a bureau in developing an agency action, *e.g.*, a policy or regulation, research data related to such findings are considered agency records even if they are in the possession of the recipient of the Federal financial assistance (recipient).

(a) If you submit a FOIA request for such research data, the bureau will require the recipient to provide the information to it within a reasonable amount of time, so the bureau can consider the data for release to the public under the FOIA.

(b) The bureau will notify you that it may charge you for any additional fees incurred as a result of obtaining the research data from the recipient. This fee is in addition to any fees the bureau may charge to process your request under the FOIA.

(c) The bureau will forward a copy of the request to the recipient, who is responsible for searching for and reviewing the requested information in accordance with DOI's FOIA regulations (43 CFR part 2). The recipient will forward a copy of any responsive records that are located, along with his/her recommendations concerning the releasability of the data, and the total cost incurred in searching for, reviewing, and providing the data to the appropriate bureau FOIA contact.

(d) The bureau will review and consider the recommendations of the recipient regarding the releasability of the requested data. However, it is the bureau, rather than the recipient, that is responsible for deciding whether the information will be released or withheld.

§ 2.26 Does the bureau provide multitrack processing of FOIA requests?

(a) A bureau may use two or more processing tracks to distinguish between simple and complex requests based on the amount of work and/or time needed to process the request, including the number of pages involved.

(b) If a bureau uses multitrack processing, it will advise requesters in its slower track(s) of the criteria of its faster track(s). For example, a bureau using multitrack processing may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the bureau's faster track(s). A bureau doing so will contact the requester by telephone or in writing, whichever is more efficient in each case.

§ 2.27 How will a bureau handle a request for information that is contained in a Privacy Act system of records? (See DOI's Privacy Act regulations (Subpart G of this part) for additional information.)

(a) When you request information pertaining to yourself that is contained in a Privacy Act system of records applicable to you (*i.e.*, the information contained in the system of records is retrieved by the bureau using your name or other personal identifier), the request will be processed under both the FOIA and the Privacy Act. If you request information about yourself, you must submit certain identifying information, usually an original signature (see the appropriate Privacy Act system notice and, Subpart G of this part) before the bureau will process your request. (Note: If you request information about yourself that is not covered by the Privacy Act, *e.g.*, the information may be filed under another subject, such as an organization, activity, event, or an investigation not retrievable by a name or personal identifier, the request will be treated only as a FOIA request.)

(b) The Privacy Act never prohibits disclosure of material that the FOIA requires to be released. Both a Privacy Act and a FOIA exemption must apply to withhold information from you if the information you seek is contained in a

Privacy Act system of records applicable to you.

(c) Sometimes a request for Privacy Act information is submitted by a ''third party'' (an individual other than the person who is the subject of the Privacy Act record). If you request Privacy Act information about another individual, the material will not be disclosed without prior written approval by that individual unless—

(1) The release is provided for under one of the Privacy Act conditions of disclosure (5 U.S.C. 552a(b)), one of which is that Privacy Act information is releasable if it is required to be released under the FOIA, or

(2) In most circumstances, if the individual is deceased. See § 2.8(d)(4).

(d) In handling a request covered by paragraph (a) of this section, the fee provisions and time limits under the FOIA will apply, except that with regard to information that is subject to the Privacy Act, the bureau will charge only for duplication and not for search and review time (see Appendix C to this part). There will be no charge if the fee for processing the request is $30 or less.

Subpart D—FOIA Appeals

§ 2.28 When may I file an appeal?

(a) You may file an appeal when:

(1) Records or parts of records have been withheld;

(2) The bureau informs you that you have not adequately described the records you are seeking, or that it does not possess responsive records and you have reason to believe it does or you question the adequacy of the bureau's search for responsive records;

(3) A decision has not been made on your request within the time limits provided in § 2.12;

(4) The bureau did not address all aspects of your request for records;

(5) You believe there is a procedural deficiency (*e.g.*, fees are improperly calculated);

(6) A fee waiver has been denied; or

(7) A request for expedited processing has been denied or not responded to on time. (Special procedures apply to this type of appeal (see §§ 2.14, 2.29(c), and 2.32(b)). An appeal of this type relates only to the request for expedited processing and does not constitute an appeal of your underlying request for records.

(b) Before filing an appeal, you may wish to communicate with the contact person listed in the FOIA response or the bureau's FOIA Officer to see if the issue can be resolved informally. Informal resolution of your concerns may be appropriate where the bureau has not responded to your request or where you believe the search conducted was not adequate. In this latter instance, you may be able to provide additional information that may assist the bureau in locating records. However, if you wish to file an appeal, it must be received by the FOIA Appeals Officer within the time limits in § 2.29.

§ 2.29 How long do I have to file an appeal?

(a) Appeals covered by §§ 2.28(a)(1), (2), and (4) thru (6). Your appeal must be received by the FOIA Appeals Officer no later than 30 workdays after the date of the final response or 30 workdays after receipt of any records that are provided to you.

(b) Appeals covered by § 2.28(a)(3). You may file an appeal any time after the time limit for responding to your request has passed.

(c) Appeals covered by § 2.28(a)(7). You should file an appeal as soon as possible.

§ 2.30 How do I file an appeal?

(a) You must submit your appeal in writing, *i.e.*, by mail, fax or e-mail, to the FOIA Appeals Officer, U.S. Department of the Interior (see Appendix A for the address). Your appeal must include the information specified in paragraph (b) of this section. Failure to send your appeal directly to the FOIA Appeals Officer may result in a delay in processing.

(b) Your appeal must contain copies of all correspondence between you and the bureau, including your request and the bureau's response (if there is one). DOI will not begin processing your appeal and the time limits for responding to your appeal will not begin to run until these documents are received.

(c) You also should include in as much detail as possible any reason(s) why you believe the bureau's response was in error.

(d) Include your name and daytime telephone number (or the name and telephone number of an appropriate contact), e-mail address and fax number (if available), in case DOI needs additional information or clarification of your appeal.

(e) If you file an appeal concerning a fee waiver denial or a denial of expedited processing, you should, in addition to complying with paragraph (b) of this section, demonstrate fully how the criteria in § 2.19(b) (see Appendix D) or § 2.14(a) are met. You also should state in as much detail as possible why you believe the initial decision was incorrect.

(f) All communications concerning your appeal should be clearly marked with the words: ''FREEDOM OF INFORMATION APPEAL.''

§ 2.31 How will DOI respond to my appeal?

(a) Appeals will be decided by the FOIA Appeals Officer. When necessary, the FOIA Appeals Officer will consult other appropriate offices, including the Office of the Solicitor (in the case of all denials of information and fee waivers, and other technical issues as necessary).

(b) The final decision on an appeal will be in writing and will state the basis for DOI's decision as follows:

(1) *Decision to release or withhold records.*

(i) If the FOIA Appeals Officer decides to release the withheld records or portions thereof, he/she will make the records available or instruct the appropriate bureau to make them available as soon as possible.

(ii) If the FOIA Appeals Officer decides to uphold in whole or part the denial of a request for records, he/she will advise you of your right to obtain judicial review.

(2) *Non-possession of records.* If the FOIA Appeals Officer decides that the requested records exist, the bureau that has the records will issue a response to you promptly and the FOIA Appeals Officer will close the file on your appeal. If the FOIA Appeals Officer decides that the requested records cannot be located or do not exist, he/she will advise you of your right to treat the decision as a denial and seek judicial review.

(3) *Non-response to a FOIA request.* If a bureau has not issued an appropriate response to your FOIA request within the 20-workday statutory time limit, the FOIA Appeals Officer will direct the bureau to issue a response directly to you as soon as possible. If the bureau responds to your request within 20-workdays after receipt of the appeal, the FOIA Appeals Officer will close the file on your appeal. Otherwise, the FOIA Appeals Officer will advise you that you may treat the lack of a response by the bureau as a denial of your appeal and seek judicial review.

(4) *Incomplete response to a FOIA request.* If a bureau has not issued a complete response to your FOIA request, the FOIA Appeals Officer will direct the bureau to issue a complete response directly to you as soon as possible, and provide you with the name and telephone number of a contact person. The FOIA Appeals Officer will close your FOIA appeal and advise you that you may treat the incomplete response by the bureau as a denial of your appeal and seek judicial review.

(5) *Procedural deficiencies.* If the FOIA Appeals Officer decides that the bureau was in error, he/she will instruct the bureau to correct the error and advise you accordingly. If the FOIA Appeals Officer decides that the bureau acted properly, he/she will deny your appeal and advise you of your right to seek judicial review.

(6) *Fee waiver denials.* If the decision is to grant your request for a fee waiver, the FOIA Appeals Officer will advise the appropriate bureau of the Department's decision and instruct the bureau to proceed with processing the request or to refund any monies you have paid. If the decision is to deny the fee waiver request, the Department will advise you of your right to seek judicial review. You also should contact the bureau office to make further arrangements to process your request if you still wish to obtain the records.

(7) *Denial of expedited processing.* If the FOIA Appeals Officer decides to grant expedited processing, he/she will direct the bureau to process your request as soon as practicable. If your request for expedited processing is denied on appeal, the FOIA Appeals Officer will advise you of your right to seek judicial review of the denial of expedited processing.

§ 2.32 How long does DOI have to respond to my appeal?

(a) The statutory time limit for responding to an appeal is 20 workdays after receipt of an appeal meeting the requirements of § 2.30.

(b) If you request expedited processing of your appeal, you must demonstrate to the Department's satisfaction that the appeal meets one of the criteria under § 2.14(a). The FOIA Appeals Officer will advise you whether the Department will grant expedited processing within 10 calendar days of its receipt of your appeal. If the FOIA Appeals Officer decides to grant expedited processing, he/she will give your appeal priority and process it ahead of other pending appeals.

(c) If you have not received a decision on your appeal within 20 workdays, you have the right to seek review in a District Court of the United States (see 5 U.S.C. 552(a)(4) and (6)). In the event that the Department is unable to reach a decision within the given time limits, the FOIA Appeals Officer will notify you of the reason for the delay and the right to seek judicial review.

§ 2.33 How will the Department notify you and the submitter of commercial or financial information when it makes an appeal decision concerning such information?

(a) *Notice of appeal decision.* If the Department decides on appeal to release records over the objections of a submitter who has advised DOI that the information is protected from release by exemption (4), the Department will advise you and the submitter that it intends to release the records 10 workdays after the notice to the submitter regarding the appeal decision.

(b) *Notice of litigation.*

(1) The Department will notify the submitter within 10 workdays of receipt of the court complaint if you file a lawsuit seeking access to any records found on appeal to be protected from release by exemption (4).

(2) The Department will notify you within 10 workdays of receipt of the court complaint if the submitter files a lawsuit requesting the court to prohibit the Department from releasing information it alleges qualifies for protection under exemption (4).

Subpart E—FOIA Annual Report

§ 2.34 Where can I get a copy of DOI's FOIA annual report?

Under 5 U.S.C. 552(e), DOI is required to prepare an annual report regarding its FOIA activities. The report includes information about FOIA requests, appeals, and litigation against the Department. Copies of DOI's annual FOIA report may be obtained from the Departmental FOIA Officer or by contacting DOI's Library which is located at the C Street entrance of the Main Interior Building (MIB), 1849 C Street, NW., Washington, DC 20240 (see Appendix A to this part). You may access the annual reports electronically by visiting DOI's FOIA home page (see Appendix B to this part for the Internet address).

4. Appendices A and B to part 2 are revised and Appendices C through F to part 2 are aldded to read as follows:

BILLING CODE 4310–RK–P

Appendix A To Part 2—Department of the Interior FOIA/Public Affairs Contacts and Reading Rooms

DEPARTMENTAL

Departmental FOIA Officer MS-5312-MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-5342 Fax No. (202) 208-6867	Departmental FOIA Appeals Officer MS-5312-MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-5339 Fax No. (202) 208-6677	Departmental Privacy Act Officer MS-5312-MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 219-0868 Fax No. (202) 501-2360
Public Affairs Office Office of Communications MS-6013, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-3171 Fax No. (202) 208-3231	Reading Room - DOI's Library MIB © Street Entrance) 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-5815 Fax No. (202) 208-6773	

OFFICE OF THE SECRETARY

FOIA Officer MS-1413, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-6045 Fax No. (202) 208-5048	Public Affairs Office Office of Communications MS-6013, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-3171 Fax No. (202) 208-3231	Office of Trust Records 6301 Indian School Road NE Suite 300 Albuquerque, NM 87110 Telephone No. (505) 816-1600 Fax No. (505) 816-1612
	Reading Room - DOI's Library MIB © Street Entrance) 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-5815 Fax No. (202) 208-6773	

OFFICE OF AIRCRAFT SERVICES

FOIA Officer PO Box 15428 Boise, ID 83715-5428 Telephone No. (208) 387-5752 Fax No. (208) 387-5830	Public Affairs Office Office of Communications MS-6013, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-3171 Fax No. (202) 208-3231	Reading Room National Interagency Fire Center 2350 W. Robinson Rd. Boise, ID 83705 Telephone No. (208) 387-5750 Fax No. (208) 387-5830

OFFICE OF HEARINGS AND APPEALS (OHA) HEADQUARTERS

FOIA Officer MS-QC-300 800 North Quincy St. Arlington, VA 22203 Telephone No. (703) 235-3800 Fax No. (703) 235-9014	Public Affairs Office Office of Communications MS-6013, MIB 1849 C St., NW. Washington, DC 20240 Telephone No (202) 208-3171 Fax No. (202) 208-3231	Reading Room Office of the Director Room 1103, BT #3 4015 Wilson Blvd. Arlington, VA 22203 Telephone No. (703) 235-3800 Fax No. (703) 235-9014

OHA REGIONAL/FIELD OFFICES

Oklahoma State Office 215 Dean McGee Ave., Rm 820 Oklahoma City, OK 73102 Telephone No. (405) 231-4896 Fax No. (405) 231-5568	Minnesota State Office The Court International Bldg. 2550 University Ave., Suite 416N St. Paul, MN 55114 Telephone No. (612) 725-3920 Fax No. (612) 727-2780	Utah State Office Elks Bldg. 139 East South Temple, Suite 600 Salt Lake City, UT 84111 Telephone No. (801) 524-5344 Fax No. (801) 524-5539
California State Office 801 I St., Rm 406 Sacramento, CA 95814 Telephone No. (916) 978-4326 Fax No. (916) 568-7422	New Mexico State Office 1700 Louisiana, NE., Ste 220 Albuquerque, NM 87110 Telephone No. (505) 262-6265 Fax No. (505) 262-6267	

OFFICE OF THE INSPECTOR GENERAL

FOIA Officer MS-5341, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-4356 Fax No. (202) 219-1944	Public Affairs Office MS-5060, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-4599 Fax No. (202) 219-1944	Reading Room Room 5060, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-4599 Fax No. (202) 219-1944

OFFICE OF THE SOLICITOR (SOL) HEADQUARTERS

FOIA Officer MS-7456, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-2961 Fax No. (202) 208-5206	Public Affairs Office Office of Communications MS-6013, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-3171 Fax No. (202) 208-3231	Reading Room Room 7069, MIB 1849 C St., NW. Washington DC 20240 Telephone No. (202) 208-5763 Fax No. (202) 208-5206

SOL REGIONAL/FIELD OFFICES

Alaska Region Office of the Regional Solicitor 4230 University Dr., Suite 300 Anchorage, AK 99508-4626 Telephone No. (907) 271-4131 Fax No. (907) 271-4143	Northeast Region Office of the Regional Solicitor 1 Gateway Center, Suite 612 Newton Corner, MA 02458-2802 Telephone No. (617) 527-3400 Fax No. (617) 527-6848	Pittsburgh Field Office Office of the Field Solicitor 3 Parkway Center, Suite 385 Pittsburgh, PA 15220 Telephone No. (412) 937-4000 Fax No. (412) 937-4003
Twin Cities Field Office Office of the Field Solicitor Bishop Whipple Federal Building 1 Federal Dr., Rm. 686 Fort Snelling, MN 55111 Telephone No. (612) 713-7100 Fax No. (612) 713-7121	Pacific Northwest Region Office of the Regional Solicitor 500 NE Multnomah St., Suite 607 Portland, OR 97232 Telephone No. (503) 231-2126 Fax No. (503) 231-2166	Billings Field Office Office of the Field Solicitor 316 North 26th St., Rm. 3004 Billings, MT 59101 Telephone No. (406) 247-7583 Fax No. (406) 247-7587
Boise Field Office Office of the Field Solicitor Federal Building, U.S. Courthouse 550 West Fort St., Rm. 365 Boise, ID 83724 Telephone No. (208) 334-1911 Fax No. (208) 334-1378	Pacific Southwest Region Office of the Regional Solicitor 2800 Cottage Way, Rm. E-1712 Sacramento, CA 95825-1890 Telephone No. (916) 978-5670 Fax No. (916) 978-5694	Palm Springs Field Office Office of the Field Solicitor 901 E. Tahquitz Canyon Way Suite C-101 Palm Springs, CA 92262 Telephone No. (760) 416-8619 Fax No. (760) 416-8719
Phoenix Field Office Office of the Field Solicitor Sandra Day O'Connor U.S. Courthouse, Suite 404 401 West Washington Street, SPC 44 Phoenix, AZ 85003-2151 Telephone No. (602) 364-7880 Fax No. (602) 364-7885	Salt Lake City Field Office Office of the Field Solicitor 6201 Federal Bldg. 125 S. State St. Salt Lake City, UT 84138 Telephone No. (801) 524-5677 Fax No. (801) 524-4506	San Francisco Field Office Office of the Field Solicitor 1111 Jackson Street, Suite 735 Oakland, CA 94607 Telephone No. (510) 817-1460 Fax No. (510) 419-0143
Southeast Region Office of the Regional Solicitor 75 Spring St., SW., Suite 304 Atlanta, GA 30303 Telephone No. (404) 331-3441 Fax No. (404) 730-2682	Knoxville Field Office Office of the Field Solicitor 530 Gay St., Rm 308 Knoxville, TN 37902 Telephone No. (865) 545-4294 Fax No. (865) 545-5314	Southwest Region Office Office of the Regional Solicitor 2400 Louisiana Blvd., NE Bldg. 1, Suite 200 Albuquerque, NM 87110-4316 Telephone No. (505) 346-2700 Fax No. (505) 346-2711
Santa Fe Field Office Office of the Field Solicitor Paisano Building 2968 Rodeo Park Drive West Room 2070 Santa Fe, NM 87505 Telephone No. (505) 988-6200 Fax No. (505) 988-6217	Tulsa Field Office Office of the Field Solicitor 7906 E. 33rd Street, Suite 100 Tulsa, OK 74145 Telephone No. (918) 669-7730 Fax No. (918) 669-7736	Rocky Mountain Region Office of the Regional Solicitor 755 Parfet St., Suite 151 Lakewood, CO 80215 Telephone No. (303) 231-5353 Fax No. (303) 231-5363

FISH & WILDLIFE SERVICE (FWS) HEADQUARTERS

FOIA Officer Arlington Square, Room 222 4401 North Fairfax Dr. Arlington, VA 22203 Telephone No. (703) 358-2504 Fax No. (703) 358-2269	Public Affairs Office MS-3447, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-5634 Fax No. (202) 208-5850	Reading Room Arlington Square, Room 224 4401 North Fairfax Dr. Arlington, VA 22203 Telephone No. (703) 358-1730 Fax No. (703) 358-2269

FWS REGIONAL/FIELD OFFICES

Region 1 (CA, HI, ID, NV, OR, WA) Eastside Federal Complex 911 Northeast 11th Ave. Portland, OR 97232-4181 Telephone No. (503) 231-6188 Fax No. (503) 231- 6259	Region 2 (AZ, NM, OK, TX) P.O. Box 1306 500 Gold Ave., SW Albuquerque, NM 87103 Telephone No. (505) 248-6925 Fax No. (505) 248-6459	Region 3 (IA, IL, IN, MN, MO, MI, OH, WI) BHW Federal Building 1 Federal Dr. Fort Snelling, MN 55111-4056 Telephone No. (612) 713-5269 Fax No. (612) 713-5280
Region 4 (AZ, FL, GA, KY, LA, MS, NC, SC, TN, VI, PR) 1875 Century Blvd. Atlanta, GA 30345 Telephone No. (404) 679-4096 Fax No. (404) 679-4093	Region 5 (CT, DC, DE, ME, MD, MA, NH, NJ, NY, PA, RI, VA, VT, WV) 300 West Gate Center Dr. Hadley, MA 01035 Telephone No. (413) 253-8313 Fax No. (413) 253-8461	Region 6 (CO, KS, MT, ND, NE, SD, UT, WY) Asst. Regional Director P.O. Box 25486 Denver Federal Center Denver, CO 80225 Telephone No. (303) 236-8116 Fax No. (303) 236-6958
	Region 7 Alaska State Office 1011 East Tudor Rd. Anchorage, AK 99503 Telephone No. (907) 786-3455 Fax No. (907) 786-3847	

NATIONAL PARK SERVICE (NPS) HEADQUARTERS

FOIA Officer Administrative Program Center Org Code 2605 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 354-1925 Fax No. (202) 371-6741	Public Affairs Office P.O. Box 37127 Washington, DC 20013-7127 Telephone No. (202) 208-6843 Fax No. (202) 219-0910	Reading Room Administrative Program Center 1201 Eye St., NW. 12th Floor Washington, DC 20005 Telephone No. (202) 354-1925 Fax No. (202) 371-6741

NPS REGIONAL/FIELD OFFICES

Alaska Region 2525 Gambell St. Anchorage, AK 99503-2892 Telephone No. (907) 257-2548 Fax No. (907) 257-2533	National Capital Region 1100 Ohio Dr., SW. Washington, DC 20242 Telephone No. (202) 619-7177 Fax No. (202) 619-7062	Pacific West Region 1111 Jackson St., Suite 700 Oakland, CA 94607 Telephone No. (510) 817-1320 Fax No. (510) 817-1325
Intermountain Region P.O. Box 25287 Denver, CO 80225 Telephone No. (303) 969-2062 Fax No. (303) 969-2002	Midwest Region 1709 Jackson St. Omaha, NE 68102 Telephone No. (402) 221-3448 Fax No. (402) 341-2039	Northeast Region U.S. Customs House, 3rd Floor 200 Chestnut St. Philadelphia, PA 19106 Telephone No. (215) 597-7384 Fax No. (215) 597-0065
Southeast Region 100 Alabama St., SW 1924 Building Atlanta, GA 30303 Telephone No. (404) 562-3182 Fax No. (404) 562-3263	Denver Service Center 12795 West Alameda Pkwy. Denver, CO 80225-0187 Telephone No. (303) 969-2131 Fax No. (303) 987-6658	Harpers Ferry Center P.O. Box 50 Harpers Ferry, WV 25425 Telephone No. (304) 535-6276 Fax No. (304) 535-2929

BUREAU OF LAND MANAGEMENT (BLM) HEADQUARTERS

FOIA Officer MS-WO-560 1620 L St., NW., Room 725 Washington, DC 20240 Telephone No. (202) 452-5086 Fax No. (202) 452-5002	Public Affairs Office MS-WO-610 1620 L St., NW., Room 406 Washington, DC 20240 Telephone No. (202) 452-5125 Fax No. (202) 452-5124	Reading Room 1620 L St., NW. - Room 750 Washington, DC 20240 Telephone No. (202) 452-5193 Fax No. (202) 452-0395

BLM REGIONAL/FIELD OFFICES

Alaska State Office 222 West 7th Ave., # 13 Anchorage, AK 99513-5076 Telephone No. (907) 271-5054 Fax No. (907) 271-3624	Arizona State Office 222 North Central Ave. Phoenix, AZ 85004-2203 Telephone No. (602) 417-9364 Fax No. (602) 417-9556	California State Office Federal Building 2800 Cottage Way Sacramento, CA 95825-0451 Telephone No. (916) 978-4409 Fax No. (916) 978-4416
Colorado State Office 2850 Youngfield St. Lakewood, CO 80215-7076 Telephone No. (303) 239-3600 Fax No. (303) 239-3933	Eastern States Office 7450 Boston Blvd. Springfield, VA 22153 Telephone No. (703) 440-1634 Fax No. (703) 440-1687	Idaho State Office 1387 South Vinnell Way Boise, ID 83709-1657 Telephone No. (208) 373-3947 Fax No. (208) 373-3904
Montana State Office P.O. Box 36800 Billings, MT 59107-6800 Telephone No. (406) 896-5069 Fax No. (406) 896-5298	Nevada State Office 1340 Financial Blvd. P.O. Box 1200 Reno, NV 89520 Telephone No. (775) 861-6632 Fax No. (775) 861-6411	New Mexico State Office 1474 Rodeo Rd. P.O. Box 27115 Santa Fe, NM 87502-0115 Telephone No. (505) 438-7636 Fax No. (505) 438-7435
Oregon State Office P.O. Box 2965 Portland, OR 97208 Telephone No. (503) 952-6276 Fax No. (503) 952-6308	Utah State Office Box 45155 Salt Lake City, UT 84145-0155 Telephone No. (801) 539-4161 Fax No. (801) 539-4183	Wyoming State Office 5353 Yellowstone Rd. Cheyenne, WY 82009 Telephone No. (307) 775-6066 Fax No. (307) 775-6082
National Interagency Fire Center 3833 South Development Ave. Boise, ID 83705-5354 Telephone No. (208) 387-5360 Fax No. (208) 387-5359	Denver Area Service Center Denver Federal Center Building 50, HR-250 Denver, CO 80225-0047 Telephone No. (303) 236-6362 Fax No. (303) 236-0711	National Training Center 9828 N. 31st Ave. Phoenix, AZ 85051 Telephone No. (602) 906-5572 Fax No. (602) 906-5619

BLM READING ROOMS

Information Access Center 222 West 7th Ave. #13 Anchorage, AK 99513 Telephone No. (907) 271-5960 Fax No. (907) 271-3624	Information Access Center 222 North Central Ave. Phoenix, AZ 85004-2203 Telephone No. (602) 417-9200 Fax No. (602) 417-9556	Information Access Center 2800 Cottage Way Sacramento, CA 95825-0451 Telephone No. (916) 978-4401 Fax No. (916) 978-4416
Information Access Center 2850 Youngfield St. Lakewood, CO 80215 Telephone No. (303) 239-3600 Fax No. (303) 239-3933	Information Access Center 7450 Boston Blvd. Springfield, VA 22153 Telephone No. (703) 440-1600 Fax No. (703) 440-1609	Information Access Center 1387 S. Vinnell Way Boise, ID 83709-1657 Telephone No. (208) 373-3889 Fax No. (208) 373-3899
Information Access Center P.O. Box 36800 Billings, MT 59107-6800 Telephone No. (406) 896-5069 Fax No. (406) 896-5298	Information Access Center P.O. Box 12000 1340 Financial Blvd. Reno, NV 89520 Telephone No. (702) 861-6500 Fax No. (702) 861-6606	Information Access Center 1474 Rodeo Rd. Santa Fe, NM 87505 Telephone No. (505) 438-7400 Fax No. (505) 438-7435
Information Access Center P.O. Box 2965 1515 SW Fifth Ave. Portland, OR 97208 Telephone No. (503) 952-6001 Fax No. (503) 952-6422	Information Access Center 324 South State St. Fourth Floor Salt Lake City, UT 84145 Telephone No. (801) 539-4001 Fax No. (801) 539-4230	Information Access Center 5353 Yellowstone Road Cheyenne, WY 82009 Telephone No. (307) 775-6256 Fax No. (307) 775-6129

MINERALS MANAGEMENT SERVICE (MMS) HEADQUARTERS

FOIA Officer 381 Elden St. MS-2200 Herndon, VA 20170-4817 Telephone No. (703) 787-1132 Fax No. (703) 787-1207	Public Affairs Office Office of Communications 1849 C St., NW MS-0200 Washington, DC 20240 Telephone No. (202) 208-3985 Fax No. (202) 208-3968

MMS REGIONAL/FIELD OFFICES

Minerals Revenue Management P.O. Box 25165, MS-320B2 Denver, CO 80225-0165 Telephone No. (303) 231-3316 Fax No. (303) 231-3781	Offshore Minerals Management 381 Elden St. MS-4063 Herndon, VA 20170-4817 Telephone No. (703) 787-1689 Fax No. (703) 787-1922	Gulf Of Mexico 1201 Elmwood Park Blvd., MS-5030 New Orleans, LA 70123-2394 Telephone No. (504) 736-2513 Fax No. (504) 736-2977
Alaska 949 East 36th Ave., Rm 300, MS-800 Anchorage, AK 99508-4302 Telephone No. (907) 271-6621 Fax No. (907) 271-6805	Pacific 770 Paseo Camarillo, MS-7001 Camarillo, CA 93010-6064 Telephone No. (805) 389-7621 Fax No. (805) 389-7689	Southern Administrative Service Center 1201 Elmwood Park Blvd., MS-2620 New Orleans, LA 70123-2394 Telephone No. (504) 736-2878 Fax No. (504) 736-2478
Western Administrative Service Center P.O. Box 25165, MS-2700 Denver, CO 80225-0165 Telephone No. (303) 275-7305 Fax No. (303) 275-7347	Reading Room Public Information Office 1201 Elmwood Park Blvd. New Orleans, LA 70123-2394 Telephone No. (800) 200-GULF Fax No. (504) 736-2602	

OFFICE OF SURFACE MINING (OSM) HEADQUARTERS

FOIA Officer MS-326, SIB 1951 Constitution Ave., NW. Washington, DC 20240 Telephone No. (202) 208-2961 Fax No. (202) 219-3100	Public Affairs Office MS-262, SIB 1951 Constitution Ave., , NW. Washington, DC 20240 Telephone No. (202) 208-2534 Fax No. (202) 501-0549	Reading Room Contact: OSM FOIA Officer Room 263, SIB 1951 Constitution Ave., NW. Washington, DC 20240 Telephone No. (202) 208-2961 Fax No. (202) 501-4734

OSM REGIONAL/FIELD OFFICES

Appalachian Region

FOIA Coordinator 3 Parkway Center Pittsburgh, PA 15220 Telephone No. (412) 937-2146 Fax No. (412) 937-2177	Virginia State Office Big Stone Gap Field Office 1941 Neeley Rd., Suite 201 Compartment 116 Big Stone Gap, VA 24219 Telephone No. (540) 523-0000 Fax No. (540) 523-5053	West Virginia State Office Charleston Field Office 1027 Virginia St., East Charleston, WV 25301 Telephone No. (304) 347-7162 Fax No. (304) 347-7170
Ohio, Maryland, Michigan State Office 4480 Refugee Rd., Suite 201 Columbus, OH 43232 Telephone No. (614) 866-0578 Fax No. (614) 469-2506	Massachusetts, Pennsylvania, Rhode Island State Office 415 Market St., Suite 3C Harrisburg, PA 17101 Telephone No. (717) 782-4036 Fax No. (717) 782-3771	Georgia, North Carolina, Tennessee State Office Knoxville Field Office 530 Gay St., Suite 500 Knoxville, TN 37902 Telephone No. (423) 545-4103 Fax No. (423) 545-4111
	Kentucky State Office Lexington Field Office 2675 Regency Rd. Lexington, KY 40503 Telephone No. (606) 233-2896 Fax No (606) 233-2895	

Mid-Continent Region

Iowa, Kansas, Missouri State Office Alton Federal Building 501 Belle St. Alton, IL 62002 Telephone No. (618) 463-6463 Fax No. (618) 463-6470	Alabama, Mississippi State Office Birmingham Field Office 135 Gemini Circle, Suite 215 Homewood, AL 35209 Telephone No. (205) 290-7286 Fax No. (205) 290-7280	Indiana, Illinois State Office Indianapolis Field Office 575 North Pennsylvania St., Room 301 Indianapolis, IN 46204 Telephone No. (317) 226-6700 Fax No. (317) 226-6182
	Arizona, Louisiana, Oklahoma, Texas State Office Tulsa Field Office 5100 East Skelly Dr., Suite 470 Tulsa, OK 74135 Telephone No. (918) 581-6430 Fax No. (918) 581-6419	

Western Region

Western Regional Office 1999 Broadway, Suite 3320 Denver, CO 80202 Telephone No (303) 844-1435 Fax No. (303) 844-1522	Arizona, California, New Mexico State Office Albuquerque Field Office 505 Marquette NW., Suite 1200 Albuquerque, NM 87102 Telephone No. (505) 248-5070 Fax No. (505) 248-5081	Idaho, Montana, North Dakota, South Dakota, Wyoming State Office Casper Field Office 100 East B St., Room 2128 Casper, WY 82601-1918 Telephone No. (307) 261-6542 Fax No. (307) 261-6552
FIELD READING ROOMS Contact: OSM FOIA Coordinators at the region/field locations		

U.S. GEOLOGICAL SURVEY (USGS) HEADQUARTERS

FOIA Officer 12201 Sunrise Valley, Dr., MS-807 Reston, VA 20192 Telephone No. (703) 648-7313 Fax No. (703) 648-7198	Public Affairs Office Office of Communications 12201 Sunrise Valley Dr., MS-119 Reston, VA 20192 Telephone No. (703) 648-4460 Fax No. (703) 648-4466	Reading Room USGS Library 12201 Sunrise Valley Dr. Reston, VA 20192 Telephone No. (703) 648-4302 Fax No. (703) 648-6373

USGS REGIONAL/FIELD OFFICES

Eastern Regional Office 12201 Sunrise Valley Dr., MS-151 Reston, VA 20192 Telephone No. (703) 648-7209 Fax No. (703) 648-4588	Central Regional Office Denver Federal Center Building 53, MS- 201 Room H1927 P.O. Box 25046 Denver, CO 80225 Telephone No. (303) 236-9201 Fax No. (303) 236-5882	Western Regional Office 345 Middlefield Rd., MS-211 Menlo Park, CA 94025-3591 Telephone No. (650) 329-4458 Fax No. (650) 329-5095

BUREAU OF RECLAMATION (BOR) HEADQUARTERS

FOIA Officer P.O. Box 25007, D-7924 Denver, CO 80225-0007 Telephone No. (303) 445-2048 Fax No. (303) 445-6575	Public Affairs Office P.O. Box 25007, D-1540 Denver, CO 80225-0007 Telephone No. (303) 236-7000 Fax No. (303) 236-9235	Reading Room Reclamation Library P.O. Box 25007, D-7925 Denver, CO 80225-0007 Telephone No. (303) 445-2072 Fax No. (303) 445-6303

BOR REGIONAL/FIELD OFFICES

Great Plains Region P.O. Box 36900, GP-3100 Billings, MT 59107-6900 Telephone No. (406) 247-7620 Fax No. (406) 247-7622	Lower Colorado Region P.O. Box 61470, LC-5301 Boulder City, NV 89006-1470 Telephone No. (702) 293-8071 Fax No. (702) 293-8615	Mid-Pacific Region 2800 Cottage Way, MP-3000 Sacramento, CA 95825-1898 Telephone No. (916) 978-5552 Fax No. (916) 978-5176

Pacific Northwest Region 1150 North Curtis Rd., PN-7600 Boise, ID 83706-1234 Telephone No. (208) 378-5120 Fax No. (208) 378-5129	Upper Colorado Region 125 South State St., Room 6107, UC482 Salt Lake City, UT 84138-1102 Telephone No. (801) 524-3655 Fax No. (801) 524-5499

BUREAU OF INDIAN AFFAIRS (BIA) HEADQUARTERS

FOIA Officer MS-4140, MIB, Code 100F 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-2977 Fax No. (202) 208-4807	Public Affairs Office MS-4542, MIB, Code 105 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 219-3710 Fax No. (202) 501-1516	Reading Room Room 2618, MIB 1849 C St., NW. Washington, DC 20240 Telephone No. (202) 208-2977 Fax No. (202) 208-4807

BIA REGIONAL/FIELD OFFICES

Pacific Region (California) 2800 Cottage Way Sacramento, CA 95825 Telephone No. (916) 978-6067 Fax No. (916) 978-6099	Great Plains Region (Nebraska, North Dakota, South Dakota) 115 4th Ave., SE. Aberdeen, SD 57401 Telephone No. (605) 226-7343 Fax No. (605) 226-7446	Southwest Region (Colorado, New Mexico) 615 First St., NW. Albuquerque, NM 87125 Telephone No. (505) 346-7592 Fax No. (505) 346-7151
Southern Plains Region (Kansas, Western Oklahoma, Texas) WCD Office Complex P.O. Box 368 Anadarko, OK 73005 Telephone No. (405) 247-5059, ext. 221 Fax No. (405) 247-6989	Rocky Mountain Region (Montana, Wyoming) 316 North 26th St. Billings, MT 59101 Telephone No. (406) 247-7988 Fax No. (406) 247-7566	Eastern Region (Florida, Louisiana, Alabama, Maine, Connecticut, Massachusetts, Rhode Island, Tennessee, Mississippi, New York, North Carolina, South Carolina) 711 Stewarts Ferry Pike Nashville, TN 37214 Telephone No. (615) 467-2931 Fax No. (615) 467-2964
Alaska Region (Alaska) P.O. Box 25520 Juneau, AK 99802-5520 Telephone No. (907) 586-7454 Fax No. (907) 586-7064	Midwest Region (Iowa, Michigan, Minnesota, Wisconsin) One Federal Dr., Room 550 Ft. Snelling, MN 55111 Telephone No. (612) 713-4400, ext. 1182 Fax No. (612) 713-4453	Eastern Oklahoma Region (Oklahoma State Office) 101 North 5th St. Muskogee, OK 74401 Telephone No. (918) 687-2414 Fax No. (918) 687-2285
Navajo Region (Navajo Reservation only: Arizona, New Mexico, Utah) P.O. Box 1060 Gallup, NM 87305 Telephone No. (505) 863-8240 Fax No. (505) 863-8324	Western Region (Arizona, California, Nevada, Utah) Two Arizona Center 400 N. 5th St. Phoenix, AZ 85001 Telephone No. (602) 379-6761 Fax No. (602) 379-4057	Northwest Region (Idaho, Oregon, Washington, Metlakatla Alaska) 911 NE 11th Ave. Portland, OR 97232 Telephone No. (503) 231-2229 Fax No. (503) 231-6731

BILLING CODE 4310–RK–C

Note: For more information on FOIA, including the most current listing of FOIA Contacts, visit DOI's FOIA home page at *http://www.doi.gov/foia/*.

Appendix B to Part 2—Internet Addresses

1. Department of the Interior (DOI) Home Page: *http://www.doi.gov*
2. DOI FOIA Home Page: *http://www.doi.gov/foia/*
3. DOI Reference Guide for Obtaining Information: *http://www.doi.gov/foia/foitabl.htm*
4. List of DOI Public Affairs Offices: *http://www.doi.gov/foia/list.html*
5. DOI FOIA Contacts: *http://www.doi.gov/foia/contacts.html*
6. DOI FOIA Regulations (43 CFR, Part 2, Subparts A and B): *http://www.doi.gov/foia/foiaregs.html*
7. DOI FOIA Policy and Guidance: *http://www.doi.gov/foia/policy.html*
8. Electronic Reading Room: *http://www.doi.gov/foia/readroom.html*
9. Index of Frequently Requested Documents: *http://www.doi.gov/foia/freq.html*
10. DOI's Frequently Requested Documents: *http://www.doi.gov/foia/frrindex.html*
11. FOIA Annual Reports to Congress: *http://www.doi.gov/foia/report.html*
12. DOI's Library: *http://library.doi.gov*
13. General Records Schedule 14, Information Services Records: *http://ardor.nara.gov/grs/grs14.html*
14. DOI Records Management Program: *http://www.doi.gov/ocio/records/*

15. DOI Privacy Act Program: *http://www.doi.gov/ocio/privacy/*

16. DOI Privacy Act Officers: *http://www.doi.gov/ocio/privacy/doi_privacy_act_officers.htm*

17. DOI Privacy Act Regulations: *http://www.doi.gov/foia/43cfrsub.html*

18. DOI Privacy Act Systems of Records Notices: *http://www.access.gpo.gov/su_docs/aces/1999_pa.html*

19. FirstGov Portal: *http://www.firstgov.gov*

Note: See DOI's FOIA home page at *http://www.doi.gov/foia/* for the most current listing of FOIA-related website addresses.

Appendix C to Part 2—Fee Schedule

If you submit a FOIA request, the bureau will charge you to search for, review, and duplicate the requested records according to your fee category (see §§ 2.16 and 2.17) and the following fee schedule. In addition, the bureau will charge you for any special handling or services performed in connection with processing your request and/or appeal under Subparts C and D of this part. The following fees will be used by all bureaus of the Department; these fees apply to services performed in making documents available for public inspection and copying under Subpart B of this part as well. The duplicating fees also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the total amount of fees for processing the request is $30 or less (see § 2.16(b)(2)), where the requester has met the requirements for a statutory fee waiver, or where the bureau has granted a discretionary fee waiver (see §§ 2.19 and 2.20).

(1) *Search and review (review applies to commercial-use requesters only).* Fees are based on: the average hourly salary (base salary plus DC locality payment), plus 16 percent for benefits, of employees in the following three categories. The average grade was established by surveying the bureaus to obtain the average grade of employees conducting FOIA searches and reviews. Fees will be increased annually consistent with Congressionally approved pay increases. Fees are charged in quarter hour increments.

(a) Clerical—Based on GS–6, Step 5, pay (all employees at GS–7 and below)

(b) Professional—Based on GS–11, Step 7, pay (all employees at GS–8 through GS–12)

(c) Managerial—Based on GS–14, Step 2, pay (all employees at GS–13 and above)

Note: Fees for the current fiscal year are posted on DOI's FOIA home page (see Appendix B). If you do not have access to the Internet, please call the Departmental FOIA Officer (see Appendix A) for a copy of the fee schedule.

	Fee
(2) Duplication:	
Pages no larger than 8.5 × 14 inches, when reproduced by standard office copying machines.	$.13 per page ($.26 for double-sided copying)
Color copies of pages no larger than 8.5 × 11 inches	$.90 per page
Pages larger than 8.5 × 14 inches	Direct cost to DOI
Color copies of pages no larger than 11 × 17 inches	$1.50 per page
Photographs and records requiring special handling (e.g., because of age, size, or format).	Direct cost to DOI
(3) Electronic records:	
Charges for services related to processing requests for electronic records	Direct cost to DOI
(4) Certification	Fee
Each certificate of verification attached to authenticate copies of records	$.25
(5) Postage/Mailing:	
Charges that exceed the cost of first class postage. Examples of such charges are express mail or overnight delivery.	Postage or Delivery charge
(6) Other Services:	
Cost of special services or materials, other than those provided for by this fee schedule, when requester is notified of such costs in advance and agrees to pay them.	Direct cost to DOI

Appendix D to Part 2—Fee Waiver Criteria

If you are seeking a fee waiver, it is your responsibility to provide detailed information to support your request. You must submit this information with your FOIA request. You should explain the significance of the release of the information to the public's understanding of the Government's operations and activities based on your understanding of the type of information that you are requesting. Each fee waiver request is judged on its own merit—we do not grant ''blanket'' fee waivers, *i.e.*, obtaining a fee waiver once does not mean you will obtain a subsequent fee waiver. Please note that inability to pay is not sufficient to justify a fee waiver.

(a) The statutory requirement for granting a fee waiver is that release of the information must be in the public interest because it—

(1) Is likely to contribute significantly to public understanding of the operations and activities of the Government; and

(2) Is not primarily in your commercial interest.

(b) In deciding whether you are entitled to a fee waiver, the bureau will consider the criteria in paragraphs (1) through (4), below. Your request for a fee waiver must address each of these criteria.

(1) How do the records concern the operations or activities of the Government?

(2) If the records concern the operations or activities of the Government, how will disclosure likely contribute to public understanding of these operations and activities?

(i) How are the contents of the records you are seeking meaningfully informative on the Department's or a bureau's operations and activities? Is there a logical connection between the content of the records and the operations or activities you are interested in?

(ii) Other than enhancing your knowledge, how will disclosure of the requested records contribute to the understanding of the public at large or a reasonably broad audience of persons interested in the subject?

(iii) Your identity, vocation, qualifications, and expertise regarding the requested information (whether you are affiliated with a newspaper, college or university, have previously published articles, books, etc.) may be relevant factors. However, merely stating that you are going to write a book, research a particular subject, or perform doctoral dissertation work, is insufficient, without demonstrating how you plan to disclose the information in a manner which will be informative to a reasonably broad audience of persons interested in the subject.

(iv) Do you have the ability and intention to disseminate the information to the general public or a reasonably broad audience of persons interested in the subject?

(A) How and to whom do you intend to disseminate the information?

(B) How do you plan to use the information to contribute to public understanding of the Government's operations or activities?

(3) If there is likely to be a contribution to public understanding, will release of the requested records contribute significantly to public understanding?

(i) Is the information being disclosed new?

(ii) Does the information being disclosed confirm or clarify data which has been released previously?

(iii) How will disclosure increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure?

(iv) Is the information already publicly available? If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a

particular issue (*e.g.*, the listing of the spotted owl as an endangered species), it is less likely that there will be a significant contribution from release.

(4) Would disclosure be primarily in your commercial interest?

(i) Do you have a commercial interest that would be furthered by disclosure? A commercial interest is a commercial, trade, or profit interest as these terms are commonly understood. Your status as ''profitmaking'' or ''non-profitmaking'' is not the deciding factor. Not only profitmaking entities, but other organizations or individuals may have a commercial interest to be served by disclosure, depending on the circumstances involved.

(ii) If you do have a commercial interest that would be furthered by disclosure, would disclosure be primarily in that interest? Would the public interest in disclosure be greater than any commercial interest you or your organization may have in the documents? If so, how would it be greater?

(iii) Your identity, vocation, and the circumstances surrounding your request are all factors to be considered in determining whether disclosure would be primarily in your commercial interest. For example:

(A) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.

(B) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.

(c) If the bureau cannot make a determination based on the information you have provided, it may ask you for additional justification regarding your request.

Appendix E to Part 2—FOIA Exemptions

Under the FOIA (5 U.S.C. 552(b)), there are *nine exemptions* which may be used to protect information from disclosure. The Department has paraphrased the exemptions, below, for your information. The paraphrases are not intended to be interpretations of the exemptions.

(1) National security information concerning national defense or foreign policy, provided that such information has been properly classified, in accordance with an Executive Order;

(2) Information related solely to the internal personnel rules and practices of an agency;

(3) Information specifically exempted from disclosure by statute (other than the Privacy Act or the Trade Secrets Act), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information which is obtained from a person and is privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, the release of which:

(A) Could reasonably be expected to interfere with enforcement proceedings;

(B) Would deprive a person of a right to a fair trial or an impartial adjudication;

(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) Could reasonably be expected to disclose the identity of a confidential source;

(E) Would disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(F) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Information contained in or related to examination, operating, or condition reports, prepared by, or on behalf of, or for the use of an agency responsible for regulating or supervising financial institutions; and

(9) Geological and geophysical information and data, including maps, concerning wells.

Appendix F to Part 2—Mineral Leasing Act and Mineral Leasing Act for Acquired Lands—Special Rules

(a) *Definitions.* As used in the section:

(1) *Exploration license* means a license issued by the Secretary of the Interior to conduct coal exploration operations on land subject to the Mineral Leasing Act, under 30 U.S.C. 201(b), or subject to the Mineral Leasing Act for Acquired Lands, under 30 U.S.C. 351–360.

(2) *Fair-market value of coal to be leased* means the minimum amount of a bid the Secretary is willing to accept in leasing coal within leasing tracts offered in general lease sales or reserved and offered for lease to public bodies, including Federal agencies, rural electric cooperatives, or non-profit corporations controlled by any of such entities, under 30 U.S.C. 201(a)(1) or 30 U.S.C. 351–360.

(3) *Information* means data, statistics, samples and other facts, whether analyzed or processed or not, pertaining to Federal coal resources.

(b) *Applicability.* This Appendix applies to the following categories of information:

(1) *Category A.* Information provided to or obtained by a bureau under 30 U.S.C. 201(b)(3) (and corresponding information under 30 U.S.C. 351–360) from the holder of an exploration license;

(2) *Category B.* Information acquired from commercial or other sources under service contract with United States Geological Survey (USGS) under 30 U.S.C. 208–1(b) (and corresponding information under 30 U.S.C. 351–360), and information developed by USGS under an exploratory program authorized by 30 U.S.C. 208–1 (and corresponding information under 30 U.S.C. 351–360);

(3) *Category C.* Information obtained from commercial sources which the commercial source acquired while not under contract with the United States Government;

(4) *Category D.* Information provided to the Secretary by a Federal department or agency under 30 U.S.C. 208–1(e) (and corresponding information under 30 U.S.C. 351–360); and

(5) *Category E.* The fair-market value of coal to be leased and comments received by the Secretary with respect to such value.

(c) *Availability of information.* Information obtained by the Department from various sources will be made available to the public as follows:

(1) *Category A—Information.* Category A information must not be disclosed to the public until after the areas to which the information pertains have been leased by the Department, or until the Secretary determines that release of the information to the public would not damage the competitive position of the holder of the exploration license, whichever comes first.

(2) *Category B—Information.* Category B information must not be withheld from the public; it will be made available by means of and at the time of open filing or publication by USGS.

(3) *Category C—Information.* To the extent Category C information is proprietary, such information must not be made available to the public until after the areas to which the information pertains have been leased by the Department.

(4) *Category D—Information.* To the extent Category D information is proprietary, the Department will withhold the information from the public for the length of time the department or agency providing the information agreed to when it obtained the information.

(5) *Category E—Information.* Category E information must not be made public until the lands to which the information pertains have been leased, or until the Secretary has determined that its release prior to the issuance of a lease is in the public interest.

[FR Doc. 02–25970 Filed 10–18–02; 8:45 am]

BILLING CODE 4310–RK–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–2228]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, on its own motion, editorially amends the Table of FM Allotments to specify the actual classes of channels allotted to various communities. The changes in channel classifications have been authorized in response to applications filed by licensees and permittees operating on

these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to permit FM Channel and Class Modifications [Upgrades] by Applications*, 8 FCC Rcd 4735 (1993).

DATES: Effective October 21, 2002.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, adopted September 4, 2002, and released September 20, 2002. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 296B and adding Channel 296C1 at Needles.

3. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by removing Channel 239C1 and adding Channel 239C2 at Valdosta.

4. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by removing Channel 240A and adding Channel 240C3 at Weston.

5. Section 73.202(b), the Table of FM Allotments under South Dakota, is amended by removing Channel 222C and adding Channel 222C1 at Rapid City.

6. Section 73.202(b), the Table of FM Allotments under Washington, is amended by removing Channel 254C3 and adding Channel 254C2 at Mabton.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 02–26232 Filed 10–18–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–2257; MB Docket No. 02–110; RM–10406]

Radio Broadcasting Services; Rose Hill and La Grange, NC

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 284C3 for Channel 284A at Rose Hill, North Carolina, reallots Channel 284C3 to La Grange, North Carolina, and modifies the license for Station WZUP to specify operation at La Grange in response to a petition filed by Conner Media, Inc. See 67 FR 38244, June 3, 2002. The coordinates for Channel 284C3 at La Grange are 35–16–00 and 77–58–00. With this action, this proceeding is terminated.

DATES: Effective November 4, 2002.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MB Docket No. 02–110, adopted September 4, 2002, and released September 20, 2002. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under North Carolina, is amended by adding La Grange, Channel 284C3 and by removing Rose Hill, Channel 284A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 02–26230 Filed 10–18–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–2227; MB Docket No. 02–118; RM–10394]

Radio Broadcasting Services; Ridgway and Rangely, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission substitution of Channel 279C1 for Channel 279C2 at Ridgway, Colorado, and the modification of Station KBNG's authorization accordingly, and the substitution of Channel 257C1 for vacant Channel 279C1 at Rangely, Colorado, to accommodate the modification. *See* 67 FR 40907 (06/14/2002). Channel 279C2 is allotted at Ridgway with a site restriction of 11.9 kilometers (7.4 miles) north of the community at coordinates 38–15–26 NL and 107–46–54 WL. Channel 257C1 can be allotted at Rangely at petitioner's suggested site 5.0 kilometers (3.1 miles) northwest of the community at coordinates 40–7–12 NL and 108–50–29 WL.

DATES: Effective November 4, 2002.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 02–118, adopted September 4, 2002, and released September 20, 2002. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–

863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by adding Channel 257C1 and removing Channel 279C1 at Rangley and by adding Channel 279C1 and removing Channel 279C2 at Ridgway.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 02–26227 Filed 10–18–02; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 67, No. 203
Monday, October 21, 2002

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.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 104, 105, 108 and 109

[Notice 2002–19]

Bipartisan Campaign Reform Act of 2002; Reporting

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on the proposed regulations relating to new requirements for the reporting of electioneering communications and independent expenditures, monthly reporting by national political party committees and quarterly reporting by the principal campaign committees of candidates for the House of Representatives and Senate, as well as reporting related to building funds. These regulations would implement several requirements in the Bipartisan Campaign Reform Act of 2002 (''BCRA'') that significantly amend the Federal Election Campaign Act of 1971, as amended (''FECA'' or ''the Act''). Please note that the Commission has not made a final decision on any of these proposals. Further information is contained in the **SUPPLEMENTARY INFORMATION** that follows.

DATES: Comments must be received on or before November 8, 2002.

ADDRESSES: All comments should be addressed to Mr. John Vergelli, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to *BCRAreport@fec.gov* and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. John Vergelli, Acting Assistant General Counsel, or Ms. Cheryl Fowle, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 (''BCRA''), Public Law 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* This is one in a series of Notices of Proposed Rulemakings (''NPRM'') the Commission has recently published to meet the rulemaking deadlines set out in BCRA. The deadline for the promulgation of these rules is 270 days after the date of enactment, which is December 22, 2002.

Introduction

This NPRM addresses: (1) Reporting of electioneering communications; (2) reporting of independent expenditures; (3) quarterly reporting by the principal campaign committees of candidates for the House of Representatives and the Senate; (4) monthly reporting by political party committees; and (5) the reporting of funds for political party committee office buildings.

The Commission sought comments on two of these topics previously in Notices of Proposed Rulemakings on ''Electioneering Communications,'' 67 FR 51,131 (August 7, 2002); and ''Coordinated and Independent Expenditures,'' 67 FR 60,042 (September 25, 2002). Another topic, addressing the reporting of funds for the purchase or construction of party office buildings, is based on a recently published final rule (''Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,'' 67 FR 49,123 and 49,127 (July 29, 2002)). The last two topics addressing the schedule of reporting for national political party committees and the principal campaign committees of House and Senate candidates have not previously been addressed in a BCRA-related NPRM.

In BCRA, Congress required the Commission to promulgate standards for reporting software, and also imposed certain other requirements on the Commission, and on various persons who file reports with the Commission, that will take effect when that computer software becomes available. 2 U.S.C. 434(a)(12). Although these Congressional mandates are related to reporting, which is the subject of this NPRM, the Commission does not propose to address the mandates here. The computer software standards will depend largely upon the results of this reporting rulemaking, and on the development of reporting forms following the completion of this rulemaking. Therefore, the Commission proposes to address the mandates in 2 U.S.C. 434(a)(12) as soon as feasible, and will solicit public comments on the mandates at that time.

Independent Expenditures and Electioneering Communications

Proposed 11 CFR 100.19 File, Filed, or Filing (2 U.S.C. 434(a))

The Commission's regulations at 11 CFR 100.19 define *file, filed,* and *filing.* Paragraph (a) of section 100.19 would be unaffected by this rulemaking, except for a new heading. Proposed paragraph (b) of section 100.19 would retain the pre-BCRA general rule that a document is considered timely filed if it is: (1) Delivered to the appropriate filing office (either the Commission or the Secretary of the Senate), or (2) sent by registered or certified mail and postmarked by 11:59 p.m. Eastern Standard/Daylight Time of the prescribed filing date—except for pre-election reports. The proposed revisions to paragraph (b) of section 100.19 would clarify that paragraph (b) is the general rule, but does not apply to reports addressed by paragraph (c) through proposed new paragraph (f).

Those exceptions would be as follows: Paragraph (c) for electronic filing—''filed'' means received by the Commission at or before 11:59 p.m. Eastern Standard/Daylight Time on the filing date; paragraph (d) for 24-hour and 48-hour reports of independent expenditures—''filed'' means received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of

the day following (24-hour reports) or the second day following (48-hour reports) the date on which the spending threshold is reached in accordance with 11 CFR 104.4(f); paragraph (e) for ''48-hour notices of last-minute contributions'' (48-hour notices filed by authorized committees of candidates of contributions of $1,000 or more received after the 20th day but more than 48 hours before 12:01 a.m. of the day of an election)—''filed'' means received by the Commission or the Secretary of the Senate within 48 hours of the receipt of a ''last-minute'' contribution of $1,000 or more; proposed paragraph (f) for 24-hour statements of electioneering communications—''filed'' means received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time of the day following the disclosure date (see 11 CFR 104.20).

Paragraphs (c) and (e) of §100.19 would remain unchanged, except for new headings.

Proposed revisions to paragraph (d) of section 100.19 would also require that the new 48-hour reports of independent expenditures, like the 24-hour reports, must be *received* rather than *filed* by the filing deadline. The proposed 48-hour reporting provision would allow filers to submit their reports using facsimile machines or electronic mail, as long as they are not required under 11 CFR 104.18 to file electronically. Under pre-BCRA paragraph (d) of §100.19, 24-hour reports of independent expenditures are only considered timely filed if they are *received* by the Commission or Secretary of the Senate within 24 hours of the time the expenditure is made.[1] Sending 24-hour reports by mail is not a viable option because it is unlikely these reports will be received by the Commission within 24 hours of the making of the expenditure. *See* ''Final Rules and Explanation and Justification for 11 CFR 100.19,'' 67 FR 12,834 (March 20, 2002). Pre-BCRA paragraph (d) also states that 24-hour reports may be filed by facsimile machine or electronic mail, in addition to other permissible means of filing (*e.g.*, hand-delivery or overnight courier). Because the reasons behind the handling of 24-hour reports apply equally to the essentially similar 48-hour reports, the Commission is proposing this parallel rule.

Under 2 U.S.C. 434(f)(1), electioneering communications must be reported within 24 hours of the ''disclosure date.'' *See* proposed 11 CFR 104.20. The Commission proposes to add new paragraph (f) to 11 CFR 100.19 to require these 24-hour statements to be *received* by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the disclosure date, rather than *filed* by that time. In addition, to assist filers with meeting this deadline, the proposed rule would allow them to file their 24-hour statements by facsimile machine or electronic mail. For the same reasons that are discussed with regard to proposed paragraph (d) of 11 CFR 100.19, this proposed paragraph would follow the timing and filing methods of 24-hour reports for independent expenditures.

11 CFR 104.5(g) and (j) Filing Dates (2 U.S.C. 434(a)(2))

Proposed paragraph (g) of 11 CFR 104.5 would move the pre-BCRA contents of paragraph (g) to proposed paragraph (g)(2) with revisions, and would add a new paragraph (g)(1), which would require that 48-hour reports of independent expenditures must be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Note that the term ''publicly distributed'' refers to communications distributed by radio or television (*see* 11 CFR 100.29(a)(5)) and the term ''publicly disseminated'' refers to communications that are made public via other media, *e.g.*, newspaper, magazines, handbills. Pre-BCRA paragraph (g) of 11 CFR 104.5 states that 24-hour reports of independent expenditures must be received by the appropriate officers no later than 24 hours after such independent expenditure is made.

Proposed paragraph (j) of §104.5 would address the filing dates for electioneering communications. Specifically, it would provide that the 24-hour statements must be received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date of disclosure.

11 CFR 105.2 Place of Filing; Senate Candidates, Their Principal Campaign Committees, and Committees Supporting Only Senate Candidates (2 U.S.C. 434(g)(3))

The Commission's pre-BCRA regulations require that 24-hour reports of independent expenditures supporting or opposing Senate candidates be filed with the Secretary of the Senate. *See* pre-BCRA 11 CFR 104.4(c), 109.2(b). In BCRA, Congress establishes the Commission as the place of filing for both 24- and 48-hour reports of independent expenditures, regardless of the office being sought by the clearly identified candidate. 2 U.S.C. 434(g)(3)(A). The proposed revisions to §105.2 would place the text of pre-BCRA 11 CFR 105.2 in proposed paragraph (a), adding the heading, ''General Rule.'' New proposed paragraph (b) of 11 CFR 105.2 would be headed, ''Exception,'' and would state that 24- and 48-hour reports of independent expenditures, must be filed with the Commission even if the communication refers to a candidate for the Senate. 2 U.S.C. 434(f).

11 CFR 104.4 Independent Expenditures by Political Committees (2 U.S.C. 434(b), (g))

The Commission has established reporting requirements for political committees making independent expenditures in accordance with 2 U.S.C. 434(b) and (g). *See* pre-BCRA 11 CFR 104.4. Paragraph (a) of §104.4 would be unaffected, other than the addition of a new heading, a grammatical correction, and an updated cross-reference.

Proposed new paragraph (b) would address reports of independent expenditures made by a political committee at any point in the campaign up to and including the 20th day before an election. Proposed paragraph (b)(1) would address independent expenditures aggregating *less than $10,000* with respect to a given election during the calendar year, up to and including the 20th day before an election. This calendar year aggregation would be based on 2 U.S.C. 434(b)(4), which requires calendar year aggregation for reports of independent expenditures by political committees. Under this calendar year approach, political committees would report the independent expenditures on Schedule E of FEC Form 3X, filed no later than the regular reporting date under 11 CFR 104.5. The Commission would interpret 2 U.S.C. 434(g), added to the Act by BCRA, to require aggregation toward the various thresholds for independent

[1] Note that BCRA, as passed on February 14, 2002, in the House of Representatives and on March 20, 2002, in the Senate, would have required 24-hour reports to be *filed* rather than *received* within 24 hours of the time the independent expenditure was made. In technical corrections to BCRA, Congress amended section 212 of BCRA by reinstating the *received* requirement. H.R. Con. Res. 361, March 22, 2002.

expenditure reporting to be done on a per election basis within the calendar year. For example, if a political committee made $5,000 in independent expenditures with respect to a Senate race, and $5,000 in independent expenditures with respect to a House race, and both of these events occurred before the 20th day before the election, that political committee would not be required to file 48-hour reports, but would be required to disclose the independent expenditures in its regularly scheduled reports. If the political committee makes $5,000 in independent expenditures with respect to a clearly identified candidate in the primary, and an additional $5,000 in independent expenditures with respect to the same candidate in the general election, no 48-hour reports would be required; but again the committee would be required to disclose the independent expenditures in its regularly scheduled reports. The Commission requests comments on whether a different time period, such as an election cycle, should be employed instead of the calendar year period.

Paragraph (b)(2) would address independent expenditures aggregating *$10,000 or more* during the calendar year up to and including the 20th day before an election. These reports would also be filed on Schedule E of FEC Form 3X. However, these reports would be required to be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Further, political committees would have to file an additional 48-hour report each time subsequent independent expenditures reach the $10,000 threshold with respect to the same election to which the first report related.

The Commission proposes revisions to renumbered paragraph (c) (*i.e.*, pre-BCRA 11 CFR 104.4(b)) stating that 24-hour reports must be *received* by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which the $1,000 threshold is reached during the final 20 days before the election. Further, proposed revisions to this paragraph would specifically state that additional 24-hour reports must be filed each time during the 24-hour reporting period in which subsequent independent expenditures reach or exceed the $1,000 threshold with respect to the same election to which the previous report related.

Proposed paragraph (d) would contain the report verification information currently found in pre-BCRA paragraph (b) of §104.4. There would be non-substantive grammatical changes to conform this paragraph to other changes in the overall section.

Proposed paragraph (e) would largely restate pre-BCRA paragraph (c) of §104.4. The most significant proposed change to this paragraph would be to make the Commission and not the Secretary of the Senate the place of filing for 24- and 48-hour reports of independent expenditures relating to Senate candidates. 2 U.S.C. 434(g)(3). *See* the discussion of 11 CFR 105.2, above.

Proposed paragraph (f) of 11 CFR 104.4 would address aggregation of independent expenditures for reporting purposes. The provisions of pre-BCRA 11 CFR 109.1(f) would be redesignated and revised to explain when and how political committees and other persons making independent expenditures must aggregate independent expenditures for purposes of determining whether 48-hour and 24-hour reports must be filed. Note that this proposed aggregation rule would apply to independent expenditures by political committees, as well as other persons; proposed 11 CFR 109.10(c) and (d) would cross-refer to this paragraph. Proposed paragraph (f) would establish that every date on which a communication that constitutes an independent expenditure is ''publicly distributed'' or otherwise publicly disseminated serves as the date that every person must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts ($1,000 for 24-hour reports or $10,000 for 48-hour reports). The term ''publicly distributed'' would have the same meaning as in new 11 CFR 100.29(b)(6), which the Commission is promulgating as part of a separate rulemaking. Thus, proposed paragraph (f) would set the same date as the starting date from which a person would have one or two days, where applicable, to file a 24-hour or 48-hour report on independent expenditures.

In addition, Congress changed the reporting requirements by adding the phrase ''or contracts to make'' to the statute. 2 U.S.C. 434(g)(1), (2). BCRA ties 24-hour and 48-hour reporting of independent expenditures to the time when a person ''makes or contracts to make independent expenditures * * *'' aggregating at or above the $1,000 and $10,000 thresholds, respectively. 2 U.S.C. 434(g)(4). Therefore, under proposed 11 CFR 104.4(f), each person would be required to include as of the proposed trigger date, in the calculation of the aggregate amount of independent expenditures, both disbursements for independent expenditures *and* all contracts obligating funds for disbursement for independent expenditures. Under this approach and the proposed timing requirements described above, once a communication that constitutes an independent expenditure is publicly distributed or disseminated as explained above, the person who paid for, or who contracted to pay for, the communication would be able to determine whether the communication satisfied the ''express advocacy'' requirement of the definition of an independent expenditure (*see* 11 CFR 100.16) and would therefore be able to determine whether the disbursement for that communication constituted an independent expenditure. A person reaching or exceeding the applicable reporting threshold would be responsible for submitting a report by 11:59 p.m. Eastern Standard/Daylight Time of the day after, for 24-hour reporting, or two days after, for 48-hour reporting, the date of the public distribution or dissemination of that communication. Please note that under the proposed rules, independent expenditures would be reported by political committees after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 11:59 p.m. of the day following the day on which the independent expenditure is first publicly distributed or otherwise publicly disseminated.

In some situations, a political committee will not make payment or incur a reportable debt before the communication underlying the independent expenditure is publicly distributed or otherwise publicly disseminated. If the communication is both publicly distributed or otherwise publicly disseminated and paid for in the same reporting period, then the committee would report the independent expenditure on Schedule E for that reporting period. If the communication is aired in one reporting period (*e.g.*, during the 24-hour reporting period) and payment is made in a later reporting period (*e.g.*, during the post-general election period), then the committee would report the independent expenditure as a memo entry on Schedule E in the reporting period in which payment is made.

In other situations, however, a political committee may pay the production and distribution costs associated with an independent

expenditure in one reporting period, but not publicly distribute or otherwise publicly disseminate it until a later reporting period. In this case, the committee would report the payment as a disbursement on Schedule B for operating expenditures. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the committee would file a Schedule E for the independent expenditure referencing the earlier Schedule B transaction. The committee would also report the disbursement for the independent expenditure as a negative entry on Schedule B so the total disbursements are not inflated. Alternatively, if the committee wishes to disclose the independent expenditure before the communication is publicly disseminated, it could report the independent expenditure on Schedule E for the reporting period in which the disbursement is made, with no further reporting obligation except for the 48-hour report if the total disbursements for independent expenditures equal or exceed $10,000 at the time the communication is publicly distributed or otherwise publicly disseminated.

Obligations incurred but not yet paid (that are reportable debts), must be reported on Schedule D. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the committee must file a Schedule E referencing the debt on Schedule D. The committee must continue to report the debt on Schedule D (and any payment on it on Schedule E), until the debt is extinguished.

The Commission seeks comment on its proposed interpretation of BCRA's ''makes or contracts to make'' language and the triggering mechanism for 24-hour and 48-hour reports. Specifically, the Commission seeks comment on an alternative interpretation that would make the actual disbursement or the execution of the contract to make the disbursement for an independent expenditure, rather than the public distribution or dissemination of the resulting communication, the triggering mechanism for the reporting requirements once the disbursements and obligations equal or exceed the respective thresholds. This change would require earlier reporting than is currently required or proposed (*i.e.*, when the communication is publicly disseminated). The policy reasons for adopting this alternative interpretation would be similar to those described in the NPRM on the reporting of electioneering communications. *See* ''Electioneering Communications'' NPRM, 67 FR 51,131 (Aug. 7, 2002).

Proposed 11 CFR 109.10 Independent Expenditure by Persons Other Than Political Committees

Proposed new § 109.10 would set forth the revised reporting requirements of pre-BCRA § 109.2. Under proposed new § 109.10, persons other than political committees would have to report their independent expenditures on either FEC Form 5 or in a signed statement containing certain information regarding the person who made the independent expenditure and the nature of the expenditure itself.

Proposed paragraph (a) of 11 CFR 109.10 would provide a cross-reference to 11 CFR 104.4 for political committees, under which they must report independent expenditures. Paragraph (a) of pre-BCRA 11 CFR 109.2 would be moved to proposed paragraphs (b) and (c) of § 109.10.

Proposed paragraph (c) would address reports of independent expenditures aggregating $10,000 or more with respect to a given election from the beginning of the calendar year up to and including the 20th day before an election. This proposed paragraph would require that 48-hour reports of independent expenditures be *received* rather than *filed* by 11:59 pm of the second day after the date on which the $10,000 threshold is reached. *See* discussion of *received* versus *filed* in § 100.19, above. Pre-BCRA paragraph (b) of § 109.2 indicates that 24-hour reports must be received after a disbursement is made for an independent expenditure, but no later than 24 hours after an independent expenditure is ''made'' under pre-BCRA paragraph 109.1(f). *See* the discussion of proposed 11 CFR 104.4(f), above. Under the proposed rules, paragraph (b) of pre-BCRA § 109.2 would be moved to new paragraph (d) of 11 CFR 109.10 and revised to reflect the modification to the aggregation and filing requirements in proposed 11 CFR 100.19(d) and 104.4 that are discussed above.

Proposed revisions to paragraph (d) of 11 CFR 109.10 (pre-BCRA 11 CFR 109.2(b)) would also mirror the changes in 11 CFR 104.4(c) as to when 24-hour reports of independent expenditures aggregating $1,000 or more after the 20th day before the election.

Proposed paragraph (e) of 11 CFR 109.10 (*i.e.*, pre-BCRA 11 CFR 109.2(a)(1) and (c)) would address the contents and verification of statements filed in lieu of FEC Form 5. Proposed paragraph (e) would include one significant change from pre-BCRA 109.2(a)(1) and (c): A person making an independent expenditure would now be required to certify that the expenditure was made independently from a political party committee and its agents, in addition to the pre-BCRA requirement of certification that the expenditure was not coordinated with a candidate, the candidate's authorized committee, or an agent of either of the foregoing. This change reflects the addition of political party committees to the definition of ''independent expenditure'' in 2 U.S.C. 431(17) and the description of coordination in 2 U.S.C. 441a(a)(7)(B)(ii) under BCRA. For the same reasons explained with reference to the definition of ''independent expenditure'' in proposed 11 CFR 100.16, the Commission would continue to include ''consultation'' in the description of activity that would cause an expenditure to lose its independence (*i.e.*, ''in cooperation, *consultation,* or concert with'' a candidate or political party committee) even though the statutory definition in 2 U.S.C. 431(17) does not retain the term.

Proposed 11 CFR 104.20—Reporting Electioneering Communications

1. Introduction

In the Electioneering Communications Final Rules, the Commission stated it would revise the proposed rules on reporting electioneering communications and re-propose the rules as part of this rulemaking.[2] Consequently, these proposed rules include the reporting requirements for electioneering communications. Although, the Electioneering Communications NPRM originally would have designated the reporting of electioneering communications as § 104.19, the proposed rules would designate reporting of electioneering communications as section proposed § 104.20. Please note that in the narrative that follows, citations to § 104.19 refer to the original proposed rules in the Electioneering Communications NPRM, and citations to § 104.20 refer to the proposed rules in this BCRA reporting NPRM.

2. Disclosure Date

BCRA requires persons who make electioneering communications costing more than $10,000 to file disclosure statements with the FEC within 24 hours of the disclosure date. 2 U.S.C. 434(f)(1). In the Electioneering Communications NPRM, proposed § 104.19(b) would have defined

[2] The original proposed rules were part of the Electioneering Communications NPRM. *See* 67 *FR* 51,131, 51,145 (Aug. 7, 2002).

''disclosure date'' as ''the first date by which a person has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; * * *'' 67 FR at 51,145 (August 7, 2002). The Electioneering Communications NPRM, however, sought comment on whether the disclosure date should be the date on which the electioneering communication aired. Thus, under this proposal, an organization could make disbursements or enter into a contract to make disbursements that exceed $10,000, but would not be required to disclose the disbursements or contract until the electioneering communication is aired. Although BCRA uses the term ''airing,'' the Commission has determined that ''publicly distributed'' more accurately encompasses how electioneering communications are disseminated to the public, including the airing of these communications. In the Electioneering Communications Final Rules, the Commission defines ''publicly distributed'' to mean ''aired, broadcast, cablecast, or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.'' 11 CFR 100.29(b)(6). Therefore, the proposed § 104.20(a)(5) would adopt the definition of ''publicly distributed'' in 11 CFR 100.29(b)(6) and the term ''publicly distributed'' would be used throughout the proposed rules instead of ''airing.''

All of the commenters who addressed this issue disagreed with the proposed rule and advocated adopting a final rule that would define ''disclosure date'' as the date of the public distribution of the electioneering communication.[3] They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed. One witness at the August 28, 2002 public hearing on electioneering communications did acknowledge that in some cases it may be difficult to ascertain when an electioneering communication is publicly distributed for purposes of triggering the 24-hour reporting period because the contract may not specify a precise time that the communication will be publicly distributed or because in some instances the broadcaster does not air the communication during the block of time specified in the contract. In addition, the Commission believes that there could be legal and practical concerns with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, particularly when such disclosure could force reporting entities to divulge confidential strategic and political information about their possible future activities.

Taking into consideration the comments described above, the Commission proposes to make the date that an electioneering communication is publicly distributed as the disclosure date under proposed §104.20(a)(1). The Commission's proposal reflects its concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed. To address the concern that a person may not know the exact time an electioneering communication will be publicly distributed during the day that it is scheduled to air, the Commission is proposing to interpret the 24-hour period in which to report the electioneering communication as starting at the end of the day in which the communication is publicly distributed. Therefore, proposed §104.20(b) would require reporting of an electioneering communication by the end of the following day. The Commission seeks comment on this interpretation.

3. Aggregation of Direct Costs of Producing or Airing Electioneering Communications

In the Electioneering Communications NPRM, proposed §104.19(a) would have required every person who makes a disbursement, or executes a contract, for the direct costs of producing or airing electioneering communications that aggregate in excess of $10,000 during a calendar year to file a statement with the Commission. Furthermore, proposed §104.19(a)(2) would have included a non-exhaustive list of what constitutes direct costs of electioneering communications. The Commission sought comment on two issues relating to this proposed requirement. The first was whether the list in proposed §104.19(a)(2) was adequate and whether the list should be exhaustive. The second issue was whether the direct costs of producing an electioneering communication and the direct costs of airing it should be aggregated separately or together to determine whether the $10,000 threshold has been reached.

The commenters to the Electioneering Communications NPRM were split on the issue of whether the list of direct costs in proposed §104.19(a)(2) should be exhaustive or non-exhaustive. One commenter who supported an exhaustive list argued that it is clear what is involved in producing a communication, and the proposed rule adequately addresses that. Another commenter recommended a non-exhaustive list so that the Commission could retain flexibility to identify other costs associated with producing and airing communications not listed in the proposed rules.

In order to provide clear guidance on this issue, proposed 11 CFR 104.20(a)(2) would include an exhaustive list of direct costs associated with producing or airing electioneering communications within the proposed definition of ''direct costs of producing or airing electioneering communications.'' The Commission seeks comments on whether there are other direct costs associated with producing or airing electioneering communications that should be included in the proposed definition. In particular, the Commission seeks comment on what, if any, other in-house production costs should be considered direct costs. The Commission also welcomes additional comments on whether the list in proposed §104.20(a)(2) should be exhaustive.

The commenters also disagreed on the question of the aggregation of direct costs of producing or airing electioneering communications. Some commenters argued that BCRA should be read to require that these costs should be aggregated separately. Under this interpretation, if it costs a person $7,000 to produce the electioneering communication and $7,000 to air it, the threshold has not been met because neither the direct costs of producing or airing the electioneering communication reached $10,000. In contrast, other commenters argued that BCRA mandates that the direct costs of producing and airing the electioneering communication be aggregated. Under this approach, the example above would result in the $10,000 threshold being met because the direct costs of producing and airing would be $14,000.

The language in proposed §104.20(b) would be identical to the language originally proposed in §104.19(a). Thus, when the direct costs of producing or airing an electioneering communication exceed $10,000 when aggregated together, the person who is making the electioneering communication would be

[3] Two commenters, submitting joint written comments, originally supported a two-step reporting process—a general report when there is a disbursement or a contract followed later by a specific report when the electioneering communication is aired. While testifying at the Commission's public hearing, these commenters agreed that defining ''disclosure date'' as the date of airing is an acceptable alternative.

required to file a statement with the Commission when the electioneering communication is publicly distributed.

4. Direction or Control

The Electioneering Communication NPRM included two proposed alternatives, identified as Alternative 4–A and Alternative 4–B, to implement the BCRA requirement to disclose ''any person sharing or exercising direction or control over the activities'' of the person making the disbursement for electioneering communications. *See* 2 U.S.C. 434(f)(2)(A). Many of the commenters expressed concern that both alternatives are vague and could encompass a large number of people, especially for electioneering communications made by membership organizations. Some of the commenters were also concerned that disclosing this information may reveal sensitive or confidential information and the decision-making processes of organizations, especially non-profit organizations, thereby placing them at a competitive disadvantage. For these reasons, these commenters argued that the Commission should require limited, if any, disclosure of persons who share or exercise direction or control over the person who makes disbursements for electioneering communications or the activities involved in making electioneering communications.

In contrast, several commenters, including the Congressional sponsors of BCRA, disagreed with both alternatives because in their view neither would disclose sufficiently the information required by BCRA. *See id.* They argued that the purpose of this disclosure requirement is to reveal not only those who have direction or control over the electioneering communications, but also those who have direction or control over the organization that makes the electioneering communications.

While the Commission appreciates the concerns of those who objected to disclosure of the decision-making process of their organizations, BCRA requires persons who make electioneering communications to disclose those who share or exercise direction or control over the person making the disbursement for electioneering communications. 2 U.S.C. 434(f)(2)(A). Because neither Alternative 4–A nor Alternative 4-B in the Electioneering Communications NPRM appear to encompass the disclosure required by BCRA, proposed §104.20(c)(2) would not incorporate either of the two alternatives. Instead, proposed paragraph (c)(2) would adopt the language of 2 U.S.C. 434(f)(2)(A).

The Electioneering Communications NPRM sought comment on whether the proposed rules should define ''direction or control over the activities'' and whether such definition should draw upon the existing earmarking regulations at 11 CFR 110.6(d) or the definition of ''to direct'' at 11 CFR 300.2(n). A commenter suggested that the definition should be broadly defined and should include those persons with the ability to influence the decision-making process concerning electioneering communications. While this same commenter agreed that the definition of ''to direct'' could be modified for inclusion into the definition of ''direction or control over the activities,'' another commenter stated that it is unsuitable to use the definition of ''to direct'' or the earmarking regulations in this context.

To provide further guidance on proposed §104.20(c)(2), the proposed rules would include a definition of ''sharing or exercising direction or control.'' Because it appears that ''direction or control'' in the context of 2 U.S.C. 434(f)(2)(A) refers to the management or decision-making process of an organization or a qualified nonprofit corporation (''QNC''), proposed §104.20(a)(3) would define ''sharing or exercising direction or control'' to mean exercising authority or responsibility for policy formulation, day-to-day management, obligation of funds, or hiring or firing employees. The Commission believes that these functions would provide sufficient scope to capture responsible persons and entities without sweeping too broadly.

In the alternative, the Commission could define ''sharing or exercising direction or control'' to mean the officers, directors, partners, or any other individuals who have the authority to bind the organization, entity, or person making the disbursement for electioneering communication. This alternative, which is not reflected in the proposed rules, seeks a more objective, bright-line definition of ''direction or control'' and would focus the definition on those persons who have the authority to act on behalf of the organization. The Commission seeks comments on these approaches to implementing 2 U.S.C. 434(f)(2)(A). The Commission also seeks comments on how these proposals would apply to individuals making electioneering communications.

5. Identification of Candidates and Elections

Under 2 U.S.C. 434(f)(2)(D), the elections to which the electioneering communications pertain, as well as the names of all clearly identified candidates referred to in the communications, must be disclosed. The Electioneering Communications NPRM provided two alternatives to proposed 11 CFR 104.19(b)(5), identified as Alternative 5–A and Alternative 5–B, which would implement this statutory provision. 67 FR 51,146. Both alternatives would require disclosure of the election and all clearly identified candidates who are referred to in the electioneering communication, but contain different language. Commenters preferred the language of Alternative 5–B because it would be easier to read and would be more consistent with 2 U.S.C. 434(f)(2)(D). Alternative 5–B arguably also is more consistent with what the Commission is proposing as the disclosure date, *see* above, as there is no doubt as to the names of clearly identified candidates appearing in a communication once a communication is publicly distributed. Accordingly, proposed §104.20(c)(5) would incorporate the language of Alternative 5–B of the Electioneering Communications NPRM.

6. Disclosure of Donors

BCRA requires persons who make electioneering communications and create segregated bank accounts for electioneering communications to disclose the names and addresses of contributors who contribute an aggregate of $1,000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E). If the organization that makes electioneering communications does not use a segregated bank account, then it would be required to disclose the names and addresses of contributors who contribute an aggregate of $1,000 or more to that organization from the beginning of the preceding year through the disclosure date. 2 U.S.C. 434(f)(2)(F).

A. Contributions/Contributors v. Donations/Donors

In the Electioneering Communications NPRM, the Commission sought comment on whether amounts given to persons who make disbursements for electioneering communications are contributions subject to the limitations, prohibitions, and reporting requirements of the Act. The Commission proposed to treat amounts given to political committees as contributions because BCRA refers to ''funds contributed'' and ''contributors.'' *See* 2 U.S.C. 434(f)(2)(E) and (F). Conversely, amounts given to persons who are not political committees would not be considered contributions. Comments on this issue were generally

favorable to the Commission's approach.[4]

Upon further analysis of this issue, the Commission proposes a different approach as to the question of whether amounts given for electioneering communications are contributions or donations. As stated in the Electioneering Communications Final Rules, the definition of ''electioneering communications'' does not include expenditures or independent expenditures that are subject to the limitations, prohibitions, and reporting requirements of the Act and the Commission's regulations. 11 CFR 100.29(c)(3). Communications made by political committees that would otherwise qualify as electioneering communications would be reported as expenditures or independent expenditures because they are made in connection with Federal elections. By operation of the exemption of expenditures and independent expenditures from the definition of ''electioneering communications,'' these communications would not be considered electioneering communications. Therefore, political committees, by definition, do not make electioneering communications. Consequently, only persons who are not political committees would make disbursements for electioneering communications.

As stated above and in the Electioneering Communications NPRM, the Commission proposed to designate amounts given for electioneering communications purposes to persons who are not political committees as ''donations.'' The Commission believes that amounts given to entities that are not political committees for electioneering communications should not be treated as contributions and should not count towards political committee status, unless these amounts would otherwise constitute a contribution under subparts B and C of part 100. Although the statutory language of BCRA uses the terms ''contributor'' and ''contributed,'' it does not use the term ''contribution'' nor does it amend the definition of ''contribution'' in 2 U.S.C. 431(8). Thus, it appears that Congress did not intend these amounts to be contributions automatically to persons who are not political committees, especially in light of the statutory exemption for expenditures and independent expenditures from the definition of ''electioneering communications.'' Accordingly, proposed §104.20(c) refers to amounts given for electioneering communications as ''donations'' and the givers of the amounts as ''donors.'' Additionally, all comments on the Electioneering Communications NPRM on this issue favored this approach. The Commission again seeks comment on this approach.

B. Disclosure Requirements

In reading 2 U.S.C. 434(f)(2)(E) and (F) together with 2 U.S.C. 441b(c)(3)(B), the Commission stated in the Electioneering Communications NPRM that these disclosure requirements for segregated bank accounts appear to apply only to qualified nonprofit corporations organized under 26 U.S.C. 501(c)(4). See 67 FR 51,143. Therefore, proposed 11 CFR 104.19(b)(6) would have required only QNCs to disclose their contributors for purposes of electioneering communications. See 11 CFR 114.10 for QNC status.

The Electioneering Communications NPRM narrative that explained proposed section 104.19(b)(7) clearly states that all persons who make electioneering communications, including QNCs that do not use segregated bank accounts, would be required to disclose their contributors who contribute an aggregate of over $1,000 during the prescribed time period. 67 FR 51,143. Nevertheless, some commenters interpreted proposed §104.19(b)(7) to apply only to QNCs and objected to limiting the disclosure requirements to only QNCs. They argued that BCRA does not limit the requirements of 2 U.S.C. 434(f)(2)(E) and (F) to just QNCs. Consequently, they recommended that all persons who make electioneering communications should be required to disclose their contributors under proposed §104.19(b)(7) and the option for segregated bank accounts in proposed §104.19(b)(6) should be extended to all persons who make electioneering communications. Additionally, some commenters expressed concern as to the requirement that organizations would be required to disclose their donors because donors may become inhibited from making donations aggregating over $1,000.

Because the Commission sees merit in these arguments, the revised proposed rules reflect the commenters' suggestions and would make clear that the application of proposed §§104.20(c)(7) and (8) would include all persons who make electioneering communications, not just QNCs. Proposed paragraphs (c)(7) and (8) would incorporate the language in proposed §§104.19(b)(6) and (7) with modifications as discussed below.

(1) *Disclosure of donors when exclusively using segregated bank accounts to make disbursements for electioneering communications*

Under proposed §104.19(b)(6) in the Electioneering Communications NPRM, QNCs that use segregated bank accounts to make disbursements for electioneering communications would be required to disclose only contributors who contributed an aggregate in excess of $1,000 to that segregated bank account. As stated above, the Commission agrees with the suggestion that this option should be made available to all persons who may make electioneering communications. Accordingly, proposed § 104.20(c)(7) would allow all such persons to establish a separate bank account to limit their reporting of the identities of their donors of $1,000 or more to those who have donated directly to that bank account, as long as only funds from the separate bank account are used to pay for electioneering communications. Additionally, the Commission notes that the final rules at 11 CFR 114.14(d) provide such persons that are not QNCs with the option of establishing a segregated bank account similar to that allowed to QNCs.

(2) *Disclosure of donors when not exclusively using segregated bank accounts to make disbursements for electioneering communications*

Because there was some confusion as to the scope of the reporting requirement in proposed 11 CFR 104.19(b)(7), proposed 11 CFR 104.20(c)(8) would differ from proposed § 104.19(b)(7) in that it would remove the reference to QNCs. Thus, proposed § 104.20(c)(8) would make clear that all persons who make electioneering communications would be required to disclose their donors who donate over $1,000 in the aggregate, if they do not use segregated bank accounts.

One commenter to the Electioneering Communications NPRM argued that the members of the organizations it represented could be subject to negative consequences if their names are disclosed in connection with an electioneering communication. The FECA provides for an advisory opinion process concerning the application of any of the statutes within the Commission's jurisdiction or any regulations promulgated by the Commission, and such a group could also seek an advisory opinion from the

[4] Further, one commenter, in response to the Commission's question concerning treatment of amounts given to non-Federal accounts of a separate segregated fund or to non-connected committees, argued that amounts given to non-Federal accounts should not be treated as contributions subject to the prohibitions against corporations and labor organization funding electioneering communications.

Commission to determine if the group would be entitled to an exemption from disclosure that would be analogous to the exemption provided to the Socialist Workers Party in Advisory Opinions 1990–13 and 1996–46 (both of which allowed the Socialist Workers Party to withhold the identities of its contributors and persons to whom it had disbursed funds because of a reasonable probability that the compelled disclosure of the party's contributors' names would subject them to threats, harassment, or reprisals from either Government officials or private parties.). BCRA's legislative history recognizes the need for limited exceptions in these circumstances. *See* 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (remarks of Sen. Snowe).

7. Other Content Requirements

Proposed § 104.20(c) would require disclosure of additional information, not described above, in connection with the reporting of electioneering communications as mandated by BCRA. *See* 2 U.S.C. 434(f)(2)(A) and (C). Proposed paragraph (c)(1) would require identification of the person making the disbursement or the person's principal place of business. Proposed paragraph (c)(3) would require identification of the custodian of the books and accounts. Proposed paragraph (c)(4) would require disclosure of information about disbursements that exceed $200. Proposed paragraph (c)(6) would require identifying the disclosure date.

8. Recordkeeping Requirement

Proposed 11 CFR 104.20(d) would require all persons who make electioneering communications or accept donations for the purpose of making electioneering communications to maintain records in accordance with 11 CFR 104.14. In the Electioneering Communications NPRM, proposed § 104.19(c) would have exempted QNCs from the recordkeeping requirements. The commenters who addressed this issue were split on whether QNCs should be exempted from the recordkeeping requirements. A commenter who did not support the exemption argued that because these entities are required to report their electioneering communications, they should also be required to maintain records that relate to the electioneering communications in order to support their reports.

In determining that all of the reporting and recordkeeping requirements for political committees were too burdensome for QNCs making independent expenditures, the Supreme Court in *FEC* v. *Massachusetts Citizens For Life, Inc.* (''MCFL'') noted that MCFL, Inc. was subject to more ''extensive requirements and more stringent restrictions'' than unincorporated nonprofit organizations. 479 U.S. 238, 254–255 (1986). In contrast, proposed § 104.20(d) would require QNCs to maintain only those records that pertain to their electioneering communications which should not be burdensome for them. Additionally, this recordkeeping requirement is no different than what is required of any other person, including unincorporated nonprofit organizations, that make disbursements for electioneering communications. Furthermore, the availability of these records would be necessary to assess the accuracy of the electioneering communications reports filed by QNCs. Therefore, proposed paragraph (d) would not include an exemption for QNCs. The Commission welcomes further comments on this issue.

9. Proposed Amendment to 11 CFR 105.2

The Electioneering Communications NPRM proposed amending current 11 CFR 105.2 to require principal campaign committees of Senatorial candidates and other political committees that support only Senatorial candidates to file their statements of electioneering with the Commission. The Commission, however, has determined that political committees do not make electioneering communications by operation of the definition of ''electioneering communications'' in 11 CFR 100.29. Therefore, proposed § 105.2(b) would not incorporate the language from the electioneering communications NPRM or include mention of statements of electioneering communications.

10. Filing with the Secretary of State

Unlike the proposed provisions for independent expenditures, the proposed rules for electioneering communications do not include provisions that remove the requirement to file reports of electioneering communications with the Secretary of State if that state has obtained a waiver under 11 CFR 108.1(b). *See* proposed 11 CFR 104.4(e), below. The Commission seeks comments on whether proposed 11 CFR 104.20 should include such a provision. (At the current time, only 1 state, Montana, and two territories, Guam and Puerto Rico, have not obtained waivers.)

Principal Campaign Committee and National Political Party Committee Reporting Schedules

Proposed 11 CFR 104.5(a)—Principal Campaign Committees of House and Senate Candidates

Proposed 11 CFR 104.5(a) would set forth the new reporting schedule for the principal campaign committees of House of Representatives and Senate candidates. Prior to BCRA, the principal campaign committees of House and Senate candidates were allowed, in the non-election years, to file semi-annually. After November 6, 2002, excluding reports for runoff elections, principal campaign committees of House and Senate candidates must file quarterly in non-election years, as well as in the election year. 2 U.S.C. 434(a)(2)(B). Proposed revised § 104.5(a)(1) would state that these committees must file quarterly. Like other quarterly reports, these must be complete as of March 31, June 30, September 30, and December 31, and must be filed by April 15, July 15, October 15, and January 31 of the following year, respectively. Proposed paragraph (a)(2) of 11 CFR 104.5 would set forth the requirements for pre-election and post-general election reports in the election year, which would be identical to paragraphs (a)(1)(i) and (ii) of the pre-BCRA section. The rules regarding semi-annual reporting (in pre-BCRA § 104.5(a)) would be deleted. Please note that these new reporting dates do not affect the principal campaign committees or other authorized committees of Presidential candidates.

Proposed 11 CFR 104.5(c)—Committees Other Than Authorized Committees of Candidates

Proposed revisions to the introductory language for paragraph (c) would clarify that while non-authorized political committees may choose to file quarterly or monthly, a national committee of a political party must report monthly under proposed 11 CFR 104.5(c)(4).

Proposed 11 CFR 104.5(c)(4) would be a new provision implementing the BCRA requirement that national political party committees must report on a monthly basis. 2 U.S.C. 434(a)(4)(B). Previously, national party committees were allowed to file quarterly in the election year and semi-annually in the non-election years. The changes to the Act by BCRA specifically state that national political party committees must file monthly, including pre-general election and post-general election reports. These changes may have been intended to remove any

doubt as to whether national political party committees that filed quarterly had to file these reports if they did not make any contributions or expenditures on behalf of candidates in these elections during pre-BCRA election reporting periods. These rules would implement BCRA's amendment.

The proposed rules would apply to the Congressional campaign committees of the political parties as national political party committees. The Commission seeks comments on whether Congressional campaign committees should so specifically be included in the regulations.

11 CFR 104.3(g)—Funds for Party Office Buildings

Before BCRA, the Act and Commission regulations provide an exception to the definition of contribution and expenditure for donations to a national or State party committee that are specifically designated to defray any cost incurred for the construction or purchase of its office facility. Pre-BCRA 2 U.S.C 431(8)(B)(vii); pre-BCRA 11 CFR 100.7(b)(12). This exception is reflected in current 11 CFR 104.3(g), which provides that funds or anything of value that were designated for party office building funds and received by a party committee must be reported as memo entries.

To implement BCRA, the Commission adopted new regulations at 11 CFR 300.12 and 300.35, which eliminate this exception for national party committees and provide that the source and reporting of donations used for the costs incurred by a State, district, or local party committee for the purchase or construction of its office building are subject to State law if donated to a non-Federal account of the committee. ''Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,'' 67 FR 49,123 and 49,127. However, if funds or things of value are contributed to (or for use by) the Federal account of a State, district, or local party committee for the purchase or construction of its office building, then the amounts donated are contributions under the Act. Consequently, proposed paragraph (g) of 11 CFR 104.3 would make it clear that any funds or things of value received by a Federal account and used for the purchase or construction of an office building, regardless of a specific contributor designation, are contributions and are not treated differently from other funds or things of value donated to a Federal account.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The bases of this certification are several. There are four areas in which new rules are being proposed. The economic impact on small entities of each subject of new proposed rules is addressed below.

Independent expenditure reporting First, with regard to the proposed new rules addressing independent expenditures that the national, State, and local party committees of the two major political parties, and other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individual citizens operating under these rules are not small entities.

The small entities to which the rules would apply would not be unduly burdened by the proposed rules because there is no significant extra cost involved, as independent expenditures must already be reported. Collectively, the differential costs will not exceed 100 million dollars per year. In addition, new reporting requirements would not significantly increase costs, as they only apply to those spending $10,000 or more on independent expenditures, and the actual reporting requirements are the minimum necessary to comply with the new statute enacted by Congress.

Electioneering communications Second, with regard to the proposed rules addressing electioneering communications, the only burden the proposed rules impose is on persons who make electioneering communications, and that burden is a minimal one, requiring persons who make such communications to provide the names and addresses of those who made donations to that person when the costs of the electioneering communication exceed $10,000. If that person is a corporation that qualifies as a QNC, then it must also certify that it meets that status. The number of small entities affected by the proposed rules is not substantial.

The Commission would adopt several rules that seek to reduce any burden that might accrue to persons who must file reports. First, the Commission would interpret the reporting requirement such that no reporting is required until after an electioneering communication is publicly distributed. More than likely, this would only require that person to file one report with the Commission. Also, the Commission would allow all persons paying for electioneering communications to establish segregated accounts, and to report the names and addresses of only those persons who contributed to those accounts. Further, the Commission would interpret the statute to not require that a certification of QNC status be filed until the person is also required to file a disclosure report. These are significant steps the Commission would take to reduce the burden on those who would make electioneering communications. The overall burden on the small entities affected by these proposed rules for reporting electioneering communications would not amount to $100 million on an annual basis. Moreover, these proposed rules would be no more than what is strictly necessary to comply with the new statute enacted by Congress.

Reporting schedules for house and senate candidates Third, regarding the new rules requiring a different non-election year reporting schedule for the authorized committees of House and Senate candidates, the reporting frequencies have increased, however, the burden would not amount to $100 million on an annual basis. Moreover, these proposed rules would be no more than what is strictly necessary to comply with the new statute enacted by Congress.

Reporting schedules for national committees of political parties Fourth, regarding the new rules requiring a different reporting schedule for national committees of political parties, as noted above, the two major national party committees are not small entities under 5 U.S.C. 601.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 105

Campaign funds, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 108

Elections, Reporting and recordkeeping requirements.

11 CFR Part 109

Elections, Reporting and Recordkeeping requirements.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend subchapter A of chapter I of title 11 of the Code of Federal Regulations as follows:

PART 100—SCOPE AND DEFINITIONS

1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.19 is amended as follows:

a. Revising the introductory text and paragraphs (b) through (e).

b. Adding a heading to paragraph (a) and adding paragraph (f).

The revisions and additions read as follows:

§ 100.19 File, filed, or filing (2 U.S.C. 434(a)).

With respect to documents required to be filed under 11 CFR parts 101, 102, 104, 105, 107, 108, and 109, and any modifications or amendments thereto, the terms *file, filed,* and *filing* mean one of the actions set forth in paragraphs (a) through (f) of this section. For purposes of this section, document means any report, statement, notice, or designation required by the Act to be filed with the Commission or the Secretary of the Senate.

(a) *Where to deliver reports.* * * *

(b) *Timely filed. General rule.* A document other than those addressed in paragraphs (c) through (f) of this section, is timely filed upon deposit as registered or certified mail in an established U.S. Post Office and postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time of the day of the filing date, except that pre-election reports so mailed must be postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time of the fifteenth day before the date of the election. Documents sent by first class mail must be received by the close of business on the prescribed filing date to be timely filed.

(c) *Electronically filed reports.* For electronic filing purposes, a document is timely filed when it is received and validated by the Federal Election Commission at or before 11:59 p.m. Eastern Standard/Daylight Time on the filing date.

(d) *48-hour and 24-hour reports of independent expenditures.*

(1) *48-hour reports of independent expenditures.* A 48-hour report of independent expenditures under 11 CFR 104.4(b) or 109.10(c) is timely filed when it is received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which independent expenditures aggregate $10,000 or more in accordance with 11 CFR 104.4(f), any time during the calendar year up to and including the 20th day before an election.

(2) *24-hour reports of independent expenditures.* A 24-hour report of independent expenditures under 11 CFR 104.4(c) or 109.10(d) is timely filed when it is received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which independent expenditures aggregate at least $1,000, in accordance with 11 CFR 104.4(f), during the period less than 20 days but more than 24 hours before an election.

(3) *Permissible means of filing.* In addition to other permissible means of filing, a 24-hour report or 48-hour report of independent expenditures may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

(e) *48-hour statements of last-minute contributions.* In addition to other permissible means of filing, authorized committees that are not required to file electronically may file 48-hour notifications of contributions using facsimile machines. All authorized committees that file with the Commission, including electronic filers, may use the Commission's web site's on-line program to file 48-hour notifications of contributions. *See* 11 CFR 104.5(f).

(f) *24-hour statements of electioneering communications.* A 24-hour statement of electioneering communications under 11 CFR 104.20 is timely filed when it is received by the Commission within 24 hours of the disclosure date (see 11 CFR 104.20(a)(1)). In addition to other permissible means of filing, a 24-hour statement of electioneering communications may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

3. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), and 439a.

4. In § 104.3, paragraph (g) is revised to read as follows:

§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

* * * * *

(g) Building funds.

(1) A political party committee must report gifts, subscriptions, loans, advances, deposits of money, or anything of value that are used by the political party committee's Federal accounts to defray the costs of construction or purchase of the committee's office building. See 11 CFR 300.35. Such a receipt is a contribution subject to the limitations and prohibitions of the Act and reportable as a contribution, regardless of whether the contributor has designated the funds or things of value for such purpose and regardless of whether such funds are deposited in a separate Federal account dedicated to that purpose.

(2) Gifts, subscriptions, loans, advances, deposits of money, or anything of value that are donated to a non-Federal account of a State, district, or local party committee and are used by that account for the purchase or construction of its office building are not contributions subject to the reporting requirements of the Act. The reporting of such funds or things of value is subject to State law.

(3) Gifts, subscriptions, loans, advances, deposits of money, or anything of value that are used by a national committee of a political party to defray the costs of construction or purchase of the national committee's office building are contributions subject to the requirements of paragraph (g)(1) of this section.

* * * * *

5. Section 104.4 is revised to read as follows:

§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(b), (d), and (g)).

(a) *Regularly scheduled reporting.* Every political committee that makes independent expenditures must report all such independent expenditures on Schedule E in accordance with 11 CFR 104.3(b)(3)(vii). Every person other than a political committee must report independent expenditures in accordance with 11 CFR 109.10.

(b) *Reports of independent expenditures made at any time up to and including the 20th day before an election.*

(1) Independent expenditures aggregating less than $10,000 in a calendar year. Political committees must report on Schedule E of FEC Form 3X at the time of their regular reports in accordance with 11 CFR 104.3, 104.5 and 104.9, all independent expenditures aggregating less than $10,000 with respect to a given election any time during the calendar year up to and

including the 20th day before an election.

(2) Independent expenditures aggregating $10,000 or more in a calendar year. Political committees must report on Schedule E of FEC Form 3X all independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election. Political committees must ensure that the Commission receives these reports no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the political committee must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. See 11 CFR 104.4(f) for aggregation. Each 48-hour report must contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. In addition to other permissible means of filing, a political committee may file the 48-hour reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(c) *Reports of independent expenditures made less than 20 days, but more than 24 hours before the day of an election.* Political committees must ensure that the Commission receives reports of independent expenditures aggregating $1,000 or more with respect to a given election, after the 20th day, but more than 24 hours, before 12:01 a.m. of the day of the election, no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the political committee must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. Each 24-hour report shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. Political committees may file reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(d) *Verification.* Political committees must verify reports of independent expenditures filed under paragraph (b) or (c) of this section by one of the methods stated in paragraph (d)(1) or (2) of this section. Any report verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(1) For reports filed on paper (*e.g.*, by hand-delivery, U.S. Mail or facsimile machine), the treasurer of the political committee that made the independent expenditure must certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(2) For reports filed by electronic mail, the treasurer of the political committee that made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(e) *Where to file.* Reports of independent expenditures under this section and part 109 shall be filed as follows.

(1) For independent expenditures in support of or in opposition to, a candidate for President or Vice President: with the Commission and the Secretary of State for the State in which the expenditure is made.

(2) For independent expenditures in support of, or in opposition to, a candidate for the Senate *or the House of Representatives*: with the Commission and the Secretary of State for the State in which the candidate is seeking election.

(3) Notwithstanding the requirements of paragraphs (e)(1) and (2) of this section, political committees and other persons shall not be required to file reports of independent expenditures with the Secretary of State if that State has obtained a waiver under 11 CFR 108.1(b).

(f) *Aggregating independent expenditures for reporting purposes.* For purposes of determining whether 24-hour and 48-hour reports must be filed in accordance with paragraphs (b) and (c) of this section and 11 CFR 109.10(c) and (d), aggregations of independent expenditures must be calculated as of the first date during the calendar year on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated, and as of the date that any such communication with respect to the same election is subsequently publicly distributed or otherwise publicly disseminated. Every person must include in the aggregate total all disbursements for independent expenditures, and all enforceable contracts, either oral or written, obligating funds for disbursements for independent expenditures, made with respect to any communication that has been publicly distributed or otherwise publicly disseminated, during the calendar year, with respect to a given election for Federal office.

6. In § 104.5, paragraphs (a) and (g) are revised and introductory text to paragraph (c), and paragraphs (c)(4) and (j) are added to read as follows:

§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).

(a) *Principal campaign committee of House or Senate candidate.* Each treasurer of a principal campaign committee supporting a candidate for the House of Representatives or for the Senate must file reports on the dates specified at paragraph (a)(1) of this section in election years and non-election years, and paragraph (a)(2) of this section in election years.

(1) *Quarterly reports.*

(i) Quarterly reports must be filed no later than the 15th day following the close of the immediately preceding calendar quarter (on April 15, July 15, and October 15), except that the report for the final calendar quarter of the year must be filed no later than January 31 of the following calendar year.

(ii) The report must be complete as of the last day of each calendar quarter.

(iii) The requirement for a quarterly report shall be waived if, under paragraph (a)(2) of this section, a pre-election report is required to be filed during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(2) *Additional reports in the election year.*

(i) *Pre-election reports.*

(A) Pre-election reports for the primary and general election must be filed no later than 12 days before any primary or general election in which the candidate seeks election. If sent by registered or certified mail, the report must be mailed no later than the 15th day before any election.

(B) The pre-election report must disclose all receipts and disbursements as of the 20th day before a primary or general election.

(ii) *Post-general election report.*

(A) The post-general election report must be filed no later than 30 days after any general election in which the candidate seeks election.

(B) The post-general election report must be complete as of the 20th day after the general election.

* * * * *

(c) *Committees other than authorized committees of candidates.* Each political committee that is not the authorized committee of a candidate, except for a national committee of a political party (including the national Congressional campaign committees of a political party), which must comply with paragraph (c)(4) of this section, must file either: Election year and non-election year reports as prescribed at paragraphs (c)(1) and (2) of this section; or monthly reports as prescribed at paragraph (c)(3) of this section. A political committee reporting under 11 CFR 104.5(c), except for a national committee of a political party (including the national Congressional campaign committees of a political party), may elect to change the frequency of its reporting from monthly to quarterly and semi-annually or vice versa. A committee, except for national committee of a political party (including the national Congressional campaign committees of a political party), may change its filing frequency only after notifying the Commission in writing of its intention at the time it files a required report under its current filing frequency. Such committee will then be required to file the next required report under its new filing frequency. A committee may change its filing frequency no more than once per calendar year.

* * * * *

(4) A national committee of a political party, including a national Congressional campaign committee, must report monthly in accordance with paragraph (c)(3) of this section.

* * * * *

(g) *Reports of independent expenditures.*

(1) *48-hour reports of independent expenditures.* Every person who or which must file a 48-hour report under 11 CFR 104.4(b) must ensure the Commission receives the report no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures by that person relating to the same election as that to which the previous report relates aggregate $10,000 or more, that person must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which the $10,000 threshold is reached or exceeded. See 11 CFR 104.4(f) for aggregation.

(2) *24-hour report of independent expenditures.* Every person who or which must file a 24-hour report under 11 CFR 104.4(c) must ensure that the Commission receives the report no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures by that person relating to the same election as that to which the previous report relates aggregate $1,000 or more, that person must ensure that the Commission receives a 24-hour report of the subsequent independent expenditures no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which the $1,000 threshold is reached or exceeded. See 11 CFR 104.4(f) for aggregation.

(3) Each 24-hour or 48-hour report of independent expenditures filed under this section shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved.

(4) For purposes of this part, a communication that is mailed to its intended audience is publicly disseminated when it is relinquished to the U.S. Postal Service.

* * * * *

(j) 24-hour statements of electioneering communications. Every person who has made a disbursement or who has executed a contract to make a disbursement for the direct costs of producing or airing electioneering communications as defined in 11 CFR 100.29 aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time of the day following the disclosure date. The statement shall be filed under penalty of perjury and in accordance with 11 CFR 104.20.

§ 104.19 [Reserved]

7. Section 104.19 is added and reserved.

8. Section 104.20 is added to read as follows:

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

(a) *Definitions.*

(1) Disclosure date means:

(i) The first date during the calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) Direct costs of producing or airing electioneering communications means the following:

(i) Costs charged by a production company, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, and the charges for a broker to purchase the airtime.

(3) Sharing or exercising direction or control means exercising authority or responsibility for:

(i) Development, establishment, or change of policy for the organization or corporation;

(ii) Day-to-day management of the organization or corporation;

(iii) Obligation of funds or signing contracts; or

(iv) Hiring or firing employees.

(4) Identification has the same meaning as in 11 CFR 100.12.

(5) Publicly distributed has the same meaning as in 11 CFR 100.29(a)(5).

(b) *Who must report.* Every person who has made a disbursement or who has executed a contract to make a disbursement for the direct costs of producing or airing electioneering communications, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time of the day following the disclosure date. The statement shall be filed under penalty of perjury and contain the information set forth in paragraph (c) of this section. Persons other than political committees must file these 24-hour statements on FEC Form 9.

(c) *Contents of statement.* Every person described in paragraph (b) of this

section shall disclose the following information:

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement, or who executed a contract to make a disbursement, for electioneering communications;

(3) The identification of the custodian of the books and accounts from which the disbursements for electioneering communications were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the communication and the elections in which they are candidates;

(6) The disclosure date as defined in this section.

(7) If the disbursements were paid exclusively out of a segregated bank account consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; and

(8) If the disbursements were not paid exclusively from the segregated bank account, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(d) *Recordkeeping.* All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications, must maintain records in accordance with 11 CFR 104.14.

PART 105—DOCUMENT FILING (2 U.S.C. 432(g))

9. The authority citation for part 105 is revised to read as follows:

Authority: 2 U.S.C. 432(g), 434, 438(a)(8).

10. Section 105.2 is revised to read as follows:

§ 105.2 Place of filing; Senate candidates, their principal campaign committees, and committees supporting only Senate candidates (2 U.S.C. 432(g)(2), 434(g)(3)).

(a) *General Rule.* Except as provided in paragraph (b) of this section, all designations, statements, reports, and notices as well as any modification(s) or amendment(s) thereto, required to be filed under 11 CFR parts 101, 102, and 104 by a candidate for nomination or election to the office of United States Senator, by his or her principal campaign committee or by any other political committee(s) that supports only candidates for nomination for election or election to the Senate of the United States shall be filed in original form with, and received by, the Secretary of the Senate, as custodian for the Federal Election Commission.

(b) *Exception.* 24-hour and 48-hour reports of independent expenditures must be filed with the Commission and not with the Secretary of the Senate, even if the communication refers to a Senate candidate:

PART 108—FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS (2 U.S.C. 439)

11. The authority citation for part 108 continues to read as follows:

Authority: 2 U.S.C. 434(a)(2), 438(a)(8), 439, 453.

12. Paragraph (b) of § 108.1 is revised to read as follows:

§ 108.1 Filing requirements (2 U.S.C. 439(a)(1)).

* * * * *

(b) The filing requirements and duties of State officers under this part 108 shall not apply to a State if the Commission has determined that the State maintains a system that can electronically receive and duplicate reports and statements filed with the Commission. Once a State has obtained a waiver pursuant to this paragraph, the waiver shall apply to all reports that can be electronically accessed and duplicated from the Commission, regardless of whether the report or statement was originally filed with the Commission. The list of states that have obtained waivers under this section is available on the Commission's web site.

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a, Pub. L. 107–155 Sec. 214(c) (March 27, 2002))

13. The authority citation for part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 441a; Pub. L. 155–107 sec. 214(c).

§ 109.2 [Removed and reserved]

14. Section 109.2 is removed and reserved.

15. Section 109.10 is added to read as follows:

§ 109.10 How do political committees and other persons report independent expenditures?

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(b) Every person, other than a political committee, who makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement, or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so at the end of the reporting period during which any such independent expenditures that aggregate in excess of $250 are made and in any reporting period thereafter in which additional independent expenditures are made.

(c) Every person, other than a political committee, who makes independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election, must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. (See 11 CFR 104.4(f) for aggregation). The person making the independent expenditures aggregating $10,000 or more must ensure that the Commission receives the report or statement no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or

signed statement no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. See 11 CFR 104.4(f) for aggregation. Such report or statement shall contain the information required by paragraph (e) of this section.

(e) Content of verified statements and verification of reports and statements.

(1) Contents of verified statement. If a signed statement is submitted, the statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) Verification of independent expenditure statements and reports. Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (*e.g.*, by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

Dated: October 11, 2002.

David. M. Mason,

Chairman, Federal Election Commission.

[FR Doc. 02–26394 Filed 10–18–02; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–18–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company Models 441 and F406 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to supersede Airworthiness Directive (AD) 2002–09–13, which currently requires a one-time inspection of the fuel boost pump wiring inside and outside the boost pump reservoir and repair or replacement of the wiring as necessary on certain Cessna Aircraft Company (Cessna) Model 441 airplanes. AD 2002–09–13 resulted from several reports of chafing and/or arcing of the fuel boost pump wiring inside and outside the fuel pump reservoir. This proposed AD would retain the actions required in AD 2002–09–13, make the one-time inspection repetitive, require the inspection and possible replacement of the wire harness, lead wires and fuel boost pump on Model F406 airplanes, and require eventual installation of an improved design wire harness and fuel boost pump as terminating action for the repetitive inspections. The actions specified by this proposed AD are intended to detect, correct, and prevent chafing and/or arcing fuel boost pump wiring, which could result in arcing within the wing fuel storage system. Such a condition could lead to ignition of explosive vapor within the fuel storage system.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before December 30, 2002.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–18–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. You may view any comments at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. You may also send comments electronically to the following address: *9-ACE–7-Docket@faa.gov.* Comments sent electronically must contain ''Docket No. 2002–CE–18–AD'' in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII text.

You may get service information that applies to this proposed AD from Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67277; telephone: (316) 517–5800; facsimile: (316) 942–9006. You may also view this information at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Robert Adamson, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4145; facsimile: 316–946–4407.

SUPPLEMENTARY INFORMATION:

Comments Invited

How Do I Comment on This Proposed AD?

The FAA invites comments on this proposed rule. You may submit whatever written data, views, or arguments you choose. You need to include the rule's docket number and submit your comments to the address specified under the caption **ADDRESSES.** We will consider all comments received on or before the closing date. We may amend this proposed rule in light of comments received. Factual information that supports your ideas and suggestions is extremely helpful in evaluating the effectiveness of this proposed AD action and determining whether we need to take additional rulemaking action.

Are There Any Specific Portions of This Proposed AD I Should Pay Attention To?

The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this proposed rule that might suggest a need to modify the rule. You may view all comments we receive before and after the closing date of the rule in the Rules Docket. We will file a report in the Rules Docket that

summarizes each contact we have with the public that concerns the substantive parts of this proposed AD.

How Can I Be Sure FAA Receives My Comment?

If you want FAA to acknowledge the receipt of your mailed comments, you must include a self-addressed, stamped postcard. On the postcard, write ''Comments to Docket No. 2002–CE–18–AD.'' We will date stamp and mail the postcard back to you.

Discussion

Has FAA Taken Any Action to This Point?

Reports of chafing and/or arcing of the fuel boost pump wiring inside the fuel pump reservoir that supplies fuel to each engine on Cessna Model 441 airplanes caused us to issue AD 2002–09–13, Amendment 39–12746 (67 FR 31117, May 9, 2002). AD 2002–09–13 requires you to: (1) Do a one-time inspection of the electrical wiring going to the fuel boost pump reservoir and the boost pump wiring inside the reservoir for chafing or damage, and (2) repair or replace the wiring as necessary.

These actions are required in accordance with Cessna Conquest Service Bulletin No.: CQB02–1R1, Revision 1, dated April 22, 2002.

What Has Happened Since AD 2002–09–13 To Initiate This Action?

Further analysis of this situation reveals that:

—The actions required by AD 2002–09–13 should also apply to Model F406 airplanes;

—The inspection should be repetitive; and

—Improved design wire harnesses and fuel boost pumps should eventually be installed as terminating action for the repetitive inspections.

Has the Manufacturer Issued Service Information That Pertains to the Model F406 Airplanes?

Cessna has issued Caravan Service Bulletin No.: CAB02–8, dated June 3, 2002, Fuel Boost Pump Wiring Harness Inspection/Modification. This service bulletin affects the Model F406 airplane, a model of similar type design as the Model 441 airplane.

Cessna has also replaced Conquest Service Bulletin No.: CQB02–1, Revision 1, with Conquest Service Bulletin No.: CQB02–1, Revision 2, dated October 7, 2002.

Service Bulletins Numbers: CAB02–8 and CQB02–1, Revision 2, also specify and include procedures for installing improved design wire harnesses and fuel boost pumps (as a terminating action for the repetitive inspections).

The FAA's Determination and an Explanation of the Provisions of This Proposed AD

What Has FAA Decided?

After examining the circumstances and reviewing all available information related to the incidents described above, we have determined that:

—The unsafe condition referenced in this document exists or could develop on other Cessna Models 441 and F406 airplanes of the same type design;

—The actions of AD 2002–09–13 should be repetitive and the improved design parts eventually incorporated; and

—AD action should be taken in order to correct this unsafe condition.

What Would This Proposed AD Require?

This proposed AD would supersede AD 2002–09–13 with a new AD that would require repetitive inspections of the Models 441 and F406 airplanes fuel boost pump wiring inside and outside the boost pump reservoir for chafing or damage and replacement of the wiring and (for the Model F406) fuel boost pump, as necessary, and require eventual installation of an improved design wire harness and fuel boost pump as terminating action for the repetitive inspections.

How Would This Action Relate to the FAA's Aging Commuter-Class Aircraft Policy?

The FAA's aging commuter aircraft policy briefly states that when a modification exists that could eliminate or reduce the number of required critical inspections, the modification should be incorporated. This policy is based on the FAA's determination that reliance on critical repetitive inspections on airplanes utilized in commuter service carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections. In determining what inspections are critical, the FAA considers (1) the safety consequences of the airplane if the known problem is not detected by the inspection; (2) the reliability of the inspection such as the probability of not detecting the known problem; (3) whether the inspection area is difficult to access; and (4) the possibility of damage to an adjacent structure as a result of the problem.

The alternative to replacing the fuel boost pump wiring and fuel boost pump would be to repetitively inspect this area for the life of the airplane. Therefore, FAA has determined that the improved design wire harness and fuel boost pump should be incorporated in all affected airplanes.

Cost Impact

How Many Airplanes Would This Proposed AD Impact?

We estimate that this proposed AD affects 370 airplanes in the U.S. registry.

What Would Be the Cost Impact of This Proposed AD on Owners/Operators of the Affected Airplanes?

We estimate the following costs to accomplish the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
8 workhours x $60 per hour = $480.	None	$480	$480 x 370 = $177,600

For Model 441 airplanes, we estimate the following costs to accomplish the proposed replacements:

Labor cost	Parts cost	Total cost per airplane
8 workhours x $60 per hour = $480	$13,101	$480 + $13,101 = $13,581

For Model F406 airplanes, we estimate the following costs to accomplish the proposed replacements:

Labor cost	Parts cost	Total cost per airplane
8 workhours x $60 per hour = $480	$7,558.	$480 + $7,558 = $8,038

Compliance Time of This Proposed AD

Why Is the Compliance Time of This Proposed AD Presented in Both Hours Time-In-Service (TIS) and Calendar Time?

The initial compliance time of this proposed AD is presented in both hours TIS (25 hours) and calendar time (60 days). Because the affected airplanes are used in general aviation operations, some operators may accumulate 25 hours TIS on the airplane in a week while others may not accumulate 25 hours TIS in a year. Although the condition specified by this proposed AD is only unsafe during airplane operation, the condition could exist on an airplane with 500 hours TIS or 2,000 hours TIS. We have determined that the dual compliance time:

—Gives all owners/operators of the affected airplanes adequate time to schedule and do the actions in this proposed AD; and

—ensures that the unsafe condition referenced in this proposed AD will be corrected within a reasonable time period without inadvertently grounding any of the affected airplanes.

Regulatory Impact

Would This Proposed AD Impact Various Entities?

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

Would This Proposed AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this proposed 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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by removing Airworthiness Directive (AD) 2002–09–13, Amendment 39–12746 (67 FR 31117, May 9, 2002), and by adding a new AD to read as follows:

Cessna Aircraft Company: Docket No. 2002–CE–18–AD; Supersedes AD 2002–09–13, Amendment 39–12746.

(a) *What airplanes are affected by this AD?* This AD applies to the following airplane models and serial numbers that are certificated in any category:

Model	Serial Nos.
441	0001 through 0362 and 698
F406	0001 through 0089

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to detect, correct, and prevent chafing and/or arcing fuel boost pump wiring, which could result in arcing within the wing fuel system. Such a condition could lead to ignition of explosive vapor within the fuel storage system.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) For Model 441 airplanes: Inspect the part number (P/N) 5718106–1 wire harness and fuel boost pump lead wires for chafing or damage.	Initially at whichever occurs first, unless already accomplished: Within the next 25 hours time-in-service (TIS) or 60 days after May 31, 2002 (the effective date of AD 2002–09–13); and repetitively thereafter at intervals not to exceed 200 hours TIS.	In accordance with Cessna Conquest Service Bulletin No.: CQB02–1, Revision 2, dated October 7, 2002.
(2) For Model F406 airplanes: Inspect the P/N 5718106–4 wire harness and fuel boost pump lead wires for chafing or damage.	Initially at whichever occurs first, unless already accomplished: Within the next 25 hours TIS after the effective date of this AD or 60 days after the effective date of this AD; and repetitively thereafter at intervals not to exceed 200 hours TIS.	In accordance with Cessna Caravan Service Bulletin No.: CAB02–8, dated June 3, 2002.

Actions	Compliance	Procedures
(3) If chafing or damage is found during any inspection required in paragraph (d)(1) or (d)(2) of this AD:. (i) For the Model 441 airplanes, replace the wire harnesses, repair fuel boost pump lead wires, or replace the fuel boost pump, as applicable.. (ii) For the Model F406 airplanes, repair or replace the wire harnesses or lead wires, or fuel boost pump, as applicable.	Before further flight after any inspection required in paragraphs (d)(1) and (d)(2) of this AD in which damage is found. If improved design wire harnesses and fuel boost pumps are not installed, continue to inspect as specified in paragraph (d)(1) or (d)(2) of this AD until these improved design parts are installed.	For the Model 441 airplanes: In accordance with Cessna Conquest Service Bulletin No.: CQB02–1, Revision 2, dated October 7, 2002. For the Model F406 airplanes: In accordance with Cessna Caravan Service Bulletin No.: CAB02–8, dated June 3, 2002.
(4) Perform the following installations: ..... (i) For the Model 441 airplanes: Install improved design fuel boost pump (P/N 1C12–17 or FAA-approved equivalent P/N) and improved design wire harness (P/N 5718106–6 or FAA-approved equivalent P/N). Installing both improved part numbers in each wing tank terminates the repetitive inspection requirements of paragraph (d)(1) of this AD.. (ii) For the Model F406 airplanes: Install improved design fuel boost pump (P/N 1C12–17 or FAA-approved equivalent P/N) and improved design wire harness (P/N 406 28 01 or FAA-approved equivalent P/N). Installing both improved part numbers in each wing tank terminates the repetitive inspection requirements of paragraph (d)(2) of this AD.	Within the next 400 hours TIS after the effective date of this AD, unless already accomplished.	For the Model 441 airplanes: In accordance with Cessna Conquest Service Bulletin No.: CQB02–1, Revision 2, dated October 7, 2002. For the Model F406 airplanes: In accordance with Cessna Caravan Service Bulletin No.: CAB02–8, dated June 3, 2002.
(5) Only install improved design wire harnesses and fuel boost pumps as specified in paragraphs (d)(4)(i) and (d)(4)(ii) of this AD.	As of the effective date of this AD	Not applicable.

(e) *Can I comply with this AD in any other way?*

(1) You may use an alternative method of compliance or adjust the compliance time if:

(i) Your alternative method of compliance provides an equivalent level of safety; and

(ii) The Manager, Wichita Aircraft Certification Office (ACO), approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

(2) Alternative methods of compliance approved in accordance with AD 2002–09–13, which is superseded by this AD, are approved as alternative methods of compliance for all inspection requirements of this AD. Regardless, you still must comply with the replacement requirements of this AD.

Note: This AD applies to each airplane identified in paragraph (a) of this AD, 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 you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Robert Adamson, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4145; facsimile: 316–946–4407.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *How do I get copies of the documents referenced in this AD?* You may get copies of the documents referenced in this AD from Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67277; telephone: (316) 517–5800; facsimile: (316) 942–9006. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

(i) *Does this AD action affect any existing AD actions?* This amendment supersedes AD 2002–09–13, Amendment 39–12746.

Issued in Kansas City, Missouri, on October 15, 2002.

Dorenda D. Baker,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–26662 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–SW–01–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron, A Division of Textron Canada Model 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Bell Helicopter Textron, A Division of Textron Canada (BHT) Model 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters. This proposal would require performing a continuity test, and repairing temporarily any unairworthy chip detector, and replacing any repaired chip detectors. This proposal is prompted by reports of poor or no continuity between the insert and the chip detector housing on certain chip detectors. The actions specified by this proposed AD are intended to prevent

failure of a chip detector indication, loss of a critical component, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before December 20, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2002–SW–01–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov*. Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jorge Castillo, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5127, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2002–SW–01–AD.'' The postcard will be date stamped and returned to the commenter.

Discussion

Transport Canada, the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on BHT Model 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters. Transport Canada advises that Tedeco B3188B and B4093 chip detectors could possibly have poor or no continuity between the insert and the chip detector housing. This could result in no chip indication when the chip detector has been bridged by metal particles.

Bell Helicopter Textron has issued Alert Service Bulletin No. 206–01–96, Revision A, and No. 206L–01–119, Revision A, both dated May 7, 2001, which specify accomplishing the Eaton Tedeco Product Bulletins attached to their Alert Service Bulletin. The Eaton Tedeco Product Bulletins contain procedures for performing a continuity test and repair of chip detectors and replacing repaired chip detectors. Transport Canada classified these alert service bulletins as mandatory and issued AD No. CF–2001–33, dated August 24, 2001, to ensure the continued airworthiness of these helicopters in Canada.

These helicopter models are manufactured in Canada and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, Transport Canada has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada, reviewed all available information, and determined that AD action is necessary for products of these type designs that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopters of the same type designs registered in the United States. Therefore, the proposed AD would require performing a continuity test, repairing the chip detectors, and replacing repaired chip detectors. The actions would be required to be accomplished in accordance with the alert service bulletins and attached technical bulletin described previously. Repairing the chip detectors is intended to serve as an interim action until the repaired chip detectors are replaced.

The FAA estimates that 2,262 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 0.5 work hours per helicopter to initially inspect the chip detectors, and 0.5 work hours per helicopter to repair and ultimately replace any chip detectors that were previously temporarily repaired, and that the average labor rate is $60 per work hour. Cost of the chip detector is estimated to be $75. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $186,615, assuming half of the fleet will require repairing and replacing the chip detectors. The chip detector manufacturer has stated that it may provide reworked or replacement parts at no charge at its discretion.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Bell Helicopter Textron, A Division of Textron Canada: Docket No. 2002–SW–01–AD.

Applicability: Model 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability

provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters 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 failure of a chip detector indication, loss of a critical component, and subsequent loss of control of the helicopter, accomplish the following:

(a) For Model 206A, 206A–1, 206B, and 206B–1 helicopters, within 60 days, perform a continuity test and repair the Eaton Tedeco chip detector (chip detector), part number (P/N) B3188B, installed in the transmission bottom case, in accordance with the ''Test Procedure'', Procedure B, and the ''Repair Instructions'' portions of the Tedeco Products Alert Service attached to Bell Helicopter Textron (BHT) Alert Service Bulletin (ASB) No. 206–01–96, Revision A, dated May 7, 2001.

(b) For 206L, 206L–1, 206L–3, and 206L–4 helicopters:

(1) Within 60 days, perform a continuity test on, and also repair, the chip detector, P/N B3188B, installed in the transmission bottom case found on transmission assemblies, P/N 206–040–004–003, 206–040–004–005, 206–040–004–101, 206–040–004–107, 206–040–004–111, or 206–040–004–115, in accordance with the ''Test Procedure'', Procedure B, and the ''Repair Instructions'' portions of the Tedeco Products Alert Service Bulletin for affected P/N B3188B chip detectors, attached to BHT ASB No. 206L–01–119, Revision A, dated May 7, 2001.

(2) Within 60 days, perform a continuity test and repair the chip detector, P/N B4093, installed in the transmission top case found on transmission assemblies, P/N 206–040–004–003, 206–040–004–005, 206–040–004–101, or 206–040–004–111, in accordance with the ''Test Procedure'', Procedure B, and the ''Repair Instructions'' portion of the Tedeco Products Alert Service Bulletin for the affected P/N B4093 chip detectors, attached to BHT ASB No. 206L–01–119, Revision A, dated May 7, 2001.

(c) Within 300 hours time-in-service (TIS) after any chip detector is repaired, replace the chip detector with a reworked or new production airworthy chip detector.

(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, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Regulations Office.

(e) Special flight permits will not be issued.

Note 3: The subject of this AD is addressed in Transport Canada (Canada) AD No. CF–2001–33, dated August 24, 2001.

Issued in Fort Worth, Texas, on October 10, 2002.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–26666 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[Notice No. 958]

RIN 1512–AC77

Temecula Viticultural Area Name Change (2001R–280P)

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) has received a petition proposing to rename the ''Temecula'' viticultural area as the ''Temecula Valley'' viticultural area. The size and boundaries of the Temecula viticultural area would remain unchanged.

DATES: Comments must be received by December 20, 2002.

ADDRESSES: Send written comments to: Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, PO Box 50221, Washington, DC 20091–0221 (Attn: Notice No. 958). Copies of the petition, the proposed regulations, and any written comments received will be available for public inspection by appointment at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226. See the Public Participation section of this notice for alternative means of commenting.

FOR FURTHER INFORMATION CONTACT: Nancy Sutton, Specialist, Regulations Division (San Francisco, California), Bureau of Alcohol, Tobacco and Firearms, 221 Main Street, 11th Floor, San Francisco, CA (415) 947–5192.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

The Federal Alcohol Administration Act (FAA Act) at 27 U.S.C. 205(e) requires that alcohol beverage labels provide the consumer with adequate information regarding a product's identity while prohibiting the use of deceptive information on such labels. The FAA Act also authorizes the Bureau of Alcohol, Tobacco and Firearms (ATF) to issue regulations to carry out the Act's provisions.

Regulations in 27 CFR Part 4, Labeling and Advertising of Wine, allow the establishment of definitive viticultural areas. The regulations allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements. A list of approved viticultural areas is contained in 27 CFR part 9, American Viticultural Areas.

Section 4.25a(e)(1), title 27, CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographic features, the boundaries of which have been delineated in subpart C of part 9.

Section 4.25a(e)(2) outlines the procedure for proposing or amending an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area or modify an existing area. A petition for a new area should include:

(a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;

(b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;

(c) Evidence relating to the geographical characteristics (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;

(d) A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and

(e) A copy (or copies) of the appropriate U.S.G.S. map(s) with the boundaries prominently marked.

A petition requesting the modification of an established viticultural area should include information, evidence, and maps appropriate to support the requested change(s).

Temecula Viticultural Area

ATF established the Temecula viticultural area (27 CFR 9.50) in Treasury Decision ATF–188, which was published in the **Federal Register** on October 23, 1984 (See 49 FR 42563). Located in southern California, the 33,000-acre Temecula viticultural area is in southwestern Riverside County in the Temecula Basin. The viticultural

area covers the southern portion of the former Vail Ranch, and its outer boundaries generally follow those of the historical Santa Rosa, Temecula, Little Temecula, and Pauba land grants.

Treasury Decision ATF–188 stated that the name ''Temecula'' was derived from the Luiseno Indian word ''Temeku,'' which means ''a place where the sun breaks through the white mist.'' The original Temecula petition stated that this description applied to the entire viticultural area, which is in a valley characterized by bright sun and misty marine air that flows inland from the Pacific Ocean. The 1984 decision noted that it is this marine air, which enters the Temecula Valley through gaps in the Santa Ana Mountains, that allows grape growing in this area.

Temecula Valley Petition

The Temecula Valley Winegrowers Association has submitted a petition to ATF requesting that the Temecula viticultural area's name be changed to ''Temecula Valley.'' The petitioners believe this name change will provide a more accurate description of the Temecula area's geography and provide greater clarity as to the area's location for wine consumers and the public. This proposed name change does not affect the boundaries of the established Temecula viticultural area.

When the Temecula viticultural area was originally petitioned twenty years ago, the Association's petition states, the area was largely rural and agricultural. The small, unincorporated village of Temecula was located near the middle of the area's southern boundary. This village is now an incorporated city, larger in size, with a growing population. According to the petitioners, the city of Temecula's growth has accentuated the differences between the city and the surrounding agricultural region known as the Temecula Valley.

The current petition states that when the Temecula viticultural area was petitioned 20 years ago, the terms ''Temecula'' and ''Temecula Valley'' were used interchangeably. The petition cites evidence from Tom Hudson's book ''A Thousand Years in the Temecula Valley'' (Temecula Valley Chamber of Commerce, 1981), including its many uses of the term ''Temecula Valley,'' in support of this position. The original Temecula petition and the 1984 Treasury Decision also cited this work. The current petition also cites the local telephone directory, which shows that numerous businesses and agencies use the name ''Temecula Valley'' in conjunction with their operating name. The 1984 Treasury Decision additionally noted the planned establishment of the new Temecula Valley High School within the viticultural area's boundaries.

The Temecula Valley Winegrowers Association petition also comments on the importance of the word ''valley'' in relation to the Temecula area by noting that the Association itself is a merger of the Temecula Valley Vintners Association and the Temecula Winegrape Growers Association. In addition, the petition cites the use of ''Napa'' and ''Napa Valley'' as an example of how the differences between a city (Napa) and the surrounding agricultural area (Napa Valley) are recognized in a viticultural area name. The petition states, ''To continue to mandate the term ''Temecula'' is to honor a loose and ill-defined use of the term.''

The current petition also cited a letter from Mr. Gary McMillan, one of the original Temecula viticultural area petitioners, supporting the name change. Mr. McMillan sent his letter directly to ATF, and a copy of was included with the Association's petition. According to his letter, Mr. McMillan recalls that the original Temecula petitioners desired to use a true, historical name for their proposed viticultural area and not the more recent commercial name of ''Rancho California,'' which was originally favored by some growers in the area. In his letter, Mr. McMillan agrees with the Association's contention that the names Temecula and Temecula Valley were often used interchangeably at the time of the original petition.

Public Participation

Comments Sought

ATF requests comments from all interested persons. Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so. However, assurance of consideration can only be given to comments received on or before the closing date.

ATF will not recognize any submitted material as confidential and comments may be disclosed to the public. Any material which the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comments. The name of the person submitting a comment is not exempt from disclosure.

Submitting Comments

By U.S. Mail: Written comments may be mailed to ATF at the address listed in the **ADDRESSES** section above.

By Fax: Comments may be submitted by facsimile transmission to (202) 927–8525, provided the comments: (1) Are legible; (2) are 8½″ x 11″ in size; (3) contain a written signature; and (4) are five pages or less in length. This limitation is necessary to assure reasonable access to the equipment. Comments sent by fax in excess of five pages will not be accepted. Receipt of fax transmittals will not be acknowledged. Facsimile transmitted comments will be treated as originals.

By E-mail: Comments may be submitted by e-mail to *nprm@atfhq/treas.gov.* E-mail comments must: (1) Contain your name, mailing address, and e-mail address; (2) reference this notice number; and (3) be legible when printed on 8½ x 11 inch size paper. We will not acknowledge the receipt of e-mail. We will treat comments submitted by e-mail as originals.

Comments may also be submitted using the comment form provided with the online copy of this proposed rule on the ATF Internet Web site at *http://www.atf.treas.gov/alcohol/rules/index.htm.*

Public Hearing: Any person who desires an opportunity to comment orally at a public hearing on the proposed regulation should submit his or her request, in writing, to the Director within the 60-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing will be held.

Reviewing Comments

You may view copies of the full comments in response to this notice of proposed rulemaking by appointment at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone 202–927–7890. You may request paper copies of the full comments (at 20 cents per page) by writing to the ATF Reference Librarian at the address shown above.

For the convenience of the public, ATF will post copies of the comments received in response to this notice on the ATF web site. All comments posted on our web site will show the name of the commenter, but will have street addresses, telephone numbers, and e-mail addresses removed. We may also omit voluminous attachments or material that we do not consider suitable for posting. In all cases, the full comment will be available in the ATF library as noted above. To access online

copies of the comments on this rulemaking, visit *http://www.atf.treas.gov/,* and select ''Regulations,'' then ''Notices of Proposed Rulemaking (Alcohol),'' and then this notice. Then click on the ''view comments'' link.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this notice because no requirement to collect information is proposed.

Regulatory Flexibility Act

It is hereby certified that this proposed regulation will not have a significant impact on a substantial number of small entities. The establishment of a viticultural area is neither an endorsement nor approval by ATF of the quality of wine produced in the area, but rather an identification of an area that is distinct from surrounding areas. ATF believes that the establishment of viticultural areas merely allows wineries to more accurately describe the origin of their wines to consumers, and helps consumers identify the wines they purchase. Thus, any benefit derived from the use of a viticultural area name is the result of the proprietor's own efforts and consumer acceptance of wines from that area.

No new requirements are proposed. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

ATF has been determined that this proposed regulation is not a significant regulatory action as defined by Executive Order 12866. Accordingly, this proposal is not subject to the analysis required by this Executive Order.

Drafting Information

The principal author of this document is N. A. Sutton, Regulations Division (San Francisco), Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Wine.

Authority and Issuance

Title 27, Code of Federal Regulations, Part 9, American Viticultural Areas, is proposed to be amended as follows:

PART 9—AMERICAN VITICULTURAL AREAS

Paragraph 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

Par. 2. Section 9.50 is amended by revising paragraph (a) and the introductory text of paragraphs (b) and (c) to read as follows:

§ 9.50 Temecula Valley.

(a) *Name.* The name of the viticultural area described in this section is ''Temecula Valley.''

(b) *Approved map.* The approved maps for determining the boundary of the Temecula Valley viticultural area are seven U.S.G.S. quadrangle maps in the 7.5 minute series, as follows:

* * * * *

(c) *Boundary.* The Temecula Valley viticultural area is located in Riverside County, California. The boundary is as follows:

* * * * *

Signed: September 26, 2002.

Bradley A. Buckles,

Director.

[FR Doc. 02–26677 Filed 10–18–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[Notice No. 957]

RIN 1512–AC70

Proposal to Establish the Seneca Lake Viticultural Area (99R–260P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms is requesting comments from any interested party concerning the proposed establishment of the ''Seneca Lake'' viticultural area. The proposed Seneca Lake viticultural area encompasses about 204,600 acres of land surrounding Seneca Lake in upstate New York. The proposed area is located within the approved Finger Lakes viticultural area. The Bureau is taking this action under its Labeling and Advertising of Wine regulations.

DATES: Written comments must be received by December 20, 2002.

ADDRESSES: Send written comments to: Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091–0221; (ATTN: Notice No. 957). To submit comments by e-mail or fax, see the ''Public Participation'' section below.

A copy of the petition, the proposed regulations, the appropriate maps, and any written comments received in response to this notice of proposed rulemaking will be available for public inspection by appointment during normal business hours at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226; telephone (202) 927–7890.

FOR FURTHER INFORMATION CONTACT: Kristy Colón, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226; telephone (202) 927–8210.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

What Is ATF's Authority To Establish a Viticultural Area?

The Federal Alcohol Administration Act (FAA Act) at 27 U.S.C. 205(e) requires that alcohol beverage labels provide the consumer with adequate information regarding a product's identity and prohibits the use of deceptive information on such labels. The FAA Act also authorizes the Bureau of Alcohol, Tobacco and Firearms (ATF) to issue regulations to carry out the Act's provisions.

Regulations in 27 CFR part 4, Labeling and Advertising of Wine, allow the establishment of definitive viticultural areas. The regulations allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements. A list of approved viticultural areas is contained in 27 CFR, part 9, American Viticultural Areas.

What Is the Definition of an American Viticultural Area?

Section 4.25a(e)(1), Title 27, CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been delineated in subpart C of part 9. Viticultural features such as soil, climate, elevation, topography, etc., distinguish it from surrounding areas.

What Is Required To Establish a Viticultural Area?

Section 4.25a(e)(2), Title 27, CFR, outlines the procedure for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area. The petition must include:

- Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;
- Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;
- Evidence relating to the geographical features (climate, soil, elevation physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;
- A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and
- A copy of the appropriate U.S.G.S. map(s) with the boundaries prominently marked.

Seneca Lake Petition

ATF has received a petition from Ms. Beverly Stamp of Lakewood Vineyards in Watkins Glen, New York proposing to establish the ''Seneca Lake'' viticultural area. The proposed area includes portions of Schuyler, Yates, Ontario, and Seneca counties in upstate New York and covers approximately 204,600 acres of primarily rural agricultural and forestland. Of that total, 3,756 acres are planted to grapes. There are currently 33 wineries on or near Seneca Lake, one of New York's eleven Finger Lakes. The Cayuga Lake viticultural area lies to the east of proposed area, and both are entirely within the established Finger Lakes viticultural area.

What Evidence Was Provided To Show the Name ''Seneca Lake'' Is Locally or Nationally Known?

According to the petitioner, Seneca Lake was named after the Seneca people of the Iroquois Nation who lived along its shores hundreds of years ago. Many local places and geographic features are named after the Seneca people. These include, for example, Seneca Lake, Seneca County, the Seneca River, Seneca Castle, Seneca Army Depot, and Seneca Lake State Park. An organization known as the Seneca Lake Winery Association includes many of the proposed area's wineries.

To demonstrate that the proposed area is locally and nationally known as ''Seneca Lake,'' the petition included several newspaper and magazine articles as evidence of the name's use. In an article from the Rochester, New York Democrat and Chronicle newspaper of November 15, 1999, entitled ''Your Land, Our Land: Finger Lakes in the Fast Lane,'' Ray Spencer, vice president of operations of Glenora Wine Cellers, stated that many ''already refer to Seneca Lake as 'the Napa Valley of the East.' '' In the February 1997 issue of Wines & Vines, a California based magazine, author Philip Hiaring described his visit to the Seneca Lake region and his interviews with winery owners and winemakers.

In addition, Seneca Lake is mentioned in ''The Oxford Companion to the Wines of North America.'' The book states that Seneca Lake is encircled by more than two dozen wineries, is one of the two largest Finger Lakes, and is the deepest with the greatest heat storing capacity, offering the surrounding hillsides the strongest mesoclimatic benefit. While the lake's first winery was built in 1866, the book notes that the 1980s saw a wave of winery openings when the appearance of vinifera varieties brought new momentum to the region's grape-growing industry.

What Boundary Evidence Was Provided?

The boundaries of the proposed Seneca Lake viticultural area encompass about 204,600 acres of largely rural land surrounding Seneca Lake, the largest of upstate New York's eleven Finger Lakes. While some of the road names used in the boundary description do not appear on the submitted U.S.G.S. maps, the petitioner provided the locally known names of these roads, as well as a more detailed map of the town of Watkins Glen indicating minor roads.

Using roads and streams, the petitioner drew the proposed Seneca Lake viticultural area's boundaries to contain the vineyards influenced by the lake's climatic effect. In addition, the petition notes, distinct ridges divide Seneca Lake from its closest neighbor, Cayuga Lake, and the nearly 800-foot elevation change within the 7.5 miles between them gives the two lakes their own microclimates.

What Evidence Relating to Geographical Features Was Provided?

The ''lake effect'' weather phenomenon makes the proposed Seneca Lake viticultural area a ''unique and superb'' wine-growing region, according to the petitioner. The ''Oxford Companion to Wine'', published by the Oxford University Press, Inc., New York, describes the lake effect as ''the year-round influence on vineyards from nearby large lakes which permits vine-growing in the northeast United States and Ontario in Canada despite their high latitude.''

The ''Oxford Companion'' also notes that the lake effect's influence on grape vines changes with the seasons. While the lakes provide moisture to the prevailing westerly winds in winter and prevent vines from freezing even in very low temperatures, in spring:

* * * the westerly winds blow across the frozen lake and become cooler. These cooler breezes blowing on the vines retard bud-break until the danger of frost has passed. In summer the lake warms up. By autumn/fall, the westerly winds are warmed as they blow across the lake. The warm breezes on the vines lengthen the growing season (balancing the late start to the growing season) by delaying the first frost.

The petitioner also provided an extract from Richard Figiel's book ''Culture in a Glass,'' that describes how the lake effect phenomenon affects the Finger Lakes region. Noting that both Seneca and Cayuga Lakes drop well below sea level, Figiel states that since the lakes are ''(n)arrow slices of water with relatively little surface area, they tend to maintain a stable temperature throughout the year.'' This causes the lakes to act as a large radiator for the surrounding area during the winter months. ''Not only do the lakes take the edge off frigid upstate winters, often keeping vineyards 10–15° warmer than locations just a half mile away,'' the book adds, ''but they also cushion the transitions of spring and fall.'' Figiel also points out that the ''(d)istinct microclimates along the hillsides rising from the lakeshores make it possible to reliably ripen grapes in a region that is generally too cold for viticulture * * *.''

The petitioner states that it is the size and depth of Seneca Lake that gives the lake its ability to influence the local climate. Seneca Lake is the largest of the Finger Lakes, covering 67.7 square miles, is 35.1 miles long, and is an average of 1.9 miles wide with a shoreline of 75.4 miles. It has a volume of 4.2 trillion gallons with a maximum depth of 635 feet. Below 150 feet, the lake's water temperature remains 39 °F (4 °C) year around. Above that depth, the water temperature varies seasonally. While Seneca Lake chills down, the petition adds, it rarely freezes during the winter months. The petition also notes that the Seneca region has the longest frost-free period in the Finger Lakes, with a growing season of about 190 days. In contrast, neighboring Cayuga Lake's growing season is only 165 to 170 days long.

Seneca Lake's latent heat storage capacity alters the local climate to such an extent, the petition states, that grapes can be grown in an area where they otherwise would not survive the cold temperatures of early spring, or the late

autumn frosts. Together with the good air drainage offered by the slopes leading to its shore, the lake's water temperature provides cool breezes in the spring, preventing early bud break in the fruit. In the fall, the lake's warmth delays early frosts, and in the winter it raises temperatures so that bud damage is lessened.

It is this ability to protect a crop from extreme temperatures, during both the growing and dormant seasons that makes the proposed Seneca Lake viticultural area distinct from surrounding areas, according to the petitioner. This lake effect is strongest within about one-half mile of Seneca Lake. For this reason, the more tender vinifera varieties are planted within this zone, while hardier American varieties and hybrids can be planted higher on the slopes. The petitioner adds that smaller lakes, even those the size of Cayuga Lake, do not have the same level of latent heat capacity and, therefore, do not modify the local climate to the same extent as Seneca Lake.

Regulatory Analyses and Notices

Is This a Significant Regulatory Action as Defined by Executive Order 12866?

ATF has determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866. Accordingly, this proposal is not subject to the analysis required by this Executive Order.

How Does the Regulatory Flexibility Act Apply to This Proposed Rule?

ATF certifies that the proposed regulations will not have a significant economic impact on a substantial number of small entities. The establishment of a viticultural area is neither an endorsement nor approval by ATF of the quality of wine produced in the area, but rather an identification of a grape-growing area that is distinct from surrounding areas. ATF believes that the establishment of viticultural areas merely allows wineries to more accurately describe the origin of their wines to consumers, and helps consumers identify the wines they purchase. Thus, any benefit derived from the use of a viticultural area name is the result of the proprietor's own efforts and consumer acceptance of wines from that area.

No new requirements are proposed. Accordingly, a regulatory flexibility analysis is not required.

Does the Paperwork Reduction Act Apply to This Proposed Rule?

The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this notice of proposed rulemaking because no new or revised record keeping or reporting requirements is proposed.

Public Participation and Request for Comments

Who May Comment on This Notice?

ATF requests comments from all interested parties. In addition, ATF specifically requests comments on the clarity of this proposed rule and how it may be made easier to understand. Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so. However, assurance of consideration can only be given to comments received on or before the closing date.

During the comment period, any person may request an opportunity to present oral testimony at a public hearing. However, the Director reserves the right to determine, in light of all circumstances, whether a public hearing will be held.

Can I Review Comments Received?

Copies of the petition, the proposed regulations, the appropriate maps, and any written comments received will be available for public inspection by appointment at the ATF Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226. To make an appointment, telephone 202–927–7890. You may request copies (at 20 cents per page) of the comments received in response to this notice by writing to the ATF Reference Librarian at the address shown above.

For the convenience of the public, ATF will post comments received in response to this notice on the ATF web site. All comments posted on our web site will show the name of the commenter, but will have street addresses, telephone numbers and e-mail addresses removed. We may also omit voluminous attachments or material that we do not consider suitable for posting. In all cases, the full comment will be available in the ATF Library as noted above. To access online copies of the comments on this rulemaking, visit *http://www.atf.treas.gov/*, and select ''Regulations,'' then ''Proposed rules (alcohol)'' and this notice. Click on the ''view comments'' link.

Will ATF Keep My Comments Confidential?

ATF will not recognize any comment as confidential. All comments and materials may be disclosed to the public. If you consider your material to be confidential or inappropriate for disclosure to the public, you should not include it in your comments. We may also disclose the name of any person who submits a comment.

How Do I Send Facsimile Comments?

You may submit comments by facsimile transmission to (202) 927–8525. Facsimile comments must:

- Be legible.
- Reference this notice number.
- Contain a legible written signature.
- Be on not more than five 8½ by 11'' pages.

We will not acknowledge receipt of facsimile transmissions. We will treat facsimile transmissions as originals.

How Do I Send Electronic Mail (E-Mail) Comments?

You may submit comments by e-mail by sending the comments to *nprm@atfhq.atf.treas.gov*. You must follow these instructions. E-mail comments must:

- Contain your name, mailing address, and e-mail address.
- Reference this notice number.
- Be legible when printed.

We will not acknowledge receipt of e-mail. We will treat comments submitted by e-mail as originals.

How Do I Send Comments to the ATF Internet Web Site?

You may also submit comments using the comment form provided with the online copy of the proposed rule on the ATF Internet web site at *http://www.atf.treas.gov*.

Drafting Information

The principal author of this document is Kristy Colón, Regulations Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Alcohol and alcoholic beverages, Consumer protection, and Wine.

Authority and Issuance

Title 27, Code of Federal Regulations, Part 9, American Viticultural Areas, is proposed to be amended as follows:

PART 9–AMERICAN VITICULTURAL AREAS

Paragraph 1. The authority citation for Part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

Par. 2. Subpart C is amended by adding § 9.xxx to read as follows:

§ 9.xxx Seneca Lake.

(a) *Name.* The name of the viticultural area described in this section is ''Seneca Lake''.

(b) *Approved Maps.* The appropriate maps for determining the boundary of the Seneca Lake viticultural area are 13 United States Geological Survey (U.S.G.S.) topographic maps (Scale: 1:24,000). The maps are titled:

(1) Burdett Quadrangle (New York-Schuyler Co. 1950 (photoinspected 1976);

(2) Montour Falls Quadrangle (New York 1978 (photorevised));

(3) Bever Dams Quadrangle (New York 1953);

(4) Reading Center Quadrangle (New York 1950 (photorevised 1978));

(5) Dundee Quadrangle (New York 1942 (photoinspected 1976));

(6) Dresden Quadrangle (New York 1943 (photorevised 1978));

(7) Penn Yan Quadrangle (New York'Yates Co. 1942 (photoinspected 1976));

(8) Stanley Quadrangle (New York 1952);

(9) Phelps Quadrangle (New York-Ontario Co. 1953);

(10) Geneva North Quadrangle (New York 1953 (photorevised 1976));

(11) Geneva South Quadrangle (New York 1953 (photorevised 1978));

(12) Ovid Quadrangle (New York-Seneca Co. 1970); and

(13) Lodi Quadrangle (New York 1942).

(c) *Boundaries.* The Seneca Lake viticultural area is located in portions of Schuyler, Yates, Ontario, and Seneca counties in New York. The boundaries are as follows: Beginning in the town of Watkins Glen at the State Route 414 bridge over the New York State Barge Canal:

(1) Follow the New York State Barge Canal south approximately 0.2 miles to the mouth of Glen Creek, on the Burdette, N.Y. map;

(2) Follow Glen Creek upstream (west), crossing the Montour Falls, N.Y. map and continuing to the Van Zandt Hollow Road bridge on the Beaver Dams, N.Y. map;

(3) Proceed north on Van Zandt Hollow Road to Cross Road;

(4) Continue north on Cross Road, which changes to Cretsley Road, to its intersection with Mud Lake Road (County Road 23) on the Reading Center, N.Y. map;

(5) Proceed west approximately 0.7 miles on County Road 23 to the intersection with Pre-emption Road;

(6) Then continue north on Pre-emption Road along the Dundee, N.Y., Penn Yan, N.Y. and Dresden, N.Y. maps, for approximately 18 miles to its junction with an unnamed light duty road just east of Keuka Lake Outlet on the Penn Yan, N.Y. map;

(7) Follow the unnamed light duty road across the Keuka Outlet, traveling approximately 0.3 miles to its junction with an unnamed light duty road, known locally as Outlet Road, in Seneca Mills;

(8) Follow Outlet Road west along the north bank of the Keuka Outlet approximately 0.6 miles, until the road forks;

(9) At the fork, continue north approximately 1 mile, on an unnamed light duty road know locally as Stiles Road, to its junction with Pre-emption Road.

(10) Then proceed north 14.6 miles on Pre-emption Road across the Stanley, N.Y. map, to an unnamed medium duty road (known locally as County Road 4), on the Phelps, N.Y. map;

(11) Then proceed west approximately 4.5 miles on County Road 4 to its intersection with Orleans Road in Seneca Castle;

(12) Then proceed north on Orleans Road, which becomes Seneca Castle Road, for 2.1 miles, to Warner Corners where the name of the road changes to Wheat Road;

(13) Continue north from Warner Corners on Wheat Road approximately 1.9 miles to its intersection with State Route 88;

(14) Continue north on State Route 88 approximately 1.4 miles, to its intersection with State Route 96 at Knickerbocker Corner;

(15) Continue east on State Route 96 approximately 10.4 miles, to the intersection with Brewer Road on the Geneva North, N.Y. map;

(16) Follow Brewer Road south approximately 1.8 miles to the intersection with U.S. Route 20/State Route 5;

(17) At the intersection of Brewer Road and U.S. Route 20/State Route 5, continue south approximately 0.1 miles, following an imaginary line to the south bank of the Seneca River;

(18) Follow the south bank of the Seneca River east approximately 0.1 miles to the mouth of the Kendig Creek;

(19) Continue south following the Kending Creek approximately 3.3 miles to the Creek's intersection with Yellow Tavern Road on the Geneva South, N.Y. map;

(20) Follow Yellow Tavern Road west approximately 0.1 miles, to its intersection with Post Road;

(21) Follow Post Road south approximately 1.4 miles to the junction with State Route 96A;

(22) Then follow State Route 96A south 17.5 miles across the Dresden, N.Y., Ovid, N.Y., and Lodi, N.Y. maps to the village of Lodi;

(23) In Lodi, continue south where State Route 96A changes to S. Main Street and then changes to an unnamed medium duty road (known locally as Center Road-Country Road 137);

(24) Continue south on Center Road-Country Road 137 for approximately 4.9 miles to the Seneca/Schuyler County Line;

(25) Then proceed west 0.5 miles on the county line to Logan Road;

(26) Then proceed 8.6 miles south on Logan Road to State Route 227 (identified by the petitioner as State Route 79) on the Burdette, N.Y. map;

(27) Then proceed approximately 800 feet east on Route 227 to Skyline Drive;

(28) Then proceed south on Skyline Drive for 2.5 miles to an unnamed stream;

(29) Follow the unnamed stream west approximately 0.6 miles to its intersection with State Route 414;

(30) Continue west on State Route 414 approximately 0.5 miles to the beginning point on the bridge over the New York State Barge Canal.

Signed: September 24, 2002.

Bradley A. Buckles,

Director.

[FR Doc. 02–26678 Filed 10–18–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD08–02–023]

RIN 2115–AE47

Drawbridge Operation Regulation; Houma Navigation Canal, LA

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the existing drawbridge operation regulation for the draw of the SR661 bridge across the Houma Navigation Canal, mile 36.0, at Houma, Terrebonne Parish, Louisiana. The modification will allow for the morning closure period to be increased by 30 minutes to facilitate the movement of

high volumes of vehicular traffic across the bridge during peak traffic hours.

DATES: Comments and related material must reach the Coast Guard on or before December 20, 2002.

ADDRESSES: You may mail comments to Commander (obc), Eighth Coast Guard District, 501 Magazine Street, New Orleans, Louisiana 70130–3396, or deliver them to room 1313 at the same address above between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying by appointment at the Bridge Administration Branch, Eighth Coast Guard District between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Frank, Bridge Administration Branch, at the address given above or telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD08–02–023), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. You may submit a request for a public meeting by writing to the Commander, Eighth Coast Guard District, Bridge Administration Branch at the address under **ADDRESSES** explaining why a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place to be announced by notice in the **Federal Register**.

Background and Purpose

The existing drawbridge operating regulations at 33 CFR 117.455 require the draw of the bridge across the Houma Navigation Canal at S661, mile 36.0 at Houma, to open on signal, except that the draw need not be opened for the passage of vessels Monday through Friday except holidays from 7 a.m. to 8:30 a.m. and 4:30 p.m. to 6 p.m.

The bridge owner requested a modification to the morning closure periods to allow the bridge to remain closed to navigation from 6:30 a.m. until 8:30 a.m. vice 7 a.m. to 8:30 a.m. Approximately 13,000 vehicles cross the bridge daily, 10% of which cross the bridge during the requested closure times. The adjustment to the morning closure time reflects a change to expand the closure period to align with the heaviest commuter traffic. The bridge averages 953 openings a month. It is estimated that 3 tows a month will be delayed by the additional 30-minute morning closure request. In a 17-day review period in July 2002, two tows requiring bridge openings were delayed during the requested additional time period. The average length of the bridge opening is less than ten minutes, delaying an average of 60 vehicles for each opening. Based upon our review of the documentation provided by the bridge owner, the closure of an additional 30 minutes in the morning will have a minimal effect on vessels wishing to transit the waterway.

In its current form, § 117.455 refers to the affected highway as ''S661.'' This proposed rule will change the name of the affected highway to its correct name, ''SR661.''

Discussion of Proposed Rule

The proposed rule would modify the existing regulation in 33 CFR 117.455 to facilitate the movement of high volumes of vehicular traffic across the bridge during peak traffic hours. The change will now allow the State Route 661 bridge to remain closed to navigation from 6:30 a.m. to 8:30 a.m. vice the presently published times of 7 a.m. to 8:30 a.m. The regulation will also identify the roadway across the bridge as SR661.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT)(44 FR 11040, February 26, 1979).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary.

This proposed rule allows vessels ample opportunity to transit this waterway with proper notification before and after the peak vehicular traffic periods. According to the vehicle traffic surveys, the public at large is better served by closure times between 6:30 a.m. and 8:30 a.m.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed rule would affect the following entities, some of which might be small entities: the owners and operators of vessels needing to transit the bridge from 6:30 a.m. to 7 a.m. on weekdays. From traffic and vessel counts it is estimated that only an additional 3 tows per month will be delayed by the thirty-minute extension to the morning closure. This is not considered to have a significant impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or

governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Bridge Administration Branch, Eighth Coast Guard District at the address above.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct cost of compliance on them. We have analyzed this proposed rule under Executive Order 13132 and have determined that this proposed rule does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not economically significant and does not cause an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph 32(e), of Commandant Instruction M16475.lD, this proposed rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons set out in the preamble, the Coast Guard proposes to amend part 117 of title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. § 117.455 is revised to read as follows:

§ 117.455 Houma Navigation Canal.

The draw of the SR661 bridge across the Houma Navigation Canal, mile 36.0, at Houma, shall open on signal; except that, the draw need not open for the passage of vessels Monday through Friday except holidays from 6:30 a.m. to 8:30 a.m. and from 4:30 p.m. to 6 p.m.

Dated: October 9, 2002.

Roy J. Casto,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 02–26718 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD08–02–022]

RIN 2115–AE47

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, LA

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the existing drawbridge operation regulation for the draw of the Bayou Dularge bridge across the Gulf Intracoastal Waterway, mile 59.9 at Houma, Terrebonne Parish, Louisiana. The modification will allow for the morning closure period to be increased by 15 minutes to facilitate the movement of high volumes of vehicular traffic across the bridge during peak traffic hours.

DATES: Comments and related material must reach the Coast Guard on or before December 20, 2002.

ADDRESSES: You may mail comments to Commander (obc), Eighth Coast Guard District, 501 Magazine Street, New Orleans, Louisiana 70130–3396, or deliver them to room 1313 at the same address above between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying by appointment at the Bridge Administration Branch,

Eighth Coast Guard District between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Frank, Bridge Administration Branch, at the address given above or telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD08–02–022), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 81/2 by 11 inches, suitable for copying. If you would like to know that they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. You may submit a request for a public meeting by writing to the Commander, Eighth Coast Guard District, Bridge Administration Branch at the address under **ADDRESSES** explaining why a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place to be announced by notice in the **Federal Register**.

Background and Purpose

The existing drawbridge operating regulations at 33 CFR 117.451(c) requires the draw of the Bayou Dularge bridge, mile 59.9, at Houma, to open on signal; except that, the draw need not be opened for the passage of vessels Monday through Friday except holidays from 6:45 a.m. to 8:30 a.m. and from 4:30 p.m. to 6 p.m.

The bridge owner requested a modification to the morning closure period to allow the bridge to remain closed to navigation from 6:30 a.m. until 8:30 a.m. vice 6:45 a.m. to 8:30 a.m. Approximately 21,000 vehicles cross the bridge daily, 10% of which cross the bridge during the requested closure times. The adjustment to the morning closure time reflects a change to align the closure periods with the times of the heaviest commuter traffic. The bridge averages 325 openings a month. The requested 15-minute closure increase in the morning will delay approximately 7 additional tows a month. In a 17-day review period in July 2002, four tows requiring bridge openings were delayed during the requested additional time period. The average length of a bridge opening is less than five minutes, delaying an average of 90 vehicles per opening. Based upon our review of the documentation provided by the bridge owner, the closure of an additional 15 minutes in the morning will have a minimal affect on vessels wishing to transit the waterway.

Additionally, by this rulemaking, the Coast Guard plans to reinsert the word ''Monday'' into the rule. The word was omitted in previous editions of the Code of Federal Regulations. This proposed rulemaking will clarify the days when the special operation regulation is in effect.

Discussion of Proposed Rule

The proposed rule would modify the existing regulation in 33 CFR 117.451(c) to facilitate the movement of high volumes of vehicular traffic across the bridge during peak traffic hours. The change would allow the Bayou Dularge bridge to remain closed to navigation from 6:30 a.m. to 8:30 a.m. vice the presently published times of 6:45 a.m. to 8:30 a.m. The regulation will also state that it is in effect Monday through Friday except holidays.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT)(44 FR 11040, February 26, 1979).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary.

This proposed rule allows vessels ample opportunity to transit this waterway with proper notification before and after the peak vehicular traffic periods. According to the vehicle traffic surveys, the public at large is better served by closure times between 6:30 a.m. and 8:30 a.m.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed rule would affect the following entities, some of which might be small entities: the owners and operators of vessels needing to transit the bridge from 6:30 a.m. to 6:45 a.m. on weekdays. From traffic and vessel counts it is estimated that only an additional 7 tows per month will be delayed by the fifteen-minute extension to the morning closure. This is not considered to have a significant impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Bridge Administration Branch, Eighth Coast Guard District at the address above.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct cost of compliance on them. We have analyzed this proposed rule under Executive Order 13132 and have determined that this proposed rule does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not economically significant and does not cause an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph 32(e), of Commandant Instruction M16475.lD, this proposed rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons set out in the preamble, the Coast Guard proposes to amend part 117 of title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.451(c) is revised to read as follows:

§ 117.451 Gulf Intracoastal Waterway.

* * * * *

(c) The draw of the Bayou Dularge bridge, mile 59.9, at Houma, shall open on signal; except that, the draw need not open for the passage of vessels Monday through Friday except holidays from 6:30 a.m. to 8:30 a.m. and from 4:30 p.m. to 6 p.m.

* * * * *

Dated: October 9, 2002.

Roy J. Casto,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 02–26717 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NH–049–7174b:FRL–7396–6]

Approval and Promulgation of Implementation Plans; New Hampshire; One-hour Ozone Attainment Demonstration for the New Hampshire Portion of the Boston-Lawrence-Worcester, MA-NH Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to fully approve the one-hour ozone attainment demonstration State Implementation Plan (SIP) for the New Hampshire portion of the Boston-Lawrence-Worcester, MA-NH serious ozone nonattainment area submitted by the New Hampshire Department of Environmental Services on June 30, 1998. This action is based on the requirements of the Clean Air Act (CAA) as amended in 1990, related to one-hour ozone attainment demonstrations.

DATES: Comments must be received on or before November 20, 2002.

ADDRESSES: Written comments (two copies if possible) should be sent to: David B. Conroy at the EPA Region I (New England) Office, One Congress Street, Suite 1100-CAQ, Boston, Massachusetts 02114–2023.

Copies of the state submittal and EPA's technical support document are available for public inspection during normal business hours (9 a.m. to 4 p.m.) at the following addresses: U.S. Environmental Protection Agency, Region 1 (New England), One Congress St., 11th Floor, Boston, Massachusetts, telephone (617) 918–1664, and at the Air Resources Division, Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302–0095 Please telephone in advance before visiting.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, (617) 918–1664.

SUPPLEMENTARY INFORMATION: This notice provides an analysis of the one-hour ozone attainment demonstration SIP submitted by the New Hampshire Department of Environmental Services (New Hampshire DES) for the New Hampshire portion of the Boston-Lawrence-Worcester MA-NH serious nonattainment area. Table of Contents:

I. Clean Air Act Requirements for Serious Ozone Nonattainment Areas
II. Background and Current Air Quality Status of the Boston-Lawrence-

Worcester, MA-NH Ozone Nonattainment Area
III. History and Time Frame for the State's Attainment Demonstration SIP
IV. What Are the Components of a Modeled Attainment Demonstration?
V. What Is the Framework for Proposing Action on the Attainment Demonstration SIPs?
VI. What Are the Relevant Policy and Guidance Documents?
VII. How Does the New Hampshire Submittal Satisfy the Framework?
VIII. Proposed Action
IX. Administrative Requirements

I. Clean Air Act Requirements for Serious Ozone Nonattainment Areas

The Clean Air Act requires EPA to establish national ambient air quality standards (NAAQS or standards) for certain widespread pollutants that cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. CAA sections 108 and 109. In 1979, EPA promulgated the one-hour 0.12 parts per million (ppm) ground-level ozone standard. 44 FR 8202 (February 8, 1979). Ground-level ozone is not emitted directly by sources. Rather, emissions of nitrogen oxides (NO_X) and volatile organic compounds (VOCs) react in the presence of sunlight to form ground-level ozone. NO_X and VOC are referred to as precursors of ozone.

An area exceeds the one-hour ozone standard each time an ambient air quality monitor records a one-hour average ozone concentration of 0.125 ppm or higher.[1] An area is violating the standard if, over a consecutive three-year period, more than three exceedances are expected to occur at any one monitor. The area's 4th highest ozone reading at a single monitor is its design value. The CAA, as amended in 1990, required EPA to designate as nonattainment any area that was violating the one-hour ozone standard, generally based on air quality monitoring data from the three-year period from 1987–1989. CAA section 107(d)(4); 56 FR 56694 (November 6, 1991). The CAA further classified these areas, based on the area's design value, as marginal, moderate, serious, severe or extreme. CAA section 181(a). Marginal areas were suffering the least significant air pollution problems while the areas classified as severe and extreme had the most significant air pollution problems.

The control requirements and dates by which attainment needs to be achieved vary with the area's classification. Marginal areas are subject to the fewest mandated control requirements and have the earliest attainment date. Severe and extreme areas are subject to more stringent planning requirements but are provided more time to attain the standard. Serious areas were required to attain the one-hour ozone standard by November 15, 1999 and severe areas are required to attain by November 15, 2005 or November 15, 2007. The Boston-Lawrence-Worcester, MA-NH ozone nonattainment area is classified as serious and its attainment date is November 15, 1999.

Under section 182(c)(2) of the CAA, serious areas were required to submit by November 15, 1994 demonstrations of how they would attain the one-hour ozone standard and how they would achieve reductions in VOC emissions of 9 percent for each three-year period until the attainment year. In some cases, NO_X emission reductions can be substituted for the required VOC emission reductions.

In general, an attainment demonstration SIP includes a modeling analysis component showing how the area will achieve the standard by its attainment date and the control measures necessary to achieve those reductions. Another component of the attainment demonstration SIP is a motor vehicle emissions budget for transportation conformity purposes. Transportation conformity is a process for ensuring that states consider the effects of emissions associated with new or improved federally-funded roadways and transit on attainment of the standard. As described in section 176(c)(2)(A) of the CAA, attainment demonstrations necessarily include the estimates of motor vehicle emissions that are consistent with attainment, which then act as a budget or ceiling for the purposes of determining whether federally-supported transportation plans and projects conform to the attainment demonstration SIP.

II. Background and Current Air Quality Status of the Boston-Lawrence-Worcester, MA–NH Ozone Nonattainment Area

The Boston-Lawrence-Worcester, MA–NH ozone nonattainment area is a multi-state nonattainment area consisting of a small portion of southern New Hampshire and the entire eastern half of Massachusetts. In New Hampshire, the nonattainment area consists of 28 individual cities and towns in portions of Hillsborough and Rockingham counties. In Hillsborough County, the individual cities and towns included in the nonattainment area are: Amherst Town, Brookline Town, Hollis Town, Hudson Town, Litchfield Town, Merrimack Town, Milford Town, Mont Vernon Town, Nashua City, Pelham Town, and Wilton Town. In Rockingham, the individual towns included in the nonattainment area are: Atkinson Town, Brentwood Town, Danville Town, Derry Town, E. Kingston Town, Hampstead Town, Hampton Falls Town, Kensington Town, Kingston Town, Londonderry Town, Newton Town, Plaistow Town, Salem Town, Sandown Town, Seabrook Town, South Hampton Town, and Windham Town. In Massachusetts, the nonattainment area includes a much larger area, consisting of 10 counties in their entirety (*i.e.*, Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth, Suffolk, and Worcester counties). Based on 1999 emission estimates by the New Hampshire DES and the Massachusetts Department of Environmental Protection (DEP), the New Hampshire portion of the nonattainment area accounted for only 6 percent of the total VOC emissions in the nonattainment area, and only 4 percent of the total NO_X emissions.

Historically and throughout most of the 1990's, ozone monitors throughout the Boston-Lawrence-Worcester, MA–NH nonattainment area violated the one-hour ozone standard. Directly downwind of the Boston-Lawrence-Worcester, MA–NH nonattainment area, there were also a number of other nonattainment areas violating the one-hour ozone standard during the 1990's in other parts of New Hampshire and in portions of southern Maine. On June 9, 1999, however, EPA determined that the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area had attained the 1-hour ozone standard (64 FR 30911).[2] This determination was based on data collected from 1996–1998. On June 9, 1999, EPA also determined that the Portsmouth-Dover-Rochester, New Hampshire ozone nonattainment area and the Portland, Maine ozone nonattainment area had also attained the 1-hour ozone standard based on data collected from 1996–1998. See 64 FR 30911. At the time of these determinations of attainment,

[1] The one-hour ozone standard is 0.12 ppm. EPA's long-standing practice is that monitored values of 0.125 ppm or higher are rounded up, and thus considered an exceedance of the NAAQS and values less than 0.125 ppm are rounded down and are not an exceedance.

[2] In that notice, EPA also determined the one-hour ozone standard no longer applied to the Boston-Lawrence-Worcester, MA–NH area. Subsequently, due to continued litigation regarding the 8-hour ozone standard, EPA reinstated the applicability of the one-hour ozone standard in all areas. See 65 FR 45182 (July 20, 2000). EPA, however, did not modify its determination that the Boston-Lawrence-Worcester, MA–NH area had attained the one-hour ozone standard prior to its attainment date.

there were no areas in any portion of New Hampshire or Maine that violated the one-hour ozone standard.

The Boston-Lawrence-Worcester, MA–NH nonattainment area continued to have air quality meeting the one-hour ozone standard in 1999 (based on data from 1997–1999) and in 2000 (based on data from 1998–2000). Based on data collected in 1999–2001, however, the Boston-Lawrence-Worcester, MA–NH area now has air quality violating the one-hour ozone standard. The violating monitors are in the southern portion of the multi-state nonattainment area in Fairhaven and Truro, Massachusetts, which are at least 75 miles from the Massachusetts-New Hampshire state border. The other nine ozone air quality monitors in the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area (*i.e,* in the Massachusetts cities and towns of Easton, Stow, Boston (two sites), Lynn, Lawrence, Worcester, and Newbury, and in Nashua, New Hampshire) continue to show attainment of the one-hour ozone NAAQS, based on 1999–2001 data. Preliminary (not quality assured) ozone data readings from the monitors for the area from the summer of 2002 show only the Truro monitor registering a violation of the one-hour ozone NAAQS for the three-year period 2000–2002.

III. History and Time Frame for the State's Attainment Demonstration SIP

A. Ozone Transport Assessment Group and the NO_X SIP Call

Notwithstanding significant efforts by the states, in 1995 EPA recognized that many states in the eastern half of the United States could not meet the November 1994 time frame for submitting an attainment demonstration SIP under the Act because emissions of NO_X and VOCs in upwind states (and the ozone formed by these emissions) affected these nonattainment areas and the full impact of this effect had not yet been determined. This phenomenon is called ozone transport.

On March 2, 1995, Mary D. Nichols, EPA's then Assistant Administrator for Air and Radiation, issued a memorandum to EPA's Regional Administrators acknowledging the efforts made by states but noting the remaining difficulties in making attainment demonstration SIP submittals.[3] Recognizing the problems created by ozone transport, the March 2, 1995 memorandum called for a collaborative process among the states in the eastern half of the country to evaluate and address transport of ozone and its precursors. This memorandum led to the formation of the Ozone Transport Assessment Group (OTAG)[4] and provided for the states to submit the attainment demonstration SIPs based on the expected time frames for OTAG to complete its evaluation of ozone transport.

In June 1997, OTAG concluded and provided EPA with recommendations regarding ozone transport. The OTAG generally concluded that transport of ozone and the precursor NO_X is significant and should be reduced regionally to enable states in the eastern half of the country to attain the ozone NAAQS.

In recognition of the length of the OTAG process, in a December 29, 1997 memorandum, Richard Wilson, EPA's then Acting Assistant Administrator for Air and Radiation, provided until April 1998 for states to submit the following elements of their attainment demonstration SIPs for serious and severe nonattainment areas: (1) Evidence that the applicable control measures in subpart 2 of part D of title I of the CAA were adopted and implemented or were on an expeditious course to being adopted and implemented; (2) a list of measures needed to meet the remaining rate-of-progress (ROP) emissions reduction requirement and to reach attainment; (3) for severe areas only, a commitment to adopt and submit target calculations for post-1999 ROP and the control measures necessary for attainment and ROP plans through the attainment year by the end of 2000; (4) a commitment to implement the SIP control programs in a timely manner and to meet ROP emissions reductions and attainment; and (5) evidence of a public hearing on the state submittal.[5] This submission is sometimes referred to as the Phase 2 submission. Motor vehicle emissions budgets can be established based on a commitment to adopt the measures needed for attainment and identification of the measures needed. Thus, state submissions due in April 1998 under the Wilson policy should have included motor vehicle emissions budgets.

Building upon the OTAG recommendations and technical analyses, in November 1997, EPA proposed action addressing the ozone transport problem. In its proposal, EPA found that current SIPs in 22 states and the District of Columbia (23 jurisdictions) were insufficient to provide for attainment and maintenance of the one-hour ozone standard because they did not regulate NO_X emissions that significantly contribute to ozone transport. 62 FR 60318 (November 7, 1997). The EPA finalized that rule in September 1998, calling on the 23 jurisdictions to revise their SIPs to require NO_X emissions reductions within the state to a level consistent with a NO_X emissions budget identified in the final rule. 63 FR 57356 (October 27, 1998). This final rule is commonly referred to as the NO_X SIP Call.

B. New Hampshire Ozone Attainment Demonstration Submittal

On June 30, 1998, New Hampshire DES submitted an ozone attainment demonstration for the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area as a revision to its SIP. On June 9, 1999, however, EPA determined that the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area had attained the 1-hour ozone standard (64 FR 30911). This determination was based on data collected from 1996–1998. Consistent with then current EPA policy,[6] since the Boston-Lawrence-Worcester, MA–NH area had attained the standard by November 15, 1999, its statutory attainment date, EPA took no action on the New Hampshire attainment demonstration SIP submittal for the Boston-Lawrence-Worcester, MA–NH area. The Boston-Lawrence-Worcester, MA–NH nonattainment area continued to have air quality meeting the one-hour ozone standard through the summer of 2000.

As mentioned above, based on data collected in 1999–2001, the Boston-Lawrence-Worcester, MA–NH area now has air quality violating the one-hour ozone standard. Thus, this nonattainment area is once again required to have an approved attainment demonstration and 9% ROP plan with respect to section 182(c)(2) of

[3] Memorandum, ''Ozone Attainment Demonstrations,'' issued March 2, 1995. A copy of the memorandum may be found on EPA's Web site at *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

[4] Letter from Mary A. Gade, Director, State of Illinois Environmental Protection Agency to Environmental Council of States (ECOS) Members, dated April 13, 1995.

[5] Memorandum, ''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM 10 NAAQS,'' issued December 29, 1997. A copy of this memorandum may be found on EPA's Web site at *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

[6] Policy guidance contained in a May 10, 1995 memorandum from John Seitz, Director of EPA's Office of Air Quality Planning and Standards, entitled ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard'' recommends that ROP and attainment demonstration requirements, along with certain other related requirements, of Part D of Title 1 of the Clean Air Act are no longer applicable to an area once it has air quality data indicating that the one-hour ozone standard has been attained.

the CAA. Today, in this proposed rule, EPA is proposing action on the attainment demonstration SIP submitted by the New Hampshire DES on June 30, 1998 for the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH area. EPA approved the state's 9% ROP plan for the area via a direct final rulemaking on April 16, 2002 (67 FR 18547). In an earlier action, EPA proposed approval of the attainment demonstration for the Massachusetts portion of this same nonattainment area. In that proposed action, EPA proposed approval of an attainment date of November 15, 2007 for the Boston-Lawrence-Worcester, MA–NH nonattainment area. EPA plans to take action separately on contingency measures for both the New Hampshire and Massachusetts portions of the Boston-Lawrence-Worcester, MA–NH nonattainment area.

The statutory attainment date for the Boston-Lawrence-Worcester, MA–NH nonattainment area is November 15, 1999. The area attained the standard as of its attainment date, but then subsequently experienced a violation. The CAA does not expressly address the appropriate attainment date for an area that attains the standard by its attainment date but then subsequently violates the standard nor does it address the planning requirements that apply to such an area. (CAA sections 179(c) and (d) and 181(b)(2) establish requirements only for those areas that EPA determines do not attain the standard by their attainment date.) With respect to the attainment date, both subparts 1 and 2 of Part D of the Act specify outside dates for attainment and provide that attainment must be ''as expeditiously as practicable'' within those outside dates. CAA sections 172(a)(2) and 181(a)(1). With respect to control obligations, EPA generally attempts first to work with the State to submit a revised SIP and, where necessary, would issue a SIP Call pursuant to section 110(k)(5) if additional controls were needed. *See e.g.*, 65 FR 64352 (Oct. 27, 2000). Here, Massachusetts has already submitted an attainment demonstration and has indicated that the demonstration provides for attainment, by November 15, 2007, which is as expeditiously as practicable, within the multi-state area. We review New Hampshire's 1998 attainment demonstration SIP submission in conjunction with the more recent attainment demonstration SIP submitted by Massachusetts in the following sections.

IV. What are the Components of a Modeled Attainment Demonstration?

The EPA provides that states may rely on a modeled attainment demonstration supplemented with additional evidence to demonstrate attainment.[7] In order to have a complete modeling demonstration submission, states should have submitted the required modeling analysis and identified any additional evidence that EPA should consider in evaluating whether the area will attain the standard.

A. Modeling Requirements

For purposes of demonstrating attainment, section 182(c) of the CAA requires serious areas to use photochemical grid modeling or an analytical method EPA determines to be as effective.[8] The photochemical grid model is set up using meteorological conditions conducive to the formation of ozone. Emissions for a base year are used to evaluate the model's ability to reproduce actual monitored air quality values and to predict air quality changes in the attainment year due to the emission changes which include growth up to and controls implemented by the attainment year. A modeling domain is chosen that encompasses the nonattainment area. Attainment is demonstrated when all predicted concentrations inside the modeling domain are at or below the NAAQS or at an acceptable upper limit above the NAAQS consistent with conditions specified by EPA's guidance. When the predicted concentrations are above the NAAQS, an optional Weight of Evidence (WOE) determination which incorporates, but is not limited to, other analyses, such as air quality and emissions trends, may be used to address uncertainty inherent in the application of photochemical grid models.

The EPA guidance identifies the features of a modeling analysis that are essential to obtain credible results. First, the state must develop and implement a modeling protocol. The modeling protocol describes the methods and procedures to be used in conducting the modeling analyses and provides for policy oversight and technical review by individuals responsible for developing or assessing the attainment demonstration (state and local agencies, EPA Regional offices, the regulated community, and public interest groups). Second, for purposes of developing the information to put into the model, the state must select air pollution days, i.e., days in the past with poor air quality, that are representative of the ozone pollution problem for the nonattainment area. Third, the state needs to identify the appropriate dimensions of the area to be modeled, i.e., the domain size. The domain should be larger than the designated nonattainment area to reduce uncertainty in the boundary conditions and should include large upwind sources just outside the nonattainment area. In general, the domain is considered the local area where control measures are most beneficial to bring the area into attainment. Fourth, the state needs to determine the grid resolution. The horizontal and vertical resolutions in the model affect the dispersion and transport of emission plumes. Artificially large grid cells (too few vertical layers and horizontal grids) may dilute concentrations and may not properly consider impacts of complex terrain, complex meteorology, and land/water interfaces. Fifth, the state needs to generate meteorological data that describe atmospheric conditions and emissions inputs. Finally, the state needs to verify that the model is properly simulating the chemistry and atmospheric conditions through diagnostic analyses and model performance tests. Once these steps are satisfactorily completed, the model is ready to be used to generate air quality estimates to support an attainment demonstration.

The modeled attainment test compares model-predicted one-hour daily maximum concentrations in all grid cells for the attainment year to the level of the NAAQS. A predicted concentration above 0.124 ppm ozone indicates that the area is expected to exceed the standard in the attainment year and a prediction at or below 0.124 ppm indicates that the area is expected to attain the standard. This type of test is often referred to as an exceedance test. The EPA's guidance recommends that states use either of two modeled attainment or exceedance tests for the one-hour ozone NAAQS: a deterministic test or a statistical test.

The deterministic test requires the state to compare predicted one-hour daily maximum ozone concentrations

[7] The EPA issued guidance on the air quality modeling that is used to demonstrate attainment with the one-hour ozone NAAQS. See U.S. EPA, (1991), Guideline for Regulatory Application of the Urban Airshed Model, EPA–450/4–91–013, (July 1991). A copy may be found on EPA's Web site at *http://www.epa.gov/ttn/scram/* (file name: ''UAMREG''). See also U.S. EPA, (1996), Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS, EPA–454/B–95–007, (June 1996). A copy may be found on EPA's Web site at *http://www.epa.gov/ttn/scram/* (file name: ''O3TEST'').

[8] Ibid.

for each modeled day[9] to the attainment level of 0.124 ppm. If none of the predictions exceed 0.124 ppm, the test is passed.

The statistical test takes into account the fact that the form of the one-hour ozone standard allows exceedances. If, over a three-year period, the area has an average of one or fewer exceedances per year, the area is not violating the standard. Thus, if the state models a very extreme day, the statistical test provides that a prediction above 0.124 ppm up to a certain upper limit may be consistent with attainment of the standard. (The form of the one-hour ozone standard allows for up to three readings above the standard over a three-year period before an area is considered to be in violation.)

The acceptable upper limit above 0.124 ppm is determined by examining the size of exceedances at monitoring sites which meet the one-hour NAAQS. For example, a monitoring site for which the four highest one-hour average concentrations over a three-year period are 0.136 ppm, 0.130 ppm, 0.128 ppm and 0.122 ppm is attaining the standard. To identify an acceptable upper limit, the statistical likelihood of observing ozone air quality exceedances of the standard of various concentrations is equated to the severity of the modeled day. The upper limit generally represents the maximum ozone concentration observed at a location on a single day and it would be the only reading above the standard that would be expected to occur no more than an average of once a year over a three-year period. Therefore, if the maximum ozone concentration predicted by the model is below the acceptable upper limit, in this case 0.136 ppm, then EPA might conclude that the modeled attainment test is passed. Generally, exceedances well above 0.124 ppm are very unusual at monitoring sites meeting the NAAQS. Thus, these upper limits are rarely substantially higher than the attainment level of 0.124 ppm.

B. Additional Analyses Where Modeling Fails To Show Attainment

When the modeling does not conclusively demonstrate attainment, additional analyses may be presented to help determine whether the area will attain the standard. As with other predictive tools, there are inherent uncertainties associated with modeling and its results. For example, there are uncertainties in some of the modeling inputs, such as the meteorological and emissions data bases for individual days and in the methodology used to assess the severity of an exceedance at individual sites. The EPA's guidance recognizes these limitations, and provides a means for considering other evidence to help assess whether attainment of the NAAQS is likely. The process by which this is done is called a weight of evidence (WOE) determination.

Under a WOE determination, the state can rely on and EPA will consider factors such as: other modeled attainment tests, *e.g.*, a rollback analysis; other modeled outputs, *e.g.*, changes in the predicted frequency and pervasiveness of exceedances and predicted changes in the design value; actual observed air quality trends; estimated emissions trends; analyses of air quality monitored data; the responsiveness of the model predictions to further controls; and, whether there are additional control measures that are or will be approved into the SIP but were not included in the modeling analysis. This list is not an exclusive list of factors that may be considered and these factors could vary from case to case. The EPA's guidance contains no limit on how close a modeled attainment test must be to passing to conclude that other evidence besides an attainment test is sufficiently compelling to suggest attainment. However, the further a modeled attainment test is from being passed, the more compelling the WOE needs to be.

The EPA's 1996 modeling guidance also recognizes a need to perform a mid-course review as a means for addressing uncertainty in the modeling results. Because of the uncertainty in long term projections, EPA believes a viable attainment demonstration that relies on WOE needs to contain provisions for periodic review of monitoring, emissions, and modeling data to assess the extent to which refinements to emission control measures are needed. The mid-course review is discussed below.

V. What Is the Framework for Proposing Action on the Attainment Demonstration SIPs?

In addition to the modeling analysis and WOE support demonstrating attainment, the EPA has identified the following key elements which generally must be present in order for EPA to approve the one-hour attainment demonstration SIPs. These elements are: control measures required by the CAA that provide reductions towards attainment and measures relied on in the modeled attainment demonstration SIP; NO_X reductions affecting boundary conditions; motor vehicle emissions budgets; any additional measures needed for attainment;[10] and a Mid-Course Review (MCR).

A. CAA Measures and Measures Relied on in the Modeled Attainment Demonstration SIP

The states should have adopted the control measures already required under the CAA for the area classification. In addition, a state may have included control measures in its attainment strategy that are in addition to measures required in the CAA. For purposes of fully approving the state's SIP, the state needs to adopt and submit all VOC and NO_X controls within the local modeling domain that were relied on for purposes of the modeled attainment demonstration.

The information in Table 1 is a summary of the CAA requirements that should be met for a serious area for the one-hour ozone NAAQS. These requirements are specified in section 182 of the CAA. EPA must have taken final action approving all measures relied on for attainment, including the required ROP control measures and target calculations, before EPA can issue a final full approval of the attainment demonstration as meeting CAA section 182(c)(2). This was done for all measures relied on in the attainment demonstration for New Hampshire.

Table 1—CAA Requirements for Serious Areas

— NSR for VOC and NO_X[11], including an offset ratio of 1.2:1 and a major VOC and NO_X source cutoff of 50 tons per year
— Reasonable Available Control Technology (RACT) for VOC and NO_X
— Enhanced Inspection and Maintenance (I/M) program for large population centers
— 15% volatile organic compound plans
— Emissions inventory
— Emission statements
— Periodic inventories
— Attainment demonstration
— 9 percent ROP plan through 1999
— Clean fuels program or substitute
— Enhanced monitoring Photochemical Assessment Monitoring Stations
— Stage II vapor recovery
— Contingency measures

[9] The initial, ''ramp-up'' days for each episode are excluded from this determination.

[10] As discussed in detail below, the New Hampshire attainment demonstration shows attainment without the need for additional measures beyond what has already been adopted into the SIP or will be required by federal regulations. Therefore additional measures are not required for New Hampshire.

[11] Unless the area has in effect a NO_X waiver under section 182(f). The New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area is not such an area.

— Reasonably Available Control Measures Analysis

1. Control Measures Adopted by New Hampshire

Adopted and submitted rules for all previously required CAA mandated measures for the specific area classification that are being relied on in the attainment demonstration are required. This also includes measures that may not be required for the area classification but that the state relied on in the SIP submission for attainment. As explained in Table 2, New Hampshire has submitted SIPs for all of the measures they are relying on for attainment.

TABLE 2.—CONTROL MEASURES IN THE ONE-HOUR OZONE ATTAINMENT PLAN FOR THE NEW HAMPSHIRE PORTION OF THE BOSTON-LAWRENCE-WORCESTER, MA–NH SERIOUS OZONE NONATTAINMENT AREA

Name of control measure	Type of measure	Approval status
On-board Refueling Vapor Recovery	Federal rule	Promulgated at 40 CFR part 86.
Federal Motor Vehicle Control program	Federal rule	Promulgated at 40 CFR part 86.
Heavy Duty Diesel Engines (On-road)	Federal rule	Promulgated at 40 CFR part 86.
Federal Non-road Heavy Duty diesel engines	Federal rule	Promulgated at engines 40 CFR part 89.
Federal Non-road Gasoline Engines	Federal rule	Promulgated at 40 CFR part 90.
Federal Marine Engines	Federal rule	Promulgated at 40 CFR part 91.
AIM Surface Coatings	Federal rule	Promulgated at 40 CFR part 59.
Automotive Refinishing	Federal rule	Promulgated at 40 CFR part 59.
Consumer & commercial products	Federal rule	Promulgated at 40 CFR part 59.
Inspection & Maintenance	CAA SIP Requirement and OTR Restructuring.	SIP approved (66 FR 1868; 1/10/01).
NO_X RACT	CAA SIP Requirement	SIP approved (62 FR 17087; 4/9/97)
VOC RACT pursuant to sections 182(a)(2)(A) and 182(b)(2)(B) of CAA.	CAA SIP Requirement	SIPs approved (63 FR 67405; 12/17/98) (63 FR 11600; 3/10/98) (58 FR 4902; 1/19/93) (58 FR 29973; 5/25/93).
VOC RACT pursuant to section 182(b)(2)(A) and (C) of CAA.	CAA SIP Requirement	SIPs approved (67 FR 48034; 7/23/02) (65 FR 42290; 7/10/2000) (63 FR 11600; 3/10/98).
Stage II Vapor Recovery	CAA SIP Requirement	SIP approved (63 FR 67405; 12/7/98).
Reformulated Gasoline	State opt-in	SIP approved (63 FR 67405; 12/7/98).
National Low Emission Vehicle	State option	SIP approved (65 FR 12476; 3/9/00).
Clean Fuel Fleets	CAA SIP Requirement	SIP approved (64 FR 52434; 9/29/99).
New Source Review	CAA SIP Requirement	SIP approved (66 FR 39100; 7/27/01).
Base Year Emissions Inventory	CAA SIP Requirement	SIP approved (62 FR 55521; 10/27/97).
15% VOC Reduction Plan	CAA SIP Requirement	SIP approved (63 FR 67405; 12/7/98).
9% rate of progress plan	CAA SIP Requirement	SIP approved (67 FR 18547; 4/16/02).
Emissions Statements	CAA SIP Requirement	SIP approved (63 FR 11600; 3/10/98).
Enhanced Monitoring (PAMS)	CAA Requirement	SIP approved (62 FR 55521; 10/27/97).
OTC NO_X MOU Phase II and III	State initiative	SIP approved (64 FR 29567; 6/2/99).
Stage II Vapor Recovery or comparable measures section OTR requirement.	CAA SIP requirement	SIP approved (64 FR 52434; 9/29/1999).

B. NO_X Reductions Consistent With the Modeling Demonstration

On October 27, 1998 , EPA completed rulemaking on the NO_X SIP call, which required states to address transport of NO_X and ozone to other states. To address transport, the NO_X SIP call established emissions budgets for NO_X that 23 jurisdictions were required to show they would meet by 2007 through enforceable SIP measures adopted and submitted by September 30, 1999. The NO_X SIP call is intended to reduce emissions in upwind states that significantly contribute to nonattainment problems. The EPA did not identify specific sources that the states must regulate nor did EPA limit the states' choices regarding where to achieve the emission reductions. The courts have largely upheld EPA's NO_X SIP Call, *Michigan* v. *United States Env. Prot. Agency*, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, U.S., 121 S.Ct. 1225, 149 L.Ed. 135 (2001); *Appalachian Power* v. *EPA*, 251 F.3d 1026 (D.C. Cir. 2001). Although a few issues were vacated or remanded to EPA for further consideration, states subject to the NO_X SIP call have largely adopted the controls necessary to meet the budgets set for them under the NO_X SIP call rule. The controls to achieve these reductions should be in place by May 2004.

New Hampshire used the best available NO_X SIP Call information in its modeling analysis. The modeling analysis is discussed in more detail below. New Hampshire itself, however, was not one of the states required to adopt enforceable SIP measures to meet EPA's NO_X SIP call. New Hampshire has adopted regulations consistent with the NO_X Memorandum of Understanding (NO_X MOU) adopted by the Ozone Transport Commission on September 27, 1994. When the NO_X MOU was developed, New Hampshire voluntarily assigned their largest utility NO_X source, the Merrimack Station, to the zone where reductions of 65 percent in 1999 and 75 percent in 2003 are required. This measure is significant because otherwise there would be no requirements for this plant under the NO_X MOU until 2003, at which time a 55 percent reduction is required. EPA approved the regulation New Hampshire adopted pursuant to the NO_X MOU on June 2, 1999 (64 FR 29567).

C. Motor Vehicle Emissions Budgets (MVEBs)

The EPA believes that attainment demonstration SIPs must necessarily estimate the level of motor vehicle emissions, which when considered with emissions from all other sources (stationary, area and other mobile source), is consistent with attainment. The estimate of motor vehicle emissions is used to determine the conformity of transportation plans and programs to the SIP, as described by CAA section 176(c)(2)(A). For transportation conformity purposes, the estimate of

motor vehicle emissions is known as the motor vehicle emissions budget. The EPA believes that appropriately identified motor vehicle emissions budgets are a necessary part of an attainment demonstration SIP. A SIP cannot effectively demonstrate attainment unless it identifies the level of motor vehicle emissions that can be produced while still demonstrating attainment.

D. Mid-Course Review

A mid-course review (MCR), which generally is performed midway between approval of the attainment demonstration and the attainment date, is a reassessment of modeling analyses and more recent monitored data to determine if a prescribed control strategy is resulting in emission reductions and air quality improvements needed to attain the ambient air quality standard for ozone as expeditiously as practicable.

E. Reasonably Available Control Measures (RACM) Analysis

Section 172(c)(1) of the CAA requires SIPs to contain all RACM and provide for attainment as expeditiously as practicable. EPA has previously provided guidance interpreting the requirements of 172(c)(1). See 57 FR 13498, 13560. In that guidance, EPA indicated its interpretation that potentially available measures that would not advance the attainment date for an area would not be considered RACM. EPA also indicated in that guidance that states should consider all potentially available measures to determine whether they were reasonably available for implementation in the area, and whether they would advance the attainment date. Further, states should indicate in their SIP submittals whether measures considered were reasonably available or not, and if measures are reasonably available they must be adopted as RACM. Finally, EPA indicated that states could reject measures as not being RACM because they would not advance the attainment date, would cause substantial widespread and long-term adverse impacts, would be economically or technologically infeasible, or would otherwise be inappropriate for local reasons, including costs. The EPA also issued a memorandum re-confirming the principles in the earlier guidance, entitled, ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas.'' John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

When EPA presented its statutory argument in support of its RACM policy to the U.S. Court of Appeals for the DC Circuit in defense of its approval of the Washington, DC, ozone SIP, the DC Circuit found reasonable EPA's interpretation that measures must advance attainment to be RACM. *Sierra Club* v. *EPA*, 294 F.3d 155, 162 (D.C.Cir. 2002). Specifically, the Court found that:

> EPA reasonably concluded that because the Act ''use[s] the same terminology in conjunction with the RACM requirement'' as it does in requiring timely attainment, *compare* 42 U.S.C. § 7502(c)(1) (requiring implementation of RACM ''as expeditiously as practicable but no later than'' the applicable attainment deadline), *with id.* § 7511(a)(1) (requiring attainment under same constraints), the RACM requirement is to be understood as a means of meeting the deadline for attainment.

Id. Morever, the D.C. Circuit rejected, as a ''misreading of both text and context,'' Sierra Club's arguments that EPA's interpretation of RACM conflicts with the Act's text and purpose and lacks any rational basis. The D.C. Circuit also found reasonable EPA's interpretation that it could consider costs in a RACM analysis and that measures may be rejected if they would require an intensive and costly effort for regulation of many small sources. *Sierra Club* v. *EPA*, 294 F.3d at 162,163.

VI. What Are the Relevant Policy and Guidance Documents?

This proposal has cited several policy and guidance memoranda. The documents and their location on EPA's web site are listed below; these documents will also be placed in the docket for this proposal action.

Relevant Documents

1. ''Guidance for Improving Weight of Evidence Through Identification of Additional Emission Reductions, Not Modeled.'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Emissions, Monitoring, and Analysis Division, Air Quality Modeling Group, Research Triangle Park, NC 27711. November 1999. Web site: *http://www.epa.gov/ttn/scram* (file name: ''ADDWOE1H'').

2. ''Serious and Severe Ozone Nonattainment Areas: Information on Emissions, Control Measures Adopted or Planned and Other Available Control Measures.'' November 24, 1999. OAQPS. U.S. EPA, RTP, NC.

3. Memorandum, ''Guidance on Motor Vehicle Emissions Budgets in One-Hour Attainment Demonstrations,'' from Merrylin Zaw-Mon, Office of Mobile Sources, to the Air Division Directors, Regions I–VI. November 3, 1999. Web site: *http://www.epa.gov/oms/transp/trafconf.html.*

4. Memorandum from Lydia Wegman and Merrylin Zaw-Mon to the Air Division Directors, Regions I–VI, ''1-Hour Ozone Attainment Demonstrations and Tier 2/Sulfur Rulemaking.'' November 8, 1999. Web site: *http://www.epa.gov/oms/transp/trafconf.html.*

5. Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, ''Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration.'' Web site: *http://www.epa.gov/scram001/tt25.htm* (file name: ''MCRGUIDE'').

6. Memorandum, ''Guidance to Clarify EPA's Policy on What Constitutes ''As Expeditiously as Practicable'' for Purposes of Attaining the One-Hour Ozone Standard for Serious and Severe Ozone Nonattainment Areas.'' John S. Seitz, Director, Office of Air Quality Planning and Standards. November 1999. Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

7. U.S. EPA, (1991), Guideline for Regulatory Application of the Urban Airshed Model, EPA–450/4–91–013, (July 1991). Web site: *http://www.epa.gov/ttn/scram/* (file name: ''UAMREG'').

8. U.S. EPA, (1996), Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS, EPA–454/B–95–007, (June 1996). Web site: *http://www.epa.gov/ttn/scram/* (file name: ''O3TEST'').

9. Memorandum, ''Ozone Attainment Demonstrations,'' from Mary D. Nichols, issued March 2, 1995. Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

10. December 29, 1997 Memorandum from Richard Wilson, Acting Assistant Administrator for Air and Radiation ''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM10 NAAQS.'' Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

VII. How Does the New Hampshire Submittal Satisfy the Framework?

This section provides a review of New Hampshire'' submittal and an analysis of how this submittal satisfies the framework discussed in Section V. of this notice.

A. What Did the State Submit?

The attainment demonstration SIP submitted by the New Hampshire DES for the Boston-Lawrence-Worcester, MA–NH area includes a modeling analysis using the CALGRID model

which demonstrates attainment using the weight-of-evidence approach. This was submitted on June 30, 1998. The SIP was subject to public notice and comment and a hearing was held on June 1, 1998. Information on how the photochemical grid modeling meets EPA guidance is summarized below.

B. How Was the Photochemical Grid Modeling Conducted?

The one-hour attainment demonstration submitted by New Hampshire is for both the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area as well as the New Hampshire Portsmouth-Dover-Rochester serious area.[12] EPA is only acting on the attainment demonstration as it applies to the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH nonattainment area.

The key element of the attainment demonstration is the photochemical grid point modeling required by the CAA. The New Hampshire attainment demonstration submittal used the CALGRID model which was approved for use by EPA since it was found to be at least as effective as the guideline model which is UAM–IV. The modeling domain for CALGRID extends from southwest Connecticut, northward 340 km to northern Vermont, and eastward to east of Nantucket, Massachusetts. For the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area, the domain meets EPA guidance since it contains adequate areas both upwind and downwind of the nonattainment area. The domain also includes the monitors with the highest measured peak ozone concentrations in Massachusetts and coastal Maine and New Hampshire. Since the original modeling was done for a much larger domain that includes not only all of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area but also includes all of Rhode Island, most of Connecticut, all of Massachusetts, southern Vermont, and most of southern Maine, the CALGRID model has several ''source'' areas and several receptor areas. The receptor area of importance for the New Hampshire SIP submittal is the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area. For the purposes of this notice, only model results in this geographic area will be used, unless otherwise noted. As shown below, EPA believes the modeling portion of the attainment demonstration meets EPA guidance.

The model was run for 10 days during four distinct episodes (August 14–17, 1987, June 21–22, 1988, July 7–8, 1988 and July 10–11, 1988). These episodes represent a variety of ozone conducive weather conditions, and also include the three worst ranked ozone episodes (1987 to 1998) for the domain. The episodes selected reflect days with high measured ozone in a variety of areas within the entire domain. This is because, as stated above, the domain covers several nonattainment areas, and in order to model the meteorology that causes high ozone, several different episodes were needed. The model results for the first day of each episode are not used for attainment demonstration purposes, because they are considered ''ramp-up days.'' Ramp-up days help reduce impacts of initial conditions; after ramp-up days, model results are more reflective of actual emissions being emitted into the atmosphere. Since the first day of each episode was not considered, this leaves six days for strategy assessment. August 16, 1987 was also not used for strategy assessment. This leaves five strategy days: August 15, 1987; August 17, 1987; June 22, 1988; July 8, 1988 and July 11, 1988.

The CALGRID model was run using the CALMET meteorological processor. This processor took actual meteorological data collected by the National Weather Service and the State Air Pollution Agencies and using extrapolation and other analysis techniques provided winds, temperatures and other meteorological parameters at approximately 400 specific grid points for each hour of the episode at up to 14 levels (*i.e.*, from the surface to top of the model which is about 5000 feet). CALMET is described in detail in the New Hampshire attainment demonstration, and was approved by EPA for use in the CALGRID modeling system.

The CALGRID model was run with emissions data prepared by EPA Region I and/or a contractor working with EPA Region I. The data were taken from the EPA Aerometric Informational Retrieval System (AIRS) data base in late 1993 and reflect the emission data supplied from the six New England States. The emission data for the small portion of New York state that forms the western edge of the domain was supplied by New York. EPA Region I quality assured all the New England AIRS data, the New York supplied data and all necessary modifications to the data. The data was further processed through the Emissions Preprocessor System (EPS Version 2.0). To more accurately model ozone in New England, day specific emissions were simulated for on-road mobile sources (cars, trucks, buses, etc.), and for large fossil-fueled fired power plants in New England. The base case CALGRID model is consistent with EPA guidance on model performance.

Future emissions were projected to 1999 and 2007 accounting for both emission increases due to industrial growth, population growth and growth in the number of miles traveled by cars, as well as emission reductions due to cleaner gasoline, cleaner cars and controls on industrial pollution. Growth factors were derived using the EPA-approved Bureau of Economic Analysis (BEA) factors and all the emissions were processed using the EPS 2.0 system.

Model runs were also performed for the year 2007. The runs employed 2007 emission estimates inside the New England Domain, along with boundary conditions files reflecting EPA's NO_X SIP Call emission estimates in upwind areas. Year 2007 emissions estimates for the states inside the modeling domain reflected EPA's NO_X SIP call as well as other federal and state control strategies being implemented by the beginning of the 2007 ozone season. This was accomplished using a two-step process. The first step was to project emissions using growth factors to account for increases or decreases in economic activity by industrial sector. In general, the states projected their emissions using the same growth factors that were used in the OTAG modeling effort. The second step involved applying control factors to source categories that would be regulated by the year 2007. States used a combination of information for control levels: those used for the OTAG modeling effort, and state-specific information relating to the effectiveness of control programs planned or in place. These 2007 emission estimates did not, however, include the Tier 2/Gasoline Sulfur program that was subsequently adopted by EPA on February 10, 2000 (65 FR 6698).

C. What Are the Conclusions From the Modeling?

EPA guidance for approval of the modeling aspect of a one-hour ozone attainment demonstration is to use the one-hour ozone grid modeling to apply one of two modeled attainment tests (deterministic or statistical) with optional weight of evidence analyses to

[12] The Portsmouth-Dover-Rochester serious area attained the one-hour ozone standard by its statutory attainment date. In June 1999, EPA issued a final rule determining that the one-hour ozone standard no longer applied (64 FR 30911). EPA has since reinstated the standard. However, Portsmouth-Dover-Rochester continues to qualify, based on recent air quality data, as a clean data area under the EPA policy related to ozone nonattainment areas meeting the one-hour ozone NAAQS (May 10, 1995) and the attainment demonstration requirement is deferred pending redesignation.

supplement the modeled attainment test results when the modeled attainment test is failed. Neither the 1999 or 2007 modeling performed for the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area shows attainment of the one-hour ozone standard (0.124 parts per million) at every grid cell for every hour of every strategy day modeled (August 15, 1987; August 17, 1987; June 22, 1988; July 8, 1988 and July 11, 1988). The maximum predicted base case concentration in the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area for the modeled episodes is 0.230 ppm, for the August 15, 1987 episode. The strategy run for this episode shows a future value in 1999 of 0.186 ppm. For the July 1988 episodes, which are modeled for both 1999 and 2007, New Hampshire looked at the predicted peaks for 1999 and 2007 in the portion of the modeling domain directly influenced by New Hampshire emissions (*i.e.*, southern New Hampshire and northeastern Massachusetts). Those peaks remain above the one-hour ozone standard, with a peak concentration of 0.188 ppm in 1999, and 0.177 ppm in 2007. None of the future case strategy modeling runs pass the strict deterministic test. Since the CALGRID model, as run for the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area, does not pass the strict deterministic attainment test, additional weight of evidence analyses are performed. When these additional weight of evidence analyses are considered, attainment is demonstrated for the Boston-Lawrence-Worcester, MA–NH area.

The paramount element in the New Hampshire weight of evidence analysis is the actual air quality monitoring data. The air quality monitoring data show that the area attained the one-hour NAAQS in 1998, based on 1996–1998 ozone data. The area remained in attainment until the summer of 2001. In the summer of 2001, the violations of the standard occurred to the south of New Hampshire. Both trajectory analyses and zero-out model runs show that the source regions for these violations is not New Hampshire, and there is nothing New Hampshire can do to eliminate or reduce these violations. This information is, in itself, enough to pass a weight-of-evidence test. However, for thoroughness, EPA analyzed more information.

Another element in a weight of evidence analysis is use of the model predicted change in ozone to estimate a future air quality design value. This uses the air quality modeling in a relative sense. An analysis of the modeled ozone data, from the CALGRID model used in the New Hampshire attainment demonstration, in conjunction with monitored air quality data shows that, with the planned emission reductions in the two precursor emissions (VOC and NO_X), ground-level ozone concentrations will be below the ambient standard by the 2007 attainment date.

More specifically, EPA used the New Hampshire attainment demonstration in a relative sense to estimate a future design value. EPA compared base case CALGRID runs to future case CALGRID runs to estimate the improvement in ozone air quality levels between the base and future cases. Four strategy days (August 15 and 17 1987; July 8, 1988 and July 11, 1988)[13] are used in this analysis, which compared the improvement in modeled air quality between the base and future modeling cases. The following procedure is applied. First, base case CALGRID runs are examined to discern the maximum one-hour ozone concentration modeled in the area of concern, in this case a large area to the north of Boston. This is the only area which New Hampshire has any chance of affecting during meteorological conditions that result in one-hour ozone exceedances in New England. The four strategy days are all examined. Next, the same area is used to determine future modeled ozone values. The modeled maximum results of the four strategy days are averaged and a reduction factor calculated from the base case to the future case. This reduction factor represent the amount of ozone reduced in this area, as the result of the emission reductions modeled. This reduction factor is used to adjust the average ozone design value for this part of the model domain, as monitored between 1985 and 1990. This monitored design value represent both the base case model years of 1987 and 1988 and also the design values used in 1991 to classify one-hour nonattainment areas.

This analysis shows that air quality design values can reasonably be expected to be reduced below 0.124 ppm based on continued additional reductions within the domain (*e.g.*, areas in CT, RI and MA) and reductions upwind, reflected in the future year boundary conditions. Furthermore, the emissions sensitivity modeling performed by the State of New Hampshire indicates that ozone reductions from emission reductions within the New England domain will be greater when boundary conditions become cleaner. So emission reductions from future programs like the Tier 2/sulfur gasoline program and the NO_X SIP call will further aid in achieving attainment of the one-hour ozone standard within the nonattainment area.

In addition to this analysis performed by EPA, the New Hampshire DES ozone attainment demonstration also contains a future design value analysis which shows similar results. The New Hampshire DES used a different set of design values than the EPA analysis. The New Hampshire DES analysis used 1995–1997 design values for all of the ozone monitors in New Hampshire. For each monitor, New Hampshire DES calculated the percent improvement in air quality necessary to bring these monitors into attainment of the NAAQS. Then, using the 1999 and 2007 CALGRID modeling runs for the July 8 and July 11 episode,[14] the New Hampshire DES calculated the percent improvement between 1999 and 2007. If this percent model improvement is greater than the improvement needed to achieve the one-hour ozone NAAQS, then the New Hampshire DES contends that attainment is shown. The results of the analysis show that New Hampshire can achieve attainment of the one-hour standard by 2007. This analysis by the New Hampshire DES adds to the weight of evidence.

In summary, the CALGRID modeling submitted by the New Hampshire DES for the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area, when analyzed using the future design value approach, shows attainment of the one-hour NAAQS will be achieved by 2007. This modeling is consistent with EPA guidance. Other information, which provides additional favorable evidence that the Boston-Lawrence-Worcester, MA–NH area, will attain in 2007, are the ambient ozone data trends, a trajectory analysis of exceedance days in the area, and zero-out modeling for New Hampshire.

D. Do the Ambient Ozone Data Show Any Trends?

In total, there are 11 ozone air quality monitors in the Boston-Lawrence-Worcester, MA–NH nonattainment area that have data from 1999–2001, ten in Massachusetts and only one in New Hampshire. They are in the Massachusetts cities and towns of Boston (two sites), Easton, Fairhaven, Lawrence, Lynn, Newbury, Stow, Truro, and Worcester, and Nashua, New

[13] The June 22, 1988 strategy day is not used because of problems re-analyzing the base case model run for this episode.

[14] Only the July 8 and 11 episode are included in this analysis because of the limited availability of appropriate 2007 boundary condition for the other episodes.

Hampshire. All of the monitors show attainment with the one-hour ozone NAAQS for the period 1999–2001, except for the Fairhaven and Truro, MA sites.

The original serious classification of the nonattainment area was based on data from the 1987 through 1989 time period. Since then and including 2001 ozone data, the latest available quality assured ozone data for the area, all 11 sites show a decrease in ozone due to emission reductions, both within Massachusetts and New Hampshire and also upwind. The monitoring sites north of the city of Boston are showing the greatest decline. For example, the one-hour ozone design value for the site in Newbury has dropped from 0.139 ppm in 1989 to 0.112 ppm in 2001, a drop of 19 percent. At the Nashua, NH site, the only site in the nonattainment area in New Hampshire, the design value has dropped from 0.121 ppm in 1989 to 0.103 ppm in 2001, a drop of 15 percent.

If we look at three additional monitors downwind of the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area, we see similar downward trends. The three monitors are Rye, NH, Kennebunkport, ME and Cape Elizabeth, ME. At the Rye, NH site, the design value has dropped from 0.156 ppm in 1989 to 0.123 ppm in 2001, a drop of 21 percent. At the Kennebunkport, ME site, the design value has dropped from 0.152 ppm in 1989 to 0.120 ppm in 2001, also, a drop of 21 percent. At the Cape Elizabeth, ME site the design value has dropped from 0.156 ppm in 1989 to 0.111 ppm in 2001, a drop of 29 percent. These substantial decreases in ozone are the result of emission reductions both within the tri-state area of Massachusetts, New Hampshire and Maine, as well as reduction in longer-range transport emissions from upwind areas.

At the two eastern Massachusetts monitors recording violations of the ozone standard in 2001 (*i.e.*, Fairhaven and Truro, Massachusetts), the ozone trend is also downward. These two sites are in the extreme southern portion of the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area, and were monitoring attainment until the summer of 2001. At the Fairhaven, MA site, the one-hour ozone design value has dropped from 0.150 ppm in 1989 to 0.125 ppm in 2001, a drop of 17 percent. This site is not in attainment, based on 1999–2001 ozone data. At the Truro, MA site, the one-hour design value has dropped from 0.146 ppm in 1989 to 0.138 ppm in 2001, for a drop of 5 percent. This site, too, is not in attainment, based on 1999–2001 ozone data. Furthermore, preliminary ozone data for the Boston-Lawrence-Worcester, MA–NH area collected during the summer of 2002, a hot summer, show that of the 11 monitors that have recorded ozone data for the past three years, only the Truro, MA monitor has an ozone design value of 0.125 ppm or above. Truro's preliminary design value for 2000–2002 is 0.130 ppm, a drop of 0.008 ppm from 2001. During 2000–2002, the fifth highest value at the Truro site is below the level of the one-hour ozone standard.

Based on the overall downward trend in one-hour ozone concentrations in this area, and because precursor emissions are projected to keep falling, both within the nonattainment area and upwind from it, there is no reason to believe that the downward trend in ozone concentrations will not continue over the near term, based on the projected emission reductions. The future emission reductions will be a result of the following: continued benefits from tighter standards on vehicles due to fleet turnover (California Low Emission Vehicles (CA LEV) in Massachusetts and New York and National Low Emission Vehicles in New Hampshire and other upwind areas); the reductions from large point sources due to the OTC NO_X Budget Program and EPA's NO_X SIP call; other federal control measures such controls on non-road engines; and the Tier 2 vehicle and low sulfur gasoline program.

E. What Do the Zero-Out Model Runs Show?

The State of New Hampshire performed many emission sensitivity model runs for the four ozone episodes (August 15–17, June 22, July 8 and July 11). A sensitivity run is a model run to determine how the model reacts to certain controlled changes to one of its inputs. An emission sensitivity run shows how the model reacts to changes in anthropogenic ozone precursor emissions (VOC, NO_X and carbon monoxide (CO)). For example, how does the CALGRID model respond to a drop in ozone precursor emissions of 50 percent. Some of the most useful, although not achievable in actuality, of these emission sensitivity runs are the so-called zero-out runs, where instead of lowering emissions by 50 or 75 percent, the emissions are completely eliminated from within a certain portion of the domain (*i.e.*, the anthropogenic emissions are set to zero). The CALGRID zero-out runs (model runs that assume no anthropogenic emissions in a given area) show that when the anthropogenic ozone precursor emissions (VOC, NO_X and Carbon monoxide (CO)) are set to zero in the State of New Hampshire for each of the four episodes modeled, there is no change in predicted ozone in the Cape Cod and southeastern Massachusetts region. The model does show decreases in ozone concentrations along the New Hampshire coast and over inland sections of New Hampshire and Maine, and in northeastern Massachusetts, but no change over Cape Cod and southeastern Massachusetts, the portion of the nonattainment area still recording ozone violations. This is to be expected on these days since the surface winds were primarily blowing from the southwest toward the northeast. But to have this shown definitively by the CALGRID model is important, because it adds to the argument that there is nothing more New Hampshire can do to lower ozone concentrations over southeastern Massachusetts, and nothing New Hampshire can presently do to advance the attainment date of the nonattainment area. To achieve attainment throughout the entire Boston-Lawrence-Worcester, MA–NH ozone nonattainment area, New Hampshire is beholden to emissions reductions from other states.

F. What Do the Trajectory Analyses Show?

One question that the zero-out modeling runs discussed above, do not answer is ''Does New Hampshire contribute to ozone exceedances on Cape Cod on other days not modeled?'' In order to answer this question, EPA looked at all days on which there were exceedances of the one-hour ozone standard on Cape Cod, in southeastern Massachusetts, and/or in Rhode Island, over the last three years when we have quality assured and quality controlled ozone data (1999–2001). This area encompasses the ozone monitoring sites in Truro, MA; Fairhaven, MA; Narragansett, RI; East Providence, RI; and West Greenwich, RI. The exceedance days at these sites during 1999–2001 are as follows: June 7, 1999, July 6, 1999, July 16, 1999, June 10, 2000, June 30, 2001, July 25, 2001, August 7, 2001, and August 9, 2001. In order to determine the most probable source region of emissions for the exceedances measured on these days, EPA performed a trajectory analysis for each day.

A trajectory is the path a parcel of air follows from point A to point B (*e.g.* from New York to Cape Cod). A backward trajectory is the reverse, where did a parcel of air come from (*e.g.*, where did the ozone on Cape Cod most likely originate?)? The path and/or trajectory depends mostly on the wind

speed and direction, but other weather parameters do come into play, such as how sunny it is, and whether the air is rising or sinking as it moves. One way of determining trajectories is with trajectory models. The model EPA used to compute backward trajectories is the HYSPLIT–4 (Hybrid Single-Particle Lagrangian Integrated Trajectory) model, developed by NOAA Air Resources Lab. Input meteorological data fields were from the National Centers for Environmental Prediction Eta Data Assimilation System. Details of this analysis are found in the technical support document for this action. EPA's trajectory analysis of the days with ozone exceedances at these sites (Truro, MA, Fairhaven, MA, Narragansett, RI, East Providence, RI and West Greenwich, RI) support the CALGRID modeling which shows that the most probable source region of the exceedances at these sites is southern New England and areas to the south and west of New England. In none of the cases modeled, do the HYSPLIT trajectories show New Hampshire as a probable source region for this ozone. This confirms the zero-out runs discussed above, and adds to the weight-of-evidence analysis.

G. Are the Causes of the Recent Violation Being Addressed?

The Boston-Lawrence-Worcester, MA–NH ozone nonattainment area was in attainment for three consecutive, three-years periods from 1998–2000 (*i.e.* 1996–1998, 1997–1999, and 1998–2000). As discussed above, the violation based on the three-year period from 1999–2001 occurred at two monitors in extreme southeastern Massachusetts. Based on zero-out modeling performed by the New Hampshire DES, the emissions that are causing these violations are not emanating from New Hampshire, but rather from sources near and upwind of these monitors.

Massachusetts, the other state in this multi-state nonattainment area, has performed additional analyses with regard to the remaining violations in the Boston-Lawrence-Worcester, MA–NH nonattainment area. Those additional analyses were submitted to EPA by the Massachusetts DEP on September 6, 2002. Those additional analyses concluded that the emission reductions that upwind states will achieve under the NO_X SIP Call, beginning in 2003, should help bring the area back into attainment. Massachusetts also analyzed how reductions from the EPA's Tier 2 vehicle and low sulfur gasoline program promulgated on February 10, 2000 (65 FR 6697) will benefit the area. In a separate action, EPA has proposed approval of the Massachusetts attainment demonstration for this nonattainment area based on the conclusion that attainment will be achieved in the future once scheduled federal and local control measures are implemented.

Even though the upwind reductions are most critical in ensuring that this area is brought back into attainment, EPA notes that there are additional control strategies and emission reductions within New Hampshire that will not fully be implemented until 2003 and beyond. These measures include: the State of New Hampshire NO_X budget and allowance trading program, additional reductions from fleet turn-over and non-road equipment turnover. These reductions will continue to help ensure that air quality improves in the area, and that maintenance of the ozone standard in southern New Hampshire is continued.

H. What Attainment Date Is Being Established for the Nonattainment Area?

The Boston-Lawrence-Worcester, MA–NH area attained the one-hour ozone standard as of 1999, its statutory deadline under the CAA. Moreover, the Boston-Lawrence-Worcester, MA–NH nonattainment area continued to have air quality meeting the one-hour ozone standard until the 1999 through 2001 time period. In the Massachusetts DEP attainment demonstration supplement that was submitted to EPA on September 6, 2002, Massachusetts provides evidence that the entire nonattainment area will once again attain by an attainment date of November 15, 2007, once a variety of scheduled control strategies are more fully implemented. In a separate action, EPA has proposed approval of the Massachusetts attainment demonstration for this nonattainment area and has proposed an attainment date of November 15, 2007. This attainment date will be for the entire nonattainment area including the New Hampshire portion.

I. What About the Mid-course Review?

As discussed above, the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area attained the ozone standard based on ozone data collected in 1997–1999 and 1998–2000, and is now violating the standard only in the southern portion of the multi-state nonattainment area, in Massachusetts. As described in EPA's proposed approval of the Massachusetts attainment demonstration for this area, the Massachusetts Department of Environmental Protection has committed to perform a mid-course review for this area by December 31, 2004. As discussed above, EPA has concluded that based on ozone modeling and trajectory analyses performed by New Hampshire DES and EPA, that New Hampshire emissions are not contributing to the continued violations in the nonattainment area. Nevertheless, New Hampshire in its attainment demonstration SIP submittal has committed to ''work with neighboring states and EPA Region I to determine the magnitude and geographic location of emission reductions required in order to most effectively attain and maintain ozone attainment for the 1-hour and then the 8-hour ozone standards.'' EPA interprets this to mean that New Hampshire will work with Massachusetts in performing a mid-course review for this area by December 31, 2004. EPA believes this mid-course review will be sufficient to determine if the nonattainment area's control strategy is resulting in emission reductions and air quality improvements needed to attain the ozone standard in the nonattainment area as expeditiously as practicable.

J. What About the Requirement for RACM?

The EPA has reviewed the SIP submittal for the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area to determine if it includes sufficient documentation concerning available RACM measures. In its June 30, 1998 attainment demonstration, New Hampshire DES describes the control measures that it is implementing to assure attainment. New Hampshire DES also analyzes how effective additional VOC and NO_X reductions in various parts of the modeling domain would be at reducing predicted elevated concentrations of ozone.

As explained above, the analyses done by the New Hampshire DES included ''zero-out'' modeling runs for five separate episode days. In these model runs, all New Hampshire anthropogenic emissions of NO_X and VOC are removed from the analysis. Those ''zero-out'' modeling runs shows the contribution that New Hampshire anthropogenic emissions have to various parts of the modeling domain. As explained above, ozone monitoring data from 1999 through 2001 for the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area shows that only ozone monitors in extreme southeastern Massachusetts currently violate the one-hour ozone NAAQS. A look at those ''zero-out'' modeling runs

with this in mind shows that even if the State of New Hampshire eliminated all anthropogenic sources of ozone precursors (NO_X and VOC), there would be no impact to the area in southeastern Massachusetts still recording NAAQs violations.

Furthermore, EPA performed a trajectory analysis of each of the days during 1999 through 2001 when exceedances of the one-hour ozone NAAQS were monitored in the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area. That analysis shows that the source region for these exceedances is southern New England and areas to the south and west of New England. None of the trajectories implicate the State of New Hampshire.

Therefore, EPA concludes based on the available information, that there are no additional emission control measures in New Hampshire that will advance the attainment date for the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH ozone nonattainment area. Thus no potential measure can be considered RACM for purposes of section 172(c)(1) for southern New Hampshire for its one-hour ozone attainment demonstration. The EPA therefore proposes that the New Hampshire SIP meets the requirements for RACM.

Although EPA does not believe that section 172(c)(1) requires implementation of additional measures for this area, this conclusion is not necessarily valid for other areas.

K. What About Motor Vehicle Emissions Budgets?

New Hampshire's 15 percent plan submitted on February 3, 1994 included a year 1996 VOC motor vehicle emissions budget of 17.96 tons per summer day. On September 27, 1996 New Hampshire submitted its post-1996 plan which included a more stringent 1999 VOC motor vehicle emissions budgets of 16.56 tons per summer day VOC, as well as identified a new NO_X budget of 22.96 tons per summer day of NO_X. These 1999 motor vehicle emissions budgets were formally determined adequate by EPA New England for use in transportation conformity on April 29, 1999. Subsequent to the rate-of-progress SIPs, on June 30, 1998, New Hampshire submitted its ozone attainment demonstration to EPA which establishes motor vehicle emissions budgets for both VOC and NO_X for 2003. The 2003 VOC and NO_X budgets (10.72 tons per summer day and 21.37 tons per summer day respectively) established by the New Hampshire ozone attainment demonstration were formally determined adequate by EPA on August 19, 1998. These budgets are currently the controlling budgets for conformity determinations for 2003 and later years because the 2003 MVEBs are more stringent than the 1999 budget.

New Hampshire's current level of VOC and NO_X emissions are consistent with a level required to attain and maintain the one-hour ozone NAAQS in New Hampshire and downwind areas. No ozone monitor in the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH serious ozone nonattainment area has experienced a violation of the one-hour ozone NAAQS since the three year period from 1996–1998. Additional VOC and NO_X emission reductions within the New Hampshire portion of the nonattainment area would not likely speed up attainment in the nonattainment area nor reduce elevated ozone levels measured in southeastern Massachusetts, the portion of the nonattainment area that still violates the one-hour ozone standard. This conclusion is justified by the zero-out modeling and trajectory analysis discussed above.

The 2003 MVEBs adopted by the State of New Hampshire are lower than the current level of motor vehicle emissions estimated in the New Hampshire portion of the Boston-Lawrence-Worcester, MA-NH nonattainment area.[15] While the 2003 MVEBs are not as stringent as the currently projected 2007 motor vehicle emissions for the area,[16] the motor vehicle emission budgets must only demonstrate that its emission level is sufficient to attain and maintain the one-hour NAAQS for ozone. For example, the projected 2007 motor vehicle emission levels can have an additional quantity of ''safety margin'' emissions to accommodate future growth added to them to create the attainment-level motor vehicle emission budgets, provided that the area continues to demonstrate attainment. The important criteria is that the motor vehicle emission level established in the attainment demonstration, when added to the stationary, area and other mobile sources are consistent with attainment of the one-hour NAAQS for ozone.

Since New Hampshire's current level of VOC and NO_X emissions are consistent with a level required to attain the one-hour ozone NAAQS, the lower 2003 MVEBs adopted by the State of New Hampshire represent acceptable attainment-level MVEBs with a safety margin included. Since the State of New Hampshire has such discretion when setting motor vehicle emissions budgets provided its budgets are consistent with the measures in the SIP, EPA is proposing to approve the budgets submitted by New Hampshire. The attainment-level MVEBs are shown in Table 3 below.

TABLE 3.—ATTAINMENT-LEVEL EMISSIONS BUDGETS FOR ON-ROAD MOBILE SOURCES IN TONS PER SUMMER DAY (TPSD)

Area	Attainment VOC budget	Attainment NO_X budget
New Hampshire portion of the Boston-Lawrence-Worcester, MA-NH area	10.72	21.37

By letter dated August 19, 1998, we informed New Hampshire that the motor vehicle emissions budgets contained within the state's ozone attainment demonstration were adequate for conformity purposes. Since that time, New Hampshire has been required to use these budgets in conformity. This notice proposes to approve the attainment-level motor vehicle emissions budgets into the SIP. Once New Hampshire's attainment demonstration is finally approved by EPA and an attainment date of November 15, 2007 is established for the entire nonattainment area, New Hampshire will be required to use 2007 as a milestone year in future transportation conformity determinations.

[15] New Hampshire estimated motor vehicle source emissions in the area for 2002 to be 11.99 tons per summer day of VOC and 26.02 tons per summer day of NO_X. The estimates were done using MOBILE6 and estimated vehicle miles traveled (VMT) data for 2002.

[16] New Hampshire estimated motor vehicle source emissions in the area for 2007 to be 8.84 tons per summer day of VOC and 19.31 tons per summer day of NO_X The estimates were also done using MOBILE6 and used estimated 2007 VMT data as well control strategies expected to be in place in 2007 including EPA's Tier 2/Sulfur gasoline program.

L. What Are the Contingency Measures for This Area?

The EPA believes the contingency measure requirements of sections 172(c)(9) and 182(c)(9) of the CAA are independent requirements from the attainment demonstration requirements under sections 172(c)(1) and 182(c)(2)(A) and the rate-of-progress (ROP) requirements under sections 172(c)(2) and 182(c)(2)(B). The contingency measure requirements are to address the event that an area fails to meet a ROP milestone or fails to attain the ozone NAAQS by the attainment date established in the SIP. The contingency measure requirements have no bearing on whether a state has submitted a SIP that projects attainment of the ozone NAAQS or the required ROP reductions toward attainment. The attainment or ROP SIP provides a demonstration that attainment or ROP requirements ought to be fulfilled, but the contingency measure SIP requirements concern what is to happen only if attainment or ROP is not actually achieved. The EPA acknowledges that contingency measures are an independently required SIP revision, but does not believe that submission of contingency measures is necessary before EPA may approve an attainment or ROP SIP.[17] New Hampshire remains obligated to submit the contingency measures required by 172(c)(9) and 182(c)(2)(A), but EPA may approve this attainment demonstration at this time even though they have not yet done so.

VIII. Proposed Action

EPA is proposing to fully approve as meeting CAA section 182(c)(2) the ground-level one-hour ozone attainment demonstration State Implementation Plan for the New Hampshire portion of the Boston-Lawrence-Worcester, MA-NH ozone nonattainment area submitted by New Hampshire on June 30, 1998, as demonstrating that the area will attain the one-hour ozone standard. We are also proposing that no potential measures can be considered RACM for New Hampshire for purposes of section 172(c)(1). This notice also proposes to approve the attainment-level motor vehicle emissions budgets submitted by New Hampshire into the SIP.

EPA is soliciting public comments on the issues discussed in this proposal. These issues will be considered before EPA takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA Regional office listed in the **ADDRESSES** section of this action.

A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available upon request from the EPA Regional Office listed in the **ADDRESSES** section of this document.

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

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

Dated: October 11, 2002.

Carl F. Dierker,

Acting, Regional Administrator, New England Region.

[FR Doc. 02–26709 Filed 10–18–02; 8:45 am]

BILLING CODE 6560–50–P

[17] The U.S. Court of Appeals for the D.C. Circuit recently addressed this issue in the context of a challenge to the Washington D.C. ozone attainment demonstration SIP, and concluded that contingency measures were required as part of an attainment demonstration SIP. *See Sierra Club* v. *EPA,* 294 F.3d 155, 164 (D.C.Cir. 2002). However, EPA believes that the court misconstrued the statute, and declines to follow the court's reasoning outside of the D.C. Circuit. EPA believes that the statute does not compel contingency measures as part of attainment demonstration SIPs because they are required as a separate submission under a separate statutory provision. See CAA sections 172(c)(9) and 182(c)(2).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7393–7]

Ohio: Proposed Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Ohio has applied to EPA for final authorization of certain changes to its hazardous waste program under the Resource Conservation and Recovery

Act (RCRA). EPA has reviewed Ohio's application and has determined that these changes satisfy all requirements needed to qualify for final authorization, and is proposing to authorize the State's changes.

DATES: If you have comments on Ohio's application for authorization for changes to its hazardous waste management program, you must submit them in writing by December 5, 2002.

ADDRESSES: Send written comments to Ms. Judy Feigler, Ohio Regulatory Specialist, U.S. Environmental Protection Agency, Waste, Pesticides and Toxics Division (DM–7J), 77 W. Jackson Blvd., Chicago, Illinois 60604. You can view and copy Ohio's application during normal business hours at the following addresses: EPA Region 5, 77 W. Jackson Blvd., Chicago, Illinois, contact: Ms. Judy Feigler, phone number: (312) 886–4179; or Ohio Environmental Protection Agency, 122 S. Front St., Columbus, Ohio, contact: Ms. Kit Arthur, phone number (614) 644–2932.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Feigler, Ohio Regulatory Specialist, U.S. Environmental Protection Agency, Waste, Pesticides and Toxics Division (DM–7J), 77 W. Jackson Blvd., Chicago, Illinois 60604, phone number: (312) 886–4179.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the federal program. As the federal program changes, states must change their programs and ask EPA to authorize the changes. Changes to state programs may be necessary when federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What Decisions Have We Made in This Rule?

EPA has determined that Ohio's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we are proposing to grant Ohio final authorization to operate its hazardous waste program with the changes described in the authorization application. Ohio will have responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New federal requirements and prohibitions imposed by federal regulations that EPA promulgates under the authority of HSWA take effect in authorized states before the states are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Ohio, including issuing permits, until the State is granted authorization to do so.

C. What Will Be the Effect if Ohio Is Authorized for These Changes?

If Ohio is authorized for these changes, a facility in Ohio subject to RCRA will have to comply with the authorized State requirements in lieu of the corresponding federal requirements in order to comply with RCRA. Additionally, such persons will have to comply with any applicable federally-issued requirements, such as, for example, HSWA regulations issued by EPA for which the State has not received authorization, and RCRA requirements that are not supplanted by authorized State-issued requirements. Ohio continues to have enforcement responsibilities under its state hazardous waste management program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, the authority to:

- Do inspections, and require monitoring, tests, analyses or reports;
- Enforce RCRA requirements and suspend or revoke permits; and
- Take enforcement actions regardless of whether the State has taken its own actions.

The action to approve these revisions would not impose additional requirements on the regulated community because the regulations for which Ohio will be authorized are already effective under State law and are not changed by the act of authorization.

D. What Happens if EPA Receives Comments That Oppose This Action?

If EPA receives comments that oppose this authorization, we will address those comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

E. What Has Ohio Previously Been Authorized For?

Ohio initially received final authorization effective June 30, 1989 (54 FR 27170–27174, June 28, 1989) to implement the RCRA hazardous waste management program. We granted authorization for changes to Ohio's program effective June 7, 1991 (56 FR 14203, April 8, 1991), as corrected effective August 19, 1991 (56 FR 28808, June 19, 1991)); effective September 25, 1995 (60 FR 51244, July 27, 1995); and effective December 23, 1996 (61 FR 54950, October 23, 1996).

F. What Changes Are We Proposing?

On June 25, 2002, Ohio submitted complete program revision applications, seeking authorization of its changes in accordance with 40 CFR 271.21. We have determined that Ohio's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization.

Ohio's program revisions are based on changes to the federal program and modifications initiated by the State. The federal and analogous State provisions involved in this proposed decision and the relevant corresponding checklists (if applicable) are listed in the following tables:

PROGRAM REVISIONS BASED ON FEDERAL RCRA CHANGES

Checklist No.	Description of federal requirement	**Federal Register**, beginning page, and publication date	Analogous state authority being authorized
58	Renewal of uniform manifest form	54 FR 45089, November 8, 1988	3745–52–20, effective December 30, 1989.
59	Miscellaneous units standards for owners/operators; correction.	54 FR 615, January 9, 1989	3745–50–44, effective December 7, 2000.
76	Criteria for listing toxic wastes; technical amendments.	55 FR 18726, May 4, 1990	3745–51–11, effective December 7, 2000.

PROGRAM REVISIONS BASED ON FEDERAL RCRA CHANGES—Continued

Checklist No.	Description of federal requirement	**Federal Register**, beginning page, and publication date	Analogous state authority being authorized
77	Double liners; correction	55 FR 19262, May 9, 1990	3745–56–21 and 3745–57–03, effective April 15, 1993.
81	Petroleum refiners primary and secondary oil/water/solids separation sludge listings, as amended.	55 FR 46354, November 2, 1990; as amended at 55 FR 51707, December 17, 1990.	3745–51–30 and 3745–51–31, effective December 7, 2000.
84	TCLP-chlorofluorocarbons	56 FR 5910, February 13, 1991	3745–51–04, effective July 27, 2001.
86	Removal of strontium sulfide from listings.	56 FR 7657, February 25, 1991	3745–51–11 and 3745–51–33, effective December 7, 2000.
88	Administrative stay for K069 listing	56 FR 19951, May 1, 1991	3745–51–32, effective December 7, 2000.
89	Petroleum refiners primary and secondary oil/water/solids separation sludge listings; correction.	56 FR 21955, May 13, 1991	3745–51–31, effective December 7, 2000.
90	Mining waste exclusion-final determination for several wastes.	56 FR 27300, June 13, 1991	3745–51–04, effective July 27, 2001; and 3745–51–11, effective December 7, 2000.
97	Exports of hazardous waste; technical corrections.	56 FR 43704, September 4, 1991	3745–52–53 and 3745–52–56, effective April 15, 1993.
99	Amendment to interim status standards for down-gradient ground water monitoring well locations at hazardous waste facilities.	56 FR 66365, December 23,1991	3745–50–10, effective December 7, 2000.
104	Oil filter exemption	57 FR 21524, May 20, 1992	3745–51–04, effective July 27, 2001.
107	Oil filter exemption-technical correction	57 FR 29220, July 1, 1992	3745–51–04, effective July 27, 2001.
110	Reportable quantity adjustment, listing of coke by-products wastes.	57 FR 37284, August 18, 1992	3745–51–04, effective July 27, 2001; and 3745–51–30 and 3745–51–32, effective September 2, 1997.
113	Liability requirements and financial responsibility.	53 FR 33938, September 1, 1988, as amended at 56 FR 30200, July 1, 1991; and 57 FR 42832, September 16, 1992.	3745–55–41 and 3745–55–47, effective September 2, 1997; and 3745–55–43, 3745–55–45, 3745–55–51, 3745–66–41, 3745–66–43, 3745–66–45, and 3745–66–47, effective December 7, 2000.
115	Reportable quantity adjustment, chlorinated toluene production wastes.	57 FR 47376, October 15, 1992	3745–51–32 and 3745–51–30, effective December 7, 2000.
117B	TCLP revision	57 FR 23062, June 1, 1992	3745–51–03, effective December 7, 2000.
118	Liquids in landfills II	57 FR 54452, November 18, 1992	3745–68–14, effective September 2, 1997; and 3745–50–10, 3745–54–13, 3745–57–14, 3745–57–16, 3745–65–13, and 3745–68–16, effective December 7, 2000.
119	TCLP revision, as amended	57 FR 55114, November 24, 1992; as amended at 58 FR 6854, February 2, 1993.	3745–51–24, effective September 2, 1997.
128	Wastes from wood surface protection	59 FR 458, January 4, 1994	3745–50–11 and 3745–51–11, effective December 7, 2000.
129	Treatability study sample exclusion	59 FR 8362, February 18, 1994	3745–51–04, effective July 27, 2001.
131	Recordkeeping instructions, technical amendment.	59 FR 13891, March 24, 1994	3745–54–73 and 3745–65–73, effective December 7, 2000.
132	Wastes from wood surface protection, correction.	59 FR 28484, June 2, 1994	3745–50–11, effective December 7, 2000.
133	Corrective action; treatment, storage, disposal facility, UST, and UIC systems; financial assurance; letter of credit.	59 FR 29958, June 10, 1994	3745–55–51, effective December 7, 2000.
135	Recovered oil exclusion, petroleum refining industry.	59 FR 38536, July 28, 1994	3745–51–03 and 3745–51–06, effective December 7, 2000; and 3745–51–04, effective July 27, 2001.
139	Testing and monitoring activities	60 FR 3089, January 13, 1995	3745–50–11, effective December 7, 2000.
140	Carbamate production and reportable quantities, as amended.	60 FR 7824, February 9, 1995; as amended at 60 FR 19165, April 17, 1995; and 60 FR 25619, May 12, 1995.	3745–51–03, 3745–51–11, 3745–51–30, 3745–51–32, and 3745–51–33, effective December 7, 2000.
141	Testing and monitoring activities; SW–846 amendments.	60 FR 17001, April 4, 1995	3745–50–11, effective December 7, 2000.
145	Liquids in landfills, test method added	60 FR 35703, July 11, 1995	3745–68–14, effective September 2, 1997; and 3745–57–14, effective December 7, 2000.

PROGRAM REVISIONS BASED ON FEDERAL RCRA CHANGES—Continued

Checklist No.	Description of federal requirement	**Federal Register**, beginning page, and publication date	Analogous state authority being authorized
150	Identification and listing, petroleum refining industry, correction.	61 FR 13103, March 26, 1996	3745–51–04, effective July 27, 2001.
168	Comparable fuel exclusion	63 FR 33782, June 19, 1998	3745–50–51, 3745–51–04, and 3745–51–38, effective July 27, 2001.

STATE-INITIATED PROGRAM CHANGES

State requirement		Analogous federal requirement—Federal rule
State rule	Effective date	
3745–50–21	March 9, 2001	40 CFR 124.6
3745–50–22	March 9, 2001	40 CFR 124.8
3745–50–30	March 9, 2001	40 CFR 270.12
3745–50–41	November 11, 1999	40 CFR 270.10
3745–50–42	March 9, 2001	40 CFR 270.11
3745–50–45	December 7, 2000	40 CFR 270.1(c)
3745–50–47	March 9, 2001	40 CFR 264.115, 40 CFR 265.115
3745–50–54	March 9, 2001	40 CFR 270.50
3745–50–57	December 7, 2000	40 CFR 270.61
3745–50–58	November 11, 1999	40 CFR 270.30
3745–51–01	February 11, 1992	40 CFR 261.1
3745–51–02	October 20, 1998	40 CFR 261.2
3745–51–08	December 7, 2000	40 CFR 261.8
3745–52–10	February 11, 1992	40 CFR 262.10
3745–52–12	February 11, 1992	40 CFR 262.12
3745–52–40	March 9, 2001	40 CFR 262.40
3745–53–11	September 2, 1997	40 CFR 263.11
3745–53–30	March 9, 2001	40 CFR 263.30
3745–55–15	November 11, 1999	40 CFR 264.115
3745–55–18	November 11, 1999	40 CFR 264.118
3745–55–44	November 11, 1999	40 CFR 264.144
3745–55–77	February 14, 1995	40 CFR 264.177
3745–56–20	November 11, 1999	40 CFR 264.220
3745–56–57	February 14, 1995	40 CFR 264.257
3745–56–70	November 11, 1999	40 CFR 264.270
3745–57–91	February 14, 1995	40 CFR 264.601
3745–65–11	December 7, 2000	40 CFR 265.11
3745–65–15	December 7, 2000	40 CFR 265.15
3745–65–90	March 9, 2001	40 CFR 265.90
3745–65–92	November 11, 1999	40 CFR 265.92
3745–66–15	November 11, 1999	40 CFR 265.115
3745–66–44	November 11, 1999	40 CFR 265.144
3745–67–73	February 14, 1995	40 CFR 265.273
3745–68–10	November 11, 1999	40 CFR 265.310
3745–69–30	February 14, 1995	40 CFR 265.430

G. Who Handles Permits After the Authorization Takes Effect?

Ohio will issue permits for all the provisions for which it is authorized and will administer the permits it issues. All permits issued by EPA prior to EPA authorizing Ohio for these revisions will continue in force until the effective date of the State's issuance or denial of a State RCRA permit, or the permit otherwise expires or is revoked. EPA will administer any RCRA hazardous waste permits or portions of permits which EPA issued prior to the effective date of this authorization until such time as Ohio has issued a corresponding State permit. EPA will not issue any more new permits or new portions of permits for provisions for which Ohio is authorized after the effective date of this authorization. EPA will continue to implement and issue permits for HSWA requirements for which Ohio is not yet authorized.

H. What Is Codification and Is EPA Codifying Ohio's Hazardous Waste Program as Authorized in This Rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart P for this authorization of Ohio's program changes until a later date.

I. How Would Authorizing Ohio for These Revisions Affect Indian Country (18 U.S.C. 1151) in Ohio?

Ohio is not authorized to carry out its hazardous waste program in Indian country, as defined in 18 U.S.C. 1151. Indian country includes:

1. All lands within the exterior boundaries of Indian reservations within or abutting the State of Ohio;

2. Any land held in trust by the U.S. for an Indian tribe; and

3. Any other land, whether on or off an Indian reservation that qualifies as Indian country.

Therefore, this action has no effect on Indian country. EPA retains the authority to implement and administer the RCRA program in Indian country. However, at this time, there is no Indian country within the State of Ohio.

J. Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action 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 action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This action does not have tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 9, 2000). This action 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 authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. This action does not include environmental justice-related issues that require consideration under Executive Order 12898 (59 FR 7929, February 16, 1994).

Under RCRA 3006(b), EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) 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 action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This proposed action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: September 26, 2002.

David A. Ullrich,

Acting Regional Administrator, Region 5.

[FR Doc. 02–26439 Filed 10–18–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–2321; MB Docket Nos. 02–296; 02–297; 02–298; 02–299; 02–300; 02–301; 02–302; RM–10571, RM–10572; RM–10574; RM–10575; RM–10576; RM–10578; RM–10579]

Radio Broadcasting Services; Broken Bow, Oklahoma, Colorado City, O'Brien, Panhandle, Shamrock, Stamford, Texas; and Taloga, Oklahoma

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes seven separate allotments in Broken Bow, Oklahoma, Colorado City, O'Brien, Panhandle, Shamrock, Stamford, Texas; and Taloga, Oklahoma proceedings in a multiple docket *Notice of Proposed Rule Making.* Katherine Pyeatt requests the allotment of Channel 261A at O'Brien, Texas as the first local aural transmission service at a site 3.7 kilometers (2.3 miles) north of the community at coordinates 33–24–47 NL and 99–51–02 WL. Katherine Pyeatt requests the allotment of Channel 295C2 at Stamford, Texas, as the third local aural transmission service at a site 7.8 kilometers (4.9 miles) north of the community at coordinates 33–00–57 NL and 99–47–46 WL. Linda Crawford requests the allotment of Channel 291C3 at Panhandle, Texas, as the community's first local aural transmission service at a site 18.0 kilometers (11.2 miles) east of the community at coordinates 35–20–38 NL and 101–10–54 WL. Maurice Salsa requests the allotment of Channel 271A at Shamrock, Texas as the second local aural transmission service at a site 2.4 kilometers (1.5 miles) west of the community at coordinates 35–12–22 NL and 100–16–23 WL. Linda Crawford requests the allotment of Channel 257A at Colorado City, Texas, as the community's third local aural transmission service at a site 10.1 kilometers (6.3 miles) northwest of the community at coordinates 32–26–23 NL and 100–57–29 WL. Jeraldine Anderson requests the allotment of Channel 232A at Broken Bow, Oklahoma, as the community's third FM channel at a site 10.2 kilometers (6.3 miles) northeast of the community at coordinates 34–04–37 NL and 94–38–58 WL. Robert Fabian requests the allotment of Channel 226A at Taloga, Oklahoma, as the community's first local aural transmission service at a site 7.8 kilometers (4.8 miles) south of the community at coordinates 35–57–57 NL and 98–59–11 WL.

DATES: Comments must be filed on or before: November 18, 2002 and reply comments must be filed on or before December 3, 2002.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners as follows: Katherine Pyeatt, 6655 Aintree Circle, Dallas, Texas 75214 (MB Docket Nos. 02–296, 02–297); Linda Crawford, 3500 Maple Avenue #1320, Dallas, Texas 75219 (MB Docket Nos. 02–298, 02–300); Maurice Salsa,

5615 Evergreen Valley Drive, Kingwood, Texas 77345 (MB Docket No. 02–299); Jeraldine Anderson, 1702 Cypress Drive, Irving, Texas 75061 (MB Docket No. 301); Robert Fabian, 4 Hickory Crossing Lane, Argyle, Texas 76226 (MB Docket No. 02–302).

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 02–296,02–297, 02–298, 02–299, 02–300, 02–301, 02–302, adopted September 11, 2002, and released, September 27, 2002. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

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

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Channel 232A at Broken Bow, and Taloga, Channel 226A.

3. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 257A at Colorado City, O'Brien, Channel 261A, Panhandle, Channel 291C3, Channel 271A at Shamrock, and Channel 233A at Stamford.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 02–26226 Filed 10–18–02; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 67, No. 203

Monday, October 21, 2002

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Notice of the National Agricultural Research, Extension, Education, and Economics Advisory Board Meeting

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, 5 U.S.C. App 2, the United States Department of Agriculture announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

DATES: The National Agricultural Research, Extension, Education, and Economics Advisory Board will meet on October 28–30, 2002.

The public may file written comments before or up to two weeks after the meeting with the contact person.

ADDRESSES: On October 28 and 29, 2002, the meeting will take place at the Capital Hilton Hotel, 16th and K Streets, NW., Washington, DC 20036. On October 30, 2002, the meeting will occur at the Economic Research Service, 1800 M Street, NW., Washington, DC 20036.

Written comments from the public may be sent to the Contact Person identified in this notice at: The National Agricultural Research, Extension, Education, and Economics Advisory Board; Research, Education, and Economics Advisory Board Office, Room 344–A, Jamie L. Whitten Building, United States Department of Agriculture, STOP 2255, 1400 Independence Avenue, SW., Washington, DC 20250–2255.

FOR FURTHER INFORMATION CONTACT: Deborah Hanfman, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board; telephone: (202) 720–3684; fax: (202) 720–6199; or e-mail: *dhanfman@reeusda.gov.*

SUPPLEMENTARY INFORMATION: On Monday, October 28, 2002, the National Agricultural Research, Extension, Education, and Economics Advisory Board will hold a general meeting at The Capital Hilton Hotel (South American Room A&B). In the morning, from 9:00 until 11:00 a.m., there will be an Orientation Session for newly appointed Board Members. The full Advisory Board Meeting begins at 1:00 p.m., which includes: general business; a special session on public comments to an Interagency Task Force Report on the National Agricultural Library; an update on the Agricultural Research Service's Peer Review Process for National Programs; and food and agricultural research related to the 2002 Farm Bill by the USDA Interagency Task Force, to be presented by Rodney Brown, Deputy Under Secretary for Research, Education, and Economics. A buffet reception with a guest speaker will follow from 7–9 p.m. in the Senate Room of The Capital Hilton Hotel.

On Tuesday, October 29, 2002, the Advisory Board will hold a Focus Session called ''Workforce Development for the Food, Agriculture, and Natural Resources System.'' The Secretary of Agriculture as well as other officials within and outside of USDA have been invited to speak on issues related to workforce development throughout the pipeline (*i.e.*, youth, RH, FFA, baccalaureate/undergraduate, graduate, and post-doctoral), with the goal of fostering a broad, strong and vital agricultural workforce for the future. By the end of the day, the Advisory Board will have voted nine members into the Board's Executive Committee, including the Chair and Vice Chair.

On Wednesday, October 30, 2002, the Advisory Board meeting will be held at USDA's Economic Research Service (ERS) facility, which is located at 1800 M Street NW., Washington, DC 20036 (Waugh Auditorium on the 3rd floor). ERS will conduct the program and highlight their key activities. At the end of the morning, the Advisory Board will discuss and wrap up any issues related to the 2½-day Board Meeting. The Board will also identify the main topic and date for the next Advisory Board Meeting (to be held in late winter or early spring of 2003).

The Advisory Board Meeting will adjourn by Wednesday, October 30, 2002, at 12 noon. At the end of each day there will be time available for public comments. Also, written comments for the public record will be welcomed before and up to two weeks following the Board meeting (by close of business November 14, 2002). All statements will become a part of the official records of the National Agricultural Research, Extension, Education, and Economics Advisory Board and will be kept on file for public review in the Research, Extension, Education, and Economics Advisory Board Office.

The findings of this Advisory Board Meeting and Focus Session will be based on input from speakers, other stakeholders, the general public, and Board discussions. They will be consolidated into recommendations to the Secretary of Agriculture, and disseminated to the land-grant colleges and universities as well as House and Senate agriculture-related committees/subcommittees of the U.S. Congress.

The consolidated meeting agenda is as follows:

October 28—9 a.m. to 11 a.m.—Orientation for New Board Members (Location: The Capital Hilton Hotel, South American Room A&B.)

October 28—1 p.m. to 5 p.m.—General Meeting, Reports & Updates (Location: The Capital Hilton Hotel, South American Room A&B.)

October 28—7 p.m. to 9 p.m.—Working Reception w/Guest Speaker (Location: The Capital Hilton Hotel, Senate Room.)

October 29—8 a.m. to 5 p.m.—Focus Session on Workforce Development; Election of Executive Committee Members (Location: The Capital Hilton Hotel, South American Room A&B.)

October 29—12 noon to 1 p.m.—Working Lunch w/Speaker (Location: The Capital Hilton Hotel, Foyer 2 and South American Room A&B.) 1 p.m. to 5 p.m.—Resume Focus Session

October 30—8 a.m. to 12 noon—Economic Research Service Program; Board Meeting Wrap Up and Plans for Next Meeting

(Location: Economic Research Service, Waugh Auditorium, 3rd Floor)

Done at Washington, DC this 16 day of October 2002.

Joseph J. Jen,

Under Secretary, Research, Education, and Economics.

[FR Doc. 02–26810 Filed 10–18–02; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl; Western Oregon and Washington, and Northwestern California; Removal of Survey and Manage Mitigation Measure Standards and Guidelines

AGENCIES: Forest Service, USDA; Bureau of Land Management, USDI. OR935 6334 PG NWFP GP3–0002.

ACTION: Notice of intent to prepare a supplement to a final environmental impact statement.

SUMMARY: The Forest Service and the Bureau of Land Management (BLM) (Collectively the Agencies) will prepare a supplemental environmental impact statement (SEIS) to meet the requirements of a Settlement Agreement pursuant to a lawsuit by Douglas Timber Operators against Forest Service and BLM. The proposed action, generally, is to change the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (Northwest Forest Plan), currently included in planning documents of the Forest Service and BLM. Specifically, the Agencies propose to remove the Survey and Manage mitigation measure standards and guidelines. Habitat needs of the affected rare or little-known species would rely on other elements of the Northwest Forest Plan and the existing Forest Service Sensitive Species and the BLM Special Status Species programs, as needed and appropriate. The proposed action would amend land and resource management plans for National Forests and BLM Districts within the range of the northern spotted owl (generally western Oregon and Washington, and northwestern California). This action will be addressed in a supplement to a final environmental impact statement because the affected species and their management were specifically addressed in the Agency's SEIS for Amendments to the Survey and Manage, Protection Buffer and other Mitigation Measures Standards and Guidelines, issued in November, 2000, and because the species and their habitat were also addressed in the SEIS for the Northwest Forest Plan, issued in February, 1994.

DATES: Comments concerning the scope of the analysis should be received in writing by November 20, 2002. No public scoping meetings are planned.

ADDRESSES: Send written comments concerning this proposal to: Comments, SEIS for Survey and Manage, PO Box 2965, Portland, Oregon 97203.

FOR FURTHER INFORMATION CONTACT: Richard C. Prather, SEIS Team Leader, PO Box 2965, Portland, Oregon 97203.

SUPPLEMENTARY INFORMATION: This SEIS will evaluate removing the Survey and Manage mitigation measure standards and guidelines. The SEIS may also consider the affected species for inclusion in the existing Forest Service Sensitive Species program and the BLM Special Status Species program as appropriate. This action would eliminate an overlapping program, increase efficiency and reduce costs.

Adoption of the proposed action would affect National Forest System (NFS) lands and public lands administered by the BLM within the range fo the northern spotted owl, generally in western Oregon and Washington, and in northwestern California. The Record of Decision for this SEIS will amend:

For the Forest Service, the National Forest Land and Resource Management Plans for Gifford Pinchot, Mt. Baker-Snoqualmie, Olympic, Wenatchee, and Okanogan National Forests in Washington; Deschutes, Mt. Hood, Rogue River, Siuslaw, Siskiyou, Umpqua, Willamette, and Winema National Forests in Oregon; and Six Rivers, Klamath, Lassen, Mendocino, Modoc, and Shasta-Trinity National Forests in California.

For the Bureau of Land Management, Resource Management Plans for Salem, Eugene, Roseburg, Medford, and Coos Bay Districts in Oregon; the Klamath Falls Resource Area of the Lakeview District, also in Oregon; and the Arcata, Redding, and Ukiah field offices in California. Also the King Range National Conservation Area Management Plan in the Arcata Resource Area in California. This decision would not apply to the Headwaters area also in California for which a separate management plan is being written.

Preliminary issues expected to be addressed in the SEIS include: the cost of implementing the Survey and Manage program, its effect on other Agency programs and priorities, and whether the proposed action meets all applicable laws and regulations including the Oregon and California Lands Act, the Federal Land Policy and Management Act, the National Forest Management Act, and the Endangered Species Act, and those statute's implementing regulations.

Although scoping is not required for supplements to environmental impact statements (40 CFR 1502.9(c)(4)), the Agencies are inviting scoping comments at this time. Comments are sought that will help the Agencies identify issues to be addressed in the SEIS, identify significant issues related to the proposed action, refine the proposed action, identify alternatives to the proposed action, and identify interested and affected persons. For comments to be most useful in this analysis, they should be submitted in writing by the date identified above. The Agencies have no plans to conduct public scoping meetings.

A scoping notice will be prepared and circulated to affected Federal, State, and local agencies, affected tribes, and individuals and organizations previously expressing an interest in the Survey and Manage standards and guidelines. The scoping notice, along with background information, will also be posted on the Internet: *http://or.blm.gov/surveyandmanagee*.

The Forest Service and BLM will be joint lead agencies for this analysis. Because of potential indirect effects to threatened or endangered species, the two agencies will consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service pursuant to the Endangered Species Act (ESA). However, none of the species covered by the Survey and Manage standards and guidelines is listed under ESA as threatened or endangered. Other Federal agencies including the Forest Service's Pacific Southwest Research Stations, Bureau of Indian Affairs, National Park Service, Environmental Protection Agency (EPA), U.S. Army Corps of Engineers, Natural Resources Conservation Service, the U.S. Geological Survey Biological Resources Division, EPA Research Laboratory, and Tribal, local, and state governments will also be involved.

The responsible officials for National Forest System lands will be the Regional Forester, Pacific Northwest Region, PO Box 3623, Portland, OR 97208 and the Regional Forester, Pacific Southwest Region, 1323 Club Drive, Vallejo, CA 94592. The responsible official for public lands administered by the BLM will be the State Director for Oregon and Washington, PO Box 2965, Portland, OR 97208 and the State Director for California, 2800 Cottage Way, Room W–1834, Sacramento, CA 95825.

The draft SEIS is expected to be filed with the EPA in January 2003 and will be available for public review. The comment period on the draft SEIS will be 90 days from the date the EPA

publishes the notice of availability in the **Federal Register**.

The Forest Service and BLM believe, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft EISs 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, 533 (1978). Also, environmental objections that could be raised at the draft EIS stage, but that are not raised until after completion of the final EIS, may be waived or dismissed by the courts. *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 90-day comment period so that substantive comments and objections are made available to the Forest Service and BLM at a time when the agencies can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service and BLM in identifying and considering issues and concerns on the proposed action, comments on the draft SEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft document. Comments may also address the adequacy of the draft SEIS or the 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 at 40 CFR 1503.3 in addressing these points.

It is expected that the final SEIS will be filed with the EPA approximately June 2003. The Agencies anticipate there will be a Record of Decision signed in July 2003 by the four responsible officials listed above.

Richard Sowa,

Acting Regional Forester, USFS R6.

Elaine Marquis-Brong,

State Director, BLM Oregon & Washington.

Dated: October 4, 2002.

Mike Pool,

State Director, California, USDI Bureau of Land Management.

Kent P. Connaughton,

Deputy Regional Forester, USFS Region 5.

[FR Doc. 02–26779 Filed 10–17–02; 11:07am]

BILLING CODE 4310–33–M

DEPARTMENT OF AGRICULTURE

Forest Service

White Pass Ski Area Expansion, Okanogan-Wenatchee and Gifford Pinchot National Forests, Yakima and Lewis Counties

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: On February 14, 2002, the Forest Service, USDA, published a Notice of Intent (NOI) in the **Federal Register** (67 FR 6906). The notice stated that the proposed action was to modify the present special use permit of the White Pass Company to authorize expansion into approximately 300 acres in Pigtail Basin for the purpose of providing additional ski opportunities. This revised NOI changes the size of the proposed expansion to approximately 770 acres and includes the larger Hogback Basin area. The revised date of filing the draft EIS is June 2003 and the revised filing of the final EIS is planned in December 2003.

DATES: Comments concerning the scope of the revised analysis should be received in writing by November 25, 2002.

ADDRESSES: Submit written comments and suggestions concerning the project to Randall Shepard, District Ranger, Naches Ranger District, 10061 Highway 12, Naches, WA 98937; phone 509–653–2205, Attn: White Pass Ski Area Expansion.

FOR FURTHER INFORMATION CONTACT: Questions and comments about this EIS should be directed to Susan Ranger, Project Planner, at Naches Ranger District, 10061 Highway 12, Naches, WA 98937; Phone 509–653–2205.

Dated: October 8, 2002.

Alan Quan,

Acting Forest Supervisor.

[FR Doc. 02–26663 Filed 10–18–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

Faulkes Telescope Corporation; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC

Docket Number: 02–030. *Applicant:* Faulkes Telescope Corporation, Honolulu, HI 96813. *Instrument:* Robotically Controlled 2 meter Astronomical Telescope. *Manufacturer:* Telescope Technologies Limited, United Kingdom. *Intended Use: See* notice at 67 FR 58354, September 16, 2002.

Comments: Comments dated September 26, 2002, were received from the University of Hawaii at Manoa in support of granting duty-free entry of the instrument. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides a research quality (2-meter primary mirror with better than arcsecond imaging performance) telescope that is robotically controlled and accessible via the Internet for observation and research use by students from the secondary school to university level having commonality with two identical telescopes for exchanged observations. The National Aeronautics and Space Administration advised October 10, 2002, that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 02–26715 Filed 10–18–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–427–815]

Notice of Correction to Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of correction to final results of countervailing duty administrative review.

SUMMARY: The Department is correcting Usinor's subsidy rate as listed in the notice of final results for the first administrative review of stainless steel sheet and strip in coils from France.

EFFECTIVE DATE: October 21, 2002.

FOR FURTHER INFORMATION CONTACT: Suresh Maniam at (202) 482–0176; Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the ''Act'') by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the ''Department'') regulations are references to the provisions codified at 19 CFR part 351 (April 2001).

Correction

On October 3, 2002, the Department published in the **Federal Register** a notice of final results for the first administrative review of stainless steel sheet and strip in coils from France (*see Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review*, 67 FR 62098 (October 3, 2002)). In the published version of that notice, the subsidy rate for Usinor was inadvertently listed as 1.90 percent *ad valorem. Id.* The correct subsidy rate for Usinor is 1.27 percent *ad valorem*. Therefore, we are correcting Usinor's subsidy rate to be 1.27 percent *ad valorem*.

This notice is issued and published pursuant to section 777(i)(1) of the Act.

Dated: October 10, 2002.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 02–26716 Filed 10–18–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

[I.D. 101602B]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Revisions to the American Lobster Requirements for Historical Participation in Areas 3, 4, and 5.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Emergency.

Burden Hours: 308.

Number of Respondents: 934.

Average Hours Per Response: 15 minutes for a cover letter; 60 minutes per affidavit; and 15 minutes to provide corroborating documentation in support of the loss of eligibility documentation.

Needs and Uses: NOAA is seeking approval for revisions to requirements that have been approved under OMB Control No. 0648–0450. The revisions would be for a cover letter, for documentation purposes, showing proof of meeting eligibility criteria for this limited entry program, and for an appeals process for documentary hardship (where eligibility documentation is unavailable due to fire, flood, or other factors beyond the applicant's control). This information is needed to more effectively manage the program and to provide fairness.

Affected Public: Business or other for-profit organizations, individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent by November 1, 2002, to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 11, 2002.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02–26696 Filed 10–18–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100802C]

Endangered Species; File No. 1346

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for modification.

SUMMARY: Notice is hereby given that Thomas B. McCormick, Channel Islands Marine Resource Institute (CIMRI), P.O. Box 1627, Port Hueneme, California 93044, has requested a modification to scientific research and enhancement Permit No. 1346.

DATES: Written or telefaxed comments must be received on or before November 20, 2002.

ADDRESSES: The modification request and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular amendment request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period. Please note that comments will not be accepted by e-mail or other electronic media.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Trevor Spradlin, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 1346, issued on May 17, 2002 (67 FR 36158), is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered

and threatened species (50 CFR 222–226).

Permit No. 1346 authorizes the permit holder to captively maintain bred white abalone for scientific research and enhancement at the CIMRI hatchery. Research activities include feeding studies, propagation studies and studies identified as goals for the long-term recovery of the white abalone. The permit holder requests authorization to collect 20 white abalone per year off of the southern California coast. These animals will then be propagated, treated for wounds, tagged and inoculated against withering syndrome. The progeny of these animals will have the same treatments and be subjects of the studies mentioned above as well as behavioral studies. In accordance with recommendations from the recovery team, the permit holder will also place these animals back into their natural habitat. The permit holder is expecting mortalities of 9.3 million per year for early juveniles, 15,000 per year for juveniles and adults and 134,000 in 2002 to reduce stock due to space limitations.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: October 15, 2002.

Eugene T. Nitta,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–26695 Filed 10–18–02; 8:45 am]

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CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

AGENCY: Corporation for National and Community Service.

ACTION: Policy guidance document.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation'') adopts final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (the Corporation's Recipient LEP Guidance). The Corporation's Recipient LEP Guidance is issued pursuant to Executive Order 13166, and supplants existing guidance on the same subject originally published at 66 FR 3548 (January 16, 2001).

DATES: This ''Guidance'' is effective October 21, 2002.

FOR FURTHER INFORMATION CONTACT: The Corporation for National and Community Service, Nancy B. Voss, Director, Equal Opportunity Office, 1201 New York Avenue, NW., Washington, DC 20525. Telephone 202–606–5000, extension 309; TDD: 202–565–2799.

SUPPLEMENTARY INFORMATION: Under Department of Justice regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* (Title VI), recipients of federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP). See 28 CFR 42.104(b)(2). Executive Order 13166, reprinted at 65 FR 50121 (August 16, 2000), directs each federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation. Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in Department of Justice Policy Guidance entitled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency.'' See 65 FR 50123 (August 16, 2000).

Initial guidance on obligations of recipients of the Corporation to take reasonable steps to ensure access by LEP persons was published on January 16, 2001. See 66 FR 3548. That guidance document was republished for additional public comment on February 5, 2002. See 67 FR 5258.

The Corporation received two comments in response to its February 5, 2002 publication of revised draft guidance on obligations of the Corporation's recipients to take reasonable steps to ensure access to programs and activities by LEP persons. The comments reflected the views of organizations serving LEP populations. While the comments identified areas for improvement and/or revision, the overall response to the draft of the Corporation's Recipient LEP Guidance was favorable.

Specific comments suggested strengthening the guidance to ensure that ''grantee'' includes every entity receiving direct or indirect federal financial assistance from the Corporation and that all of the recipient's activities are covered, as well as providing more guidance to recipients in promoting sub-recipients' compliance and recipients' liability for failure to do so. Additional comments requested that grantees be required to document language assistance efforts; that the balancing test not be used to deny LEP individuals access to important services; that recipients be provided assistance in determining the population within which to assess the number of LEP persons without relying on census data alone; that staff be required to receive periodic refresher training; that maintaining a written policy for language access be mandatory rather than advisory and that greater detail be included regarding policies, such as directing recipients to post notices and provide a telephone voicemail menu and addressing goals and accountability; that a ''safe harbor'' for translation of documents be included; and that translators in addition to community organizations check translated documents.

Subsequent to the Corporation's publication and republication of its Guidance, the Corporation received notification from the Department of Justice that the Corporation should conform its Guidance to guidance issued by the Department of Justice. By memorandum to federal agencies received July 8, 2002, Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Department of Justice, stated that it is critical that agency LEP recipient guidance documents be consistent with one another. He noted that in its March 14, 2002 Report to Congress on the Assessment of the Total Benefits and Costs of Implementing Executive Order Number 13166 (*http://www.lep.gov*), the Office of Management and Budget has made it clear that the benefits of Executive Order 13166 can be substantial, both to the recipients and to the ultimate beneficiaries. However, OMB also stressed that in order to reduce costs of compliance, consistency in agency guidance documents is critical, particularly since many recipients receive assistance from more than one federal agency. Therefore, Assistant Attorney General Boyd directed federal agencies to use the Department of Justice's final guidance to Department of Justice recipients published at 67 FR 41455 on June 18, 2002 as their model for publication or republication of recipient LEP guidance, modifying examples to make them relevant to the particular agency's recipients.

Accordingly, the Corporation adopted the Department of Justice's model in

issuing this final version of the Corporation's Guidance. Therefore, we are not responding directly to the comments received by the Corporation. We believe that the Department of Justice fully considered the issues identified by those commenting on the Corporation's Guidance when the Department of Justice issued its final guidance.

The text of the Corporation's final guidance document appears below.

It has been determined that this Guidance, which supplants existing Guidance on the same subject previously published at 66 FR 3548 (January 16, 2001), does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553.

Dated: October 15, 2002.

Wendy Zenker,

Chief Operating Officer.

I. Introduction

Most individuals living in the United States read, write, speak and understand English. There are many individuals, however, for whom English is not their primary language. For instance, based on the 2000 census, over 26 million individuals speak Spanish and almost 7 million individuals speak an Asian or Pacific Island language at home. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or ''LEP.'' While detailed data from the 2000 census has not yet been released, 26% of all Spanish-speakers, 29.9% of all Chinese-speakers, and 28.2% of all Vietnamese-speakers reported that they spoke English ''not well'' or ''not at all'' in response to the 1990 census.

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by federally funded programs and activities. The Federal Government funds an array of services that can be made accessible to otherwise eligible LEP persons. The Federal Government is committed to improving the accessibility of these programs and activities to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. Recipients should not overlook the long-term positive impacts of incorporating or offering English as a Second Language (ESL) programs in parallel with language assistance services. ESL courses can serve as an important adjunct to a proper LEP plan. However, the fact that ESL classes are made available does not obviate the statutory and regulatory requirement to provide meaningful access for those who are not yet English proficient. Recipients of federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services.[1]

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This policy guidance clarifies existing legal requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.[2] These are the same criteria the Corporation will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations.

Many commentators have noted that some have interpreted the case of *Alexander* v. *Sandoval,* 532 U.S. 275 (2001), as impliedly striking down the regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. The Department of Justice has taken the position that this is not the case, and has reaffirmed its LEP Guidance to federal grant-making agencies. Accordingly, we will strive to ensure that federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.

[1] The Corporation recognizes that many recipients had language assistance programs in place prior to the issuance of Executive Order 13166. This policy guidance provides a uniform framework for a recipient to integrate, formalize, and assess the continued vitality of these existing and possibly additional reasonable efforts based on the nature of its program or activity, the current needs of the LEP populations it encounters, and its prior experience in providing language services in the community it serves.

[2] The policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take responsible steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English proficient.

II. Legal Authority

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall ''on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' Section 602 authorizes and directs federal agencies that are empowered to extend federal financial assistance to any program or activity ''to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability.'' 42 U.S.C. 2000d–1.

Department of Justice regulations promulgated pursuant to section 602 forbid recipients from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.'' 28 CFR 42.104(b)(2). The Corporation's regulations impose the same prohibitions on recipients. 45 CFR 1203.4.

The Supreme Court, in *Lau* v. *Nichols,* 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of Department of Justice, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination. In Lau, a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs.

On August 11, 2000, Executive Order 13166 was issued. ''Improving Access to Services for Persons with Limited English Proficiency,'' 65 FR 50121 (August 16, 2000). Under that order, every federal agency that provides financial assistance to non-federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' or from ''utiliz[ing] criteria or methods

of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

On that same day, Department of Justice issued a general guidance document addressed to ''Executive Agency Civil Rights Officers'' setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. ''Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons With Limited English Proficiency,'' 65 FR 50123 (August 16, 2000) (Department of Justice ''LEP Guidance'').

Pursuant to Executive Order 13166, the Corporation developed its own guidance document for recipients and initially issued it on January 16, 2001. ''Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,'' 66 FR 3548 (January 16, 2001). Subsequent to the Corporation's publication and republication of its Guidance for further comment on February 5, 2002, the Corporation received notification from the Department of Justice that the Corporation should conform its Guidance to guidance issued by the Department of Justice. By memorandum to federal agencies received July 8, 2002, Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Department of Justice, stated that it is critical that agency LEP recipient guidance documents be consistent with one another. Assistant Attorney General Boyd directed federal agencies to use the Department of Justice's final guidance to Department of Justice recipients published at 67 FR 41455 on June 18, 2002 as their model for publication or republication of recipient LEP guidance, modifying examples to make them relevant to the particular agency's recipients.

This guidance document is thus published pursuant to Executive Order 13166 and supplants the January 16, 2001 publication in light of Assistant Attorney General Boyd's July 8, 2002 clarifying memorandum.

III. Who Is Covered?

All recipients of federal financial assistance from the Corporation are required to provide meaningful access to LEP persons.[3] Federal financial assistance includes grants, cooperative agreements, training, technical assistance, use of equipment, donations of surplus property, and other assistance. A grantee is any entity receiving federal financial assistance from the Corporation to operate a federally assisted program. Recipients of the Corporation's assistance include, for example:

- State Commissions.
- AmeriCorps*VISTA and Senior Corps sponsors.
- State educational agencies and schools from elementary through graduate level.
- AmeriCorps*NCCC projects.
- Community based organizations, both secular and faith-based.
- Non-profits, from national organizations such as Boys and Girls Clubs of America to neighborhood entities such as senior centers.

Subrecipients likewise are covered when federal funds are passed through from one recipient to a subrecipient.

Coverage extends to a recipient's entire program or activity, *i.e.*, to all parts of a recipient's operations. This is true even if only one part of the recipient receives the federal assistance.[4]

Example: The Corporation provides assistance to a school to facilitate an after school program. The entire school system'not just the particular school'is covered.

Finally, some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to federal non-discrimination requirements, including those applicable to the provision of federally assisted services to persons with limited English proficiency.

IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or ''LEP,'' entitled to language assistance with respect to a particular type of service, benefit, or encounter.

Examples of populations likely to include LEP persons who are encountered and/or served by the Corporation's recipients and should be considered when planning language services include, but are not limited to:

- Applicants for or participants enrolled in national service programs (AmeriCorps, National Senior Service Corps or Learn and Serve America).
- Persons receiving services, or eligible to receive, services performed by participants in national service programs or by other portions of the recipient's program or activity.

V. How Does a Recipient Determine the Extent of Its Obligation To Provide LEP Services?

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits.

After applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient for the different types of programs or activities in which it engages. For instance, some of a recipient's activities will be more important than others and/or have greater impact on or contact with LEP persons, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. Recipients of the Corporation should apply the following four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps they should take to ensure meaningful access for LEP persons.

[3] Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the DOJ LEP Guidance are to additionally apply to the programs and activities of federal agencies, including the Corporation.

[4] However, if a federal agency were to decide to terminate federal funds based on noncompliance with Title VI or its regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d–1.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

One factor in determining what language services recipients should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons ''eligible to be served, or likely to be directly affected, by'' a recipient's program or activity are those who are served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that has been approved by a federal grant agency as the recipient's service area. However, where, for instance, a State Commission serves a large LEP population, the appropriate service area is most likely the geographic service areas or operating sites defined in the Corporation's grant applications, and not the entire state. Where no service area has previously been approved, the relevant service area may be that which is approved by state or local authorities or designated by the recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations.

Recipients should first examine their prior experiences with LEP encounters and determine the breadth and scope of language services that were needed. In conducting this analysis, it is important to include language minority populations that are eligible for their programs or activities but may be underserved because of existing language barriers. Other data should be consulted to refine or validate a recipient's prior experience, including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments.[5] Community agencies, school systems, religious organizations, legal aid entities, and others can often assist in identifying populations for whom outreach is needed and who would benefit from the recipients' programs and activities were language services provided.

(2) The Frequency With Which LEP Individuals Come in Contact With the Program

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with an LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intensified solution. If an LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual's program or activity contact is unpredictable or infrequent. But even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services under the program in question. This plan need not be intricate. It may be as simple as being prepared to use one of the commercially-available telephonic interpretation services to obtain immediate interpreter services. In applying this standard, recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

(3) The Nature and Importance of the Program, Activity, or Service Provided by the Program

The more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The obligations to communicate information in situations involving health and safety (such as home visits to the frail elderly, vaccinations and immunizations, maternal health screening); disaster response; homeland security; legal rights (such as assisting persons preparing to apply for citizenship or enrolling for government or social services) differ, for example, from those to provide recreational programming. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, ''reasonable steps'' may cease to be reasonable where the costs imposed substantially exceed the benefits.

Resource and cost issues, however, can often be reduced by technological advances; the sharing of language assistance materials and services among and between recipients, advocacy groups, and Federal grant agencies; and reasonable business practices. Where appropriate, training bilingual staff to act as interpreters and translators, information sharing through industry groups, telephonic and video conferencing interpretation services, pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be ''fixed'' later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, or the formalized use of qualified community volunteers, for example, may help reduce costs.[6] Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

This four-factor analysis necessarily implicates the ''mix'' of LEP services required. Recipients have two main ways to provide language services: Oral

[5] The focus of the analysis is on lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language who speak or understand English less than well. Some of the most commonly spoken languages other than English may be spoken by people who are also overwhelmingly proficient in English. Thus, they may not be the languages spoken most frequently by limited English proficient individuals. When using demographic data, it is important to focus in on the languages spoken by those who are not proficient in English.

[6] Small recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective.

interpretation either in person or via telephone interpretation service (hereinafter ''interpretation'') and written translation (hereinafter ''translation''). Oral interpretation can range from on-site interpreters for critical services provided to a high volume of LEP persons to access through commercially-available telephonic interpretation services. Written translation, likewise, can range from translation of an entire document to translation of a short description of the document. In some cases, language services should be made available on an expedited basis while in others the LEP individual may be referred to another office of the recipient for language assistance.

The correct mix should be based on what is both necessary and reasonable in light of the four-factor analysis. For instance, programs focusing on providing critical services to immigrants and refugees, such as providing assistance with enrollment in public services or access to emergency or medical care, may need immediate oral interpreters available and should give serious consideration to hiring some bilingual staff. (Of course, many recipients focusing on serving LEP populations have already made such arrangements.) In contrast, there may be circumstances where the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language services may be high—such as in the case of a voluntary general public tour of a public facility—in which pre-arranged language services for the particular service may not be necessary. Regardless of the type of language service provided, quality and accuracy of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient. Recipients have substantial flexibility in determining the appropriate mix.

VI. Selecting Language Assistance Services

Recipients have two main ways to provide language services: oral and written language services. Quality and accuracy of the language service is critical in order to avoid serious consequences to the LEP person and to the recipient.

A. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the following options for providing competent interpreters in a timely manner:

Competence of Interpreters. When providing oral assistance, recipients should ensure competency of the language service provider, no matter which of the strategies outlined below are used. Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to do written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should ensure that they:

Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (*e.g.*, consecutive, simultaneous, summarization, or sight translation); Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology used by the LEP person;[7] and understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires.

Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in contacts with health care providers, social services, schools, and public services).

Some recipients, such as those dealing with assisting indigents dependent on the recipient for interpretation with health care providers, law enforcement or administrative boards, may have additional self-imposed requirements for interpreters. Where such proceedings are lengthy, the interpreter will likely need breaks and team interpreting may be appropriate to ensure accuracy and to prevent errors caused by mental fatigue of interpreters.

While quality and accuracy of language services is critical, the quality and accuracy of language services is nonetheless part of the appropriate mix of LEP services required. The quality and accuracy of language services in a hospital emergency room, for example, must be extraordinarily high, while the quality and accuracy of language services in a bicycle safety class need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner. To be meaningfully effective, language assistance should be timely. While there is no single definition for ''timely'' applicable to all types of interactions at all times by all types of recipients, one clear guide is that the language assistance should be provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. For example, when the timeliness of services is important, such as with certain activities of recipients providing health and safety services or disaster response, and when important rights are at issue, a recipient would likely not be providing meaningful access if it had one bilingual staffer available one day a week to provide the service. Such conduct would likely result in delays for LEP persons that would be significantly greater than those for English proficient persons. Conversely, where access to or exercise of a service, benefit, or right is not effectively precluded by a reasonable delay, language assistance can likely be delayed for a reasonable period.

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. Recipients can, for example, fill public contact positions, such teachers, service providers, or program directors, with staff who are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff are also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting. Being bilingual does not necessarily mean that a person has the ability to interpret. In addition, there may be times when the role of the

[7] Many languages have ''regionalisms,'' or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, because there may be languages which do not have an appropriate direct interpretation of some legal terms and the interpreter should be so aware and be able to provide the most appropriate interpretation. The interpreter should likely make the recipient aware of the issue and the interpreter and recipient can then work to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate.

bilingual employee may conflict with the role of an interpreter. Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff are fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to provide accurate and meaningful communication with an LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer speedy interpreting assistance in many different languages. They may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone.

Although telephonic interpretation services are useful in many situations, it is important to ensure that, when using such services, the interpreters used are competent to interpret any technical or legal terms specific to a particular program that may be important parts of the conversation. Nuances in language and non-verbal communication can often assist an interpreter and cannot be recognized over the phone. Video teleconferencing may sometimes help to resolve this issue where necessary. In addition, where documents are being discussed, it is important to give telephonic interpreters adequate opportunity to review the document prior to the discussion and any logistical problems should be addressed.

Using Community Volunteers. In addition to consideration of bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure meaningful access by LEP persons, use of recipient-coordinated community volunteers, working with, for instance, community-based organizations may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. They may be particularly useful in providing language access for a recipient's less critical programs and activities. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and to help ensure that services are available more regularly.

Use of Family Members or Friends as Interpreters. Although recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, where LEP persons so desire, they should be permitted to use, at their own expense, an interpreter of their own choosing (whether a professional interpreter, family member or friend) in place of or as a supplement to the free language services expressly offered by the recipient. LEP persons may feel more comfortable when a trusted family member or friend acts as an interpreter. In addition, in exigent circumstances that are not reasonably foreseeable, temporary use of interpreters not provided by the recipient may be necessary. However, with proper planning and implementation, recipients should be able to avoid most such situations.

Recipients, however, should take special care to ensure that family, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own interest in accurate interpretation. In many circumstances, family members (especially children) or friends are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (*e.g.*, sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community. In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to protect themselves or another perpetrator in a domestic violence or other criminal matter. For these reasons, when oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LEP person. For the Corporation's recipient programs and activities, this is particularly true in situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services.

While issues of competency, confidentiality, and conflict of interest in the use of family members (especially children) or friends often make their use inappropriate, the use of these individuals as interpreters may be an appropriate option where proper application of the four factors would lead to a conclusion that recipient-provided services are not necessary. An example of this is a voluntary educational tour of a public facility offered to the public. There, the importance and nature of the activity may be relatively low and unlikely to implicate issues of confidentiality, conflict of interest, or the need for accuracy. In addition, the resources needed and costs of providing language services may be high. In such a setting, an LEP person's use of family, friends, or others may be appropriate.

If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether a record of that choice and of the recipient's offer of assistance is appropriate. Where precise, complete, and accurate interpretations or translations of information and/or testimony are critical for medical or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use his or her own interpreter as well. Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using children as interpreters. The recipient should take care to ensure that

the LEP person's choice is voluntary, that the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and that the LEP person knows that a competent interpreter could be provided by the recipient at no cost.

B. Written Language Services (Translation)

Translation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language).

What Documents Should be Translated? After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently-encountered LEP group eligible to be served and/or likely to be affected by the recipient's program.

Such written materials could include, for example:

- Applications for benefits or services;
- Consent forms;
- Documents containing important information regarding participation in a program (such as descriptions of eligibility for tutoring, assignment of a Senior Companion, instructions for filing for reimbursement of expenses, application for health care or child care benefits);
- Notices pertaining to the reduction, denial or termination of services or benefits, or to the right to appeal such actions or that require a response from beneficiaries;
- The member contract, job description, and an explanation of the Grievance Procedure;
- Notices advising LEP persons of the availability of free language assistance; and
- Other outreach materials.

Whether or not a document (or the information it solicits) is ''vital'' may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. For instance, applications for bicycle safety courses should not generally be considered vital, whereas applications for benefits regarding disaster relief, medical services or housing could be considered vital. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across its various activities, what documents are ''vital'' to the meaningful access of the LEP populations they serve.

Classifying a document as vital or non-vital is sometimes difficult, especially in the case of outreach materials like brochures or other information on rights and services. Awareness of rights or services is an important part of ''meaningful access.'' Lack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access. Thus, where a recipient is engaged in community outreach activities in furtherance of its activities, it should regularly assess the needs of the populations frequently encountered or affected by the program or activity to determine whether certain critical outreach materials should be translated. Community organizations may be helpful in determining what outreach materials may be most helpful to translate. In addition, the recipient should consider whether translations of outreach material may be made more effective when done in tandem with other outreach methods, including utilizing the ethnic media, schools, religious, and community organizations to spread a message.

Sometimes a document includes both vital and non-vital information. This may be the case when the document is very large. It may also be the case when the title and a phone number for obtaining more information on the contents of the document in frequently-encountered languages other than English is critical, but the document is sent out to the general public and cannot reasonably be translated into many languages. Thus, vital information may include, for instance, the provision of information in appropriate languages other than English regarding where a LEP person might obtain an interpretation or translation of the document.

Into What Languages Should Documents be Translated? The languages spoken by the LEP individuals with whom the recipient has contact determine the languages into which vital documents should be translated. A distinction should be made, however, between languages that are frequently encountered by a recipient and less commonly-encountered languages. Many recipients serve communities in large cities or across the country. They regularly serve LEP persons who speak dozens and sometimes over 100 different languages. To translate all written materials into all of those languages is unrealistic. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources.

Nevertheless, well-substantiated claims of lack of resources to translate all vital documents into dozens of languages do not necessarily relieve the recipient of the obligation to translate those documents into at least several of the more frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time. As a result, the extent of the recipient's obligation to provide written translations of documents should be determined by the recipient on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis. Because translation is a one-time expense, consideration should be given to whether the upfront cost of translating a document (as opposed to oral interpretation) should be amortized over the likely lifespan of the document when applying this four-factor analysis.

Safe Harbor. Many recipients would like to ensure with greater certainty that they comply with their obligations to provide written translations in languages other than English. Paragraphs (a) and (b) outline the circumstances that can provide a ''safe harbor'' for recipients regarding the requirements for translation of written materials. A ''safe harbor'' means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations.

The failure to provide written translations under the circumstances outlined in paragraphs (a) and (b) does not mean there is non-compliance. Rather, they provide a common starting point for recipients to consider whether and at what point the importance of the service, benefit, or activity involved; the nature of the information sought; and the number or proportion of LEP persons served call for written translations of commonly-used forms into frequently-encountered languages other than English. Thus, these paragraphs merely provide a guide for recipients that would like greater certainty of compliance than can be provided by a fact-intensive, four-factor analysis.

Example: Even if the safe harbors are not used, if written translation of a certain document(s) would be so burdensome as to defeat the legitimate objectives of its program, the translation of the written materials is not necessary. Other ways of providing meaningful access, such as effective oral interpretation of certain vital

documents, might be acceptable under such circumstances.

Safe Harbor. The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The Corporation recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable. For example, programs that address the needs of immigrants and refugees who may not be literate should, where appropriate, ensure that crucial information regarding medical, financial or legal rights have been explained.

Competence of Translators. As with oral interpreters, translators of written documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting, and a person who is a competent interpreter may or may not be competent to translate.

Particularly where medical, legal or other vital documents are being translated, competence can often be achieved by use of certified translators. Certification or accreditation may not always be possible or necessary.[8] Competence can often be ensured by having a second, independent translator ''check'' the work of the primary translator. Alternatively, one translator can translate the document, and a second, independent translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called ''back translation.''

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English language version or has no relevant equivalent meaning.[9] Community organizations may be able to help consider whether a document is written at a good level for the audience. Likewise, consistency in the words and phrases used to translate terms of art, legal, or other technical concepts helps avoid confusion by LEP individuals and may reduce costs.

While quality and accuracy of translation services is critical, the quality and accuracy of translation services is nonetheless part of the appropriate mix of LEP services required. For instance, documents that are simple and have no legal or other consequence for LEP persons who rely on them may use translators that are less skilled than important documents with legal or other information upon which reliance has important consequences (including, *e.g.*, information or documents of recipients regarding certain health and safety services and certain legal rights). The permanent nature of written translations, however, imposes additional responsibility on the recipient to ensure that the quality and accuracy permit meaningful access by LEP persons.

VII. Elements of Effective Plan on Language Assistance for LEP Persons

After completing the four-factor analysis and deciding what language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs of the LEP populations they serve. Recipients have considerable flexibility in developing this plan. The development and maintenance of a periodically-updated written plan on language assistance for LEP persons (''LEP plan'') for use by recipient employees serving the public will likely be the most appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance.

Moreover, such written plans would likely provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. These benefits should lead most recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services. Despite these benefits, certain recipients of the Corporation, such as recipients serving very few LEP persons and recipients with very limited resources, may choose not to develop a written LEP plan. However, the absence of a written LEP plan does not obviate the underlying obligation to ensure meaningful access by LEP persons to a recipient's program or activities. Accordingly, in the event that a recipient elects not to develop a written plan, it should consider alternative ways to articulate in some other reasonable manner a plan for providing meaningful access. Entities having significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very helpful in providing important input into this planning process from the beginning.

The following five steps may be helpful in designing an LEP plan and are typically part of effective implementation plans.

(1) Identifying LEP Individuals Who Need Language Assistance

The first two factors in the four-factor analysis require an assessment of the number or proportion of LEP individuals eligible to be served or encountered and the frequency of encounters. This requires recipients to identify LEP persons with whom it has contact.

One way to determine the language of communication is to use language identification cards (or ''I speak cards''), which invite LEP persons to identify their language needs to staff. Such cards, for instance, might say ''I speak Spanish'' in both Spanish and English, ''I speak Vietnamese'' in both English and Vietnamese, etc. To reduce costs of compliance, the federal government has made a set of these cards available on the Internet. The Census Bureau ''I speak card'' can be found and downloaded at *http://www.usdoj.gov/crt/cor/13166.htm.* When records are

[8] For those languages in which no formal accreditation currently exists, a particular level of membership in a professional translation association can provide some indicator of professionalism.

[9] For instance, there may be languages which do not have an appropriate direct translation of some legal terms and the translator should be able to provide an appropriate translation. The translator should likely also make the recipient aware of this. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate. Recipients will find it more effective and less costly if they try to maintain consistency in the words and phrases used to translate terms of art and legal or other technical concepts. Creating or using already-created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous translations of similar material by the recipient, other recipients, or federal agencies may be helpful.

normally kept of past interactions with members of the public, the language of the LEP person can be included as part of the record. In addition to helping employees identify the language of LEP persons they encounter, this process will help in future applications of the first two factors of the four-factor analysis. In addition, posting notices in commonly encountered languages notifying LEP persons of language assistance will encourage them to self-identify.

(2) Language Assistance Measures

An effective LEP plan would likely include information about the ways in which language assistance will be provided. For instance, recipients may want to include information on at least the following:

- Types of language services available.
- How staff can obtain those services.
- How to respond to LEP callers.
- How to respond to written communications from LEP persons.
- How to respond to LEP individuals who have in-person contact with recipient staff.
- How to ensure competency of interpreters and translation services.

(3) Training Staff

Staff should know their obligations to provide meaningful access to information and services for LEP persons. An effective LEP plan would likely include training to ensure that:

- Staff know about LEP policies and procedures.
- Staff having contact with the public are trained to work effectively with in-person and telephone interpreters.

Recipients may want to include this training as part of the orientation for new employees. It is important to ensure that all employees in public contact positions are properly trained. Recipients have flexibility in deciding the manner in which the training is provided. The more frequent the contact with LEP persons, the greater the need will be for in-depth training. Staff with little or no contact with LEP persons may only have to be aware of an LEP plan. However, management staff, even if they do not interact regularly with LEP persons, should be fully aware of and understand the plan so they can reinforce its importance and ensure its implementation by staff.

(4) Providing Notice to LEP Persons

Once an agency has decided, based on the four factors, that it will provide language services, it is important for the recipient to let LEP persons know that those services are available and that they are free of charge. Recipients should provide this notice in a language LEP persons will understand. Examples of notification that recipients should consider include:

- Posting signs in intake areas and other entry points. When language assistance is needed to ensure meaningful access to information and services, it is important to provide notice in appropriate languages in intake areas or initial points of contact so that LEP persons can learn how to access those language services. This is particularly true in areas with high volumes of LEP persons seeking access to certain services or activities run by recipients of the Corporation dealing with assisting individuals in accessing health, safety or social services. For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered. They should explain how to get the language help.[10]
- Stating in outreach documents that language services are available from the agency. Announcements could be in, for instance, brochures, booklets, and in outreach and recruitment information. These statements should be translated into the most common languages and could be ''tagged'' onto the front of common documents.
- Working with community-based organizations and other stakeholders to inform LEP individuals of the recipients' services, including the availability of language assistance services.
- Using a telephone voice mail menu. The menu could be in the most common languages encountered. It should provide information about available language assistance services and how to get them.
- Including notices in local newspapers in languages other than English.
- Providing notices on non-English-language radio and television stations about the available language assistance services and how to get them.
- Presentations and/or notices at schools and religious organizations.

(5) Monitoring and Updating the LEP Plan

Recipients should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees. In addition, recipients should consider whether changes in demographics, types of services, or other needs require annual reevaluation of their LEP plan. Less frequent reevaluation may be more appropriate where demographics, services, and needs are more static. One good way to evaluate the LEP plan is to seek feedback from the community.

In their reviews, recipients may want to consider assessing changes in:

- Current LEP populations in service area or population affected or encountered.
- Frequency of encounters with LEP language groups.
- Nature and importance of activities to LEP persons.
- Availability of resources, including technological advances and sources of additional resources, and the costs imposed.
- Whether existing assistance is meeting the needs of LEP persons.
- Whether staff knows and understands the LEP plan and how to implement it.
- Whether identified sources for assistance are still available and viable.

In addition to these five elements, effective plans set clear goals, management accountability, and opportunities for community input and planning throughout the process.

VIII. Voluntary Compliance Effort

The goal for Title VI and Title VI regulatory enforcement is to achieve voluntary compliance. The requirement to provide meaningful access to LEP persons is enforced and implemented by the Corporation through the procedures identified in the Title VI regulations. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

The Title VI regulations provide that the Corporation will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI or its regulations. If the investigation results in a finding of compliance, the Corporation will inform the recipient in writing of this determination, including the basis for the determination. The Corporation uses voluntary mediation to resolve most complaints. However, if a case is fully investigated and results in a finding of noncompliance, the Corporation must inform the recipient of the noncompliance through a Letter of Findings that sets out the areas of

[10] The Social Security Administration has made such signs available at *http://www.ssa.gov/multilanguage/langlist1.htm*. These signs could, for example, be modified for recipient use.

noncompliance and the steps that must be taken to correct the noncompliance. It must attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, the Corporation must secure compliance through the termination of federal assistance after the Corporation recipient has been given an opportunity for an administrative hearing and/or by referring the matter to the Department of Justice to seek injunctive relief or pursue other enforcement proceedings.

The Corporation engages in voluntary compliance efforts and provides technical assistance to recipients at all stages of an investigation. During these efforts, the Corporation proposes reasonable timetables for achieving compliance and consults with and assists recipients in exploring cost-effective ways of coming into compliance. In determining a recipient's compliance with the Title VI regulations, the Corporation's primary concern is to ensure that the recipient's policies and procedures provide meaningful access for LEP persons to the recipient's programs and activities.

While all recipients must work toward building systems that will ensure access for LEP individuals, the Corporation acknowledges that the implementation of a comprehensive system to serve LEP individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. As recipients take reasonable steps to provide meaningful access to federally assisted programs and activities for LEP persons, the Corporation will look favorably on intermediate steps recipients take that are consistent with this Guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons.

This does not excuse noncompliance but instead recognizes that full compliance in all areas of a recipient's activities and for all potential language minority groups may reasonably require a series of implementing actions over a period of time. However, in developing any phased implementation schedule, recipients of the Corporation should ensure that the provision of appropriate assistance for significant LEP populations or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first. Recipients are encouraged to document their efforts to provide LEP persons with meaningful access to federally assisted programs and activities.

IX. Promising Practices

This section provides examples of promising practices that recipients engage in using the federal financial assistance (the national service volunteers) provided by the Corporation. Recipient programs are responsible for ensuring meaningful access to all portions of their program or activity, not just the portions in which national service participants serve. So long as the language services are accurate, timely, and appropriate in the manner outlined in this guidance, the types of promising practices summarized below can assist recipients in meeting the meaningful access requirements of Title VI and the Title VI regulations.

Examples of Promising Practices That Provide Access to LEP Persons

The Association of Farmworker Opportunity Programs AmeriCorps program recruits former farmworkers to serve as AmeriCorps members. Most members are bilingual, and many are LEP. Members are encouraged to take English as a Second Language classes as a part of their member development plan. The program provides pesticide safety training to farmworkers and their families. Members conduct the training in Spanish.

The program uses the following techniques to ensure that members understand their terms of service and benefits:

- Recruiting posters, flyers and the Member Service Contract are provided in Spanish.
- AmeriCorps project staff are bilingual (Spanish/English).
- Orientation training is provided in Spanish and English.
- Conference calls are held in Spanish when all members speak Spanish.
- Two bilingual second-year members led a team of members that communicated about their service projects exclusively in Spanish.
- Members had to be bilingual, but did not require English as the first language.
- Recruitment took place at the local field office level, and candidates were often from the farmworker community.

The Parents Making a Difference AmeriCorps program recruits a diverse corps including many bilingual members to provide outreach to parents in low-income school communities. Members translate at parent-teacher conferences, call parents about absent children, and organize a wide variety of parent-oriented outreach and educational activities.

''Classroom in the Kitchen'' gives parents tips on how to support the educational growth of their children in their homes. Diverse language abilities and cultural knowledge are extremely important in this regard. The range of English proficiency is varied, allowing members to help each other, and communication about program activities is largely bilingual.

The program provides English-Second-Language classes for LEP AmeriCorps members as part of their Member Development Plan. (This language support is required by the Rhode Island Commission for all AmeriCorps programs, in the same vein as the GED training requirement.)

The Temple University Center for Intergenerational Learning, Students Helping in the Naturalization of Elders (SHINE) program. SHINE is a national, multicultural, intergenerational service-learning initiative in five cities. College students provide language, literacy, and citizenship tutoring to elderly immigrants and refugees. Currently, students serve as coaches in ESL/citizenship classes or as tutors in community centers, temples, churches, housing developments, and ethnic organizations.

Northeastern University, San Francisco State University, Loyola University, Florida International University and Temple University are involved with SHINE. Students participate through courses, work study, and campus volunteer organizations. SHINE program coordinators partner with local community organizations; recruit, train, place, and monitor students at community sites; and provide support and technical assistance.

Since 1997, more than 60 faculty from education, social work, anthropology, political science, modern languages, sociology, English, Latino, and Asian studies have offered SHINE as a service-learning option in their courses. Over 1,000 students provided over 25,000 hours of instruction to 3,500 older learners at 37 sites in Boston, San Francisco, Chicago, Miami, and Philadelphia.

The Albuquerque Senior Companion Program (SCP), sponsored by the City of Albuquerque, Department of Senior Affairs, serves a diverse senior population with Native American, Hispanic, and Anglo volunteers. Senior Companions assist the frail elderly with household tasks and companionship.

Ten of its volunteer stations are located on Pueblos. Each Pueblo has its own language. The program works closely with its site managers/supervisors who are bilingual

employees of the individual Pueblo governments and generally are residents of the Pueblos. Senior Companions serve on their own Pueblos and walk to the homes of their clients.

Due to language and cultural barriers these supervisors assist with all areas of the program. They are familiar with the population in their individual Pueblos and use this knowledge to assist with recruitment, placement, and training.

ACCION International, an AmeriCorps*VISTA project sponsor, is a nonprofit that fights poverty through microlending. ACCION Chicago did outreach to home-based businesses that rarely have access to capital. An AmeriCorps*VISTA member found that many of the women make ends meet through programs such as Mary Kay cosmetics. The AmeriCorps*VISTA member worked with the ACCION loan officer to develop a loan product specifically for these women and has organized bilingual information sessions throughout Chicago neighborhoods.

''Bring New Jersey Together'' is an AmeriCorps program in Jersey City, New Jersey that seeks to bridge the cultural and linguistic barriers separating new Americans from the rest of the community. AmeriCorps members serve LEP community members by translating documents and escorting them to places such as medical appointments, the grocery store, or anywhere else where a translator may be necessary. The primary languages of the program are Spanish, Russian, and Vietnamese, but also Albanian, Creole, Indian languages, and others depending on the influx of refugees.

The New Jersey Commission built a partnership with the International Institute of New Jersey, which had provided services to the immigrant community for fifty years, to establish an AmeriCorps program that served the needs of the community.

The Honolulu Chinese Citizenship Tutorial Program is a service-learning project site in the Campus Compact National Center for Community Colleges, ''2+4=Service on Common Ground''. The University of Hawaii at Monoa's College of Social Sciences collaborated with the Kapl'olani Community College, Chaminade University, the Chinese Community Action Coalition and Child and Family Service. Local bilingual college students serve as tutors (during a 10-week session) for Chinese immigrants to help them pass their citizenship exams. The immigrants are recruited by visiting adult education classes, through Chinese radio programs, flyers, and Chinese language newspapers. The Chinese Community Action Coalition provides the curriculum and resources such as Scrabble, books, word-picture matching games, and card games for constructing simple English sentences.

The tutorial sessions focus on passing the INS exam and conversational English. Many of the immigrants are senior citizens. The classes are held in Chinatown. Since the project began, about 1,000 immigrants and refugees have enrolled. Over 300 students have participated as tutors and approximately one-third of the Chinese immigrants became citizens.

Transition House, Santa Barbara, CA., is a facility that primarily serves homeless Hispanic women. The services are tailored to meet the needs of each family to help women and their children move from homelessness and unemployment to employment and permanent housing. The AmeriCorps*VISTA members assigned to the project are bilingual. The clientele is 60% monolingual Spanish speakers.

The AmeriCorps*VISTA members are creating a Career Development Curriculum that is fully translated into Spanish and members host seminars about immigration and consumer credit counseling services. There was a need to improve communication with clients. One of the AmeriCorps*VISTA members developed ''halfsheets'', one side in Spanish, the other in English, that explain the services offered by Transition House.

The AmeriCorps*VISTA members are responsible for placement of children in daycare to enable parents to work. They accompany families to childcare providers to assist with translation and to help make the families feel at ease with placing their children in childcare.

[FR Doc. 02–26632 Filed 10–18–02; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by November 20, 2002.

Title, form, and OMB number: Validation of Public or Community Service Employment Performed by Retired Personnel Retired Under the Temporary Early Retirement Authority (TERA) for Increased Retirement Compensation; DD Form 2676; OMB Number 0704–0357.

Type of request: Revision.

Number of respondents: 756.

Responses pre respondent: 1.

Annual responses: 756.

Average burden per responses: 10 minutes.

Annual burden hours: 126.

Needs and Uses: This information collection requirement is necessary to validate the public service or community service of military members who retired under the Temporary Early Retirement Authority. The Military Services and the Coast Guard had the authority until December 31, 2001, to permit early retirement for selected Service personnel with more than 15, but less than 20 years of service. All of these members who retired under Section 4403(a) before the completion of at least 20 years of active duty service may take employment in public or community service, making them eligible for increased early retirement compensation. A retiree may receive service credit for all qualifying periods of employment by a registered public or community service organization during the ''enhanced requirement qualification period.'' This qualification period begins on the date of retirement and ends on the date the retired member would have attained 20 years of creditable service for retirement purposes. This information collection is needed to provide certification of a member's full-time public and/or community service employment by a registered public or community service organization and to recomputed the member's retired pay for all qualifying periods of employment.

Affected public: Business or Other For-Profit; Not-For-Profit Institutions; State, Local or Tribal Government.

Frequency: On Occasion.

Respondent's Obligation: Required to Obtain or Retain benefits.

OMB Desk Officer: Ms. Jackie Zieher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, VA 22202–4302.

Dated: October 11, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 02–26634 Filed 10–18–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 03–01]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/COMPT/RM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 03–01 with attached transmittal, policy jurisdiction, and Sensitivity of Technology.

Dated: October 15, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–08–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

11 OCT 2002

In reply refer to:
I-02/014147

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act (AECA), as amended, we are forwarding herewith Transmittal No. 03-01 and under separate cover the classified offset certificate thereto. This Transmittal concerns the Department of the Army's proposed Letter(s) of Offer and Acceptance (LOA) to the Taipei Economic and Cultural Representative Office in the United States for defense articles and service estimated to cost $18 million. Soon after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

Reporting of Offset Agreements in accordance with Section 36(b)(1)(C) of the Arms Export Control Act (AECA), as amended, requires a description of any offset agreement with respect to this proposed sale. Section 36(g) of the AECA, as amended, provides that reported information related to offset agreements be treated as confidential information in accordance with section 12(c) of the Export Administration Act of 1979 (50 U.S.C. App. 2411(c)). Information about offsets for this proposed sale is described in the enclosed confidential attachment.

Sincerely,

TOME H. WALTERS, JR.
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachment
As stated

Separate Cover:
Offset certificate

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 03-01

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Taipei Economic and Cultural Representative Office in the United States**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$17 million
Other	$ 1 million
TOTAL	$18 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 290 TOW-2B missiles, spare and repair parts, technical support, support equipment, personnel training and training equipment, technical data and publications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.**

(iv) **Military Department: Army (YWW)**

(v) **Prior Related Cases, if any:**
FMS case JBD - $80 million – 25Jun97
FMS case XXF - $12 million – 10Jul80

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** 11 OCT 2002

* **as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States – TOW-2B Anti-Armor Guided Missiles

Taipei Economic and Cultural Representative Office in the United States has requested a possible sale of 290 TOW-2B missiles, spare and repair parts, technical support, support equipment, personnel training and training equipment, technical data and publications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $18 million.

This sale is consistent with United States law and policy as expressed in Public Law 96-8.

The recipient will use these missiles to increase its military defensive posture and will have no difficulty absorbing these additional missiles into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Raytheon Company in Tucson, Arizona. One or more proposed offset agreements may be related to this proposed sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the recipient.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 03-01

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The TOW-2 Weapon System hardware and documentation provides with this proposed sale are Unclassified. However, sensitive technology is contained with the system itself. This sensitivity is primarily in the software programs, which instruct the system how to operate in the presence of countermeasures. Programs are contained in the system in the form of microprocessors with only Read out Memory maps being available, which do not provide the software program itself. The overall hardware is also considered sensitive in that the modulation frequency and infrared wavelengths could be useful in attempted countermeasure development. The benefits to be derived from this proposed sale outweigh the potential damage that could result if sensitive technology were revealed to unauthorized persons.

2. A determination has been made that the recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

[FR Doc. 02–26636 Filed 10–18–02; 8:45 am]
BILLING CODE 5001–08–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 03–02]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/COMPT/RM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 03–02 with attached transmittal and policy justification.

Dated: October 15, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–08–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

11 OCT 2002

In reply refer to:
I-02/014148

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act (AECA), as amended, we are forwarding herewith Transmittal No. 03-02 and under separate cover the classified offset certificate thereto. This Transmittal concerns the Department of the Navy's proposed Letter(s) of Offer and Acceptance (LOA) to Kuwait for defense articles and service estimated to cost $131 million. Soon after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

Reporting of Offset Agreements in accordance with Section 36(b)(1)(C) of the Arms Export Control Act (AECA), as amended, requires a description of any offset agreement with respect to this proposed sale. Section 36(g) of the AECA, as amended, provides that reported information related to offset agreements be treated as confidential information in accordance with section 12(c) of the Export Administration Act of 1979 (50 U.S.C. App. 2411(c)). Information about offsets for this proposed sale is described in the enclosed confidential attachment.

Sincerely,

TOME H. WALTERS, JR.
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachment
As stated

Separate Cover:
Offset certificate

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 03-02

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Kuwait

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ 0 million
Other	$131 million
TOTAL	$131 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** Aerostat balloon/radar system comprised of 71M Low Altitude Surveillance System (LASS) Balloon with a non-MDE version of the AN/TPS-63 radar. Also included in the proposed sale are: Interim AN/TPS-63 radar components, spare LASS balloon, AN/TPS-63 radar component (Tether Up), miscellaneous commercial vehicles, spare and repair parts, supply support, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical assistance and other related elements of logistics support.

(iv) **Military Department:** Navy (LBF)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** none

(viii) **Date Report Delivered to Congress:** 11 OCT 2002

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Kuwait – Aerostat Radar System

The Government of Kuwait has requested a possible sale to replace its Aerostat radar system with the Aerostat balloon/radar system comprised of the 71M Low Altitude Surveillance System (LASS) Balloon with a non-MDE version of the AN/TPS-63 radar. Also included in the proposed sale are: Interim AN/TPS-63 radar components, spare LASS balloon, AN/TPS-63 radar component (Tether Up), miscellaneous commercial vehicles, spare and repair parts, supply support, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical assistance and other related elements of logistics support. The estimated cost is $131 million.

The Aerostat system is defensive in nature and will be used as part of Kuwait's early warning system to monitor ground traffic and low-flying aircraft along its borders. The Aerostat is a relatively low technology, fixed site system that Kuwait can easily absorb and utilize within its existing structure. Regional foreign policy and military developments affecting this proposed sale have been carefully considered and the positive features of having a friendly coalition force in the region are a driving force.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The principle contractors will be: TCOM in Columbia, Maryland and Northop Grumman in Baltimore, Maryland. One or more proposed offset agreements may be related to this proposed sale.

Implementation of this proposed sale will require the assignment of 13 contractor representatives to perform Operation and Maintenance in Kuwait for up to 3 years after delivery.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 02–26637 Filed 10–18–02; 8:45 am]
BILLING CODE 5001–08–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 03–04]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/COMPT/RM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 03–04 with attached transmittal, policy justification, and sensitivity of Technology.

Dated: October 15, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–08–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

11 OCT 2002

In reply refer to:
I-02/013325

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act (AECA), as amended, we are forwarding herewith Transmittal No. 03-04, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance (LOA) to Australia for defense articles and services estimated to cost $90 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

TOME H. WALTERS, JR.
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachments

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 03-04

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Australia

(ii) **Total Estimated Value:**

Major Defense Equipment*	$85 million
Other	$ 5 million
TOTAL	$90 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** up to 64 RGM-84L Harpoon Block II missiles, maintenance training and equipment, spare and repair parts, training, shipboard equipment, support and test equipment, publications, U.S. Government and contractor technical assistance and other related elements of logistics support.

(iv) **Military Department:** Navy (AWK)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached

(viii) **Date Report Delivered to Congress:** 11 OCT 2002

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia – RGM-84L Harpoon Missiles

The Government of Australia has requested a possible sale of up to 64 RGM-84L Harpoon Block II missiles, maintenance training and equipment, spare and repair parts, training, shipboard equipment, support and test equipment, publications, U.S. Government and contractor technical assistance and other related elements of logistics support. The estimated cost is $90 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of an ally which has been and continues to be an important force for political stability and economic progress in the Western Pacific region.

Australia currently deploys Harpoon missiles on surface ships, submarines and aircraft and will use these additional missiles to augment its present Harpoon missile inventory and enhance its overall military capability. Australia will have no difficulty absorbing these additional Harpoon missiles into its inventory.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the Boeing Company of St. Louis, Missouri. There are no offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of five contractor engineering technical representatives for one-week intervals to participate in program review and technical reviews to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 03-04

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The RGM-84L Harpoon Block II missile contains sensitive technology and has the following classified components, including applicable technical, equipment, documentation and manuals:

a. Radar seeker
b. Missile characteristics and performance data
c. Global Positioning System (GPS) standard positioning service improves mid-course guidance to the target area

2. The RGM-84L Harpoon missile is a ship-launched, anti-ship, 75nm range, sea skimming, "fire and forget" missile with auto-pilot navigation and multiple waypoint capability. Harpoon Block I terminal guidance is provided by a radar seeker with a selectable attack profile. The Harpoon Block II upgrade incorporates software and hardware changes that will add an improved Anti-Surface Warfare (ASUW) capability against ships in the open ocean and in the littoral. Harpoon Block II hardware improvements includes a new Guidance Control Unit (GCU) that uses GPS aided inertial navigation. This will improve the missile's overall navigation accuracy. GPS accuracy will also give Harpoon Block II an inherent secondary role against land-based targets, making Block II useful in coastal target suppression roles. Harpoon Block II software improvements include changes to the launching system that will provide the operator with the ability to superimpose a geographic coastline on the mission-planning screen. This will allow the user to shape the search pattern of the Harpoon seeker in ASUW mode, enhancing its performance in littoral areas. The information on the Harpoon is classified Confidential.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Australia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

[FR Doc. 02–26638 Filed 10–18–02; 8:45 am]
BILLING CODE 5001–08–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 03–05]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/COMPT/RM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of

Representatives, Transmittal 03–05 with attached transmittal and policy justification.

Dated: October 15, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–08–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

11 OCT 2002

In reply refer to:
I-02/013661

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act (AECA), as amended, we are forwarding herewith Transmittal No. 03-05, concerning the Defense Information Systems Agency's proposed Letter(s) of Offer and Acceptance (LOA) to North Atlantic Treaty Organization Consultation, Command, and Control Agency for defense articles and services estimated to cost $550 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

TOME H. WALTERS, JR.
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachments

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 03-05

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: NATO Consultation, Command, and Control Agency**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ 0 million
Other	$550 million
TOTAL	$550 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: Satellite communication services and support for Extremely High Frequency (EHF) service on the United States Advanced EHF (AEHF) systems, AEHF follow-on support for meeting future satellite communication requirements, control of service-provisioned resources on AEHF and applicable follow-on systems, communications infrastructure upgrade and maintenance support, operation and logistics support including training, publications and documentation, U.S. Government and contractor technical assistance and other related requirements.**

(iv) **Military Department: DISA (GEH)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: none**

(viii) **Date Report Delivered to Congress:** 11 OCT 2002

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

North Atlantic Treaty Organization Consultation, Command, and Control Agency – Satellite Communication Services and Support

North Atlantic Treaty Organization Consultation, Command, and Control Agency (NATO NC3A) has requested a possible sale of satellite communication services and support for Extremely High Frequency (EHF) service on the United States Advanced EHF (AEHF) systems, AEHF follow-on support for meeting future satellite communication requirements, control of service-provisioned resources on AEHF and applicable follow-on systems, communications infrastructure upgrade and maintenance support, operation and logistics support including training, publications and documentation, U.S. Government and contractor technical assistance and other related requirements. The estimated cost is $550 million.

This proposed sale is in support of a competition which is limited to bids from member nations that participate in NATO. NATO remains the fundamental component of U.S. national security in the North Atlantic and European regions. By providing satellite communication services, the U.S. ensures interoperability with our own capabilities and those of our NATO allies and maintains a direct influence on NATO's communications architecture.

NATO currently has a satellite communications system that is used in support of NATO military operations and to provide communications for political consultations. This proposed sale would obtain a protected satellite communications capability and augment their satellite communications system. NATO has been operating a satellite communications system since the early 1970's.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

There is no prime contractor involved in this program. The NATO bid is opened only to NATO member nations. There are no offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of 10 U.S. Government and 15 contractor representatives, throughout NATO's area of operations, for 11 years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 02–26639 Filed 10–18–02; 8:45 am]
BILLING CODE 5001–08–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 03–06]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/COMPT/RM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 03–06 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 15, 2002.

Patricia L. Toppings,

Alternative OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–08–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

11 OCT 2002

In reply refer to:
I-02/013831

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act (AECA), as amended, we are forwarding herewith Transmittal No. 03-06, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance (LOA) to the United Kingdom for defense articles and services estimated to cost $535 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

TOME H. WALTERS, JR.
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachments

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 03-06

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: United Kingdom**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$514 million
Other	$ 21 million
TOTAL	$535 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: eight MH-47G Special Operations Chinook helicopters, spare and repair parts, support equipment, publications and technical data, communications equipment, maintenance, personnel training and training equipment, contractor engineering and technical support services, preparation of aircraft for shipment, and other related elements of logistics support.**

(iv) **Military Department: Army (WNF)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** 11 OCT 2002

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Kingdom – MH-47G Special Operations Chinook Helicopters

The Government of the United Kingdom has requested a possible sale of eight MH-47G Special Operations Chinook helicopters, spare and repair parts, support equipment, publications and technical data, communications equipment, maintenance, personnel training and training equipment, contractor engineering and technical support services, preparation of aircraft for shipment, and other related elements of logistics support. The estimated cost is $535 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United States by helping to improve the military capabilities of the United Kingdom and furthering standardization and interoperability.

The United Kingdom needs these helicopters to fulfill its strategic commitments for self-defense/coalition activities and to enhance its military capability. The United Kingdom will have no difficulty absorbing these helicopters into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the Boeing Company of Philadelphia, Pennsylvania. There are no offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the United Kingdom.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 03-06

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The MH-47G Chinook helicopter includes the following classified or sensitive components:

a. MH-47G Advanced Aircraft Survivability Equipment (AASE) Suite, with the following two major subsystems:

(1) The MH-47G Suite of Integrated Radio Frequency Countermeasures (SIRFC) is a fully integrated aircraft survivability system that provides radar warning and electronic countermeasures for the MH-47G helicopter. This system detects, identifies, prioritizes, and counters pulse, pulse doppler, continuous wave and pulse compression signals. The MH-47G critical system information is stored in the SIRFC in the form of mission source codes, User Data Files (UDF), classification algorithms, and coded threat parametrics, all classified Secret. The data, including operational software, proposed for release will not, in itself, facilitate reverse engineering.

(2) The MH-47G Suite of Integrated Infrared Countermeasures (SIIRCM) is a fully integrated aircraft survivability system that detects advanced infrared threats in all environments. This system uses a directional laser/lamp technology to defeat the infrared threat. The MH-47G critical system information is stored in the SIIRCM in the form of mission source codes, User Data Files (UDF), classification algorithms, and coded threat parametrics, all classified Secret. The data, including operational software, proposed for release will not in itself facilitate reverse engineering.

b. The Controlled Cryptographic Items (CCI) include the KY-58, KIT-1C, and KY-100 secure communications equipment. These systems are portable hardware units, which must be accounted for but are Unclassified when un-keyed (no code loaded in system). When the system is mounted in the aircraft and keyed, the equipment is considered classified (level of classification based on code keyed in system). The aircraft has provisions that allow both pilot and co-pilot to zeroize (erase) all codes upon imminent capture by threat forces. Internal mechanisms and design of cryptographic equipment is classified. Releasable technical manuals for operational and organic level maintenance are Unclassified. The data, including operational software, proposed for release will not facilitate reverse engineering.

c. The AP-174 Multi-Mode Radar (MMR) and Advanced Forward Looking Infrared Radar (FLIR) provides the MH-47G enhanced capabilities for weather penetration as well as night navigation capabilities. These two separate systems may be used singularly or in combination. Hardware is Unclassified, technical manuals for authorized maintenance levels are Unclassified. Reverse engineering is not a major concern.

2. Loss of this hardware and/or data could permit development of information leading to the exploitation of this aircraft and its capabilities/vulnerabilities. Therefore, if a technologically capable adversary were to obtain these devices, the aircraft could be compromised through reverse engineering techniques that could defeat the aircraft's effectiveness.

3. A determination has been made that the United Kingdom can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

[FR Doc. 02–26640 Filed 10–18–02; 8:45 am]

BILLING CODE 5001–08–C

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Joint Defense Science Board/Air Force Scientific Advisory Board Task Force on the Acquisition of National Security Space Programs will meet in closed sessions on November 7–8, 2002; and November 18–20, 2002, in Chantilly, VA. This Task Force will review the acquisition of National Security Space Programs and make recommendations to improve the acquisition of space programs from their initiation to deployment.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Task Force3 will focus on what matters to providing national security advantage to the United States and look at the problem in as holistic a fashion as possible, considering the entire space acquisition process, including industry suppliers as well as government acquirers. The assessment will consider what is happening in the four inter-connected sectors of the space business—commercial, civil, intelligence and military. Personnel issues, including numbers, skills, experience and demographics of space professionals (including CAAS and FFRDC personnel) as well as effects of corporate mergers in all these areas may be included. The assessment will also consider all aspects of the government's role in managing and funding space system acquisition—SPO, PEO, Science and Technology, Major Command, Service Headquarters, OSD, NRO, NASA and Congress—to derive insights.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. II), it has been determined that these Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly these meetings will be closed to the public.

Dated: October 11, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–26635 Filed 10–18–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Proposed Collection; Comment Request

AGENCY: Department of the Air Force, DOD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) the Paperwork Reduction Act of 1995, the Office of the Secretary of Defense announces the proposed reinstatement of a public collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical unity; (b) the accuracy of the agency's estimate of the burden proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments by December 20, 2002.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the DOD Air Carrier and Analysis Office (HQ AMC/DOB), 402 Scott Drive, Unit 3A1, Scott AFB, IL 62225–5302, ATTN: Ms. Pat Stout.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instrument, please write to the above address or call HQ AMC/DOB at 618–229–3092.

Title, Associated Form, and OMB Number: DOD Statement of Intent, AMC Form 207, OMB Number 0701–0137.

Needs and Uses: The information collection requirement is necessary to assist the overall evaluation of commercial airlines to provide quality, safe, and reliable airlift service when procured by the Department of Defense (DOD). Information is needed to comply with 32CFR861.

Affected Public: Businesses or other for profit.

Annual Burden Hours: 300.

Number of Respondents: 15.

Responses per Respondent: 1.

Average Burden for Respondent: 20 hours.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are commercial air carriers desiring to supply airlift services to DoD. AMC 207 provides vital information from the carriers needed to determine their eligibility to participate in the DoD Air Transportation Program.

Pamela D. Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 02–26651 Filed 10–18–02; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Lake Charles Harbor and Terminal District Resolution 2002–089A Proposed Channel Users' Fee for Calcasieu River Waterway, Louisiana Project

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice.

SUMMARY: The Board of Commissioners of the Lake Charles Harbor and Terminal District (District) in regular session on May 13, 2002, adopted Resolution No. 2002–089A approving a proposed channel users' fee, cited herein, and authorizing the District staff to proceed with all required procedures to implement a users' fee to fund the local (non-Federal) share of the Federal Calcasieu River, Louisiana project. This is in accordance with, and as authorized by the Water Resources Development Act (WRDA) of 1986 (Pub. L. 99–662) and Louisiana Revised Statute (La. RS) 34:203(2)(a). Publication in the **Federal Register** is pursuant to Section 208 of the WRDA 1986 (33 U.S.C. 2236(a)(5)(B)).

FOR FURTHER INFORMATION CONTACT: Questions regarding the proposed users' fee may be directed to James L. Robinson, Director of Navigation, Lake Charles Harbor and Terminal District (337) 493–3620. Interested persons may review related studies and reports during normal work hours (8 a.m. to 12 Noon and 1 p.m. until 5 p.m., Monday through Friday except for appropriate holidays) at the offices of the Port of Lake Charles, 150 Marine Street, Lake Charles, LA 70601.

SUPPLEMENTARY INFORMATION: Having complied with State of Louisiana notice-publishing requirements of La. RS 34:203(2)(b), the proposed users' fee was developed as a method to ensure that the District could look to specified channel users to help finance its non-Federal expenditures, shares of operation and maintenance costs of the Calcasieu River Federal navigation project within the District's jurisdiction, emergency response services, contingency planning and procurement of equipment and facilities, as may be specifically authorized or controlled by the federal and state statutes. Administration, collection and enforcement will be by the District (Port of Lake Charles) through liaison with shipping agents and U. S. Customs officials. La. RS 34:203A(2)(a) authorizes that pursuant to Public Law 99–662, the Water Resources Development Act of 1986, or regulation, or if because of contractual obligations of the District with the United States of America or any agency thereof the District is required to fund the non-Federal share of dredging expenses or expenses related to the dredging of the authorized Federal navigation channel within the District, the District may regulate and impose reasonable users' fee. The users' fee shall reflect, to a reasonable degree and to the extent required by federal law, the benefits provided by the project to a particular class or type of vessel pursuant to Public Law 99–662.

The District, in compliance with state law, published a local Notice of Intent to establish commercial navigable channel users' fee for certain vessels of maximum design draught (draft) greater than 6.095 meters (20 feet) transiting any portion of the Calcasieu River Waterway ship channel. This notice announcing a public hearing to consider the users' fee was published in official journals of the Parishes comprising the District. The Board of Commissioners of the Lake Charles Harbor and Terminal District convened a public hearing on Monday, May 13, 2002 at 5 p.m. in the Board Room, 150 Marine Street, Lake Charles, Louisiana to officially consider the appropriateness of implementing the proposed Calcasieu River Waterway navigable channel users' fee.

The fee is authorized based upon expenditures of the District's past and continuing contribution to ensuring navigable channel configuration including, but not limited to, acquiring lands for dredged material disposal facilities, funding the non-Federal cost to construct dikes for dredged material disposal facilities, emergency response, related contingency planning, procurement of equipment and facilities, necessary personnel training, operation of the navigation project to include navigation-related improvements (*e.g.* procurement of an internet-based Harbor Management System capable of supporting/utilizing NOAA's Physical Oceanographic Real-Time data system and the U.S. Coast Guard's intended procurement of a Vessel Traffic Monitoring system, and a navigation security Automatic Identification System base station and other navigation security, safety and efficiency initiatives). Channel users' fees generated will offset the District's incurred expenses associated with completed navigation projects not to exceed actual accrued District expenditures. The fee would not be duplicitous with federal Harbor Maintenance Tax assessments incurred under Public Law 99–662 (26 U.S.C 4461), as amended.

Exempted vessels include:

Vessels owned and operated by the United States Government, a foreign country, a state, or a political subdivision of a country or state, unless engaged in commercial services; towing vessels; vessels engaged in dredging activities; vessels engaged in intraport movements; and vessels with design draught (draft) of 20 feet (6.095 meters) or less.

The following is a proposed fee schedule, for vessels calling on non-public Calcasieu River ship terminals under the jurisdiction of the District:

Length Overall (LOA) in meters × Design Draught (DRAFT) in Meters × ($0.1)= $Users'' Fee

Example: 280 meters(LOA) × 11 meters draft × $0.1= $308.00

The design draught (draft) as indicated in ''Lloyds Register of Shipping,'' if exceeding forty feet (40′) or 12.189 meters, will be limited to 12.189 meters for this fee computation for vessels other than heavylift vessels conducting loading or offloading evolutions in the Cameron Hole.

Users' fee at the aforementioned rates, charged to applicable vessels calling on public Calcasieu River terminals under the jurisdiction of the District, will be specifically accounted for within the dockage tariff.

Under 33 U.S.C. 2236(a)(5), a public hearing on the proposed harbor users' fee is scheduled for December 9, 2002 commencing at 5 p.m. in the Board Room, 150 Marine Street, Lake Charles, Louisiana. Upon completion of the public hearing and public comment period, the Board is directed to transmit the final fee schedule concurrently to the Army Corps of Engineers New Orleans District Engineer, Director of Civil Works Corps Headquarters, the Assistant Secretary of the Army for Civil Works, and to the Federal Maritime Commission in the form of the adopted Resolution.

Under 33 U.S.C. 2236(a)(6) public comments concerning the proposed harbor users' fee should be directed in writing to James L. Robinson, Director of Navigation, Lake Charles Harbor and Terminal District, PO Box 3753, Lake Charles, Louisiana 70602. Tel. (337) 493–3620. The public comment period will close upon the close of business at 5 p.m., December 20, 2002. Written comments must be received by the District on or before that date in order to be considered by the Board prior to taking final action on the proposed harbor usage fee.

* * * * *

Dated: September 27, 2002.

Michael J. Walsh,

Colonel, U.S. Army, Executive Director of Civil Works.

[FR Doc. 02–26644 Filed 10–18–02; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.359B]

Early Reading First Program

AGENCY: Department of Education.

ACTION: Notice reopening the Early Reading First Program grant competition for fiscal year (FY) 2002 to extend the Full Application deadline date.

SUMMARY: The Secretary reopens the Early Reading First Program grant competition for FY 2002 to extend the deadline date for the submission of Full Applications. The Secretary takes this action because of delivery problems due to unexpected traffic stoppages in the Washington, DC area on the original receipt deadline of Friday, October 11.

Eligibility: This extension applies to all eligible applicants for the Full Application phase of the Early Reading First grant competition for FY 2002.

DATES: The original receipt deadline for Full Applications under the Early Reading First Program for FY 2002 was Friday, October 11, 2002. However, the Washington, DC area experienced significant traffic disruptions on that date, including the closure of major highways into the area.

Therefore, the Department extends the receipt deadline for Full Applications and reopens the competition for a very short time to address this situation.

The new deadline for receipt of Full Applications under the Early Reading First Program for FY 2002 is Tuesday, October 22, 2002 (including for certain applicants from Louisiana, as discussed later under this heading). If you or a courier or delivery service deliver an application by hand, the deadline is at 4:30 p.m. on October 22. The October 22 deadline replaces the original October 11, 2002 receipt deadline for Full Applications.

All other instructions for transmitting applications in the Early Reading First application package (pp. E–3 and E–4) remain in effect. The deadline date for the transmittal of State process recommendations by State Single Points of Contact (SPOCs) and comments by other interested parties remains as originally posted.

An extension notice for certain applicants from Louisiana submitting Full Applications was published in the **Federal Register** on October 11, 2002 (67 FR 63390), under which the receipt deadline was extended to Friday, October 18, 2002, due to Tropical Storm Lili. The extension in this notice to Tuesday, October 22, 2002, also applies to those Louisiana applicants.

The original notice inviting applications (for both Pre-Applications and Full Applications) was published in the **Federal Register** on June 7, 2002 (67 FR 39369–39374).

FOR FURTHER INFORMATION CONTACT: Tracy Bethel or Mary Ann Lesiak, Office of Elementary and Secondary Education, 400 Maryland Avenue SW., Washington, DC 20202–6132. Telephone: (202) 260–4555, or via Internet: *erf@ed.gov.* Applications for, and information about, the Early Reading First program competition are available here: *http://www.ed.gov/offices/OESE/earlyreading/index.html.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

If you want to transmit a recommendation or comment under Executive Order 12372, you can find the latest list and addresses of individual SPOCs on the Web site of the Office of Management and Budget at the following address: *http://www.whitehouse.gov/omb/grants.*

If you are an individual with a disability, you may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to either of the contact persons listed in this notice.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

Dated: October 17, 2002.

Susan B. Neuman,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 02–26868 Filed 10–18–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Senior Executive Service; Performance Review Board

AGENCY: Department of Energy.

ACTION: SES Performance Review Board Standing Register.

SUMMARY: This notice provides the Performance Review Board Standing Register for the Department of Energy. This listing supersedes all previously published lists of PRB members.

EFFECTIVE DATE: These appointments are effective as of September 30, 2002.

Ackerly, Lawrence R.
Allison, Jeffrey M.
Anderson, Charles E.
Anderson, James L.
Anderson, Margot H.
Angulo, Veronica A.
Aoki, Steven
Arkin, Richard W.
Arthur III, William John
Ascanio, Xavier
Baca, Frank A.
Baca, Mark C.
Bailey Jr, Lawrence O.
Bajura, Rita A.
Baker, Kenneth E.
Ballard, William W.
Barker Jr, William L.
Bashista, John R.
Bauer, Carl O.
Baur, Daniel J.
Beckett, Thomas H.
Beecy, David J.
Bergholz Jr, Warren E.
Berube, Raymond P.
Bielan, Douglas J.
Bilson, Helen E.
Black, Richard L.
Black, Steven K.
Blackwood, Edward B.
Bladow, Joel K.
Boardman, Karen L.
Borchardt, Charles A.
Borgstrom, Carol M.
Borgstrom, Howard G.
Bowman, Gerald C.
Boyd, Gerald G.
Braden Jr, Robert C.
Bradley, Samuel M.
Brendlinger, Terry L.
Brewer, Robert H.
Breznay, George B.
Brocoum, Stephan J.
Brodman, John R.
Bromberg, Kenneth M.
Bronstein, Eli B.
Brown III, Robert J.
Brumley, William J.
Bubar, Patrice M.
Burns, Allen L.

Burrows, Charles W.
Butler, Jerome M.
Butler, Roger A.
Campbell, Elizabeth E.
Campbell, James Thomas
Carabetta, Ralph A.
Caravelli, John M.
Cardinali, Henry A.
Carey Jr, Robert H.
Carlson, John T.
Carlson, Kathleen Ann
Cary, Steven V.
Cavanagh, James J.
Chacey, Kenneth A.
Chaney, Kimberly A. Hayes
Christensen, William J.
Chun, Sun W.
Clark III, Willie
Clark, John R.
Clausen, Max Jon
Coburn, Leonard L.
Combs, Marshall O.
Conti, John J.
Cook, John S.
Corey, Ray J.
Costlow, Brian D.
Cowan, Gwendolyn S.
Craig Jr, Jack R.
Crandall, David H.
Crawford, David W.
Cross, Claudia A.
Crowe, Richard C.
Cumesty, Edward G.
Curtis, James H.
Cygelman, Andre I.
D'Agostino, Thomas
Darugh, David G.
Davies, Nelia A.
De Lorenzo, Ralph H.
Decker, James F.
Dedik, Patricia
Degrasse Jr, Robert W.
Dehmer, Patricia M.
Dehoratiis Jr, Guido
Deihl, Michael A.
Delwiche, Gregory K.
Demko, Joseph C.
Dennison, William J.
Der, Victor K.
Dever, Gertrude L.
Difiglio, Carmen NMN.
Dixon, Robert K.
Dobriansky, Larisa E.
Doggett, Frederick D.
Doherty, Donald P.
Dooley III, George J.
Durnan, Denis D.
Dyer, J. Russell
Eberwein, Catherine D.
Edmondson, John J.
Egger, Mary H.
Elwood, Jerry W.
Erickson, Leif
Erickson, Ralph E.
Esvelt, Terence G.
Evans, Karen S.
Faulkner, Douglas L.
Fiore, James J.
Fitzgerald, Cheryl P.
Foley, Kathleen Y.
Folker, Robert D.
Fowler, Jennifer Johnson
Franklin, Charles Anson
Frazier, Marvin E.
Frei, Mark W.
Fryberger, Teresa
Furiga, Richard D.
Fygi, Eric J.
Gale, Barry G.
Garcia, Marvin L.
Garland, Robert W.
Garson, Henry K.
Gebus, George R.
Geidl, John C.
Gibson Jr, William C.
Gibson, Judith D.
Gilbertson, Mark A.
Ginsberg, Mark B.
Glenn, Daniel E.
Glotfelty, James W.
Golan, Paul M.
Goldsmith, Robert NMN.
Gollomp, Lawrence A.
Goodrum, William S.
Gordon-Hagerty, Lisa E.
Gottlieb, Paul A.
Greenberg, Raymond F.
Greenwood, Johnnie D.
Gross, Thomas J.
Gunn Jr, Marvin E.
Gurule, David A.
Haberman, Norton NMN.
Hacskaylo, Michael S.
Hafner, Steven C.
Hansen, Charles A.
Hardin, Michael G.
Hardwick Jr, Raymond J.
Hartman, James K.
Hartman, John R.
Harvey, John R.
Harvey, Tobin K.
Hass, Rickey R.
Hawthorne, Joan Gates
Headley, Larry C.
Heenan, Thomas F.
Hensley Jr, Willie F.
Hibbitts Jr, Howard D.
Hickok, Steven G.
Hill, David R.
Hirahara, James S.
Hodson, Patricia J.
Hollander, Marc S.
Holland, Michael D.
Hollowell, Betty L. N.
Hooper, Michael K.
Hopf, Richard H.
Horton, Donald G.
Hudome, Randa F.
Huizenga, David G.
Hunemuller, Maureen A.
Hutzler, Mary Jean
Izell, Kathy D.
Jaffe, Harold
Jenkins, Robert G.
Johnson, Frederick M.
Johnson, Milton D.
Johnson, Owen B.
Johnson, Robert Shane
Johnson, Sandra L.
Johnston, Marc
Jones, C. Rick
Jordan, Rosalie M.
Joseph, Antionette Grayso
Juarez, Liova D.
Juckett, Donald A.
Judge, Geoffrey J.
Kane, Michael C.
Kelliher, Joseph T.
Kennedy, John P.
Kersten, John H.
Keselburg, James D.
Kessler, Elizabeth A.
Kight, Gene H.
Kilgore, Webster C.
Kilpatrick, Michael A.
Kirkendall, Nancy J.
Kirkman, Larry D.
Kirk, Robert S.
Klein, Keith A.
Klein, Susan Elaine
Knipp, Robert M.
Knox, Eric K.
Konopnicki, Thad T.
Kovar, Dennis G.
Kruger, Paul W.
Lambert, James B.
Landers, James C.
Lane, Anthony R.
Lange, Robert G.
Lawrence, Andrew C.
Lee, Steven NMN.
Lehman, Daniel R.
Levin Jr, William B.
Lewis Jr, William A.
Lewis, Roger A.
Lightner, Ralph G.
Longsworth, Paul M.
Lopatto, Jeanne T.
Lowe, Owen W.
Maddox, Mark R.
Maguire, Joseph J.
Magwood IV, William D.
Mahaley, Joseph S.
Maharay, William S.
Maher, Mark W.
Male, Barbara D.
Malosh, George J.
Mangeno, James J.
Mann, Thomas O.
Marcois, Barton W.
Marcus, Gail H.
Markel Jr, Kenneth E.
Marks Jr, David L.
Marlay, Robert C.
Marmolejos, Poli A.
Masterson, Mary A.
Mazurowski, Barbara A.
McCloud, Floyd R.
McCracken, Stephen H.
McDonnell III, James F.
McKee, Barbara N.
McMonigle, Joseph P.
McRae, James Bennett
McSlarrow, Kyle E.
Meeks, Timothy J.
Mellington, Suzanne P.
Meyer, Charles E.
Michelsen, Stephen J.
Miller, Clarence L.
Miller, Deborah C.
Millhone, John P.
Milner, Ronald A.
Miotla, Dennis M.
Monette, Deborah D.
Monhart, Jane L.
Moorer, Richard F.
Morrow, Margaret K.
Mosquera, James P.
Mournighan, Stephen D.
Mueller, Troy J.
Murphie, William E.
Murphy, Alice Q.
Nealy, Carson L.
Nichols, Clayton R.
Nolan, Elizabeth A.
Norman, Paul E.
Nulton, John D.
O'Brien, Betsy K.

O'Donovan, Kevin M.
O'Fallon, John R.
Olinger, Shirley J.
Oliver, Lawrence R.
Oliver, Stephen R.
Oosterman, Carl H.
Ott, Merrie Christine
Owendoff, James M.
Owen, Michael W.
Owens, Karen A.
Paduchik, Robert A.
Parks Jr, William P.
Parnes, Sanford J.
Patrinos, Aristides A.
Pearson, Orin F.
Pease, Harrison G.
Penry, Judith M.
Perin, Stephen G.
Peterson, Bradley A.
Pettengill, Harry J.
Piper II, Lloyd L.
Podonsky, Glenn S.
Poe, Robert W.
Powers, James G.
Powers, Kenneth W.
Price Jr, Robert S.
Provencher, Richard B.
Przybylek, Charles S.
Przysucha, John L.
Pumphrey, David L.
Rapuano, Kenneth P.
Reed, Craig R.
Rhoderick, Jay E.
Richardson, Herbert
Rispoli, James A.
Roberts, Michael NMN.
Robison, Sally A.
Rodeheaver, Thomas N.
Rodekohr, Mark E.
Rodgers, Stephen J.
Rollow, Thomas A.
Rosen, Simon Peter
Rudins, George NMN.
Rudy, Gregory P.
Ryder, Thomas S.
Salmon, Jeffrey T.
Salm, Philip E.
Sato, Walter N.
Schepens, Roy J.
Schmitt, Eugene C.
Schmitt, William A.
Schnapp, Robert M.
Schneider, Sandra L.
Schoenbauer, Martin J.
Schweitzer, Eric A.
Schwier, Jean F.
Scott, Bruce B.
Scott, Randal S.
Sellers, Elizabeth D.
Shages, John D.
Sharpley, Christopher R.
Shaw, John S.
Shearer, Elizabeth L.
Sherman, Helen O.
Silbergleid, Steven A.
Simpson, Christopher
Simpson, Edward R.
Singer, Marvin I.
Siskin, Edward J.
Sitzer, Scott B.
Skubel, Stephen C.
Slutz, James A.
Smith, Alan C.
Smith, Alexandra B.
Smith, Barry Alan
Smith, Stephen M.
Snider, Linda J.
Sohinki, Stephen M.
Solich, Donald J.
Stadler, Silas D.
Staffin, Robin NMN.
Stallman, Robert M.
Stark, Richard M.
Stevens, Walter J.
Stewart Jr, Jake W.
Stone, Barbara R.
Strakey Jr, Joseph P.
Strauss, Neal J.
Sullivan, Daniel J.
Sullivan, John R.
Swailes, John H.
Sweeney II, James R.
Swift, Justin R.
Swink, Denise F.
Sylvester, William G.
Taboas, Anibal L.
Tavares, Antonio F.
Taylor, William J.
Tedrow, Richard T.
Thomas, Iran L.
Todd, John C.
Torkos, Thomas M.
Trautman, Stephen J.
Triay, Ines R.
Tryon, Arthur E.
Turi, James A.
Turner, James M.
Underwood, William R.
Vagts, Kenneth A.
Valdez, William J.
Van Fleet, James L.
Vanzandt, Vickie A.
Vieth, Jill Schroeder
Wagner, Patrice M.
Wahlquist, Earl J.
Waisley, Sandra L.
Walsh, Robert J.
Warnick, Walter L.
Weedall, Michael J.
Weis, Michael J.
Whatley, Michael D.
Whitaker Jr, Mark B.
Wieker, Thomas L.
Wilcher, Larry D.
Wilken, Daniel H.
Williams, Alice C.
Williams, Mark H.
Williams, Richard N.
Willingham Jr,Frank M.
Willis, John W.
Wilmot, Edwin L.
Worthington, Patricia R.
Wright, Stephen J.
Wunderlich, Robert C.
Yuan-Soo Hoo, Camille C.
Zamorski, Michael J.
Ziesing, Rolf F.

Issued in Washington, DC.

Bruce M. Carnes,

Director, Office of Management, Budget and Evaluation/Chief Financial Officer.

[FR Doc. 02–26671 Filed 10–18–02; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7396–4]

Environmental Appeals Board (EAB); Oral Argument Before the EAB

AGENCY: Environmental Protection Agency.

ACTION: Notice of oral argument.

SUMMARY: The Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency (EPA) will hold oral argument in *In re Carlota Copper Co.*, NPDES Appeal Nos. 00–23 and 02–26, on Thursday, October 24, 2002, at 10 a.m. in the EPA Administrative Courtroom, 1201 Constitution Avenue, NW., Washington, DC. The argument is open to the public.

DATES: The oral argument will be held on Thursday, October 24, 2002, at 10 a.m.

ADDRESSES: The oral argument will be held in the EPA Administrative Courtroom, 1201 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Eurika Durr, Clerk of the Board, telephone: 202–501–7060; e-mail: *durr.eurika@epa.gov.*

Dated: October 9, 2002.

Ronald L. McCallum,

Environmental Appeals Judge.

[FR Doc. 02–26708 Filed 10–18–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7396–8]

Announcement of a Public Stakeholder Meeting on Drinking Water Distribution System Impacts on Water Quality

AGENCY: Environmental Protection Agency.

ACTION: Notice of a public stakeholder meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has scheduled a public meeting to discuss the finished water quality in distribution systems. The purpose of this meeting is to provide information to stakeholders and the public.

DATES: The stakeholder Meeting will be held from 9 a.m. to 4 p.m. Pacific Time on November 14, 2002.

ADDRESSES: The meeting will be at the Westcoast Grand Hotel at 1415 Fifth Avenue, Seattle, WA, phone (206) 971–8000.

FOR FURTHER INFORMATION CONTACT: For technical inquiries contact: Mr. Kenneth

Rotert, (202) 564–5280, e-mail: *rotert.kenneth@epa.gov*. For registration and general information about this meeting, please contact Ms. Stephanie Danner at The Cadmus Group, Inc; 1901 North Fort Myer Dr., Suite 900, Arlington, VA 22209, by phone: (703) 247–6129; by fax: (703) 247–6001, or by e-mail at *Sdanner@cadmusgroup.com*.

SUPPLEMENTARY INFORMATION: The meeting will provide stakeholders information on nine white papers which present available data, information, and research on the potential public health impacts of drinking water distribution systems.

Those registered by November 8 will receive background materials prior to the meeting. Additional information on these and other EPA activities under SDWA is available at the Safe Drinking Water Hotline at (800) 426–4791.

Meeting materials, including the previously mentioned white papers, are available at *http://www.epa.gov/safewater/tcr/tcr.html*. Proceedings of the meeting will also be posted on this website.

Any person needing special accommodations at this meeting, including wheelchair access, should contact the same previously-noted point of contact at The Cadmus Group, Inc., at least five business days before the meeting so that the Agency can make appropriate arrangements.

Same day registration for this meeting will be from 8:45 a.m. to 9 a.m. Pacific Time.

Dated: October 16, 2002.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 02–26713 Filed 10–18–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7396–5]

Public Water Supervision Program Revision for the State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of Tennessee is revising its approved Public Water System Supervision Program. Tennessee has adopted drinking water regulations which incorporate the requirements of the Public Notification Rule. EPA has determined that these revisions are no less stringent than the corresponding federal regulations. Therefore, EPA intends to approve this State program revision.

All interested parties may request a public hearing. A request for a public hearing must be submitted by November 20, 2002, to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by November 20, 2002, a public hearing will be held. If no timely and appropriate request for a hearing is received, and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on November 20, 2002. Any request for a public hearing shall include the following information: (1) The name, address, and telephone number of the individual organization, or other entity requesting a hearing; (2) A brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; (3) The signature of the individual making the request, or, if the request is made on the behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, at the following offices: Tennessee Department of Environment and Conservation, Division of Water Supply, 401 Church Street, L&C Tower, Sixth Floor, Nashville, Tennessee, 37243–1549, or at the Environmental Protection Agency, Region 4, Drinking Water Section, 61 Forsyth Street Southwest, Atlanta, Georgia 30303.

FOR FURTHER INFORMATION CONTACT: Vivian Doyle, EPA Region 4, Drinking Water Section at the Atlanta address given above, or by telephone at (404) 562–9942.

Authority: Sections 1401 and 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR parts 141 and 142.

Dated: September 24, 2002.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 02–26711 Filed 10–18–02; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifiers: CMS–10074, CMS–R–0290, CMS–R–0285, & CMS–2744]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

(1) *Type of Information Collection Request:* New collection; *Title of Information Collection:* Program for the All-Inclusive Elderly Health Survey (PHS); *Form No.:* CMS–10074 (OMB# 0938–NEW); *Use:* The Centers for Medicare & Medicaid Services has developed a survey, the PHS, that is similar to the Health Outcomes Survey (HOS). The main purpose of the PHS is to collect health status information that may be used to adjust Medicare payments to PACE organizations. It has been successfully pilot-tested to assess response rates and accuracy of responses under different distribution approaches. The pilot test enabled CMS to select an approach whereby PACE enrollees will be sent surveys to fill out and can request assistance from family or professionals.; *Frequency:* Annually; *Affected Public:* Individuals or Households, Not-for-profit institutions; *Number of Respondents:* 15,800; *Total Annual Responses:* 5,814; *Total Annual Hours:* 1082.

(2) *Type of Information Collection Request:* Extension of a currently approved collection; *Title of*

Information Collection: Procedures for Making National Coverage Decisions; *Form No.:* CMS–R–0290 (OMB# 0938–0776); *Use:* These information collection requirements provide the process CMS will use to make a national coverage decision for a specific item or service under sections 1862 and 1871 of the Social Security Act. This will streamline our decision making process and will increase the opportunities for public participation in making national coverage decisions; *Frequency:* Other (as needed); *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 200; *Total Annual Responses:* 200; *Total Annual Hours:* 8,000.

(3) *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Retirement Benefit Information; *Form No.:* CMS–R–0285 (OMB# 0938–0769); *Use:* This information is needed to determine whether a beneficiary meets the requirements for reduction of the Part A premium to zero.; *Frequency:* On occasion.; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 1,500; *Total Annual Responses:* 1,500; *Total Annual Hours:* 208.

(4) *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* End Stage Renal Disease Medical Information System ESRD Facility Survey; *Form No.:* CMS–2744 (OMB# 0938–0447); *Use:* The ESRD Facility Survey form is completed annually by Medicare approved providers of dialysis and transplant services. The CMS–2744 is designed to collect information concerning treatment trends, utilization of services and patterns of practice in treating ESRD patients.; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 4,225; *Total Annual Responses:* 4,225; *Total Annual Hours:* 33,800.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://www.hcfa.gov/regs/prdact95.htm,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Clearance Officer designated at the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances, Attention: Dawn Willinghan, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: October 10, 2002.

John P. Burke, III,

Paperwork Reduction Act Team Leader, CMS Reports Clearance Officer, Office of Strategic Operations and Strategic Affairs, Division of Regulations Development and Issuances.

[FR Doc. 02–26652 Filed 10–18–02; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–R–21]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Extension of a currently approved collection; *Title of Information Collection:* Withholding Medicare Payments to Recover Medicaid Overpayments and Supporting Regulations in 42 CFR 447.31; *Form No.:* CMS–R–21 (OMB# 0938–0287); *Use:* Overpayments may occur in either the Medicare and Medicaid program, at times resulting in a situation where an institution or person that provides services owes a repayment to one program while still receiving reimbursement from the other. Certain Medicaid providers that are subject to offsets for the collection of Medicaid overpayments may terminate or substantially reduce their participation in Medicaid, leaving the State Medicaid Agency unable to recover the amounts due. These information collection requirements give CMS the authority to recover Medicaid overpayments by offsetting payments due to a provider under the program; *Frequency:* On occasion; *Affected Public:* State, Local, or Tribal Government; *Number of Respondents:* 54; *Total Annual Responses:* 27; *Total Annual Hours:* 81.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.hcfa.gov/regs/prdact95.htm*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov*, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Brenda Aguilar, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: October 10, 2002.

John P. Burke, III,

Paperwork Reduction Act Team Leader, CMS Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances.

[FR Doc. 02–26653 Filed 10–18–02; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8013–N]

RIN 0938–AL56

Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 2003

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

ACTION: Notice.

SUMMARY: This notice announces the inpatient hospital deductible and the hospital and extended care services

coinsurance amounts for services furnished in calendar year 2003 under Medicare's Hospital Insurance program (Medicare Part A). The Medicare statute specifies the formulae used to determine these amounts.

The inpatient hospital deductible will be $840. The daily coinsurance amounts will be: (a) $210 for the 61st through 90th day of hospitalization in a benefit period; (b) $420 for lifetime reserve days; and (c) $105.00 for the 21st through 100th day of extended care services in a skilled nursing facility in a benefit period.

EFFECTIVE DATE: This notice is effective on January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Clare McFarland, (410) 786–6390.

For case-mix analysis only: Gregory J. Savord, (410) 786–1521.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1813 of the Social Security Act (the Act) provides for an inpatient hospital deductible to be subtracted from the amount payable by Medicare for inpatient hospital services furnished to a beneficiary. It also provides for certain coinsurance amounts to be subtracted from the amounts payable by Medicare for inpatient hospital and extended care services. Section 1813(b)(2) of the Act requires us to determine and publish, between September 1 and September 15 of each year, the amount of the inpatient hospital deductible and the hospital and extended care services coinsurance amounts applicable for services furnished in the following calendar year.

II. Computing the Inpatient Hospital Deductible for 2003

Section 1813(b) of the Act prescribes the method for computing the amount of the inpatient hospital deductible. The inpatient hospital deductible is an amount equal to the inpatient hospital deductible for the preceding calendar year, changed by our best estimate of the payment-weighted average of the applicable percentage increases (as defined in section 1886(b)(3)(B) of the Act) used for updating the payment rates to hospitals for discharges in the fiscal year that begins on October 1 of such preceding calendar year, and adjusted to reflect changes in real case mix. The adjustment to reflect changes in real case mix is determined on the basis of the most recent case mix data available. The amount determined under this formula is rounded to the nearest multiple of $4 (or, if midway between two multiples of $4, to the next higher multiple of $4).

Under section 1886(b)(3)(B)(i) of the Act, as amended by section 4401(a) of the Balanced Budget Act of 1997 (BBA '97) (Pub. L. 105–33) and section 301(a) of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 (Pub. L. 106–554, enacted on December 21, 2000), the percentage increase used to update the payment rates for fiscal year 2003 for hospitals paid under the prospective payment system is the market basket percentage increase minus 0.55 percentage points.

Under section 1886(b)(3)(B)(ii) of the Act, the percentage increase used to update the payment rates for fiscal year 2003 for hospitals excluded from the prospective payment system is the market basket percentage increase, defined according to section 1886(b)(3)(B)(iii) of the Act.

The market basket percentage increase for fiscal year 2003 is 3.5 percent, as announced in the final rule titled ''Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2003 Rates; Final Rule'' published in the **Federal Register** on August 1, 2002 (67 FR 49982). Therefore, the percentage increase for hospitals paid under the prospective payment system is 2.95 percent. The average payment percentage increase for hospitals excluded from the prospective payment system is 3.5 percent. Weighting these percentages in accordance with payment volume, our best estimate of the payment-weighted average of the increases in the payment rates for fiscal year 2003 is 3.0 percent.

To develop the adjustment for real case mix, we first calculated for each hospital an average case mix that reflects the relative costliness of that hospital's mix of cases compared to those of other hospitals. We then computed the change in average case mix for hospitals paid under the Medicare prospective payment system in fiscal year 2002 compared to fiscal year 2001. (We excluded from this calculation hospitals excluded from the prospective payment system because their payments are based on reasonable costs and are affected only by real changes in case mix.) We used bills from prospective payment hospitals received in CMS as of July 2002. These bills represent a total of about 8.8 million discharges for fiscal year 2002 and provide the most recent case mix data available at this time. Based on these bills, the change in average case mix in fiscal year 2002 is 0.17 percent. Based on past experience, we expect the overall case mix change to be 0.5 percent as the year progresses and more fiscal year 2002 data become available.

Section 1813 of the Act requires that the inpatient hospital deductible be adjusted only by that portion of the case mix change that is determined to be real. We estimate that the change in real case mix for fiscal year 2002 is 0.5 percent.

Thus, the estimate of the payment-weighted average of the applicable percentage increases used for updating the payment rates is 3.0 percent, and the real case mix adjustment factor for the deductible is 0.5 percent. Therefore, under the statutory formula, the inpatient hospital deductible for services furnished in calendar year 2003 is $840. This deductible amount is determined by multiplying $812 (the inpatient hospital deductible for 2002) by the payment-weighted average increase in the payment rates of 1.03 multiplied by the increase in real case mix of 1.005, which equals $840.54 and is rounded to $840.

III. Computing the Inpatient Hospital and Extended Care Services Coinsurance Amounts for 2003

The coinsurance amounts provided for in section 1813 of the Act are defined as fixed percentages of the inpatient hospital deductible for services furnished in the same calendar year. Thus, the increase in the deductible generates increases in the coinsurance amounts. For inpatient hospital and extended care services furnished in 2003, in accordance with the fixed percentages defined in the law, the daily coinsurance for the 61st through 90th day of hospitalization in a benefit period will be $210 (one-fourth of the inpatient hospital deductible); the daily coinsurance for lifetime reserve days will be $420 (one-half of the inpatient hospital deductible); and the daily coinsurance for the 21st through 100th day of extended care services in a skilled nursing facility in a benefit period will be $105.00 (one-eighth of the inpatient hospital deductible).

IV. Cost to Beneficiaries

We estimate that in 2003 there will be about 8.95 million deductibles paid at $840 each, about 2.31 million days subject to coinsurance at $210 per day (for hospital days 61 through 90), about 1.03 million lifetime reserve days subject to coinsurance at $420 per day, and about 26.50 million extended care days subject to coinsurance at $105.00 per day. Similarly, we estimate that in 2002 there will be about 8.78 million deductibles paid at $812 each, about 2.27 million days subject to coinsurance at $203 per day (for hospital days 61

through 90), about 1.01 million lifetime reserve days subject to coinsurance at $406 per day, and about 25.99 million extended care days subject to coinsurance at $101.50 per day. Therefore, the estimated total increase in cost to beneficiaries is about $580 million (rounded to the nearest $10 million), due to (1) the increase in the deductible and coinsurance amounts and (2) the change in the number of deductibles and daily coinsurance amounts paid.

V. Waiver of Proposed Notice and Comment Period

The Medicare statute, as discussed previously, requires publication of the Medicare Part A inpatient hospital deductible and the hospital and extended care services coinsurance amounts for services for each calendar year. The amounts are determined according to the statute. As has been our custom, we use general notices, rather than notice and comment rulemaking procedures, to make the announcements. In doing so, we acknowledge that, under the Administrative Procedure Act, interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice are excepted from the requirements of notice and comment rulemaking.

We considered publishing a proposed notice to provide a period for public comment. However, we may waive that procedure if we find good cause that prior notice and comment are impracticable, unnecessary, or contrary to the public interest. We find that the procedure for notice and comment is unnecessary because the formulae used to calculate the inpatient hospital deductible and hospital and extended care services coinsurance amounts are statutorily directed, and we can exercise no discretion in following those formulae. Moreover, the statute establishes the time period for which the deductible and coinsurance amounts will apply and delaying publication would be contrary to the public interest. Therefore, we find good cause to waive publication of a proposed notice and solicitation of public comments.

VI. Regulatory Impact Statement

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

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). As stated in section IV of this notice, we estimate that the total increase in costs to beneficiaries associated with this notice is about $580 million due to (1) the increase in the deductible and coinsurance amounts and (2) the change in the number of deductibles and daily coinsurance amounts paid. Therefore, this notice is a major rule as defined in Title 5, United States Code, section 804(2) and is an economically significant rule under Executive Order 12866.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not considered small entities. We have determined that this notice will not have a significant economic impact on a substantial number of small entities. Therefore, we are not preparing an analysis for the RFA.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We have determined that this notice will not have a significant effect on the operations of a substantial number of small rural hospitals. Therefore, we are not preparing an analysis for section 1102(b) of the Act.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditures in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This notice has no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This notice has no consequential effect on State or local governments.

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

Authority: Secs. 1813(b)(2) of the Social Security Act (42 U.S.C. 1395e–2(b)(2)).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: September 4, 2002.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: September 20, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–26674 Filed 10–18–02; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8014–N]

RIN 0938–AL63

Medicare Program; Monthly Actuarial Rates and Monthly Supplementary Medical Insurance Premium Rate Beginning January 1, 2003

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

ACTION: Notice.

SUMMARY: In accordance with section 1839 of the Social Security Act (the Act), this notice announces the monthly actuarial rates for aged (age 65 and over) and disabled (under age 65) enrollees in the Medicare Supplementary Medical Insurance (SMI) program for 2003. It also announces the monthly SMI premium to be paid by all enrollees during 2003. The monthly actuarial rates for 2003 are $118.70 for aged enrollees and $141.00 for disabled enrollees. The monthly SMI premium rate for 2003 is $58.70. (The 2002 premium rate was $54.00). This compares to projections of the 2003 SMI premium of $57.00 in the 2002 Trustees Report and $63.30 in the 2001 Trustees Report. The 2003 Part B premium is not equal to 50 percent of the monthly actuarial rate because of the differential between the amount of home health that is transferred into Part B in 2003 (the

full cost) and the amount in Part B that is included in the premium calculation (six-sevenths). Included in the monthly premium rate is $3.68 for home health services being transferred into Part B.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Carter S. Warfield, (410) 786–6396.

SUPPLEMENTARY INFORMATION:

I. Background

The Medicare Supplementary Medical Insurance (SMI) program is the voluntary Medicare Part B program that pays all or part of the costs for physicians' services, outpatient hospital services, home health services, services furnished by rural health clinics, ambulatory surgical centers, comprehensive outpatient rehabilitation facilities, and certain other medical and health services not covered by hospital insurance (HI) (Medicare Part A). The SMI program is available to individuals who are entitled to HI and to U.S. residents who have attained age 65 and are citizens, or aliens who were lawfully admitted for permanent residence and have resided in the United States for 5 consecutive years. This program requires enrollment and payment of monthly premiums, as provided in 42 CFR part 407, subpart B, and part 408, respectively. The difference between the premiums paid by all enrollees and total incurred costs is met from the general revenues of the Federal Government.

The Secretary of the Department of Health and Human Services (the Secretary) is required by section 1839 of the Social Security Act (the Act) to issue two annual notices relating to the SMI program.

One notice announces two amounts that, according to actuarial estimates, will equal respectively, one-half the expected average monthly cost of SMI for each aged enrollee (age 65 or over) and one-half the expected average monthly cost of SMI for each disabled enrollee (under age 65) during the year beginning the following January. These amounts are called ''monthly actuarial rates.''

The second notice announces the monthly SMI premium rate to be paid by aged and disabled enrollees for the year beginning the following January. (Although the costs to the program per disabled enrollee are different than for the aged, the law provides that they pay the same premium amount.) Beginning with the passage of section 203 of the Social Security Amendments of 1972 (Pub. L. 92–603), the premium rate, which was determined on a fiscal year basis, was limited to the lesser of the actuarial rate for aged enrollees, or the current monthly premium rate increased by the same percentage as the most recent general increase in monthly Title II social security benefits.

However, the passage of section 124 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) suspended this premium determination process. Section 124 of TEFRA changed the premium basis to 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees). Section 606 of the Social Security Amendments of 1983 (Pub. L. 98–21), section 2302 of the Deficit Reduction Act of 1984 (DEFRA '84) (Pub. L. 98–369), section 9313 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA '85) (Pub. L. 99–272), section 4080 of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (Pub. L. 100–203), and section 6301 of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89) (Pub. L. 101–239) extended the provision that the premium be based on 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees). This extension expired at the end of 1990.

The premium rate for 1991 through 1995 was legislated by section 1839(e)(1)(B) of the Act, as added by section 4301 of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) (Pub.L. 101–508). In January 1996, the premium determination basis would have reverted to the method established by the 1972 Social Security Act Amendments. However, section 13571 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) (Pub. L. 103–66) changed the premium basis to 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees) for 1996 through 1998.

Section 4571 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) permanently extended the provision that the premium be based on 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees).

The BBA included a further provision affecting the calculation of the SMI actuarial rates and premiums for 1998 through 2003. Section 4611 of the BBA modified the home health benefit payable under the HI program for individuals enrolled in the SMI program. Under this section, expenditures for home health services not considered ''post-institutional'' are payable under the SMI program rather than the HI program, beginning in 1998. However, section 4611(e)(1) of the BBA required that there be a transition from 1998 through 2002 for the aggregate amount of the expenditures transferred from the HI program to the SMI program. Section 4611(e)(2) of the BBA also provided a specific yearly proportion for the transferred funds. The proportions were 1/6 for 1998, 1/3 for 1999, 1/2 for 2000, 2/3 for 2001, and 5/6 for 2002. For purposes of determining the correct amount of financing from general revenues of the Federal Government, it was necessary to include only these transitional amounts in the monthly actuarial rates for both aged and disabled enrollees, rather than the total cost of the home health services being transferred. Accordingly, the actuarial rates shown in this announcement reflect the net transitional cost only.

Section 4611(e)(3) of the BBA also specified, for the purposes of determining the premium, that the monthly actuarial rate for enrollees age 65 and over shall be computed as though the transition would occur for 1998 through 2003 and that 1/7 of the cost would be transferred in 1998, 2/7 in 1999, 3/7 in 2000, 4/7 in 2001, 5/7 in 2002, and in 2003. Therefore, the transition period for incorporating this home health transfer into the premium is 7 years while the transition period for including these services in the actuarial rate is 6 years. As a result, the premium rate for this year will be less than 50 percent of the actuarial rate for aged enrollees announced by the Secretary.

New section 1933(c) of the Act, as added by section 4732(c) of the BBA, required the Secretary to allocate money from the SMI trust fund to the State Medicaid programs for the purpose of providing Medicare Part B premium assistance from 1998 through 2002 for the section 1933 qualifying low-income Medicaid beneficiaries. This allocation, while not being a benefit expenditure, was an expenditure of the trust fund and was included in calculating the SMI actuarial rates through 2002.

As determined according to section 1839(a)(3) of the Act and section 4611(e)(3) of the BBA, the premium rate for 2003 is $58.70. Included in the premium rate is $3.68 for home health services transferred into Part B.

A further provision affecting the calculation of the SMI premium is section 1839(f) of the Act, as amended by section 211 of the Medicare Catastrophic Coverage Act of 1988 (MCCA '88) (Pub. L. 100–360). (The Medicare Catastrophic Coverage Repeal Act of 1989 (Pub. L. 101–234) did not repeal the revisions to section 1839(f) made by MCCA '88.) Section 1839(f), referred to as the hold-harmless provision, provides that if an individual

is entitled to benefits under section 202 or 223 of the Act (the Old-Age and Survivors Insurance Benefit and the Disability Insurance Benefit, respectively) and has the SMI premiums deducted from these benefit payments, the premium increase will be reduced to avoid causing a decrease in the individual's net monthly payment. This decrease in payment occurs if the increase in the individual's social security benefit due to the cost-of-living adjustment under section 215(i) of the Act is less than the increase in the premium. Specifically, the reduction in the premium amount applies if the individual is entitled to benefits under section 202 or 223 of the Act for November and December of a particular year and the individual's SMI premiums for December and the following January are deducted from the respective month's section 202 or 223 benefits.

A check for benefits under section 202 or 223 of the Act is received in the month following the month for which the benefits are due. The SMI premium that is deducted from a particular check is the SMI payment for the month in which the check is received. Therefore, a benefit check for November is not received until December, but has the December's SMI premium deducted from it.

Generally, if a beneficiary qualifies for hold-harmless protection—that is, if the beneficiary was in current payment status for November and December of the previous year—the reduced premium for the individual for that January and each of the succeeding 11 months for which he or she is entitled to benefits, under section 202 or 203 of the Act, is the greater of the following:

(1) The monthly premium for January reduced as necessary to make the December monthly benefits, after the deduction of the SMI premium for January, at least equal to the preceding November's monthly benefits, after the deduction of the SMI premium for December; or

(2) The monthly premium for that individual for that December.

In determining the premium limitations under section 1839(f) of the Act, the monthly benefits to which an individual is entitled under section 202 or 223 of the Act do not include retroactive adjustments or payments and deductions on account of work. Also, once the monthly premium amount has been established under section 1839(f) of the Act, it will not be changed during the year even if there are retroactive adjustments or payments and deductions on account of work that apply to the individual's monthly benefits.

Individuals who have enrolled in the SMI program late or have reenrolled after the termination of a coverage period are subject to an increased premium under section 1839(b) of the Act. The increase is a percentage of the premium and is based on the new premium rate before any reductions under section 1839(f) are made.

II. Notice of Monthly Actuarial Rates and Monthly Premium Rate

The monthly actuarial rates applicable for 2003 are $118.70 for enrollees age 65 and over, and $141.00 for disabled enrollees under age 65. Section III of this notice gives the actuarial assumptions and bases from which these rates are derived. The monthly premium rate will be $58.70 during 2003. Included in the monthly premium rate is $3.68 for home health services transferred into Part B.

III. Statement of Actuarial Assumptions and Bases Employed in Determining the Monthly Actuarial Rates and the Monthly Premium Rate for the Supplementary Medical Insurance Program Beginning January 2003

A. Actuarial Status of the Supplementary Medical Insurance Trust Fund

Under the law, the starting point for determining the monthly premium is the amount that would be necessary to finance the SMI program on an incurred basis. This is the amount of income that would be sufficient to pay for services furnished during that year (including associated administrative costs) even though payment for some of these services will not be made until after the close of the year. The portion of income required to cover benefits not paid until after the close of the year is added to the trust fund and used when needed.

The rates are established prospectively and are, therefore, subject to projection error. Additionally, legislation enacted after the financing has been established, but effective for the period in which the financing has been set, may affect program costs. As a result, the income to the program may not equal incurred costs. Therefore, trust fund assets should be maintained at a level that is adequate to cover a moderate degree of variation between actual and projected costs, and the amount of incurred, but unpaid expenses. An appropriate level for assets to cover a moderate degree of variation between actual and projected costs depends on numerous factors. The most important of these factors are: (1) The difference from prior years between the actual performance of the program and estimates made at the time financing was established, and (2) the expected relationship between incurred and cash expenditures. Ongoing analysis is made of both factors as the trends vary over time.

Table 1 summarizes the estimated actuarial status of the trust fund as of the end of the financing period for 2001 and 2002.

TABLE 1.—ESTIMATED ACTUARIAL STATUS OF THE SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND AS OF THE END OF THE FINANCING PERIOD

[In millions of dollars]

Financing period ending	Assets	Liabilities	Assets less liabilities
Dec. 31, 2001	$41,889	$7,799	$34,091
Dec. 31, 2002	36,187	7,557	28,630

B. Monthly Actuarial Rate for Enrollees Age 65 and Older

The monthly actuarial rate for enrollees age 65 and older is one-half of the monthly projected cost of benefits, the Medicaid transfer (for 1998 through 2002), and administrative expenses for each enrollee age 65 and older, adjusted to allow for interest earnings on assets in the trust fund and a contingency margin. The contingency margin is an amount appropriate to provide for a moderate degree of variation between actual and projected costs and to

amortize any surplus or unfunded liabilities. As noted in section I of this announcement, section 4611(e)(2) of the BBA required that the full cost of the home health services transferred be included in the actuarial rate for 2003.

The monthly actuarial rate for enrollees age 65 and older for 2003 is determined by first establishing per-enrollee cost by type of service from program data through 2001 and then projecting these costs for subsequent years. The projection factors used are shown in Table 2. The projected values for financing periods from January 1, 2000 through December 31, 2003, are shown in Table 3.

The projected monthly rate required to pay for one-half of the total of benefits and administrative costs for enrollees age 65 and over for 2003 is $122.11. The monthly actuarial rate of $118.70 also provides an adjustment of -$3.38 for interest earnings and -$0.03 for a contingency margin. Based on current estimates, it appears that the assets are more than sufficient to cover the amount of incurred but unpaid expenses and to provide for a moderate degree of variation between actual and projected costs. Thus, a negative contingency margin reduces assets to a more appropriate level.

C. Monthly Actuarial Rate for Disabled Enrollees

Disabled enrollees are those persons enrolled in SMI because of entitlement (before age 65) to disability benefits for more than 24 months or because of entitlement to Medicare under the end-stage renal disease (ESRD) program. Projected monthly costs for disabled enrollees (other than those with ESRD) are prepared in a fashion parallel to the projection for the aged using appropriate actuarial assumptions (see Table 2). Costs for the ESRD program are projected differently because of the different nature of services offered by the program. The combined results for all disabled enrollees are shown in Table 4.

The projected monthly rate required to pay for one-half of the total of benefits and administrative costs for disabled enrollees for 2003 is $137.86. The monthly actuarial rate of $141.00 also provides an adjustment of -$2.10 for interest earnings and $5.24 for a contingency margin. Based on current estimates, it appears that the assets are not sufficient to cover the amount of incurred, but unpaid expenses and to provide for a moderate degree of variation between actual and projected costs. Thus, a positive contingency margin is needed to increase assets to a more appropriate level.

D. Sensitivity Testing

Several factors contribute to uncertainty about future trends in medical care costs. It is appropriate to test the adequacy of the rates using alternative assumptions. The results of those assumptions are shown in Table 5. One set represents increases that are lower and, therefore, more optimistic than the current estimate. The other set represents increases that are higher and, therefore, more pessimistic than the current estimate. The values for the alternative assumptions were determined from a statistical analysis of the historical variation in the respective increase factors.

Table 5 indicates that, under the assumptions used in preparing this report, the monthly actuarial rates would result in an excess of assets over liabilities of $29,268 million by the end of December 2003. This amounts to 24.5 percent of the estimated total incurred expenditures for the following year. Assumptions that are somewhat more pessimistic (and therefore, test the adequacy of the assets to accommodate projection errors) produce a surplus of $24,976 million by the end of December 2003, which amounts to 19.2 percent of the estimated total incurred expenditures for the following year. Under fairly optimistic assumptions, the monthly actuarial rates would result in a surplus of $33,751 million by the end of December 2003, which amounts to 30.9 percent of the estimated total incurred expenditures for the following year.

E. Premium Rate

As determined by section 1839(a)(3) of the Act and section 4611(e)(3) of the BBA, the monthly premium rate for 2003, for both aged and disabled enrollees, is $58.70.

TABLE 2.—PROJECTION FACTORS [1], 12-MONTH PERIODS ENDING DECEMBER 31 OF 2000–2003

[In percent]

Calendar year	Physicians' services		Durable medical equipment	Carrier lab [4]	Other carrier services [5]	Outpatient hospital	Home health agency	Hospital lab [6]	Other intermediary services [7]	Managed care
	Fees [2]	Residual [3]								
Aged:										
2000	5.8	3.5	10.1	7.3	14.1	−1.1	−10.7	5.3	21.4	5.8
2001	5.7	3.4	12.5	7.4	16.4	−1.3	24.3	−8.7	5.1	5.2
2002	−4.1	3.6	7.4	3.8	11.5	3.7	12.0	8.7	10.9	7.5
2003	−4.3	4.2	7.2	5.3	11.1	2.9	6.5	5.2	−16.3	2.1
Disabled:										
2000	5.8	3.5	11.1	4.0	12.0	45.2	−9.8	8.3	−1.2	1.3
2001	5.7	5.3	15.0	9.5	20.5	37.6	21.9	1.3	−8.2	0.9
2002	−4.1	3.4	6.6	3.6	11.4	−18.6	9.4	7.1	9.8	4.5
2003	−4.3	4.1	7.2	5.2	10.9	−29.1	5.7	5.1	−28.1	2.0

[1] All values for services other than managed care are per fee-for-service enrollee. Managed care values are per managed care enrollee.
[2] As recognized for payment under the program.
[3] Increase in the number of services received per enrollee and greater relative use of more expensive services.
[4] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[5] Includes physician administered drugs, ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[6] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[7] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.

TABLE 3.—DERIVATION OF MONTHLY ACTUARIAL RATE FOR ENROLLEES AGE 65 AND OVER FINANCING PERIODS ENDING DECEMBER 31, 2000 THROUGH DECEMBER 31, 2003

	Financing periods			
	CY 2000	CY 2001	CY 2002	CY 2003
Covered services (at level recognized):				
Physician fee schedule	55.37	62.11	63.20	63.39
Durable medical equipment	6.33	7.31	8.02	8.66
Carrier lab [1]	2.46	2.71	2.88	3.05
Other carrier services [2]	10.53	12.58	14.35	16.05
Outpatient hospital	19.31	19.55	20.74	21.49
Home health	[5] 5.68	[5] 7.24	[5] 8.30	8.90
Hospital lab [3]	1.93	1.81	2.01	2.13
Other intermediary services [4]	6.36	6.86	7.78	6.56
Managed care	[6] 22.26	[6] 20.89	[6] 20.07	19.74
Total services	[7] 130.22	[7] 141.06	[7] 147.35	149.96
Cost-sharing:				
Deductible	−3.78	−3.94	−3.73	−3.85
Coinsurance	−24.41	−25.17	−26.12	−26.38
Total benefits	102.02	111.95	117.51	119.74
Administrative expenses	1.95	2.19	2.23	2.37
Incurred expenditures	103.97	114.14	119.73	122.11
Value of interest	−4.18	−3.57	−3.21	−3.38
Adjustment for home health agency services transferred from HI	[8] −3.43	[8] −2.81	[8] −1.59	.....
Contingency margin for projection error and to amortize the surplus or deficit	−4.46	−6.75	−5.63	−0.03
Monthly actuarial rate	$91.90	$101.00	$109.30	$118.70

[1] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[2] Includes physician administered drugs, ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[3] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[4] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.
[5] This amount includes the full cost of the fee-for-service home health services being transferred from the HI program as a result of the BBA as if the transition did not apply, as well as the cost of furnishing all home health services to those individuals enrolled in SMI only.
[6] This amount includes the full cost of the managed care home health services being transferred from the HI program as a result of the BBA as if the transition did not apply, as well as the cost of furnishing all other SMI services to individuals enrolled in managed care.
[7] Includes transfers to Medicaid. Section 1933(c)(2) of the Act, as added by section 4732(c) of the BBA, allocates an amount to be transferred from the SMI trust fund to the state Medicaid programs. This transfer is for the purpose of paying the SMI premiums for certain low-income beneficiaries. It is not a benefit expenditure but is used in determining the SMI actuarial rates since it is an expenditure of the trust fund.
[8] Section 4611 of the BBA specifies that expenditures for home health services not considered ''post-institutional'' will be payable under the SMI program rather than the HI program beginning in 1998. However, section 4611(e)(1) requires there be a transition from 1998 through 2002 for the aggregate amount of the expenditures transferred from the HI program to the SMI program. For 1998, the amount transferred is 1/6 of the full cost for such services, for 1999, 1/3, for 2000, 1/2, for 2001, 2/3, and for 2002, 5/6. Therefore, the adjustment for 2000 represents 1/6 of the full cost, for 2001, 1/2, and for 2002, 1/3. This amount adjusts the actuarial rate to reflect the correct amount attributable to home health services.

TABLE 4.—DERIVATION OF MONTHLY ACTUARIAL RATE FOR DISABLED ENROLLEES FINANCING PERIODS ENDING DECEMBER 31, 2000 THROUGH DECEMBER 31, 2003

	Financing periods			
	CY 2000	CY 2001	CY 2002	CY 2003
Covered services (at level recognized):				
Physician fee schedule	57.10	63.98	64.03	63.90
Durable medical equipment	10.20	11.86	12.74	13.68
Carrier lab [1]	2.87	3.10	3.23	3.41
Other carrier services [2]	11.42	13.74	15.38	17.11
Outpatient hospital	34.26	47.46	38.96	27.66
Home health	[5] 4.40	[5] 5.42	[5] 5.97	6.32
Hospital lab [3]	2.83	2.82	3.02	3.18
Other intermediary services [4]	28.78	28.53	29.88	28.61
Managed care	[6] 10.73	[6] 9.82	[6] 9.43	9.43
Total services	[7] 162.59	[7] 186.73	[7] 182.64	173.29
Cost-sharing:				
Deductible	−3.67	−3.88	−3.57	−3.74
Coinsurance	−44.70	−57.11	−47.08	−34.37
Total benefits	114.22	125.74	131.99	135.19
Administrative expenses	2.18	2.46	2.50	2.68

TABLE 4.—DERIVATION OF MONTHLY ACTUARIAL RATE FOR DISABLED ENROLLEES FINANCING PERIODS ENDING DECEMBER 31, 2000 THROUGH DECEMBER 31, 2003—Continued

	Financing periods			
	CY 2000	CY 2001	CY 2002	CY 2003
Incurred expenditures	116.40	128.19	134.49	137.86
Value of interest	−1.60	−2.26	−1.99	−2.10
Adjustment for home health agency services transferred from HI	[8] −2.59	[8] −2.08	[8] −1.13	.....
Contingency margin for projection error and to amortize the surplus or deficit	8.89	8.34	−8.27	5.24
Monthly actuarial rate	$121.10	$132.20	$123.10	$141.00

[1] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[2] Includes physician administered drugs, ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[3] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[4] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.
[5] This amount includes the full cost of the fee-for-service home health services being transferred from the HI program as a result of the BBA as if the transition did not apply, as well as the cost of furnishing all home health services to those individuals enrolled in SMI only.
[6] This amount includes the full cost of the managed care home health services being transferred from the HI program as a result of the BBA as if the transition did not apply, as well as the cost of furnishing all other SMI services to individuals enrolled in managed care.
[7] Includes transfers to Medicaid. Section 1933(c)(2) of the Act, as added by section 4732(c) of the BBA, allocates an amount to be transferred from the SMI trust fund to the state Medicaid programs. This transfer is for the purpose of paying the SMI premiums for certain low-income beneficiaries. It is not a benefit expenditure but is used in determining the SMI actuarial rates since it is an expenditure of the trust fund.
[8] Section 4611 of the BBA specifies that expenditures for home health services not considered ''post-institutional'' will be payable under the SMI program rather than the HI program beginning in 1998. However, section 4611(e)(1) requires there be a transition from 1998 through 2002 for the aggregate amount of the expenditures transferred from the HI program to the SMI program. For 1998, the amount transferred is ⅙ of the full cost for such services, for 1999, ⅓, for 2000, ½, for 2001, ⅔, and for 2002, ⅚. Therefore, the adjustment for 2000 represents ½ of the full cost, for 2001, ⅓, and for 2002, ⅙. This amount adjusts the actuarial rate to reflect the correct amount attributable to home health services.

TABLE 5.—ACTUARIAL STATUS OF THE SMI TRUST FUND UNDER THREE SETS OF ASSUMPTIONS FOR FINANCING PERIODS THROUGH DECEMBER 31, 2003

As of December 31	2001	2002	2003
This projection:			
Actuarial status (in millions):			
Assets	41,889	36,187	37,830
Liabilities	7,799	7,557	8,561
Assets less liabilities	34,091	28,630	29,268
Ratio (in percent) [1]	31.1	25.0	24.5
Low cost projection:			
Actuarial status (in millions):			
Assets	41,889	36,187	41,988
Liabilities	7,799	7,097	8,237
Assets less liabilities	34,091	29,090	33,751
Ratio (in percent) [1]	32.5	27.3	30.9
High cost projection:			
Actuarial status (in millions):			
Assets	41,889	36,187	33,901
Liabilities	7,799	8,027	8,925
Assets less liabilities	34,091	28,160	24,976
Ratio (in percent) [1]	29.8	23.0	19.2

[1] Ratio of assets less liabilities at the end of the year to the total incurred expenditures during the following year, expressed as a percent.

IV. Regulatory Impact Analysis

We have examined the impact of this notice as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) September 19, 1980 (Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 to $29 million in any 1 year (65 FR 69432). For purposes of the RFA, States and individuals are not considered to be small entities.

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

determined that this notice will not have a significant effect on a substantial number of small entities nor on the operations of a substantial number of small rural hospitals. Therefore, we are not preparing analyses for either the RFA or section 1102(b) of the Act.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in an 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This notice has no consequential effect on State, local, or tribal governments. We believe the private sector costs of this notice fall below this threshold as well.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have determined that this notice does not significantly affect the rights, roles, and responsibilities of States.

This notice announces that the monthly actuarial rates applicable for 2003 are $118.70 for enrollees age 65 and over, and $141.00 for disabled enrollees under age 65. It also announces that the monthly SMI premium rate for calendar year 2003 is $58.70. The SMI premium rate of $58.70 is 8.7 percent higher than the $54.00 premium rate for 2002. We estimate that the cost of this increase from the current premium to the approximately 38 million SMI enrollees will be about $2.161 billion for 2003. Therefore, this notice is a major rule as defined in Title 5, United States Code, section 804(2) and is an economically significant rule under Executive Order 12866.

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

V. Waiver of Proposed Notice

The Medicare statute requires the publication of the monthly actuarial rates and the Part B premium amounts in September. We ordinarily use general notices, rather than notice and comment rulemaking procedures, to make such announcements. In doing so, we note that under the Administrative Procedure Act interpretive rules; general statements of policy; and rules of agency organization, procedure, or practice are excepted from the requirements of notice and comment rulemaking.

We considered publishing a proposed notice to provide a period for public comment. However, we may waive that procedure if we find, for good cause, that prior notice and comment are impracticable, unnecessary, or contrary to the public interest. We find that the procedure for notice and comment is unnecessary because the formula used to calculate the SMI premium is statutorily directed, and we can exercise no discretion in applying that formula. Moreover, the statute establishes the time period for which the premium rates will apply, and delaying publication of the SMI premium rate such that it would not be published before that time would be contrary to the public interest. Therefore, we find good cause to waive publication of a proposed notice and solicitation of public comments.

(Section 1839 of the Social Security Act; 42 U.S.C. 1395r)

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

Dated: September 4, 2002.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: September 23, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–26675 Filed 10–18–02; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8015–N]

RIN 0938–AL69

Medicare Program; Part A Premium for 2003 for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement

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

ACTION: Notice.

SUMMARY: This notice announces the Hospital Insurance premium for calendar year 2003 under Medicare's Hospital Insurance program (Part A) for the uninsured, not otherwise eligible aged (hereafter known as the ''uninsured aged'') and for certain disabled individuals who have exhausted other entitlement. The monthly Medicare Part A premium for the 12 months beginning January 1, 2003 for these individuals is $316. The reduced premium for certain other individuals as described in this notice is $174. Section 1818(d) of the Social Security Act specifies the method to be used to determine these amounts.

EFFECTIVE DATE: This notice is effective January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Clare McFarland, (410) 786–6390.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1818 of the Social Security Act (the Act) provides for voluntary enrollment in the Medicare Hospital Insurance program (Medicare Part A), subject to payment of a monthly premium, of certain persons aged 65 and older who are uninsured under the Old-Age, Survivors and Disability Insurance Program (OASDI) or the Railroad Retirement Act and do not otherwise meet the requirements for entitlement to Medicare Part A. (Persons insured under the OASDI program or the Railroad Retirement Act and certain others do not have to pay premiums for hospital insurance.)

Section 1818(d) of the Act requires us to estimate, on an average per capita basis, the amount to be paid from the Federal Hospital Insurance Trust Fund for services performed and related administrative costs incurred in the following calendar year with respect to individuals aged 65 and over who will be entitled to benefits under Medicare Part A. We must then determine, during September of each year, the monthly actuarial rate for the following year (the per capita amount estimated above divided by 12) and publish the dollar amount for the monthly premium in the succeeding calendar year. If the premium is not a multiple of $1, the premium is rounded to the nearest multiple of $1 (or, if it is a multiple of 50 cents but not of $1, it is rounded to the next highest $1). The 2002 premium under this method was $319 and was effective January 1, 2002. (See 66 FR 54264, October 26, 2001.)

Section 1818A of the Act provides for voluntary enrollment in Medicare Part A, subject to payment of a monthly premium, of certain disabled individuals who have exhausted other entitlement. These are individuals who are not currently entitled to Part A coverage, but who were entitled to coverage due to a disabling impairment under section 226(b) of the Act, and who would still be entitled to Part A coverage if their earnings had not exceeded the statutorily defined substantial gainful activity amount (section 223(d)(4) of the Act).

Section 1818A(d)(2) of the Act specifies that the provisions relating to premiums under section 1818(d) through (f) of the Act for the aged will

also apply to certain disabled individuals as described above.

Section 13508 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66) amended section 1818(d) of the Act to provide for a reduction in the premium amount for certain voluntary (section 1818 and 1818A) enrollees. The reduction applies to an individual who is eligible to buy into the Medicare Part A program and who, as of the last day of the previous month—

- Had at least 30 quarters of coverage under title II of the Act;
- Was married, and had been married for the previous 1-year period, to a person who had at least 30 quarters of coverage;
- Had been married to a person for at least 1 year at the time of the person's death if, at the time of death, the person had at least 30 quarters of coverage; or
- Is divorced from a person and had been married to the person for at least 10 years at the time of the divorce if, at the time of the divorce, the person had at least 30 quarters of coverage.

Section 1818(d)(4)(A) of the Act specifies that the premium that these individuals will pay for calendar year 2003 will be equal to the premium for uninsured aged enrollees reduced by 45-percent.

II. Monthly Premium Amount for 2003

- The monthly premium for the uninsured aged and certain disabled individuals who have exhausted other entitlement, for the 12 months beginning January 1, 2003, is $316.
- The monthly premium for those individuals subject to the 45-percent reduction in the monthly premium is $174.

III. Monthly Premium Rate Calculation

As discussed in section I of this notice, the monthly Medicare Part A premium is equal to the estimated monthly actuarial rate for 2003 rounded to the nearest multiple of $1 and equals one-twelfth of the average per capita amount, which is determined by projecting the number of individuals aged 65 and over entitled to Hospital Insurance and the benefits and administrative costs that will be incurred on their behalf.

The steps involved in projecting these future costs to the Federal Hospital Insurance Trust Fund are:

- Establishing the present cost of services furnished to beneficiaries, by type of service, to serve as a projection base;
- Projecting increases in payment amounts for each of the service types; and
- Projecting increases in administrative costs.

We base our projections for 2003 on (a) current historical data, and (b) projection assumptions derived from current law and the Mid-Session Review of the President's Fiscal Year 2003 Budget.

We estimate that in calendar year 2003, 34.021 million people aged 65 and over will be entitled to benefits (without premium payment) and that they will incur $128.931 billion of benefits and related administrative costs. Thus, the estimated monthly average per capita amount is $315.81 and the monthly premium is $316. The full monthly premium reduced by 45-percent is $174.

IV. Costs to Beneficiaries

The 2003 premium of $316 is about 1 percent lower than the 2002 premium of $319.

We estimate that approximately 406,000 enrollees will voluntarily enroll in Medicare Part A by paying the full premium. We estimate an additional 1,000 enrollees will pay the reduced premium. We estimate that the aggregate savings to enrollees paying these premiums will be about $15 million in 2003 over 2002.

V. Waiver of Notice of Proposed Rulemaking

We are not using notice and comment rulemaking in this notification of Part A premiums for 2003, as that procedure is unnecessary because of the lack of discretion in the statutory formula that is used to calculate the premium and the solely ministerial function that this notice serves. The Administrative Procedure Act permits agencies to waive notice and comment rulemaking when this notice and public procedure thereon are unnecessary. Furthermore, given that we are statutorily bound to make these estimates and promulgate these rates all in the month of September, the Congress clearly did not envision the use of notice and comment rulemaking, as it is not feasible to conduct such a process in a 30-day period. On this basis, we waive publication of a proposed notice and a solicitation of public comments.

Regulatory Impact Statement

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

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). The estimated overall effect of these changes in the premium will be a savings to voluntary (section 1818 and 1818A) enrollees of about $15 million. Therefore this notice is not a major rule as defined in Title 5, United States Code, section 804(2) and is not an economically significant rule under Executive Order 12866.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not considered to be small entities. We have determined that this notice will not have a significant economic impact on a substantial number of small entities. Therefore, we are not preparing an analysis for the RFA.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We have determined that this notice will not have a significant effect on the operations of a substantial number of small rural hospitals. Therefore, we are not preparing an analysis for section 1102(b) of the Act.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditures in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This notice has no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local

governments, preempts State law, or otherwise has Federalism implications. This notice will not have a substantial effect on State or local governments.

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

Authority: Sections 1818(d)(2) and 1818A(d)(2) of the Social Security Act (42 U.S.C. 1395i–2(d)(2) and 1395i–2a(d)(2)).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: September 4, 2002.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: September 23, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–26676 Filed 10–18–02; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Women's Health Initiative Subcommittee of the Advisory Committee for Reproductive Health Drugs; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Women's Health Initiative Subcommittee of the Advisory Committee for Reproductive Health Drugs.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on November 12, 2002, from 8 a.m. to 6 p.m. and on November 13, 2002, from 8 a.m. to 5 p.m.

Location: Holiday Inn, Versailles Ballroom, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Jayne E. Peterson, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, e-mail: PETERSONJ@CDER.FDA.GOV, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12537. Please call the Information Line for up-to-date information on this meeting. Current information may also be accessed on the Internet at the FDA Docket Web site at http://www.fda.gov/ohrms/dockets/ac/acmenu.htm.

Agenda: On both days, presentations and subcommittee discussions will address the following issues related to the study results from the estrogen plus progestin component of the Women's Health Initiative (WHI): (1) Assessment of the known benefits for the approved indications and risk management considerations, (2) the extent to which these new data might be extrapolated to other combination estrogen/progestin products and doses, and (3) the WHI's implications for future clinical trials of hormonal therapy.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the subcommittee. Written submissions may be made to the contact person by November 1, 2002. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. on November 12, 2002, and between approximately 1 p.m. and 2 p.m. on November 13, 2002. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before November 1, 2002, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Jayne Peterson (see *Contact Person*) at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 11, 2002.

Linda Arey Skladany,

Senior Associate Commissioner for External Relations.

[FR Doc. 02–26728 Filed 10–18–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, U.S.C, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Proposed Project: National Health Service Corps (NHSC) Travel Request Worksheet, Non-Federal Personnel—In Use Without Approval

The National Health Service Corps (NHSC) of the HRSA's Bureau of Health Professions (BHPr), is committed to improving the health of the Nation's underserved by uniting communities in need with caring health professionals and by supporting communities' efforts to build better systems of care.

The Travel Request Worksheet is used by Scholarship Program recipients to receive travel support to perform pre-employment interviews at sites on the Approved Practice List at the Federal Government's expense. The travel approval process is initiated when the scholar notifies the NHSC's In-Service Support Branch or the respective Bureau of Prisons, Indian Health Service, and Immigration and Naturalization Service recruitment office of an impending interview at one or more NHSC approved practice sites.

The Travel Request Worksheet is also used to initiate the relocation process. Upon receipt of the Travel Request Worksheet, the NHSC will review and approve the request and promptly notify the NHSC contractor authorizing the funding for the relocation.

Estimates of annualized reporting burden are as follows:

Type of Respondent	Number of respondents	Responses per respondent	Hours per response	Total burden hours
Health Care Professionals	311	1	.066	21

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 11A–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. written comments should be received within 60 days of this notice.

Dated: October 15, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–26669 Filed 10–18–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Training Tomorrow's Scientists: Linking Minorities and Mentors Through the Web

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 Behavioral and Social Sciences Research (OBSSR), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection

Title: Training Tomorrow's Scientists: Linking Minorities and Mentors Through the Web. *Type of Information Collection Request:* REVISION, OMB control number 0925–0475, Expiration Date 1/31/2003. *Need and Use of Information Collection:* This website allows federally-funded researchers supported by any of the 27 Institutes and Centers of the NIH to submit an electronic form describing his or her research areas, as well as interests in mentoring minority students or junior faculty. The researcher's description is posted on the website for searching by interested minority applicants. Minority students or junior faculty search the website to identify researchers with whom they would like to work. The research projects in the database are located all over the country and involve cutting edge research activities by scientists funded through the Institutes and Centers of the NIH. These research projects range from studies of children to research on older adults, from laboratory research to field research, from social research to a combination of biological and behavioral research. Applicants conduct an electronic search using categories such as research areas of interest, desired geographic location of the researcher, and their level of education. The primary objective of the program is to ensure that, in the coming decades, a concentration of minority researchers will be available to address behavioral and social factors important in improving the public health and eliminating racial disparities. Increasing the number of minority scientists in the U.S. will expand our currently limited knowledge about the epidemiology and treatment of diseases in minority population. *Frequency of Response:* On occasion. *Affected Public:* Individuals or households. *Type of Respondents:* Students, Post-doctorals, Junior Faculty, and Principal Investigators. The annual reporting burden is as follows: *Estimated Number of Respondents:* 50; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* 10 minutes; and *Estimated Total Amount Burden Hours Requested:* 8. There is no annualized cost to respondents. There are no Capital Costs, Operating Costs and/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 Contact: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Ms. Dana Sampson, Program Analyst, OBSSR, OD NIH, Building 1, Room 256, 1 Center Drive, Bethesda, MD 20892, or call non-toll-free number (301) 402–1146 or E-mail your request, including your address to: *SampsonD@od.nih.gov*≤.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

John Jarman,

Executive Officer, Office of the Director, National Institutes of Health.

[FR Doc. 02–26698 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Behavioral and Environmental Risk Factors for Childhood

Summary: Under the provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute of Child Health and Human Development (NICHD), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on January 29, 2002, page 4275 and allowed 60 days for public comment. Public comments in support of the data collection were received from the American Academy of Pediatrics. The purpose of this notice is

to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection

Title: Behavioral and Environmental Risk Factors for Childhood Drowning. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The proposed study seeks to determine the relationship between swimming lessons, swimming ability, and other risk or protective factors on the one hand, and the risk of drowning on the other. Drowning is the second leading cause of unintentional injury death among children in the United States. Children under the age of five years are at particularly increased risk with drowning rates peaking among 1–2 year olds. Adolescent males are also at increased risk. While some preventive strategies, such as pool fencing, are known to be effective, the impact of other preventive strategies is unclear. For example, it is estimated that at least 20% of children between the ages of 1–4 years participate in formal swimming instructions, yet the effect of these instructions on the risk of drowning is unknown. Some argue that early exposure to swimming lessons might increase the risk of drowning by increasing exposure and decreasing children's fear of the water. Among adolescents, there is some indirect evidence that more skilled swimmers may be at increased risk of drowning. Better swimmers are likely to participate in more water-related activities and may feel confident enough to swim in higher risk settings, such as remote natural bodies of water with no lifeguards present. The findings from this study will provide valuable information concerning risk and protective factors for childhood drownings, information that is crucial in directing future preventive efforts. The proposed study will utilize a case-control methodology to identify associations between behavioral and environmental factors and the risk of drowning.

Interviews will be conducted with parents/guardians of 1272 children (424 cases and 848 controls.) The case interview and the control interview are estimated to take 40 minutes to complete. Additionally, a short, 10 minute questionnaire will be administered to 200 adolescents ages 14–19 years to assess risk behaviors related to water activities. Controls will be identified through random-digit dialing. It is estimated that 32,358 households will need to be screened (at 5 minutes per screener) to identify the 848 controls. Screening and study interviews will be conducted over a 27-month study period. There are no Capital Costs, Operating Costs and/or Maintenance Costs to report.

Type of respondent	Number of respondents	Frequency of response	Average hours per response	Total hours burden	Annual hour burden
Respondents to Parent/Guardian Case Interview	424	1	0.667	282.8	126
Respondents to RDD Screener	32,358	1	0.0835	2701.8	1201
Respondents to Control Interview	848	1	0.667	565.6	251
Respondents to Adolescent Interview	200	1	0.167	33.4	15
Total				3,583.6	1,593

Request for Comments

Written comments and/or suggestions from the public and affected agencies should address 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.

Direct Comments to OMB

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, *Attention:* Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Charles Grewe, Contracting Officer, NICHD, NIH. Address: 6100 Executive Blvd., Suite 7A07, Bethesda, MD 20892–7510; e-mail address *cg59b@nih.gov;* Phone: (303) 496–4611 (collect calls cannot be accepted).

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: October 9, 2002.

Kathleen Wilburn,

Project Clearance Liaison, NICHD, National Institutes of Health.

[FR Doc. 02–26699 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Alternative Medicine; 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 Center for Complementary and Alternative Medicine Special Emphasis Panel, K06 Meeting.

Date: October 17, 2002.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: William A. Kachadorian, PhD, MTS, Scientific Review Administrator, Office of Scientific Review, National Center for Complementary Alternative Medicine, 6707 Democracy Blvd, Ste 106, Bethesda, MD 20892–5475, (301) 594–2014, *kachadow&mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26701 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Alternative Medicine; 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 Center for Complementary and Alternative Medicine Special Emphasis Panel, CB04 Meeting.

Date: November 4, 2002.

Time: 1 pm to 5 pm.

Agenda: To review and evaluate grant applications.

Place: 6707 Democracy Blvd., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Carol Pontzer, PhD, Scientific Review Administrator, National Center for Complementary and Alternative Medicine, 6707 Democracy Blvd., Bethesda, MD 20892.

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26702 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group, Acquired Immunodeficiency Syndrome Research Review Committee, AIDS Research Review Committee.

Date: November 7–8, 2002.

Time: 8:30 am to 2 pm.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Hotel, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Roberta Binder, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, HIH, Room 2209, 6700B Rockledge Drive, Bethesda, MD 20892–7616, 301–496–2550, *rb169n@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26700 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, The International Centers for Excellence in Research Clinical Research and Management Training Program.

Date: November 8, 2002.

Time: 2 pm to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Roberta Binder, PhD, Scientific Review Administrator, Division of Extramural Activities, NIAID, 6700B Rockledge Drive, Rm 2155, Bethesda, MD 20892, 301–496–7966, *rb169n@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26703 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of closed 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 Mental Health Special Emphasis Panel,

Services Research Review Committee—Phone Session.

Date: November 5, 2002.

Time: 11 am to 1:30 pm.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Martha Ann Carey, PhD, RN, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9608, Bethesda, MD 20892–9608, 301–443–1606, *mcarey@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26704 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed 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 Mental Health Special Emphasis Panel, M–RISP.

Date: December 5, 2002.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Henry J. Haigler, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Rm. 6150, MSC 9608, Bethesda, MD 20892–9608, 301/443–7216, *hhaigler@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26705 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Cancellation of Meeting

Notice is hereby given of the cancellation of the PubMed Central National Advisory Committee, November 4, 2002, 9:30 am to November 4, 2002, 4 pm, Library of Medicine, Board Room, Room 2E17, Bldg. 38, 8600 Rockville Pike, Bethesda, MD, 20892 which was published in the **Federal Register** on August 21,2002, 67 FR 54227.

The meeting is cancelled due to concern regarding quorum and availability of Committee members.

Dated: October 10, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–26706 Filed 10–18–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration (SAMHSA)

Special Emphasis Panels I; Notice of Meetings

Pursuant to Pub. L. 92–463, notice is hereby given of the following meetings of SAMHSA Special Emphasis Panels I in November and December 2002.

A summary of the meetings and a roster of the members may be obtained from: Ms. Coral Sweeney, Review Specialist, SAMHSA, Office of Policy and Program Coordination, Division of Extramural Activities, Policy, and Review, 5600 Fishers Lane, Room 17–89, Rockville, Maryland 20857. Telephone: (301) 443–2998.

Substantive program information may be obtained from the individual named as Contact for the meeting listed below.

The meetings will include the review, discussion and evaluation of individual grant applications. These discussions could reveal personal information concerning individuals associated with the applications. Accordingly, these meetings are concerned with matters exempt from mandatory disclosure in Title 5 U.S.C. 552b© (6) and 5 U.S.C. App.2, § 10(d).

Committee Name: SAMHSA Special Emphasis Panel 1 (SEP1).

Meeting Date: November 18th–22nd, 2002.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Closed: 11 a.m. November 20th to Adjournment.

Panel: Recovery Community Services Program (RCSP II), 4 Committees.

Contact: Diane McMenamin, Director, Division of Extramural Activities, Policy and Review, Parklawn Building, 5600 Fishers Lane, Room 1789, Rockville, Maryland 20857.

Committee Name: SAMHSA Special Emphasis Panel 1 (SEP1).

Meeting Date: November 18th–22nd, 2002.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Closed: 11 a.m. November 20th to Adjournment.

Panel: Strengthening Communities—Youth, 2 Committees.

Contact: Diane McMenamin, Director, Division of Extramural Activities, Policy and Review, Parklawn Building, 5600 Fishers Lane, Room 1789, Rockville, Maryland 20857.

Committee Name: SAMHSA Special Emphasis Panel 1 (SEP1).

Meeting Date: December 9th–13th, 2002.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Closed: 11 a.m. December 11th to Adjournment.

Panel: American Indian/Alaskan Native and Rural, Community Planning Program.

Contact: Diane McMenamin, Director, Division of Extramural Activities, Policy and Review, Parklawn Building, 5600 Fishers Lane, Room 1789, Rockville, Maryland 20857.

Committee Name: SAMHSA Special Emphasis Panel 1 (SEP1).

Meeting Date: December 2nd–6th, 2002.

Place: Gaithersburg Marriott Rio, Gaithersburg, Maryland.

Closed: 11 a.m. December 4th to Adjournment.

Panel: CMHS Jail Diversion.

Contact: Diane McMenamin, Director, Division of Extramural Activities, Policy and Review, Parklawn Building, 5600 Fishers Lane, Room 1789, Rockville, Maryland 20857.

Committee Name: SAMHSA Special Emphasis Panel 1 (SEP1).

Meeting Date: December, 2002.

Place: SAMHS, 5600 Fishers Lane, Rockville, Maryland.

Closed: Phone Review—Closed Entirely.

Panel: Conference Grants.

Contact: Diane McMenamin, Director, Division of Extramural Activities, Policy and Review, Parklawn Building, 5600 Fishers Lane, Room 1789, Rockville, Maryland 20857.

Dated: October 15, 2002.

Coral Sweeney,

Review Specialist, , Substance Abuse and Mental Health Services Administration.

[FR Doc. 02–26670 Filed 10–18–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–957–1420–BJ]

Idaho: Filing of Plats of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of surveys.

SUMMARY: The Bureau of Land Management (BLM) has officially filed the plats of survey of the lands described below in the BLM Idaho State Office, Boise, Idaho, effective 9 a.m., on the dates specified.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709–1657.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Land Management to meet certain administrative needs of the Bureau of Land Management. The lands we surveyed are:

The plat representing the dependent resurvey of portions of the south and west boundaries, and portions of the subdivisional lines, and the subdivision of sections 31 and 32, in T. 13 S., R. 26 E., Boise Meridian, Idaho, was accepted July 11, 2002.

The plat representing the entire survey record of the dependent resurvey of a portion of the west boundary and the subdivisional lines, and the subdivision of section 18, in T. 13 N., R. 20 E., Boise Meridian, Idaho, was accepted July 31, 2002.

The plats representing the dependent resurvey of portions of the west boundary and subdivisional lines, and a metes-and-bounds survey of a portion of the Craters of the Moon National Monument in sections 10, 15, 16, 19, 20, and 21, in T. 8 S., R. 28 E., Boise Meridian, Idaho, were accepted August 21, 2002.

The plats representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of section 2, the survey of a portion of the 2000 meanders of the right bank of the Henrys Fork of the Snake River in section 2, and a metes-and-bounds survey in section 2, in T. 5 N., R. 38 E., and the corrective dependent resurvey of a portion of the First Standard Parallel North, the dependent resurvey of a portion of the First Standard Parallel North, the dependent resurvey of a portion of the east boundary, the corrective dependent resurvey of a portion of the subdivisional lines, the dependent resurvey of a portion of the subdivisional lines and a portion of the 1879 meanders of Henrys Fork of the Snake River, and the subdivision of certain sections, certain metes-and-bounds surveys within sections 27 and 35, and the survey of the 2000 meanders of Henrys Fork of the Snake River in section 36, in T. 6 N., R. 38 E., Boise Meridian, Idaho, were accepted August 28, 2002.

The plat representing the dependent resurvey of portions of the west and north boundaries, and portions of the subdivisional lines, and the subdivision of sections 5, 6, and 7, in T. 14 ., R. 26 E., Boise Meridian, Idaho, was accepted August 30, 2002.

The plat representing the dependent resurvey of a portion of the west boundary and a portion of the subdivisional lines, and the subdivision of section 31, in T. 3 N., R. 25 E., Boise Meridian, Idaho, was accepted September 4, 2002.

The plat representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of sections 23, 26, and 34, in T. 6 S., R. 24 E., Boise Meridian, Idaho, was accepted September 6, 2002.

This survey was executed at the request of the Bureau of Indian Affairs for administrative management purposes. The land surveyed is:

The plat representing the dependent resurvey of a portion of the east boundary and subdivisional lines, the subdivision of section 24, and the survey of the 2001 meanders of the Blackfoot River, the north boundary of the Fort Hall Indian Reservation, and portions of the 2001 median line of the Blackfoot River in section 24, in T. 3 S., R. 34 E., Boise Meridian, Idaho, was accepted August 15, 2002.

Dated: October 11, 2002.

Harry K. Smith,

Acting, Chief Cadastral Surveyor for Idaho.

[FR Doc. 02–26659 Filed 10–18–02; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–952–03–1420–BJ]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

EFFECTIVE DATES: Filing is effective at 10:00 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: Robert M. Scruggs, Chief, Branch of Geographic Sciences, Bureau of Land Management (BLM), Nevada State Office, 1340 Financial Blvd., PO Box 12000, Reno, Nevada 89520, 775–861–6541.

SUPPLEMENTARY INFORMATION: 1. The Plats of Survey of the following described lands were officially filed at the Nevada State Office, Reno, Nevada, on September 12, 2002:

The plat representing the dependent resurvey of a portion of the south boundary and a portion of the subdivisional lines, the subdivision of section 26 and further subdivision of section 27, and metes-and-bounds surveys of portions of the right-of-way lines of Interstate Highway No. 15 and the Union Pacific Railroad, Township 25 South, Range 59 East, Mount Diablo Meridian, Nevada, under Group No. 797, was accepted September 10, 2002.

The plat, in four (4) sheets, representing the dependent resurvey of the east boundary, a portion of the south boundary and a portion of the subdivisional lines, the subdivision of sections 33 and 34, and metes-and-bounds surveys of the right-of-way lines of Interstate Highway No. 15 and a portion of the westerly right-of-way line of the Union Pacific Railroad, Township 26 South, Range 59 East, Mount Diablo Meridian, Nevada, under Group No. 797, was accepted September 10, 2002.

These surveys were executed to meet certain administrative needs of the Bureau of Land Management and Clark County.

2. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada, on September 26, 2002:

The plat representing the dependent resurvey of a portion of the north boundary and a portion of the subdivisional lines, and the subdivision of sections 6, 8 and 18, Township 26 North, Range 31 East, Mount Diablo Meridian, Nevada, under Group No. 783, was accepted September 24, 2002.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

3. The Plats of Survey of the following described lands were officially filed at the Nevada State Office, Reno, Nevada, on September 30, 2002:

The plat representing the dependent resurvey of a portion of the subdivisional lines, the subdivision of section 33, and a metes-and-bounds survey of portions of the centerline of U.S. Highway 95, in section 33, Township 7 South, Range 44 East, Mount Diablo Meridian, Nevada, under Group No. 800, was accepted September 27, 2002.

The plat representing the dependent resurvey of a portion of the subdivisional lines, the subdivision of section 3, and a metes-and-bounds survey of the centerline of U.S. Highway 95, in section 3, Township 8 South, Range 44 East, Mount Diablo Meridian, Nevada, under Group No. 800, was accepted September 27, 2002.

These surveys were executed to meet certain administrative needs of the Bureau of Land Management and the Bureau of Indian Affairs.

4. The above-listed surveys are now the basic record for describing the lands for all authorized purposes. These surveys have been placed in the open files in the BLM Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: October 11, 2002.

Robert V. Abbey,

State Director, Nevada.

[FR Doc. 02–26654 Filed 10–18–02; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil Action No. 02–888–A]

United States v. The Mathworks, Inc. and Wind River Systems, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed final Judgment, and Stipulation and Order pertaining to each Defendant individually, and a Competitive Impact Statement related thereto have been filed with the United States District Court for the Eastern District of Virginia in *United States of America* v. *The MathWorks, Inc. and Wind River Systems, Inc.,* Civil Action No. 02–888–A. The proposed final Judgments represent a full settlement of this matter, as they resolve all issues between the United States and each Defendant. On June 21, 2002, the United States filed a Complaint against The MathWorks, Inc. and Wind River Systems, Inc. alleging that the Defendants entered into a series of agreements that had the purpose and effect of eliminating the MATRIXx product suite from the market in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Through these agreements, The MathWorks and WindRiver agreed to shift dynamic control system design software customers from Wind River to The MathWorks. The proposed Final Judgments require both The MathWorks and Wind River to facilitate the sale of the MATRIXx products and intellectual property to a buyer acceptable to the United States and the appointment of a trustee to effect the sale. Copies of the Complaint, proposed Final Judgments and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, in Room 200, 325 Seventh Street, NW., at the Office of the Clerk of the United States District Court for the Eastern District of Virginia, Alexandria, Virginia, and on the Antitrust Division's Web site at *http://www.usdoj.gov/atr/cases/indx346.htm.*

Public comment is invited within 60 days of the days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Renata B. Hesse, Chief, Networks and Technology Section, Antitrust Division, U.S. Department of Justice, 600 E Street, NW., Suite 9500, Washington, DC 20530.

Constance K. Robinson,

Director of Operations.

Stipulation and Order

It is hereby stipulated by and between the undersigned parties, through their respective counsel, as follows:

1. The Court has jurisdiction over the subject matter of Plaintiff's Complaint alleging Defendants Wind River Systems, Inc. (''Wind River'') and The MathWorks, Inc. (''The MathWorks'') entered into an agreement that violates Section 1 of the Sherman Act (15 U.S.C. 1), and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Eastern District of Virginia.

2. The United States and The MathWorks stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of either party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. 16), and without further notice to either party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on The MathWorks and by filing that notice with the Court.

3. The MathWorks shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by both parties and submitted to the Court.

5. In the event that the United States withdraws its consent, as provided in paragraph 2 above, or in the event that the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this

Stipulation shall be without prejudice to either party in this or any other proceeding.

Respectfully submitted,
Dated: August 15, 2002.

For Plaintiff United States of America,

James J. Tierney,
U.S. Department of Justice, Antitrust Division, Networks and Technology Section, 600 E Street, NW., Suite 9500, Washington, DC 20530. Tel: (202) 307–0797. Fax: (202) 616–8544.

Richard Parker (VSB No. 44751),
Assistant United States Attorney, 2100 Jamieson Avenue, Alexandria, VA 22314. Tel: (703) 299–3700.

For Defendant The MathWorks, Inc.

Thane D. Scott,
Ruth T. Dowling,
Mitchell C. Bailin,
Palmer & Dodge LL.P., 111 Huntington Avenue, Boston, MA 02199–7613, Tel: (617) 239–0100. Fax: (617) 227–4420.

Mark Gidley,
David A. Balto,
Jamie M. Crowe (VSB No. 37186),
601 Thirteenth Street, NW., Washington, DC 20005–3807. Tel.: (202) 626–3600. Fax: (202) 639–9355.

Order

It is so ordered by this Court, this _____ day of _____ 2002.

_____
Chief United States District Judge.

Certificate of Service

The undersigned certifies that the Stipulation And Order was served by fax and U.S. Mail on the following counsel this 15th day of August, 2002:

Counsel for Wind River, Inc. Richard L. Rosen, Arnold & Porter, 555 Twelfth Street, NW., Washington, DC 20004–1206. Tel: (202) 942–5000. Fax: (202) 942–5999.

James J. Tierney.

In the matter of: United States District Court, for the Eastern District of Virginia, Alexandria Division; Civil Action No. 02–888–A, Chief Judge Hilton. United States of America, Plaintiff, v. The MathWorks, Inc. and Wind River Systems, Inc., Defendants.

Final Judgment

Whereas, Plaintiff United States of America filed its Complaint on June 21, 2002, alleging that The MathWorks, Inc. (''The MathWorks'') and Wind River Systems, Inc. (''Wind River'') entered into a series of agreements related to Wind River's MATRIXx product line that violate Section 1 of the Sherman Act;

And Whereas the United States and Wind River on June 21, 2002, consented to entry of a Final Judgment that would require Wind River to use its reasonable best efforts to divest its interest in the MATRIXx assets in the event a Final Judgment is entered against The MathWorks;

And whereas the United States and The MathWorks, by their respective attorneys, have consented to the entry of this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

And whereas The MathWorks agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the United States believes that entry of this Final judgment is in the public interest;

Now, Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, *it is Ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against The MathWorks under Section 1 of the Sherman Act (15 U.S.C. 1).

II. Definitions

As used in this Final Judgment:

(A) ''MATRIXx Agreements'' means the February 16, 2001, Distribution Agreement and other elated and contemporaneous agreements between Wind River and The MathWorks.

(B) ''MATRIXx assets'' means all rights and tangible and intangible assets, including but not limited to, all contracts, software code, copyrights, patents, licenses, sublicenses, trademarks and other intellectual property, within the scope of the MATRIXx Agreements (excluding Retained Rights and U.S. Patents Nos. 4,796,179, 5,133,045, and 5,612,866 assigned to The MathWorks in the February 16, 2001, Patent Assignment between ISI and The MathWorks).

(C) ''The MathWorks'' means The MathWorks, Inc., a Delaware corporation with its headquarters in Natick, Massachusetts, its parents, successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees, and any other person acting for, on behalf of, or under the control of them.

(D) ''Wind River'' means Wind River Systems, Inc., a Delaware corporation with its headquarters in Alameda, California, its parents, successors and assigns, and its subsidiaries (including Integrated Systems, Inc. (''ISI'')), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees, and any other person acting for, on behalf of, or under the control of them.

(E) ''Retained Contracts'' mean all Wind River and ISI contracts regarding the MATRIXx products that remain in effect as of the date this Final Judgment becomes effective and were identified and retained by Wind River in the MATRIXx Agreements.

(F) ''Retained Rights'' mean (a) a worldwide, royalty-free, non-exclusive right under the MATRIXx assets to use, modify, improve, copy, display, perform, create derivative work of and enhance the MATRIXx products and distribute the same solely in connection with Wind River's provision of support services (including, without limitation, the right to provide source code to the extent contractually obligated) related to Retained Contracts; (b) a worldwide, royalty-free, non-exclusive license under the patents included within the MATRIXx assets to make, have made, use, sell, offer for sale, or import (I) articles that may be covered by one or more claims of such patents provided such acts are in connection with the provision of support services related to Retained Contracts or (ii) any Wind River products available for purchase as of February 16, 2001 (except the MATRIXx products), including all modifications, derivatives, new versions and new releases of the same.

III. Applicability

This Final Judgment applies to The MathWorks and all other persons in active concert or participation with the MathWorks who receive actual notice of this Final judgment by personal service or otherwise.

IV. Asset Sale

The United States and the MathWorks agree as follows:

(A) As soon as possible, but no later than 30 days from the date of filing of this proposed Final Judgment with the Court, the United States shall nominate an independent agent to serve as Trustee to accomplish the sale of the MATRIXx assets to a purchaser approved by the United States pursuant to the terms of this Final Judgment and any subsequent order of the Court.

(B) The Trustee shall serve at the cost and expense of defendants, on such customary and commercially reasonable terms and conditions as the United States, in its sole discretion, proposes, subject to approval by the Court. The Trustee shall receive compensation that is customary and commercially reasonable for asset sales of the size and

complexity as those included herein, including a substantial success incentive and any reasonable and necessary legal expenses relating to its role as Trustee. The Trustee shall account to the Court and defendants for all monies derived from the sale of the MATRIXx assets and all costs and expenses so incurred.

(C) Upon application of the United States, the Court shall appoint the Trustee nominated by the United States and approve the engagement letter, provided that the engagement letter's terms and conditions are customary and commercially reasonable and consistent with this Final Judgment.

(D) The Trustee shall have the duty to attempt to sell the MATRIXx assets and negotiate a definitive sales and licensing agreement with a purchase pursuant to the terms of this Final Judgment, the terms of the engagement letter and any subsequent order of the Court. The Trustee shall promptly make known, by usual and customary means, the availability of the MATRIXx assets, and shall attempt to sell the assets in a manner consistent with its typical commercial practices, including protection of the defendants' confidential information. Defendants shall have no authority or responsibility with respect to the attempt to sell the MATRIXx assets or negotiate the definitive sales and licensing agreement, except to promptly provide any information relating to the MATRIXx assets requested by the Trustee in writing or as otherwise provided herein.

(E) Defendants shall promptly provide to the Trustee all information and documents requested in order to prepare offering materials and provide customary due diligence information to prospective purchasers with respect to the MATRIXx assets. Defendants shall comply fully with all such requests within three business days, unless the Trustee, in its sole discretion, waives or extends the time period, or excuses defendants from providing certain specified information.

(F) The Trustee shall commence offering the MATRIXx assets for sale immediately after certification to the Court that it has received adequate information from the defendants to offer the MATRIXx assets for sale. The certification shall be made within five business days of receipt of the adequate information. After the sales offering has commenced, the Trustee may make such additional written requests for information as may be reasonably necessary to perform its duties, and the defendants shall comply fully with such requests within 3 business days, unless the Trustee, in its sole discretion, waives or extends the time period, or excuses defendants from providing certain specified information.

(G) The Trustee shall have 90 days from the date of such certification in which to offer the MATRIXx assets for sale and consummate a definitive sales and licensing agreement with a purchaser. There shall be no extensions of this 90-day period, except, however, the running of the 90-day period shall toll for any undue delay the Court finds is caused by defendants.

(H) The Trustee shall negotiate a definitive sales and licensing agreement on customary and commercially reasonable terms, substantially equivalent, except for the payment terms, to the terms and conditions in the MATRIXx Agreements to the extent possible, and that provides to the purchaser representations, warranties and covenants equivalent to those in the MATRIXx Agreements. The defendants may allocate primary responsibility for and indemnification under such warranties among themselves as customary and appropriate to their respective rights and obligations concerning the MATRIXx assets on the date of such sale. The definitive sales and licensing agreement will provide for transitional support to the purchaser, equivalent to that offered under the MATRIXx Agreements.

(I) The Trustee shall make written reports of its activities to the Court, the United States and defendants 30 days, 45 days, 60 days, 75 days, and 90 days after initiation of its attempts to sell the MATRIXx assets. Such reports shall include the name, address, and telephone number of each person who made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the MATRIXx assets, and shall describe in detail each contact with such person, including the terms of any offers made or received. To the extent such reports contain information that the Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Trustee shall maintain full records of all efforts made to divest the MATRIXx assets. The Trustee may discuss its progress with the United States and defendants as it deems reasonable under the circumstances.

(J) The MATRIXx assets to be conveyed shall include substantially all assets, rights and property interests of both The MathWorks and Wind River as currently exist pursuant to the MATRIXx Agreements, except, however, that The MathWorks may retain ownership of the three patents referenced in paragraph II(B), in which case the definitive sales and license agreement shall include a patent license to the purchaser. Any such patent license must:

(1) Cover as many of the three patents as the purchaser wishes to license;

(2) Be perpetual, fully paid-up, and without continuing royalties to either defendant;

(3) Not contain any field-of-use restrictions whatsoever;

(4) Permit the purchaser to sublicense the intellectual property so licensed (the ''IP'') in order to:

(a) Adequately convey rights to exploit the technology to end user customers of any product or service that includes the IP;

(b) Enter into development or support outsourcing or co-development agreements with third parties in conjunction with the purchaser's products or services, or joint venture agreements with third parties in which the purchaser and the third party both retain an interest in the resulting product, service, research or IP;

(c) Effectuate transfer of the license either upon change of control of the purchaser, or upon sale of all or a substantial portion of the MATRIXx assets; and

(d) Permit use of the IP in third-party products or services designed and intended for use with the purchaser's product, e.g., complementary softward tools;

(5) Permit, without any restriction, grantback, or royalties, the ability to innovate based on the IP and to use such innovations in the purchaser's products or under any circumstances set forth above without restriction;

(6) Permit enforcement of infringement that damages the purchaser, except that The MathWorks may have a first right to enforce the patients, provided that if it does so the purchaser has appropriate intervention rights to protect its license or IP rights, and may have the right to join the purchaser as a party to any such infringement suit as may be necessary to protect fully the rights of The MathWorks; and

(7) Contain an appropriate covenant not to sue the purchaser with respect to the patents covered by the license.

(K) Wind River shall be entitled to Retained Rights as provided in the proposed Final Judgment by the United States and Wind River and filed June 21, 2002.

(L) The minimum price for the MATRIXx Assets shall be $2 million cash, plus the cost and expenses of the Trustee. The defendants may, with the approval of the United States, waive this

minimum reserve price requirement. The MathWorks shall not finance the purchase or retain a contingent monetary or other interest in the MATRIXx assets being sold, other than ownership of certain patents to the extent described herein. All other costs (including the compensation of the Trustee in the event a sale of the MATRIXx assets is not consummated) will be borne by the defendants, allocated between themselves as they may agree.

(M) The United States shall have, in its sole discretion, the right to approve any prospective purchaser and the terms of any sales and license agreement negotiated with a prospective purchaser as follows:

(1) The United States shall have sole discretion to determine whether the MATRIXx assets could be competitively viable if owned by a prospective purchaser identified by the Trustee. If the United States determines that a prospective purchaser is competitively viable, the Trustee shall negotiate a definitive sales and license agreement with such purchaser. In the event of multiple bids, the United States, in its sole discretion, shall decide which prospective purchaser(s) the Trustee should pursue for purposes of negotiating a definitive sales and license agreement and shall so direct the Trustee. The MathWorks shall not challenge any such determinations by the United States.

(2) The United States and defendants shall have the right to request modifications, consistent with the terms of this Final Judgment, to any of the terms of any sales and license agreement with a prospective purchaser. The Trustee shall have discretion to approve or disapprove any such modifications, subject to the right of final approval of the definitive sales and license agreement by the United States. When considering any such request for modifications, the Trustee will take into account whether the terms and conditions in the proposed sales and license agreement are customary and reasonable for such sales and license of assets.

(3) Should the United States disapprove any purchaser or any term of the definitive sales and license agreement, the United States shall direct the Trustee to attempt to identify an alternative purchaser, or negotiate an acceptable agreement, consistent with this Final Judgment.

(N) The Trustee may seek to enforce the obligations of The MathWorks pursuant to this Final Judgment or the engagement agreement by filing a contempt motion with the Court.

(O) If the Trustee is unable to negotiate a definitive agreement within the period set forth in paragraph IV(G) at or above the price set forth in paragraph IV(L), the case shall be dismissed upon motion by any party.

V. United States' Access and Inspection

(A) For the purpose of determining or securing compliance with this Final Judgment or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privileged, duly authorized representatives of the United States Department of Justice, including consultant and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to The MathWorks be permitted:

(1) Access during The MathWorks' office hours to inspect and copy or, at the United States' option, to require The MathWorks to provide copies of all books, ledgers, accounts, records, and documents in its possession custody or control relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record at the United States' discretion, The MathWorks's directors, officers, employees, or agents, who may have their individual counsel present, relating to any matters contained in this Final Judgment. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by The MathWorks.

(B) Upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division. The MathWorks shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

(C) No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If, at the time information or documents are furnished by The MathWorks to the United States, The MathWorks represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and The MathWorks marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give ten (10 calendar days' notice prior to divulging such materials in any legal proceeding (other than a grand jury proceeding) to which the MathWorks is not a party.

VI. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions.

VII. Expiration of Final Judgment

This Final Judgment shall expire upon the earlier of (1) the date on which The MathWorks no longer has any right, title or interest in any of the MATRIXx assets except with regard to ownership of patent rights as specified herein, or (2) the date of dismissal of this action as a result of the failure of the Trustee to accomplish the sale of the MATRIXx assets pursuant to the terms of this order. If the MATRIXx assets are sold pursuant to the terms of this Final Judgment, The MathWorks shall not purchase, license or otherwise acquire substantially all of the MATRIXx assets before September 1, 2007, without the prior written consent of the United States.

VIII. Costs

Each party shall bear its own costs of this action.

IX. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Dated: _____

Court approval subject to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

_____

Chief United States District Judge.

In the matter of: United States District Court for the Eastern District of Virginia, Alexandria Division; Civil Action No. 02–888–A, Chief Judge Hilton. United States of America, Plaintiff, v. The MathWorks, Inc. and Wind River Systems, Inc., Defendants.

Competitive Impact Statement

Pursuant to Section 5(b) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act (codified at 15 U.S.C. 16(b)–(h) (''Tunney Act'')), the United

States files this Competitive Impact Statement relating to the proposed Final Judgments against Wind River Systems, Inc. and The MathWorks, Inc., submitted on June 21, 2002 and August 15, 2002, respectively, for entry in this antitrust proceeding.

I. Nature and Purpose of the Proceeding

On June 21, 2002, the United States filed a civil antitrust Complaint alleging that The MathWorks, Inc. (''The MathWorks'') and Wind River Systems, Inc. (''Wind River''), head-to-head competitors in the sale of dynamic control system design software products, restrained competition in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

The complaint alleges that, on February 16, 2001, the MathWorks and Wind River entered into a number of agreements that eliminated competition between Wind River's MATRIXx products and The MathWorks' Simulink products. These agreements (hereinafter, collectively, the ''MATRIXx Agreement'') give The MathWorks the exclusive worldwide right to price and sell Wind River's MATRIXx for two years, transfer the customer support of MATRIXx to The MathWorks, require Wind River to stop developing and selling MATRIXx, and give The MathWorks an option to acquire MATRIXx in 2003. The MathWorks announced at the time it entered into the MATRIXx Agreement that there would be no further development of the MATRIXx products. As result of the MATRIXx Agreement, competition has been eliminated between The MathWorks and Wind River in the sale of dynamic control system design software. The Complaint seeks divestiture of the MATRIXx products to an independent and viable third party to restore the competition eliminated by the MATRIXx Agreement.

Defendants in this action have now agreed to cooperate fully to offer the MATRIXx products for sale. On June 21, 2002, the United States filed a proposed Final Judgment in this matter containing injunctive relief against Wind River, the nominal owner of the MATRIXx assets, that will require Wind River to fully cooperate with any court order requiring the divestiture of MATRIXx to a competitively viable third party. Because the MathWorks had previously acquired significant rights in the MATRIXx assets under the MATRIXx Agreement, Wind River's consent alone was insufficient to effectuate fully the relief sought by the United States in the Complaint. The lawsuit therefore continued against The MathWorks. On August 15, 2002, the United States and The MathWorks filed a proposed Final Judgment that will lead to either the prompt and certain divestiture of the MATRIXx assets to a competitively viable third part or the dismissal of the Complaint in this action. By the proposed Final Judgment against The MathWorks, in combination with the proposed Final Judgment previously filed against Wind River, the United States has now received consent from all necessary parties sufficient to effectuate a judicially-supervised sale of the MATRIXx products. The proposed Final Judgments filed with the Court will terminate this action against the Defendents.

II. Actions Giving Rise to the Alleged Violations

A. Dynamic Control System Design Software

An integral part of the control system of many complex devices is the ''controller''—the on-board computer and software programs that govern a device's operation. In aircraft, for example, the controller works by receiving pilot input plus input from various sensors (such as speed and altitude), processing the input, and providing outputs that optimize the aircraft's handling and operation through the use of various components (such as engines, flaps and the rudder).

Control system design tools were introduced approximately fifteen years ago and they provide significant benefits to control system design engineers. Before such tools were developed, engineers had to manually create equations that mathematically represented the behavior of the control system, write the appropriate software code to be installed in the on-board computers, and then build prototypes to test the system. Modern control system design tools have automated the analysis and modeling, as well as the code generation and simulation. With a mathematical engine at their core, and enhanced by graphical user interfaces, control system design tools are used by engineers to create ''virtual'' models of the control system. For very complex systems, the analytical process (model, analyze, design, test, produce) can only be accomplished efficiently with the help of computers and specialized software.

The initial modeling step is extremely important. The better the model is at simulating reality, the better and more robust the control system will be. Yet, a model is still an abstraction. So, after the analyzing and designing steps, the engineer still needs to test the controls in real or near-real situations. If the controls fail the testing, then the initial steps of the analytical process are repeated with small design tweaks and the process repeats until the control pass final testing. The final product is computer code that can be embedded in a computer or on a chip.

MATRIXx and The MathWorks' Simulink are dynamic control system design toolsets providing functionality that addresses each of the engineer's tasks and aids in rapid control systems development. For example, both toolsets have:

(1) Graphical interfaces and high level scripting languages for modeling and simulation, and mathematical engines with advanced control design modules, or libraries, for design and analysis;

(2) Automatic efficient code generation suitable for testing and production; and

(3) Tools for real-time simulation and testing.

The tools in the Simulink toolset, numbered by functionality, are called: (1) Simulink and MATLAB; (2) Real Time Workshop; and (3) xPC. The tools in the MATRIXx toolset are called: (1) Systembuild and xMath; (2) Autocode; and (3) RealSim.

MATRIXx and Simulink are considered ''suites'' or ''toolsets'' of control design software. Suite products from a single vendor offer not only full functionality, but also seamless integration between tools used throughout the analytical process. As a result, no time is lost by a need to convert designs or data from one tool to another. Utilizing a suite or toolset of control design software facilitates the ability to make changes anywhere in the modeling and design process. Seamless integration is one of the keys to the rapid development of complex control systems.

MATRIXx and Simulink were developed from common source code in the early 1980s. Because of their common origin, the products are similar. However, the products have been independently developed by different companies for more than fifteen years. The competing development efforts represent one critical way that the Defendants compete. For the last ten to fifteen years. MATRIXx and Simulink have competed head-to-head for sales, not only by competing on price, but also by adding features to lure customers away from one another.

B. Illegal Agreement To Allocate Markets, Fix Prices, and Unreasonably Reduce Competition

In April 2000, Wind River acquired Integrated Systems, Inc. (''ISI''). At the

time, ISI was a well regarded vendor of software, tools, and engineering services for the embedded systems market. Its embedded real-time operating system, deployed in more than 38 million devices worldwide as of 2000, addressed the telecom/datacom, consumer electronics, automotive, aerospace, and emerging Internet appliance marketplaces. Among its software portfolio it also produced the MATRIXx family of software products. Although ISI had spent considerable resources developing MATRIXx since the mid-1980s, its primary business continued to revolve around the embedded systems market.

Wind River, itself a significant vendor of software for embedded systems, pursued the acquisition of ISI, in large part, to obtain a skilled pool of embedded system software developers that it hoped would shorten the time to market for critical new embedded system products. Wind River soon came to view MATRIXx as a struggling product line within ISI with small revenue and no growth potential. More importantly, the MATRIXx market was neither within Wind River's core competency nor central strategic focus for the future. Thus, Wind River decided not to devote any of its resources to the continued development and sale of MATRIXx.

Shortly after Wind River's acquisition of ISI, The MathWorks approached Wind River and began vigorously negotiating to acquire the MATRIXx assets. On February 16, 2001, The MathWorks and Wind River entered into the MATRIXx Agreement under which Wind River granted The MathWorks exclusive distribution and license rights to the MATRIXx toolset and the MATRIXx intellectual property (including the right to incorporate MATRIXx source code into The MathWorks products) during a thirty-month license period beginning on February 16, 2001. Following the expiration of the thirty-month license period, The MathWorks would have the option to acquire MATRIXx.

Under the MATRIXx Agreement, The MathWorks is required to provide two years of customer support (ending in February 2003) for existing MATRIXx users.[1] While Wind River agreed to continue fulfilling its existing customer support obligations, as well as provide ''critical'' bug fixes during the license period, the MATRIXx Agreement provides that Wind River will not produce new versions of MATRIXx with feature enhancements. The MathWorks and Wind River also agreed on the pricing of Simulink when purchased by MATRIXx customers. The companies agreed that The MathWorks would give customers with current MATRIXx licenses, who switched to The MathWorks suite of products, a discount amounting to 50% off the list price of The MathWorks products for those who switched in the first year of the MATRIXx Agreement and 25% off for those who switched in the second year of the MATRIXx Agreement.

The MathWorks agreed to make payments to Wind River totaling $11,500,000 over a three-year period. These payments are to be made on a set schedule and are not contingent on the volume of MATRIXx products MathWorks sells. Further, Wind River granted The MathWorks an option to purchase MATRIXx and certain MATRIXx intellectual property (*e.g.,* the source code, customer lists, trademarks and copyrights) twenty months after closing for an additional sum of $2,000,000. Wind River has retained exclusive ownership of the optioned assets during the interim and until The MathWorks exercises its right to acquire them. Finally, the MATRIXx Agreement assigned certain patent rights to The MathWorks for $500,000.

C. Effect of the Illegal Agreement

The MATRIXx Agreement eliminated competition between The MathWorks and Wind River in the simulation software, automatic code generation, and testing software markets. The MathWorks now has complete control over the development and pricing of the products of its closest competitor in these dynamic control systems design software markets, thus depriving customers of the benefits of competition between Defendants' products, including competition based on price, service, and product innovation.

Further, many customers value tight integration of the products in each of the dynamic control system design software markets. Both The MathWorks and Wind River cooperated with a small number of companies to facilitate interfaces between the Defendants' products and those companies' products that compete with the Defendants' products in individual software markets. The competition between the MATRIXx toolset and the Simulink toolset provided Defendants an incentive to facilitate interoperation with third-party products, as an unwillingness by one to do so would likely advantage the other. As a consequence of the elimination of competition resulting from the MATRIXx Agreement, The MathWorks will have less incentive to provide such technical cooperation to competitors selling individual products, thus further reducing competition for consumers who value integrated products.

The MATRIXx Agreement allocates MATRIXx customers between Wind River and The MathWorks, fixes price terms for those customers ceded to The MathWorks who subsequently switch to Simulink, and permits The MathWorks to control the future of, and enables the elimination of, the MATRIXx products. As the MATRIXx products are the principal competitive products to The MathWorks' own dynamic control system design software, the overall effect of the MATRIXx Agreement is to eliminate competition between Defendants in the three separate dynamic control system design software markets: (1) Simulation software market, where products in the MATRIXx and Simulink suite are used by engineers to design, analyze, and simulate dynamic control system behavior; (2) automatic code generation software market, where products in both suites are used to automatically generate code from models developed with simulation software; and (3) testing software market, where products in both suites are used by engineers to test their models and then automatically generate code by simulating the function of the control system in a real time environment. Consumers are harmed both by the elimination of the MATRIXx products as a competitive alternative, as well as the resulting reduction of competitive pressure on The MathWorks to lower prices, improve service, continue product innovation and development of its own dynamic control system design software products, and cooperate with companies selling individual products.

III. Explanation of the Proposed Final Judgments

During the course of an investigation, customers complained to the Antitrust Division that the MATRIXx Agreement had eliminated Wind River's MATRIXx—the only significant products that competed directly with The MathWorks' Simulink products—as a competitive alternative in the market. Because customers indicated that, due to the present lack of development of MATRIXx and its uncertain future, they would soon have to begin a costly migration to The MathWorks' Simulink products, the United States ultimately concluded that a quick and effective remedy was necessary to reestablish MATRIXx as a viable alternative. The

[1] Wind River retained rights to the MATRIXx intellectual property during the license period in order to provide support service to two International Space Station customers.

United States further concluded, however, that simply rescinding the MATRIXx Agreement would not restore the competition it had eliminated in light of Wind River's genuine desire to exit the markets for the MATRIXx family of software products. At the same time, the principal defense offered by Defendants for their conduct was a contention that no competitive buyer would be interested in purchasing the MATRIXx assets. Taking into account customer concerns and the The MathWorks' arguments, the United States pursued an enforcement approach that would both test Defendants' assertions as to MATRIXx market value and maximize the possibility of restoring effective competition in a timely manner.

The United States and Defendants entered into an April 26, 2002, letter agreement that required an attempted sale of the MATRIXx product line in an effort to restore the competition eliminated by the MATRIXx Agreement. Under the April 26 letter agreement, Defendants were given the opportunity to test their assertion that no other viable purchaser existed by agreeing to ''shop'' the MATRIXx assets through an independent agent. The United States believed that one or more viable purchasers existed and that an independent agent would succeed in finding a buyer. The United States acknowledged, however, that, if no alternative viable purchaser emerged from the ''shop,'' remedying the competitive harm caused by the MATRIXx Agreement would be difficult. The United States thus agreed that, should the ''shop'' fail following a good faith effort, and given Wind River's decision to discontinue the sale and development of the MATRIXx products, it would close its investigation without taking any enforcement action. However, the Defendants did not comply with the terms of the April 26 letter agreement and the United States, on June 21, 2002, filed its Complaint seeking a judicially-enforced sale of the MATRIXx assets.

Contemporaneously with the filing of the Complaint, the United States and Wind River filed a proposed Final Judgment that would settle the case against Wind River on the condition that it fully cooperate with any court order requiring the divestiture of the MATRIXx assets. As noted above, because both Wind River and The MathWorks retain rights in the MATRIXx products, Wind River's consent alone was insufficient to effectuate fully the relief sought by the United States in the Complaint. The lawsuit, therefore, continued against The MathWorks. On August 15, 2002, the United States and The MathWorks filed a proposed Final Judgment that would resolve the case against The MathWorks. The proposed Final Judgment between the United States and The MathWorks contains injunctive relief that is intended to promptly offer the MATRIXx assets for sale to a competitively viable third party approved by the United States. It further establishes a structure and time line for the sale that will be supervised by the court. Thus, the proposed Final Judgments against Wind River and The MathWorks will lead to either the prompt and certain divestiture of the MATRIXx assets or the dismissal of the Complaint in this action.

A. Proposed Final Judgment Against Wind River

On June 21, 2002, the United States filed a Stipulation and Order and a proposed Final Judgment that resolved the allegations in the Complaint against Wind River. Pursuant to the proposed Final Judgment, Wind River agreed to facilitate the United States' efforts to divest the MATRIXx assets. Wind River's agreement to assist the United States in a divestiture of the MATRIXx assets, however, was expressly conditioned on the Court entering a Final Judgment against The MathWorks ordering the divestiture of the MATRIXx assets.

1. Wind River Covenants

Section IV of the proposed Final Judgment against Wind River sets forth the substantive injunctive provisions and is designed to assist the United States in its efforts to promote continued competition in the markets for dynamic control system design software. Thus, Section IV(C) of the proposed Final Judgment states that the United States is seeking a judgment that would require, among other things, the prompt and certain divestiture of all MATRIXx assets to a buyer acceptable to the United States and the appointment of a trustee to effect the divestiture. Wind River is expressly prohibited from contesting the entry of such a judgment. In addition, Section IV(C) requires Wind River to use its reasonable best efforts to assist in effectuating such an order by divesting all of its rights, title, and interests in the MATRIXx assets. Section IV(D) further requires Wind River to take steps to ensure the prompt and certain divestiture of any rights in the MATRIXx assets currently held by The MathWorks that revert to Wind River. Wind River shall retain certain rights to use and distribute the MATRIXx products and intellectual property related to specific contracts it retained in the MATRIXx Agreement and any Wind River products available for purchase as of February 16, 2001 (except for the MATRIXx products). These Retained Rights, as outlined in the proposed Final Judgments, are all current rights held by Wind River.

2. Termination of Action, Compliance, and Expiration of Final Judgment

Insofar as Wind River's consent alone was insufficient to achieve a full divestiture of the MATRIXx assets, and because the United States had neither an order from the Court requiring The MathWorks to divest the MATRIXx assets nor had reached an agreement with The MathWorks on a proposed Final Judgment requiring the divestiture of the MATRIXx assets, Wind River remained a party to this action under Section IV(A) for the sole purpose of effectuating any relief ordered by the Court or agreed to by the United States and The MathWorks. Wind River also agreed to permit the United States to monitor its compliance with the Final Judgment under Section V of the proposed Final Judgment under substantially the same terms as agreed to by The MathWorks and discussed in subsection III(B)(2) below.

Under Section VII of the proposed Final Judgment against Wind River, the Final Judgment does not have a fixed term or date of expiration. Because Wind River's obligations were dependent upon the United States gaining a Final Judgment against The MathWorks requiring divestiture of the MATRIXx assets, the Final Judgment against Wind River was made contingent upon a Final Judgment against The MathWorks and will expire upon the earlier of: (1) Wind River's completion of all obligations imposed upon it pursuant to Section IV of this Final Judgment in light of the proposed Final Judgment against The MathWorks; or (2) the date on which Wind River no longer has any right, title, or interest in any of the MATRIXx assets (except for the Retained Rights).

B. Proposed Final Judgment Against the MathWorks

Subsequent to the proposed Final Judgment filed in this case against Wind River, the United States reached agreement with The MathWorks on a proposed final Judgment that will facilitate the offer for sale of the MATRIXx assets to a competitively viable third party. Defendants' compliance with the terms of the proposed Final Judgments, filed on June

21, 2002 and August 15, 2002, will terminate this action.

1. Divestiture Provisions

Section IV of the proposed Final Judgment agreed to by The MathWorks contains substantive provisions setting forth the terms on which the MATRIXx assets will be offered for sale. It is designed to lead expeditiously to the identification of competitively viable third parties who are interested in acquiring the MATRIXx assets, negotiation of a definitive sales and licensing agreement, and restoration of competition in the markets for dynamic control system design software. Thus, Sections IV(A)–(C) provide that the United States will, as soon as possible, but in no event later than 30 days from the date the proposed Final Judgment was filed with the Court, select an independent agent to serve as Trustee for the purpose of accomplishing the sale of the MATRIXx assets to a purchaser approved by the United States. The United States will have the sole discretion, subject to approval by the Court, to negotiate the terms and conditions on which the Trustee shall serve and the Trustee shall serve at the cost and expense of the Defendants.

Sections IV(D) and (E) direct the Trustee to attempt to sell the MATRIXx assets and negotiate a definitive sales and licensing agreement with a prospective purchaser. To this end, the Trustee is required to promptly make it known that the MATRIXx assets are available for purchase. In order to assist the Trustee in preparing offering materials and to provide prospective purchasers with customary due diligence information with respect to the MATRIXx assets, the Defendants must provide the Trustee with all requested information and documents within three business days. Section IV(D) expressly provides that Defendants shall have no authority or responsibility with respect to the sale of the MATRIXx assets, except promptly to provide any information relating to the MATRIXx assets requested by the Trustee.

Sections IV(F)–(H) provide that the Trustee shall have 90 days from the date on which it certifies to the Court that the Defendants have provided adequate information to offer the MATRIXx assets for sale and to consummate a definitive sales and licensing agreement with a purchaser approved by the United States. During this 90-day period, the Trustee may request additional information and documents from the Defendants who shall comply with any such request within three business days. If a divestiture of the MATRIXx assets is to occur under the proposed Final Judgment, it must be consummated within the 90-day period prescribed by Section IV(G), as the 90-day period may only be extended for undue delays fond by the Court to be caused by Defendants. A definitive sales and licensing agreement, negotiated by the Trustee, shall be on customary and commercially reasonable terms and substantially equivalent, except for the payment terms, to the terms and conditions in the MATRIXx Agreement, to the extent possible. For example, the definitive sales and licensing agreement should include representations, warranties, covenants, and transitional support to the purchaser equivalent to those in the MATRIXx Agreement.

Pursuant to Section IV(M), the United States shall have the sole discretion to approve both prospective purchasers and the terms of any sales and licensing agreement negotiated with an approved prospective purchaser. If the United States determines that a prospective purchaser is competitively viable, it will direct the Trustee to negotiate a definitive sales and licensing agreement with that prospective purchaser. In the event of multiple prospective purchasers, the United States, in its sole discretion, will direct the Trustee as to with which prospective purchaser(s) the Trustee should negotiate. The MathWorks is expressly prohibited from challenging any decisions made by the United States regarding the selection of prospective purchasers or approval of specific terms. While each Defendant has the right to request modifications to the terms of any sales and licensing agreement with a prospective purchaser, the Trustee is permitted to approve or deny such modifications. The United States, however, retains the right of final approval over all terms and conditions of the definitive sales and licensing agreement. Should the United States reject any purchaser or any term of the definitive sales and licensing agreement, the United States will direct the Trustee to attempt to identify an alternative purchaser, or negotiate an acceptable agreement, consistent with the proposed Final Judgment.

Section IV(J) expressly provides that The MathWorks may retain ownership of three patents subject to the MATRIXx Agreement, so long as the purchaser is offered a comprehensive license to the patents that permits unimpeded use. Any patent license issued under the Final Judgment:

- Must be perpetual, fully paid-up, and without continuing royalties to either Defendant;
- Must not limit the purchaser's ability to use the patents in any of purchaser's current or future products or service;
- Must permit the purchaser to sublicense the intellectual property contained in the patents so as to:
- Convey rights necessary to exploit the technology to end user customers of any product or service that includes the intellectual property;
- Enter into joint development, joint marketing, and other joint ventures with third parties in which the purchaser and the third party retain an interest in the resulting product, service, research or intellectual property;
- Permit transfer of the license either upon change of control of the purchaser, or upon sale of all or a substantial portion of the MATRIXx assets; and
- Permit the use of the intellectual property in products or services designed and intended for use with purchaser's products or as a complement to purchaser's products:
- Must permit the purchaser the ability to innovate based on the intellectual property and to use such innovations in the purchaser's products or under any circumstance set forth above without restriction, grantback, or royalty;
- Must permit the purchaser to enforce infringement claims that damage the purchaser in circumstances where The MathWorks fails to enforce intellectual property rights under the patents; and
- Must contain an appropriate covenant not to sue the purchaser with respect to the patents covered by the license.

Under Section IV(I), the Trustee is required to file written reports with the Court, the United States, and the Defendants after thirty days, and each 15 days thereafter, describing the Trustee's activities to date. Section IV(K) provides that Wind River is entitled to retain certain rights to defined in Section II of the proposed Final Judgment. Section IV(L) establishes a minimum price of $2,000,000, plus the cost and expenses of the Trustee, for which the MATRIXx assets may be sold unless the Defendants, with the approval of the United States, waive this minimum reserve price requirement. Section IV(N) expressly gives the Trustee the ability to enforce the obligations of the MathWorks under the proposed Final Judgment or the Trustee's engagement letter by way of filing a contempt motion with the Court. Finally, Section IV(O) provides that if the Trustee is unable to negotiate a definitive sales and licensing agreement with the period set forth in Section IV(G), the United

States' Complaint in this action may be dismissed upon motion by any party.

2. Compliance

Section V of the proposed Final Judgment requires The MathWorks to provide documents and information within its control necessary for the purposes of determining and securing compliance with the Final Judgment. Upon written request and on reasonable notice, The MathWorks shall provide the United States with access to all records and documents in its possession or control, make available its employees, and submit written reports related to matters contained in the Final Judgment.

3. Jurisdiction, Termination, and Acquisition of MATRIXx

Pursuant to Section VI of the proposed Final Judgment, the Court retains jurisdiction over this matter in order to enable any party to the Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out the Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions.

Because the outcome of the sale is uncertain, the Final Judgment does not have a fixed term or date of expiration. The Final Judgment sets out a procedure and time line under which a trustee will offer the MATRIXx assets for sale, but recognizes that such sale may not be accomplished, in which case the lawsuit will be dismissed. Because divestiture of the MATRIXx assets is dependent upon the Turstee's success in identifying a suitable prospective purchaser and negotiating a definitive sales and licensing agreement acceptable to the United States within a prescribed period of time, Section VII provides that the Final Judgment shall expire upon the earlier of: (1) the date on which The MathWorks no longer has any right, title or interest in any of the MATRIXx assets except with regard to the ownership of patent rights specified in Section IV(J); or (2) the date of dismissal of this action as a result of the failure of the Trustee to accomplish the sale of the MATRIXx assets pursuant to the terms of the Final Judgment.

Finally, Section VII further expressly provides that if the MATRIXx assets are sold pursuant to the terms of the Final Judgment, The MathWorks is prohibiting from purchasing, licensing, or otherwise acquiring all or substantially all of the MATRIXx assets before September 1, 2007, without the prior written consent of the United States.

IV. Alternatives to the Proposed Final Judgments

The United States considered, as an alternative to the proposed Final Judgments, a full trial on the merits against the Defendants. The United States is satisfied, however, that a trial would not result in injunctive relief against Defendants beyond what is contained in the proposed Final Judgments against Wind River and The MathWorks, filed on June 21, 2002, and August 15, 2002, respectively. Moreover, the proposed injunctive relief is designed to more quickly achieve the primary objective of the litigation—preserving MATRIXx as a viable competitive alternative in the relevant markets for dynamic control system design software to the extent it is possible to do so.

V. Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees.

Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against defendants.

VI. Procedures Available for Modification of the Proposed Final Judgments

The parties have stipulated that the proposed Final Judgments may be entered by this Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the decree upon this Court's determination that the proposed Final Judgments are in the public interest.

As provided by Sections 5(b) and (d) of the Clayton Act, 15 U.S.C. 16(b) and (d), any person may submit to the Department written comments regarding the proposed Final Judgments. Any person who wishes to comment must do so within sixty days of publication of this Competitive Impact Statement and the proposed Final Judgments in the **Federal Register**.

The Department will evaluate and respond to the comments. All comments will be given due consideration by the Department, which remains free to withdraw its consent to the proposed Final Judgments at any time prior to entry. The comments and the responses of the Department will be filled with the Court and published in the **Federal Register**.

Written comments should be submitted to: Renata B. Hesse, Chief, Networks and Technology Section, United States Department of Justice, Antitrust Division, 600 E Street, NW., Suite 9500, Washington, DC 20530.

The proposed Final Judgments provide that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgments.

VII. Standard of Review Under the Tunney Act, for the Proposed Final Judgments

The Tunney Act requires that injunctions of anticompetitive conduct contained in proposed consent judgments in antitrust cases brought by the United States be subject to a 60 day comment period, after which the court shall determine whether entry of the proposed Final Judgments are ''in the public interest.'' In making that determination, the court *may* consider—

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment.

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the compliant including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. 16(e) (emphasis added). As the Court of Appeals for the District of Columbia has held, the Tunney Act permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the Government's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly

settlement through the consent decree process.'' [2] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanation of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[3]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462–63 (9th Cir. 1988), quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir.) *cert. denied,* 454 U.S. 1083 (1981); *see also Microsoft,* 56 F.3d at 1458. Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be let, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest,'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgments, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitve effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standards more flexible and less strict than the standard required for a finding of liability. A ''proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' [5]

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459. Since the ''court's authority to review the decree depends entirely on the Government's exercising its procsecutorial discretion by bringing a case in the first place,'' it follows that the Court ''is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States might have but did not purse. *Id.*

VIII. Determinative Material/ Documents

No materials and documents of the type described in the Section 5(b) of the Clayton Act, 15 U.S.C. 16(b), were considered in formulating the proposed Final Judgments. Consequently, none are being filed with this Competitive Impact Statement.

Dated: September 19, 2002.

Respectfully submitted,

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Certificate of Service

I certify that on September 19, 2002, a true and correct copy of the United States' Competitive Impact Statement, related to the proposed Final Judgments in this matter against Defendants and agreed to by Defendants pursuant to the Stipulations And Orders filed with the Court, was served on the following counsel:

Counsel for Wind River Systems, Inc.: Richard L. Rosen, Arnold & Porter, 555 Twelfth Street, NW., Washington, DC 20004–1206. Fax: 202/942–5999.

By: hand delivery.

Counsel for The MathWorks, Inc.: Thane D. Scott, Palmer & Dodge, LLP, 111 Huntington Avenue, Boston, Massachusetts 02199–7163. Fax: 617/227–4420.

By: fax and Federal Express.

J. Mark Gidley, White & Case, LLP, 601 Thirteenth Street, NW., Washington, DC 20005–3807. Fax: 202/639–9355.

By: hand delivery.

David E. Blake-Thomas.

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[2] 119 Congressional Record 24,598 (1973). *See United States* v. *Gillette Co.,* 406 F. Supp. 173, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93–1463, 93rd Cong. 2d Sess. 8–9 (1974), 1974 U.S.C.C.A.N. 6535, 6538.

[3] *United States* v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977); *see also United States* v. *Loew's Inc.,* 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States* v. *Columbia Artists Mgmt, Inc.,* 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

[4] *United States* v. *Bechtel Corp.,* 648 F.2d at 666 (citations omitted) (emphasis added); *see United States* v. *BNS, Inc.,* 858 F.2d at 463; *United States* v. *National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States* v. *Gillette Co.,* 406 F. Supp. at 716. *See also United States* v. *American Cyanamid Co.,* 719 F.2d 558, 565 (2d Cir,. 1983), *cert denied,* 465 U.S. 1101 (1984).

[5] *United States* v. *American Tel. & Tel. Co.,* 552 F. Supp. 131, 151, (D.D.C. 1982) (quoting *Gillette,* 406 F. Supp. at 716), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *United States* v. *Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States* v. *Carrols Dev. Corp.* 454 F. Supp. 1215, 1222, (N.D.N.Y. 1978).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration, Manufacturer of Controlled Substances; Notice of Registration

By Notice dated April 11, 2002, and published in the **Federal Register** on April 26, 2002, (67 FR 20827), Irix Pharmaceuticals, Inc., 101 Technology Place, Florence, South Carolina 29501, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of methylphenidate (1724), a basic class of controlled substance listed in Schedule II.

The firm plans to manufacture methylphenidate for sale to their customers.

No comments or objections have been received. DEA has considered the factors in Title 21, U.S.C., Section 823(a) and determined that the registration of Irix Pharmaceuticals, Inc. to manufacture methylphenidate is consistent with the public interest at this time. DEA has investigated the firm on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above

firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: August 28, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–26681 Filed 10–18–02; 8:45 am]

BILLING CODE 4410–09–M

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Sunshine Act; Meeting

TIME AND DATE: 9 a.m. to 12 p.m., Monday, November 18, 2002.

PLACE: The offices of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, 110 South Church Avenue, Suite 3350, Tucson AZ 85701.

STATUS: This meeting will be open to the public, unless it is necessary for the Board to consider items in executive session.

MATTERS TO BE CONSIDERED: (1) A report on the U.S. Institute for Environmental Conflict Resolution; (2) a report from the Udall Center for Studies in Public Policy; (3) a report on the Native Nations Institute; (4) program reports; (5) a report on the Udall Archives; and (6) a report from the Management Committee.

PORTIONS OPEN TO THE PUBLIC: All sessions with the exception of the session listed below.

PORTIONS CLOSED TO THE PUBLIC: Executive session.

CONTACT PERSON FOR MORE INFORMATION: Christopher L. Helms, Executive Director, 110 South Church Avenue, Suite 3350, Tucson, AZ 85701, (520) 670–5529.

Dated: October 16, 2002.

Christopher L. Helms,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. 02–26788 Filed 10–17–02; 10:05 am]

BILLING CODE 6820–FN–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346, License No. NPF–3]

FirstEnergy Nuclear Operating Company; Davis-Besse Nuclear Power Station, Unit 1; Notice of Issuance of Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has issued a Director's Decision with regard to a Petition dated April 24, 2002, filed by David Lochbaum on behalf of multiple organizations, hereinafter referred to as the ''Petitioners.'' The Petition was supplemented on May 9, 2002. The Petition concerns the operation of the Davis-Besse Nuclear Power Station, Unit 1, operated by FirstEnergy Nuclear Operating Company.

The Petition requested that the U.S. Nuclear Regulatory Commission (NRC) issue an Order to FirstEnergy Nuclear Operating Company (the licensee), requiring a verification by an independent party (VIP) for issues related to the reactor pressure vessel (RPV) head problem at Davis-Besse, Unit 1, and that the VIP be tasked with the following:

1. Verifying the adequacy of the problem identification and resolution (PIR) process.
2. Verifying the root cause evaluation prepared by the licensee for the damage to the RPV head.
3. Verifying that the long-term accumulation of boric acid within the reactor containment did not impair the function of safety-related systems, structures, and components (SSCs).
4. Verifying that the licensee has taken appropriate actions in response to NRC generic communications.
5. Verifying that the licensee has not deferred other plant modifications without appropriate justification.
6. Verifying that all entities responsible for safety reviews (e.g., Quality Assurance, INPO, the nuclear insurer, the plant operating review committee, the offsite safety review committee, etc.) are properly in the loop and functioning adequately.
7. Documenting its work in a publicly available report.
8. Presenting its conclusions to the NRC in a public meeting conducted near the plant site.

In support of their request, the Petitioners cite the Order issued by the NRC on August 14, 1996, to Northeast Nuclear Energy Company, the owner of the Millstone Nuclear Power Station in Connecticut, as a recent and relevant precedent for the action they requested. The Petitioners consider that restarting the Davis-Besse plant before an independent team of experts has examined the safety issues related to the RPV head problem would be potentially unsafe and in violation of Federal regulations.

The Petition of April 24, 2002, raises concerns originating in the licensee's identification of extensive degradation to the pressure boundary material of the RPV head on March 6, 2002. The VIP requested by the Petitioners would provide an independent program to verify the adequacy of plant owner performance and to reassure the public that all reasonable safety measures have been taken prior to plant restart.

On May 9, 2002, the Petitioners and the licensee met with the staff's Petition Review Board. The meeting gave the Petitioners and the licensee an opportunity to provide additional information and to clarify issues raised in the Petition.

The NRC sent a copy of the proposed Director's Decision to the Petitioners and to the licensee for comment on August 16, 2002. The Petitioners responded with comments on August 29, 2002, and the licensee responded on August 30, 2002. The comments and the NRC staff's response to them are included in the Director's Decision.

The Director of the Office of Nuclear Reactor Regulation has denied the request to issue an Order. The reasons for this decision are explained in Director's Decision DD–02–01 pursuant to 10 CFR 2.206, the complete text of which is available for inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville, Maryland, and on the NRC's Web site *http://www.nrc.gov/reading-rm/adams.html* (the Electronic Reading Room), via the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML022620366.

The NRC staff finds that its ongoing actions are sufficient to verify the adequacy of the licensee's performance related to RPV head degradation issues and to reassure the public that all reasonable safety measures have been taken prior to plant restart. The establishment of the Augmented Inspection Team and the Inspection Manual Chapter (IMC) 0350 Oversight Panel, as well as the comprehensive technical reviews being performed by the staff and investigations being performed by the NRC's Office of Investigations, are responsive to the degradation problem at Davis-Besse. The staff has adequate expertise and resources to monitor the licensee's corrective and preventative actions.

Thus, the enforcement-related action requested by the Petitioners for a VIP is not warranted. Additionally, the licensee is already taking action to provide an adequate level of independent verification for restart activities. Therefore, the Petitioners' request that the NRC issue an Order to the licensee requiring the establishment of a VIP is denied. If further assessment by the IMC 0350 Oversight Panel identifies new and/or different issues that would warrant consideration of an enforcement-related action similar to that used at Millstone, a change to the current staff regulatory approach would be considered.

A copy of the Director's Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206 of the Commission's regulations. As provided for by this regulation, the Director's Decision will constitute the final action of the Commission 25 days after the date of the decision, unless the Commission, on its own motion, institutes a review of the Director's Decision in that time.

Dated at Rockville, Maryland, this 15th day of October, 2002.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 02–26707 Filed 10–18–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7001]

Paducah Gaseous Diffusion Plant, United States Enrichment Corp.; Notice of Approval of Request for Temporary Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of approval of request for temporary exemption.

SUMMARY: The Nuclear Regulatory Commission (Commission) is approving, upon publication of this notice, a request for a temporary exemption from the requirement to perform an emergency preparedness (EP) exercise every 2 years for the Paducah Gaseous Diffusion Plant operated by the United States Enrichment Corporation (USEC). The temporary exemption is needed because USEC needs to concentrate available resources on prompt implementation of requirements in the Commission's Security Order issued June 17, 2002, and postponement of the EP exercise until after implementation of the Security Order requirements will provide a better indication of preparedness under the new requirements. USEC requested authorization to conduct the EP exercise on September 10, 2003, a delay of approximately 10 months from the currently scheduled exercise date of November 13, 2002. However, the Commission is requiring USEC to conduct the exercise no earlier than July 15, 2003, and no later than August 15, 2003. USEC will then return to the normal biennial schedule with the next exercise being conducted in September 2004. The NRC has prepared an environmental assessment with a Finding Of No Significant Impact (FONSI) on the request.

FOR FURTHER INFORMATION CONTACT: Dan E. Martin, Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 415–7254, e-mail dem1@nrc.gov.

SUPPLEMENTARY INFORMATION: The Commission is approving a temporary exemption from the requirement to perform an emergency preparedness exercise every 2 years, pursuant to 10 CFR part 76, for the Paducah Gaseous Diffusion Plant (PGDP), operated by USEC. The facility is authorized to use Special Nuclear Material (SNM) in the enrichment of natural uranium to prepare low-enriched uranium to be used by others in the fabrication of nuclear fuel pellets and fuel assemblies and operates near Paducah, Kentucky.

The PGDP facility was scheduled to conduct an EP exercise on November 13, 2002. USEC has requested an exemption to allow postponement of the exercise until September 10, 2003, a delay of about 10 months. The delay is requested in order to allow USEC to concentrate available resources on implementation of requirements in the Security Order issued by the Commission on June 17, 2002. The Security Order compels a variety of actions to increase security in light of the terrorist attacks on the United States that occurred on September 11, 2001, and is not subject to public disclosure. USEC also wishes to postpone the exercise until after the Security Order requirements are implemented because the exercise will then provide a better indication of preparedness under the new requirements. The Commission is requiring USEC to conduct the exercise no earlier than July 15, 2003, and no later than August 15, 2003.

The last biennial EP exercise conducted at the PGDP facility was conducted on September 21, 2000. USEC's Emergency Plan, in accordance with 10 CFR 76.91(l), requires that plant personnel plan and conduct biennial EP exercises. Because USEC needs to schedule the next exercise beyond the end of calendar year 2002, USEC has requested a temporary exemption from the requirement to conduct biennial EP exercises. USEC requested authorization to conduct the EP exercise on September 10, 2003. However, the Commission is requiring USEC to conduct the exercise no earlier than July 15, 2003, and no later than August 15, 2003. The Commission is also requiring USEC to offer and conduct training for off-site responders, before the exercise is conducted, to familiarize them with the new security requirements. USEC will then return to the normal biennial schedule with the next exercise being conducted in September 2004. The NRC staff has prepared an environmental assessment of the proposed action and reached a finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would grant temporary schedular relief from the requirement of 10 CFR 76.91(l) to perform a biennial EP exercise during calendar year 2002. The proposed action would require USEC to conduct the PGDP 2002 biennial exercise no earlier than July 15, 2003, and no later than August 15, 2003, and would require USEC to offer and conduct training for off-site responders to familiarize them with the new security requirements before the exercise is conducted. The proposed action is otherwise in accordance with USEC's request dated August 28, 2002.

Need for the Proposed Action

The proposed action is necessary to support a request by USEC that the EP exercise scheduled for November 13, 2002, be postponed beyond calendar year 2002, to the summer of 2003. The delay is needed to allow USEC to concentrate available resources on implementation of requirements in the Security Order issued by the Commission on June 17, 2002, until completion. The Security Order compels a variety of actions to increase security in light of the terrorist attacks on the United States that occurred on September 11, 2001, and is not subject to public disclosure. Among the actions that USEC is required to take are substantial plant modifications, training

programs, and development and implementation of new procedures. USEC also wishes to postpone the exercise until after the Security Order requirements are implemented because the exercise will then provide a better indication of preparedness under the new requirements.

Environmental Impacts of the Proposed Action

The proposed action would not materially affect the emergency response capabilities of the PGDP facility. The last EP exercise was conducted on September 21, 2000, and there were no issues identified which required immediate corrective action. One weakness identified concerned the failure of staff critiques to identify all areas of exercise weaknesses. This weakness has been addressed by USEC by communicating this finding to exercise participants and monitoring subsequent critiques for adequacy. NRC reviews and inspections since the 2000 exercise have not identified a decline in the effectiveness of USEC's emergency response capability. The postponement should have no impact on the effectiveness of USEC's emergency response capability. To assure Commission staff receive practice needed to assure Commission readiness to cope with an emergency at the GDPs or other fuel cycle facilities, the Commission is requiring USEC to conduct the exercise no earlier than July 15, 2003, and no later than August 15, 2003. To assure that off-site responders are prepared, the Commission is requiring USEC to offer and conduct training for off-site responders to familiarize them with the new security requirements before the exercise is conducted.

Because temperatures in July and August can be very high, and the temperatures in the cascade buildings and in other plant facilities can be extraordinarily high in those months, there is risk of significant heat stress to exercise participants required to wear substantial protective gear for anti-contamination, fire protection, or security purposes. To avoid significant risk of heat stress during the exercise, the Commission will allow USEC to not require that response personnel involved in the exercise wear the full complement of protective gear where heat stress would be a likely result.

The proposed action will not increase the probability or consequences of plant accidents, no changes are being made in the amounts or types of any effluents that could be released off-site, and there is no increase in individual or cumulative radiation exposure. Accordingly, the Commission concludes that there are no significant radiological impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not affect nonradiological plant effluents and has no other environmental impact. Accordingly, the Commission concludes that there are no significant nonradiological impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action. Denial of the proposed action would result in no change in environmental impacts and would result in hardship to USEC and others by potentially delaying the implementation of the requirements in the Commission's Security Order issued June 17, 2002. The environmental impacts of the proposed action and the alternative action are otherwise similar.

Alternative Use of Resources

The proposed action does not involve the use of any resources beyond those already necessary to conduct the EP exercise during 2002, and would merely delay the exercise.

Agencies and Persons Consulted

In accordance with its stated policy, the NRC staff consulted with: (1) State of Illinois official Thomas Ortciger, Director, Illinois Department of Nuclear Safety; (2) State of Kentucky official Janice H. Jasper, Radiation Health and Toxic Agents Branch, Cabinet for Health Services; and (3) U.S. Department of Energy official Randall M. DeVault, Group Leader, Transition and Technology Group, Office of Nuclear Fuel Security and Uranium Technology, regarding the environmental impact of the proposed action. No objections were received.

Consultations with the U.S. Fish and Wildlife Service and the State Historic Preservation Officer were not performed because of the lack of any conceivable impact to fish and wildlife or historic assets.

Finding of No Significant Impact

Based on the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

List of Preparers

This document was prepared by Dan E. Martin, Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards. Mr. Martin is the Project Manager for the Paducah Gaseous Diffusion Plant.

For further details with respect to the proposed action, see the USEC letter request dated August 28, 2002, available for public inspection at the Commission's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site *http://www.nrc.gov/reading-rm/adams.html*.

Dated at Rockville, Maryland this 10th day of October, 2002.

For the Nuclear Regulatory Commission

Daniel M. Gillen,

Chief, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 02–26553 Filed 10–18–02; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46651; File No. SR–BSE–2002–18]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange Relating to an Extension of a Temporary Exemption Concerning an Interpretation of its Execution Guarantee Rule

October 11, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 3, 2002, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend a temporary exemption related to an interpretation of its Execution Guarantee Rule in response to Commission action regarding *de minimis* trades through of certain Exchange Traded Funds (''ETFs'') in the Intermarket Trading System (''ITS'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to add Paragraph .07 to the Interpretations and Policies section of Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee*, of the BSE Rules. This rule proposal is in response to a Commission order issued August 28, 2002, granting a *de minimis* exemption for transactions in certain Exchange Traded Funds from the Trade-Through Provisions of the ITS Plan (''Order'').[3] As of the implementation date of the Order, September 4, 2002, certain executions that take place according to the Rules of the Exchange may be deemed violative of the provisions thereof.

On September 4, 2002, the Exchange submitted a proposed rule change on a pilot basis, which was effective upon filing, that would allow the Exchange to not enforce a specific provision of its rules relating to trade-through protection for certain securities.[4] The pilot expired on October 4, 2002. The Exchange is seeking to extend the pilot for an additional thirty days, until November 3, 2002.

In Chapter II, *Dealings on the Exchange,* Section 33, *Execution Guarantee,* of the BSE Rules, paragraph (c)(2) states that ''All agency limit orders will be filled if one of the following conditions occur * * * (2) there has been price penetration of the limit in the primary market. * * *'' Moreover, in various sections of Chapter XV, *Dealer Specialists,* there are similar provisions.[5] These provisions, in particular those set forth in Chapter II, guarantee that a limit order in a BSE specialist's book will be filled if the primary market trades through the limit price. The BSE specialist provides this protection to its customer limit orders in part due to the fact that the specialist can seek relief through ITS in the event of a trade-through.

As a result of the Commission's Order, certain primary market trades-through in ETFs will constitute exempt trades-through, but will still, under BSE Rules, trigger an obligation on the part of a BSE specialist to provide trade-through protection. However, the specialist will no longer be able to seek recourse to seek satisfaction through ITS from the primary market. Accordingly, the BSE specialist will be competitively disadvantaged if this section of its rules is strictly enforced, while the *de minimis* exemption exists for other ITS participants. Therefore, the BSE is seeking to implement an Interpretation of Chapter II, Section 33(c)(2) of its rules permitting the Exchange to not enforce the provision following a *de minimis* trade through of certain ETFs outlined in the Order.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of section 6(b) of the Act[6] and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate 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, that it is designed to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

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.

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 comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange and therefore, has become effective pursuant to section 19(b)(3)(A)(i) of the Act[8] and subparagraph (f)(1) of Rule 19b–4 thereunder.[9]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[3] *See* Securities Exchange Act Release No. 46428, 67 FR 56607 (September 4, 2002) (the ''Order''). Participants of the ITS Plan are exempt from Section 8(d) of the Plan, for the period of September 4, 2002 until June 4, 2003, with respect to transactions in Nasdaq-100 Index (''QQQs''), the Dow Jones Industrial Average Index (''DIAMONDs''), and the Standard & Poor's 500 Index (''SPDRs''), that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS.

[4] *See* Securities Exchange Act Release No. 46482 (September 10, 2002), 67 FR 58662 (September 17, 2002).

[5] *See, e.g.*, the Commentary to Section 1, *Specialists,* which sets forth a specialist's obligations in relation to buying and selling on a principal basis while holding unexecuted orders in his book; Section 2, *Responsibilities,* which sets forth, in part, a specialist's primary duties as agent; Section 4, *Precedence to Orders in the Book,* which sets forth the precedence parameters a specialist must adhere to; and Section 18, *Procedures for Competing Specialists,* which sets forth, in various paragraphs, obligations which may conflict with the *de minimis* exemption in the Order.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(i).

[9] 17 CFR 240.19b–4(f)(1).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–BSE–2002–18 and should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26684 Filed 10–18–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46644; File No. SR–CBOE–2002–60]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Extending for a Two-Month Period the Pilot Program for the Exchange's 100 Spoke RAES Wheel

October 10, 2002.

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 September 30, 2002, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The proposed rule change has been filed by CBOE as a ''non-controversial'' rule change under Rule 19b–4(f)(6) of the Act.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to extend, for an additional two-month period, the pilot program that permits the appropriate Floor Procedure Committee (''FPC'') to allocate orders on the Exchange's Retail Automatic Execution System (''RAES'') under the allocation system known as the 100 Spoke RAES Wheel.

The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 25, 2000, the Commission approved on a nine-month pilot basis the Exchange's proposal to amend Rule 6.8, which governs the operation of RAES,[4] to provide the appropriate FPC with a third choice for apportioning RAES trades among participating market makers, the 100 Spoke RAES Wheel.[5] In those classes where the 100 Spoke RAES Wheel is employed, the distribution of RAES trades to participating market-makers is essentially identical to the distribution of in-person agency market-maker trades for non-RAES trades in that class. The 100 Spoke RAES Wheel pilot program is used as anticipated.

The pilot program was extended four times and currently ends on September 28, 2002.[6] The Exchange now proposes to extend the pilot program for an additional two-month period ending November 28, 2002 pending permanent approval of the pilot program.

2. Statutory Basis

The Exchange believes that the proposed rule change will continue to be consistent with the requirements of Section 6(b)(5) of the Act.[7] Section 6(b)(5) of the Act requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate 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.

CBOE believes that the pilot program will continue to provide the appropriate FPC with flexibility in determining the appropriate allocation system for a given class of options on RAES. CBOE believes that the continuation of the pilot program will continue to reward those market makers who are most active in providing liquidity to agency business in the assigned option class.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by the Exchange as a ''non-controversial'' rule change pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest,

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] RAES is the Exchange's automatic execution system for public customer market or marketable limit orders of less than a certain size.

[5] Securities Exchange Act Release No. 42824 (May 25, 2000), 65 FR 37442 (June 14, 2000) (SR–CBOE–99–40).

[6] Securities Exchange Act Release No. 44020 (February 28, 2001), 66 FR 13985 (March 8, 2001) (six-month extension, SR–CBOE–2001–07); Securities Exchange Act Release No. 44749 (August 28, 2001), 66 FR 46487 (September 5, 2001) (four-month extension, SR–CBOE–2001–47); Securities Exchange Act Release No. 45230 (January 3, 2002), 67 FR 1380 (January 10, 2002) (six-month extension, SR–CBOE–2001–68); and Securities Exchange Act Release No. 46149 (June 28, 2002), 67 FR 45161 (July 8, 2002) (three-month extension, SR–CBOE–2002–34).

[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).

provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)[11] thereunder.

The Exchange has requested that the Commission waive the five-day pre-notice requirement and the 30-day operative delay, to permit the Exchange to implement the proposal on September 30, 2002, the date of filing. September 30, 2002 is the first trading day after expiration of the pilot program on Saturday, September 28, 2002. Under Rule 19b–4(f)(6)(iii), a proposed ''non-controversial'' rule change does not become operative for 30 days after the date of filing, unless the Commission designates a shorter time.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow for the continued operation of the pilot without interruption.[12] According to CBOE, with the continuation of the pilot program, market makers will continue to have greater incentive to compete effectively for orders in the crowd, which benefits investors and promotes the public interest. In addition, CBOE maintains that given the widespread use of the 100 Spoke RAES Wheel in equity options trading stations, requiring the Exchange to discontinue the use of the 100 Spoke RAES Wheel as of September 30, 2002 would cause disruption to those trading stations and thus, be disruptive to investors and the public interest. For these reasons, the Commission designates the proposed rule change to be effective and operative upon filing with the Commission. The Commission also waives the five-business-day pre-filing requirement. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange.

All submissions should refer to the File No. SR–CBOE–2002–60 and should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26689 Filed 10–18–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46637; File No. SR–CME–2002–01]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Mercantile Exchange, Inc. Relating to Customer Margin Requirements for Security Futures

October 10, 2002.

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 September 27, 2002, Chicago Mercantile Exchange, Inc. (''CME'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CME. On October 7, 2002, the CME submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CME proposes to amend its Rules as they pertain to customer performance bonds (or ''margins'') for Security Futures as detailed below. Below is the text of the proposed rule change. Proposed new language is italicized; deletions are bracketed.

* * * * *

833. Customer Performance Bonds for Security Futures Held in Futures Accounts

Performance bond (or ''margin'') requirements associated with Security Futures, as defined by Section 1a(31) of the Commodity Exchange Act (CEA), on behalf of Customers, as defined in Rule 930.B.2.b., whether effected on the Exchange or on a Marketplace apart from Exchange but cleared by the Clearing House per Chapter 8B, and held in a futures account (with any exceptions noted in the Rules), shall be determined and administered per the Rules of the Exchange; and, in compliance with CFTC Regulation Sections 41.42 through 41.49; and, SEC Regulation 242.400 through 242.406, including any successor Regulations. If Exchange Rules should be found to be inconsistent with CFTC Regulation Sections 41.42 through 41.49; and, SEC Regulation 242.400 through 242.406, including any successor Regulations, the CFTC and SEC Regulations shall prevail.

930. Performance Bond Requirements: Account Holder Level

930.A. Performance Bond System

The Standard Portfolio Analysis of Risk (SPAN®) Performance Bond System is the performance bond system adopted by the Exchange. SPAN generated performance bond requirements shall constitute Exchange performance bond requirements. All references to performance bond within the rules of the Exchange shall relate to those computed by the SPAN system.

Performance bond systems other than the SPAN system may be used to meet Exchange performance bond

[3] *See* letter from Phupinder S. Gill, Managing Director and President, Clearing House Division, CME, to Office of Market Supervision, Division of Market Regulation, Commission, dated October 4, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange replaced in its entirety the Form 19b–4 filed on September 27, 2002.

requirements if the clearing member can demonstrate that its system will always produce a performance bond requirement equal to or greater than the SPAN performance bond requirements.

930.B. Performance Bond Rates

1. Non-Security Futures

Exchange staff shall determine initial and maintenance performance bond rates used in determining Exchange performance bond requirements. The Board reserves the right to change or modify any performance bond levels determined by Exchange staff.

2. Security Futures

a. Initial and maintenance performance bond (or ''margin'') rates used in determining Exchange performance bond requirements applied to Security Futures on behalf of Customers, whether effected on the Exchange or on a Marketplace apart from Exchange but cleared by the Clearing House per Chapter 8B, and held in a futures account, shall be established at levels no lower than those prescribed by CFTC Regulation Section 41.45; and, SEC Regulation 242.403, including any successor Regulations.

b. As used in this Rule, the term ''Customer'' does not include (a) an ''exempted person'' as defined in CFTC Regulation 41.43(a)(9) and SEC Regulation 242.401(a)(9); or (b) Market Makers as defined below.

A Person shall be a ''Market Maker'' for purposes of this Rule, and shall be excluded from the requirements set forth in CFTC Regulations 41.42 through 41.49; and, SEC Regulations 242.400 through 242.406 in accordance with CFTC Regulation 41.42(c)(2)(v) and SEC Regulation 242.400(c)(2)(v), with respect to all trading in Security Futures for its own account, if such Person is an Exchange Member that is registered with the Exchange as a ''Security Futures Dealer.''

Each Market Maker shall (a) be registered as a floor trader or a floor broker with the CFTC under Section 4f(a)(1) of the CEA or as a dealer with the SEC under Section 15(b) of the Exchange Act; (b) maintain records sufficient to prove compliance with the requirements set forth in this Rule and CFTC Regulation 41.42(c)(2)(v) and SEC Regulation 242.400(c)(2)(v), including without limitation, trading account statements and other financial records sufficient to detail activity and verify conformance with the standards set forth herein; and (c) hold itself out as being willing to buy and sell Security Futures for its own account on a regular or continuous basis.

Market Makers satisfy condition (c) above if (a) at least 75% of their gross revenues, on an annual basis, is derived from business activities or occupations from trading listed financial derivatives, and the instruments underlying those derivatives, including security futures; stock index futures and options; stock and index options; stocks; foreign currency futures and options; foreign currencies; interest rate futures and options; fixed income instruments; and, commodity futures and options; or (b) except for unusual circumstances, at least 50% of their security futures trading activity on the Exchange in any calendar quarter, measured in terms of contract volume, is in security futures contracts to which the Market Maker is assigned as a Security Futures Dealer by the Exchange.

Any Market Maker that fails to comply with the applicable Rules of the Exchange, CFTC Regulations 41.41 through 41.49 and SEC Regulations 242.400 through 242.406 shall be subject to disciplinary action in accordance with Chapter 4. Appropriate sanctions in the case of any such failure shall include, without limitation, a revocation of such Market Maker's registration as a Security Futures Dealer.

This Rule 930.B.2.b shall apply regardless whether the position(s) in Exchange security futures are held in a futures account, or held in a securities account.

c. The Exchange shall establish initial and maintenance performance bond requirements applicable to Security Futures and held in a futures account, provided that the performance bond requirement for any long or short position held by a clearing member on behalf of a Customer shall not be less than 20% of the current market value of the relevant Contract; or, such other requirement as may be established by the CFTC and SEC for purposes of CFTC Regulation 41.45(b)(1) and SEC Regulation 242.403(b)(1) except as provided below.

d. Initial and maintenance performance bond requirements for offsetting positions involving Security Futures and related positions are provided in the schedule below, for purposes of CFTC Regulation 41.45(b)(2) and SEC Regulation 242.403(b)(2).

Performance Bond (or ''Margin'') Requirements for Offsetting Positions

Description of offset	*Security underlying the security future*	*Initial margin requirement*	*Maintenance margin requirement*
1. Long security future (or basket of security futures representing each component of a narrow-based securities index[1]) and long put option[2] on the same underlying security (or index).	*Individual stock or narrow-based security index.*	*20% of the current market value of the long security future, plus pay for the long put in full.*	*The lower of: (1) 10% of the aggregate exercise price[3] of the put plus the aggregate put out-of-the-money[4] amount, if any; or (2) 20% of the current market value of the long security future.*
2. Short security future (or basket of security futures representing each component of a narrow-based securities index) and short put option on the same underlying security (or index).	*Individual stock or narrow-based security index.*	*20% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any. Proceeds from the put sale may be applied.*	*20% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any.[5]*
3. Long security future and short position in the same security (or securities basket) underlying the security future.	*Individual stock or narrow-based security index.*	*The initial margin required under Regulation T for the short stock or stocks.*	*5% of the current market value as defined in Regulation T of the stock or stocks underlying the security future.*

Performance Bond (or "Margin") Requirements for Offsetting Positions—Continued

Description of offset	*Security underlying the security future*	*Initial margin requirement*	*Maintenance margin requirement*
4. Long security future (or basket of security futures representing each component of a narrow-based securities index) and short call option on the same underlying security (or index).	*Individual stock or narrow-based security index.*	*20% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any. Proceeds from the call sale may be applied.*	*20% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any.*
5. Long a basket of narrow-based security futures that together tracks a broad-based index and short a broad-based security index call option contract on the same index.	*Narrow-based security index .....*	*20% of the current market value of the long basket of narrow-based security futures, plus the aggregate call in-the-money amount, if any. Proceeds from the call sale may be applied.*	*20% of the current market value of the long basket of narrow-based security futures, plus the aggregate call in-the-money amount, if any.*
6. Short a basket of narrow-based security futures that together tracks a broad-based security index and short a broad-based security index put option contract on the same index.	*Narrow-based security index .....*	*20% of the current market value of the short basket of narrow-based security futures, plus the aggregate call in-the-money amount, if any. Proceeds from the put sale may be applied.*	*20% of the current market value of the short basket of narrow-based security futures, plus the aggregate put in-the-money amount, if any.*
7. Long a basket of narrow-based security futures that together tracks a broad-based security index and long a broad-based security index put option contract on the same index.	*Narrow-based security index .....*	*20% of the current market value of the long basket of narrow-based security futures, plus pay for the long put in full.*	*The lower of: (1) 10% of the aggregate exercise price of the put, plus the aggregate put out-of-the-money amount, if any; or (2) 20% of the current market value of the long basket of security futures.*
8. Short a basket of narrow-based security futures that together tracks a broad-based security index and long a broad-based security index call option contract on the same index.	*Narrow-based security index .....*	*20% of the current market value of the short basket of narrow-based security futures, plus pay for the long call in full.*	*The lower of: (1) 10% of the aggregate exercise price of the call, plus the aggregate call out-of-the-money amount, if any; or (2) 20% of the current market value of the short basket of security futures.*
9. Long security future and short security future on the same underlying security (or index).	*Individual stock or narrow-based security index.*	*The greater of: 5% of the current market value of the long security future; or (2) 5% of the current market value of the short security future.*	*The greater of: 5% of the current market value of the long security future; or (2) 5% of the current market value of the short security future.*
10. Long security future, long put option and short call option. The long security future, long put and short call must be on the same underlying security and the put and call must have the same exercise price. (Conversion).	*Individual stock or narrow-based security index.*	*20% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any, plus pay for the put in full. Proceeds from the call sale may be applied.*	*10% of the aggregate exercise price, plus the aggregate call in-the-money amount, if any.*
11. Long security future, long put option and short call option. The long security future, long put and short call must be on the same underlying security and the put exercise price must be below the call exercise price (Collar).	*Individual stock or narrow-based security index.*	*20% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any, plus pay for the put in full. Proceeds from call sale may be applied.*	*The lower of: (1) 10% of the aggregate exercise price of the put plus the aggregate put out-of-the money amount, if any; or (2) 20% of the aggregate exercise price of the call, plus the aggregate call in-the-money amount, if any.*
12. Short security future and long position in the same security (or securities basket) underlying the security future.	*Individual stock or narrow-based security index.*	*The initial margin required under Regulation T for the long stock or stocks.*	*5% of the current market value, as defined in Regulation T, of the long stock or stocks.*
13. Short security future and long position in a security immediately convertible into the same security underlying the security future, without restriction, including the payment of money.	*Individual stock or narrow-based security index.*	*The initial margin required under Regulation T for the long security.*	*10% of the current market value, as defined in Regulation T, of the long security.*
14. Short security future (or basket of security futures representing each component of a narrow-based securities index) and long call option or warrant on the same underlying security (or index).	*Individual stock or narrow-based security.*	*20% of the current market value of the short security future, plus pay for the call in full.*	*The lower of: (1) 10% of the aggregate exercise price of the call, plus the aggregate call out-of-the-money amount, if any; or (2) 20% of the current market value of the short security future.*

Performance Bond (or ''Margin'') Requirements for Offsetting Positions—Continued

Description of offset	*Security underlying the security future*	*Initial margin requirement*	*Maintenance margin requirement*
15. Short security future, Short put option and long call option. The short security future, short put and long call must be on the same underlying security and the put and call must have the same exercise price. (Reverse Conversion).	*Individual stock or narrow-based security index.*	*20% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any, plus pay for the call in full. Proceeds from put sale may be applied.*	*10% of the aggregate exercise price, plus the aggregate put in-the-money amount, if any.*
16. Long (short) a basket of security futures, each based on a narrow-based security index that together tracks the broad-based index and short (long) a broad-based index future.	*Narrow-based security index .....*	*5% of the current market value for the long (short) basket of security futures.*	*5% of the current market value of the long (short) basket of security futures.*
17. Long (short) a basket of security futures that together tracks a narrow-based index and short (long) a narrow-based index future.	*Individual stock or narrow-based security index.*	*The greater of: (1) 5% of the current market value of the long security future(s); or (2) 5% of the current market value of the short security future(s).*	*The greater of: (1) 5% of the current market value of the long security future(s); or (2) 5% of the current market value of the short security future(s).*
18. Long (short) a security future and short (long) an identical security future traded on a different market.[6]	*Individual stock or narrow-based security index.*	*The greater of: (1) 3% of the current market value of the long security future(s); or (2) 3% of the current market value of the short security future(s).*	*The greater of: (1) 3% of the current market value of the long security future(s); or (2) 3% of the current market value of the short security future(s).*

[1] *Baskets of securities or security futures contracts must replicate the securities that comprise the index, and in the same proportion.*

[2] *Generally, for the purposes of these rules, unless otherwise specified, stock index warrants shall be treated as if they were index options.*

[3] *''Aggregate exercise price,'' with respect to an option or warrant based on an underlying security, means the exercise price of an option or warrant contract multiplied by the numbers of units of the underlying security covered by the option contract or warrant. ''Aggregate exercise price'' with respect to an index option, means the exercise price multiplied by the index multiplier.*

[4] *''Out-of-the-money'' amounts shall be determined as follows:*

(1) for stock call options and warrants, any excess of the aggregate exercise price of the option or warrant over its current market value (as determined in accordance with Regulation T of the Board of Governors of the Federal Reserve System);

(2) for stock put options or warrants, any excess of the current market value (as determined in accordance with Regulation T of the Board of Governors of the Federal Reserve System) of the option or warrant over its aggregate exercise price;

(3) for stock index call options and warrants, any excess of the aggregate exercise price of the option or warrant over the product of the current index value and the applicable index multiplier; and

(4) for stock index put options and warrants, any excess of the product of the current index value and the applicable index multiplier over the aggregate exercise price of the option or warrant. See, *e.g.*, NYSE Rule 431 (Exchange Act Release No. 42011 (October 14, 1999), 64 FR 57172 (October 22, 1999) (order approving SR–NYSE–99–03)); Amex Rule 462 (Exchange Act Release No. 43582 (November 17, 2000), 65 FR 71151 (November 29, 2000) (order approving SR–Amex–99–27)); CBOE Rule 12.3 (Exchange Act Release No. 41658 (July 27, 1999), 64 FR 42736 (August 5, 1999) (order approving SR–CBOE–97–67)); or NASD Rule 2520 (Exchange Act Release No. 43581 (November 17, 2000), 65 FR 70854 (November 28, 2000) (order approving SR–NASD–00–15)).

[5] *''In-the-money'' amounts must be determined as follows:*

(1) for stock call options and warrants, any excess of the current market value (as determined in accordance with Regulation T of the Board of Governors of the Federal Reserve System) of the option or warrant over its aggregate exercise price;

(2) for stock put options or warrants, any excess of the aggregate exercise price of the option or warrant over its current market value (as determined in accordance with Regulation T of the Board of Governors of the Federal Reserve System);

(3) for stock index call options and warrants, any excess of the product of the current index value and the applicable index multiplier over the aggregate exercise price of the option or warrant; and

(4) for stock index put options and warrants, any excess of the aggregate exercise price of the option or warrant over the product of the current index value and the applicable index multiplier.

[6] *Two security futures will be considered ''identical'' for this purpose if they are issued by the same clearing agency or cleared and guaranteed by the same derivatives clearing organization, have identical contract specifications, and would offset each other at the clearing level.*

930.C. Acceptable Performance Bond Deposits

1. Non-Security Futures

Clearing members may accept from their account holders as performance bond cash currencies of any denomination, readily marketable securities (as defined by SEC Rule 15c3–1(c)(11) and applicable SEC interpretations), money market mutual funds allowable under CFTC Regulation 1.25, and bank-issued letters of credit.

Clearing members shall not accept as performance bond from an account holder securities that have been issued by the account holder or an affiliate of the account holder unless the clearing member files a petition with and receives permission from Exchange staff.

Bank-issued letters of credit must be in a form acceptable to the Exchange. Such letters of credit must be drawable in the United States. Clearing members shall not accept as performance bond from an account holder letters of credit issued by the account holder, an affiliate of the account holder, the clearing member, or an affiliate of the clearing member.

All assets deposited by account holders to meet performance bond requirements must be and remain unencumbered by third party claims against the depositing account holder.

Except to the extent that Exchange staff shall prescribe otherwise, cash currency performance bond deposits shall be valued at market value. All other performance bond deposits other than letters of credit shall be valued at an amount not to exceed market value less applicable haircuts as set forth in SEC Rule 240.15c3–1.

2. Security Futures

a. Clearing Members may accept from their Customers as performance bond (or ''margin'') for Security Futures held in a futures account, deposits of cash, margin securities (subject to the limitations set forth in the following sentence), exempted securities, any other assets permitted under Regulation T of the Board of Governors of the Federal Reserve System (as in effect from time to time) to satisfy a performance bond deficiency in a securities margin account, and any combination of the foregoing, each as valued in accordance with CFTC Regulations 41.46(c) and 41.46(e); and, SEC Regulations 242.404(c) and 242.404(e). Shares of a money market mutual fund that meet the requirements of CFTC Regulation 1.25 may be accepted as a performance bond deposit from a Customer for purposes of this Rule.

b. A Clearing Member shall not accept as performance bond from any Customer securities that have been issued by such Customer or an Affiliate of such Customer unless such Clearing Member files a petition with and receives permission from the Exchange for such purpose.

c. All assets deposited by a Customer to meet performance bond requirements must be and remain unencumbered by third party claims against the depositing Customer.

930.D. Acceptance of Orders

Clearing members may accept orders for an account provided sufficient performance bond is on deposit in the account or is forthcoming within a reasonable time. For an account which has been subject to calls for performance bond for an unreasonable time, clearing members may only accept orders that reduce the performance bond requirements of existing positions in the account. Clearing members may not accept orders for an account that has been in debit an unreasonable time.

930.E. Calls for Performance Bond

1. Clearing members must issue calls for performance bond that would bring an account up to the initial performance bond requirement: a. when performance bond equity in an account initially falls below the maintenance performance bond requirement; and b. subsequently, when performance bond equity plus existing performance bond calls in an account is less than the maintenance performance bond requirement.

Such calls must be made within one business day after the occurrence of the event giving rise to the call. Clearing members may call for additional performance bond at their discretion. Notwithstanding the foregoing, a clearing member is not required to call for or collect performance bond for day trades.

2. Clearing members shall only reduce a call for performance bond through the receipt of performance bond deposits permitted under subsection C. of this rule. Clearing members may delete a call for performance bond through: a. the receipt of performance bond deposits permitted under subsection C. of this rule only if such deposits equal or exceed the amount of the total performance bond call; or b. inter-day favorable market movements and/or the liquidation of positions only if performance bond equity in the account is equal to or greater than the initial performance bond requirement. Clearing members shall reduce an account holder's oldest outstanding performance bond call first.

3. Clearing members must maintain written records of all performance bond calls issued, reduced, and deleted.

930.F. Disbursements of Excess Performance Bond

Clearing members may only release performance bond deposits from an account if such deposits are in excess of initial performance bond requirements.

930.G. Loans to Account Holders

Clearing members may not extend loans to account holders for performance bond purposes unless such loans are secured as defined in CFTC Regulation 1.17(c)(3). The proceeds of such loans must be treated in accordance with CFTC Regulation 1.30.

930.H. Aggregation of Accounts and Positions

Clearing members may aggregate accounts under identical ownership within the same classifications of customer segregated, customer secured, special reserve account for the exclusive benefit of customers, and nonsegregated for performance bond purposes. Clearing members may compute performance bond requirements on identically owned concurrent long and short positions on a net basis.

930.I. Hedge Positions

Clearing members shall have reasonable support for bona-fide hedge and risk management positions, as defined by Rule 543, that are afforded hedge performance bond rates.

930.J. Omnibus Accounts

1. Clearing members shall collect performance bond on a gross basis for positions held in domestic and foreign omnibus accounts.

2. For omnibus accounts, initial performance bond requirements shall equal maintenance performance bond requirements.

3. Clearing members shall obtain and maintain written instructions from domestic and foreign omnibus accounts for positions which are entitled to spread or hedge performance bond rates.

930.K. Liquidation of Accounts

1. Non-Security Futures

If an account holder fails to comply with a performance bond call within a reasonable time (the clearing member may deem one hour to be a reasonable time), the clearing member may close out the account holder's trades or sufficient contracts thereof to restore the account holder's account to required performance bond status. Clearing members shall maintain full discretion to determine when and under what circumstances positions in any account shall be liquidated.

2. Security Futures

If a Customer fails to comply with a performance bond (or ''margin'') call within a reasonable period of time (the clearing member may deem one hour to be a reasonable period of time), the relevant clearing member shall take the deduction required with respect to an undermargined account in computing its net capital under applicable CFTC Regulations and SEC Regulations.

If at any time there is a liquidating deficit in an account in which security futures are held, the clearing member shall take steps to liquidate positions in the account promptly and in an orderly manner.

930.L. Failure To Maintain Performance Bond Requirements

If a clearing member fails to maintain performance bond requirements for an account in accordance with this rule, the Exchange may direct such clearing member to immediately liquidate all or part of the account's positions to eliminate the deficiency.

930.M. Violation

Violation of this rule may constitute a major offense.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for,

the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule amendments are intended to establish procedures relating to the determination and administration of customer performance bonds (or ''margins''). Further, these amendments define the applicability of these requirements, specifically excluding qualifying security futures dealers from customer security futures performance bond requirements and related regulatory requirements. Proposed Rule 833 generally establishes that the determination and administration of customer performance bonds shall be consistent with prevailing practices on the Exchange, except to the extent that Exchange practices may be inconsistent with Commodity Futures Trading Commission (''CFTC'') Regulations 41.42 through 41.49 and SEC Regulations 242.400 through 242.406.

General Applicability—Proposed Rule 833 delineates the scope of application of the proposed rule amendments in two important respects: (1) It provides that the proposed rule amendments apply only with respect to security futures transactions executed on CME; or, to those executed on a marketplace apart from CME but cleared through CME facilities. To the extent that security futures intermediaries engage in security futures transactions on or through other exchanges as well, they will need to comply with the respective performance bond requirements established by such other venues; (2) proposed Rule 833 establishes that the proposed rule amendments apply only to customers as defined in proposed Rule 930.B.2.b.; and (3) the proposed rule amendments are applicable only to security futures held in futures accounts. While security futures may be held in a securities account as well, the administration of securities accounts shall be governed, in addition to all applicable Regulations, by Rules adopted by other relevant self-regulatory organizations.

Proposed Rule 930.B.2.b. identifies ''exempted persons'' and ''market makers'' as non-customers for purposes of the proposed rule amendments and, therefore, exempt from the application of such provisions. Exempted persons are specifically identified by reference to applicable CFTC and SEC Regulations.

Market Maker Exclusion—CFTC Regulation 41.42(c)(2)(v) and SEC Regulation 242.400(c)(2)(v) permit exchanges to adopt rules containing specified requirements for security futures dealers, on the basis of which the financial relations between security futures intermediaries, on the one hand, and qualifying security futures dealers, are excluded from the customer performance bond requirements for security futures. Any rules so adopted by an exchange must meet the criteria set forth in Section 7(c)(2)(B) of the Act.[4]

CME proposes a market maker exclusion in its proposed Rule 930.B.2.b. that relies on CFTC Regulation 41.42(c)(2)(v) and SEC Regulation 242.400(c)(2)(v). In particular, Exchange members who meet certain qualifications will be permitted to register with the Exchange as security futures dealers. As such, their accounts would not be subject to customer security futures performance bond (or ''margin'') requirements.

These members will be floor traders or floor brokers registered with the CFTC under Section 4f(a)(1) of the Commodity Exchange Act, as amended, or dealers registered with the SEC under Section 15(b) of the Act.[5] As such, they may not qualify as exempted persons within the meaning of Regulation 242.401(a)(9) under the Act. Absent the provisions of proposed Rule 930.B.2.b., they arguably would have to be treated as customers for purposes of determining performance bond requirements, even with respect to their proprietary market making activities. This would be different from the treatment of security futures dealers on securities exchanges under Section 7(c)(3) of the Act,[6] and therefore would be contrary to the statutory objectives reflected in Section 7(c)(2)(B) of the Act.[7]

The market maker exclusion as proposed contains all of the criteria and limitations set forth in CFTC Regulation 41.42(c)(2)(v) and SEC Regulation 242.400(c)(2)(v). In particular, the Exchange intends to test a security futures dealer's willingness to hold itself out to buy and sell on a regular or continuous basis by application of a revenue test. Note that the Commissions' release regarding security futures customer margins identified three alternate means by which to demonstrate such willingness:

1. An exchange may require members to effect a certain percentage of its security futures trades with persons other than those registered as market makers;

2. Exchange members could be subject to rules that impose an affirmative obligation to quote on a regular or continuous basis;

3. An exchange may require that a ''large majority'' of an exchange member's revenue is derived from trading listed financial based derivatives including futures and options on stocks, stock indexes, foreign currencies, interest rate instruments.

CME proposes the application of the 3rd standard listed above. Specifically, CME proposes that market makers must derive at least 75% of their gross revenues, on an annual basis, from business activities or occupations from trading listed financial-based derivatives or the instruments underlying those derivatives, including security futures; stock index futures; stock and index options; stocks; foreign currency futures and options; foreign currencies; interest rate futures and options; fixed income instruments; and, commodity futures and options. We believe that it is appropriate to extend the enumeration of derivatives to include the underlying instruments as closely related to the business activities or occupations specifically referenced in the Commissions' release.

Alternatively, a market maker may satisfy this standard if, except for unusual circumstances, at least 50% of its security futures trading activity in any calendar quarter is in security futures to which it is assigned by the Exchange to act as a ''Security Futures Dealer.''

Market makers are required to maintain books and records including trading statements and other financial records that would evidence compliance with these standards. This recordkeeping requirement includes, without limitation, such trading statements and other financial records as may be necessary specifically to verify compliance. Failure on the part of a market maker to comply with these standards may result in revocation of security futures dealer status or other sanctions provided under CME Rules.

The parameters of this market maker exclusion shall apply to position(s) in Exchange security futures contracts regardless of whether such position(s)

[4] 15 U.S.C. 78g(c)(2)(B).

[5] 15 U.S.C. 78o(b).

[6] 15 U.S.C. 78g(c)(3).

[7] 15 U.S.C. 78g(c)(2)(B).

are held in a futures account, or held in a securities account.

CME believes proposed Rule 930.B.2.b. to be consistent with the requirements of the Act and with the explanations accompanying the publication of those requirements.

Performance Bond Rates—Proposed Rule 930.B.2.a. addresses the issue of customer performance bond rates by requiring that such rates shall be established at levels no lower than those prescribed by CFTC Regulation 41.45 and SEC Regulation 242.403. Proposed Rule 930.B.2.c. elaborates by establishing the requisite performance bond level for each long or short position in a security future at 20% of the current market value of such security future, as required by SEC Regulation 242.403(b) and CFTC Regulation 41.45(b).

Exceptions to that 20% requirement are established per proposed Rule 930.B.2.d. These exceptions rely upon SEC Regulation 242.403(b)(2) and CFTC Regulation 41.45(b)(2), which establish that a self-regulatory authority may set the required initial or maintenance performance bond level for offsetting positions involving security futures and related positions at a level lower than the level that would apply if performance bond requirements for such positions were calculated separately based on the aforementioned 20% requirement, provided the rules establishing such lower performance bond levels meet the criteria set forth in Section 7(c)(2)(B) of the Act.[8] That Section requires that:

(I) The margin requirements for a security futures product be consistent with the margin requirements for comparable option contracts traded on any exchange registered pursuant to Section 6(a) of [the Act]; [9] and

(II) Initial and maintenance margin levels for a security futures product not be lower than the lowest level of margin, exclusive of premium, required for any comparable option contract traded on any exchange registered pursuant to Section 6(a) of [the Act],[10] other than an option on a security future.

Absent the performance bond relief afforded by the proposed Rule 930.B.2.d., security futures intermediaries would be required to collect performance bond from their customers equal to 20% of the current market value of the security futures held on behalf of such customers, irrespective of whether such security futures positions are hedged or unhedged. With respect to option contracts traded on securities exchanges, the Commission has recognized that it is ''appropriate for the SROs to recognize the hedged nature of certain combined options strategies and prescribe margin requirements that better reflect the risk of those strategies.'' [11]

CME believes that the same considerations apply in connection with the determination of performance bond levels for offsetting positions involving security futures and related positions. If performance bond offsets were not available with respect to security futures, the customer performance bond requirements applicable to such instruments would effectively be inconsistent with, and more onerous than, the performance bond requirements for comparable option contracts traded on securities exchanges. This would be contrary to the statutory objectives reflected in Section 7(c)(2)(B) of the Act.[12]

Proposed Rule 930.B.2.d. is accompanied by a schedule which describes in detail the performance bond offsets available with respect to particular combinations of security futures and related positions. Such schedule is substantively identical to the table of offsets included in the Commission's release on Customer Margin Rules Relating to Security Futures (the ''Customer Margin Release'').[13] While the table differs in certain respects from similar tables in effect for exchange-traded options, the Commission acknowledged in its Customer Margin Release that these limited differences are warranted by different characteristics of the instruments to which they relate. Accordingly, CME believes that the Proposed Margin Offset Rule is consistent with the requirements of the Act and the rules and regulations thereunder.

Performance Bond Administration—Proposed Rule 930.C.2.a identifies the types of performance bonds that a security futures intermediary may accept from a Customer. Consistent with SEC Regulation 242.404(b) and CFTC Regulation 41.46(b), acceptable types of performance bond are limited to: deposits of cash, margin securities (subject to specified restrictions), exempted securities, any other assets permitted under Regulation T of the Board of Governors of the Federal Reserve System to satisfy a performance bond deficiency in a securities margin account, and any combination of the foregoing. Proposed Rule 930.C.2.b. further provides that the different types of eligible performance bond are to be valued in accordance with the applicable principles set forth in SEC Regulations 242.404(c) and 242.404(e) and CFTC Regulations 41.46(c) and 41.46(e).

Proposed Rule 930.K.2 requires a security futures intermediary to take the deduction required with respect to an underfunded account in computing its net capital under applicable CFTC and SEC Regulations if the customer has failed to comply with a required performance bond call within a reasonable period of time. This requirement is consistent with SEC Regulation 242.406(a) and CFTC Regulation 41.48(a). Further, Proposed Rule 930.K.2 requires the liquidation of an account where there is a liquidating deficit, in accordance with SEC Regulation 242.406(b) and CFTC Regulation 41.48(a).

2. Statutory Basis

The Act Regulations and related provisions of the Act are premised on each self-regulatory organization adopting performance bond requirements that are functionally equivalent to the proposed amendments to CME Rule 930. Accordingly, CME Rule 930, as amended per this proposal, represents a corollary of, and is designed to give effect to, the Act Regulations and related provisions of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule amendments will have an impact on competition because, as described above, (1) the Exchange's general approach to the question of customer performance bonds for security futures is based on its long standing practices, consistent with standards adopted by the U.S. futures exchanges' Joint Audit Committee and similar rules in effect for other contract markets, (2) customer performance bond for security futures will be consistent with rules in effect for options traded on exchanges registered pursuant to Section 6(a) of the Act; [14] and (3) CME's

[8] 15 U.S.C. 78g(c)(2)(B).

[9] 15 U.S.C. 78f(a).

[10] *Id.*

[11] *See* Securities Exchange Act Release Nos. 41658 (July 27, 1999), 64 FR 42736 (August 5, 1999) (order approving SR–CBOE–97–67 amending CBOE Rule 12.3); 42011 (October 14, 1999), 64 FR 57172 (October 22, 1999) (order approving SR–NYSE–99–03 amending NYSE Rule 431); 43582 (November 17, 2000), 65 FR 71151 (November 29, 2000) (order approving SR–Amex-99–27 amending Amex Rule 462); and 43581 (November 17, 2000), 65 FR 70854 (November 28, 2000) (order approving SR–NASD–00–15 amending NASD Rule 2520).

[12] 15 U.S.C. 78g(c)(2)(B).

[13] *See* Securities Exchange Act Release No. 46292 (August 1, 2002), 67 FR 53146 (August 14, 2002).

[14] 15 U.S.C. 78f(a).

proposed Market Maker Exception ensures that qualifying security futures dealers on CME are subject to performance bond requirements that are comparable to those traditionally applicable to security futures dealers on securities exchanges. In addition, it is expected that other self-regulatory organizations listing Security Futures will adopt rules that are substantially similar to the proposed rule amendments.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments on the proposed rule amendments have not been solicited by the Exchange nor have any such comments been received to date.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. 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, as amended, 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 the filing will also be available for inspection and copying at the principal offices of the Exchange. All submissions should refer to File No. SR–CME–2002–01 and should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26721 Filed 10–18–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46657; File No. SR–CHX–2002–18]

Self-Regulatory Organizations; The Chicago Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Execution Price for Odd-Lot Orders Executed on the Chicago Stock Exchange

October 11, 2002.

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 June 20, 2002, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CHX.[3] CHX filed Amendment No. 1 to the proposed rule change on September 23, 2002.[4] The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons, and order accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Article XXXI, Rule 9 of the CHX Rules, which governs, among other things, execution prices for odd-lot orders. The text of the proposed rule follows:

Additions are *italicized*; deletions are [bracketed].

Chicago Stock Exchange Rules

Article XXXI

Odd-Lots and Odd-Lot Dealers, Dual System

* * * * *

Execution of Odd-Lot Orders During the Primary Trading Session

Rule 9.

* * * * *

(b) Nasdaq/NM Securities and Dually Traded Issues. As to Nasdaq/NM Securities [and to certain stocks dually traded on this Exchange and on another national securities exchange and which stocks have been designated as being in the dual trading system], market orders will be accepted for execution as an odd-lot based on the best bid disseminated pursuant to SEC Rule 11 Ac1–1 on a sell order or the best offer disseminated pursuant to SEC Rule 11 Ac 1–1 on a buy order in effect at the time the order is presented at the specialist post, provided the order is for a number of shares less than the full lot in said stock. *Any market order to purchase or sell a Dual Trading System issue in an odd-lot amount, which is transmitted for execution to an odd-lot dealer or its agent shall be executed, unless otherwise provided herein, at the price of the adjusted ITS bid (in the case of an order to sell) or adjusted ITS offer (in the case of an order to purchase) in the security at the time the order is received by the Exchange system designated to process odd-lot orders (the ''odd-lot system'').*

* * * * *

(b) General. [An odd-lot market order shall be executed at the proper full lot bid or ask price.]

* * * * *

(vi) In instances in which quotation information is not available, e.g., the quotation collection or dissemination facilities are inoperable, or the primary market in the security has been determined to be in non-firm mode (as referenced in Interpretation and Policy .01), standard, regular way odd-lot market orders shall be executed based on the next primary market round lot sale or shall be executed by the member organization designated by the Exchange as the odd-lot dealer for the issue, at a price deemed appropriate under prevailing market conditions.

* * * * *

Interpretations and Policies:

.01 Adjusted Best Bid or Offer. For purposes of paragraph (b) of this Rule, the terms ''adjusted ITS best bid'' and ''adjusted ITS best offer'' for a security shall mean the highest bid and lowest

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This submission is virtually identical to SR–CHX–2001–29, which was filed with the Commission on November 23, 2001, but was erroneously given a pre-existing file number by the CHX.

[4] *See* letter from Kathleen M. Boege, Associate General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission (September 20, 2002) (''Amendment No. 1''). In Amendment No. 1, CHX made clarifying and technical changes to the rule text of the proposed rule change.

offer, respectively, disseminated by (i) the Exchange or (ii) a market center participating in the Intermarket Trading System; provided, however, that the bid and offer in another ITS market center will be considered in determining the adjusted ITS best bid or adjusted ITS best offer in a security only if (a) the security is included in ITS in that market center; (b) the size of the quotation is greater than 100 shares; (c) the bid or offer is no more than $.25 away from the bid or offer disseminated by the primary market; (d) the quotation conforms to Exchange requirements regarding minimum trading variations; (e) the quotation does not result in a locked market; (f) the market center is not experiencing operational or system problems with respect to the dissemination of quotation information; and (g) the bid or offer is ''firm,'' that is, members of the market center disseminating the bid or offer are not relieved of their obligations with respect to such bid or offer under paragraph (c)(2) of Rule 11Ac1–1 pursuant to the ''unusual market'' exception of paragraph (b)(3) of Rule 11Ac1–1.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CHX included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received regarding the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The CHX has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Article XXXI, Rule 9 of the CHX Rules, which governs, among other things, execution prices for odd-lot orders. According to the Exchange, the proposed rule change is substantially similar to a proposed rule change approved by the Commission with respect to Rule 124(A) of the New York Stock Exchange (''NYSE''), which governs execution prices for odd-lot orders on the floor of the NYSE.[5]

Under the proposed rule change, odd-lot orders for Dual Trading System issues will be executed at the adjusted Intermarket Trading System (''ITS'') Best Bid or Offer (''BBO''). The ITS BBO is defined in proposed Interpretation and Policy .01 for Article XXXI, Rule 9 as the highest bid or lowest offer disseminated by the Exchange or a market center participating in ITS. Under the proposed Interpretation, the bid or offer of another market center would be used in determining the ITS BBO if: (1) The security is included in ITS in that market center, (2) the size of the quotation is greater than 100 shares, (3) the bid or offer is no more than $0.25 away from the bid or offer disseminated by the primary market, (4) the quotation conforms to Exchange requirements regarding minimum trading variations, and (5) the quotation does not result in a locked market. The Exchange believes that these provisions should help ensure that the odd-lot execution price for ITS securities is not established utilizing erroneous quotation information from other market centers. Similarly, proposed Article XXXI, Rule 9(c)(vi) would govern odd-lot executions for ITS securities in instances where quotation information is unavailable due to unusual market conditions. In particular, if unusual market conditions existed (*i.e.*, inoperable quotation collection or dissemination facilities, or the primary market in the security has been determined to be in non-firm mode (as referenced in proposed Interpretation and Policy .01)), standard, regular way odd-lot market orders would be executed based on the next primary market round lot sale or shall be executed by the member organization designated by the Exchange as the odd-lot dealer for the issue, at a price deemed appropriate under prevailing market conditions.

The Exchange believes that the proposed rule change is appropriate because the rule amendments are virtually identical to the analogous NYSE rule. Moreover, the Exchange believes that the proposed rule change is to the ultimate benefit of investors, to the extent that calculation of the adjusted ITS BBO excludes erroneous quotation information.

2. Statutory Basis

The proposed rule is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[6] In particular, the proposed rule is consistent with Section 6(b)(5) of the Act[7] in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CHX–2002–18 and should be submitted by November 12, 2002.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b).[8] Specifically, the Commission believes the proposal is consistent with the

[5] See Securities Exchange Act Release No. 38874 (July 25, 1997), 62 FR 41456 (August 1, 1997).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)

Section 6(b)(5)[9] requirements that the rules of an exchange be designed to remove impediments to and perfect the mechanism of a free and open market, to facilitate transactions in securities and, in general, to protect investors and the public interest.[10]

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that the instant proposed rule change, as amended, is substantively similar to NYSE Rule 124, which has been reviewed and approved by the Commission.[11] Thus, this proposal does not raise any new regulatory issues or concerns. For instance, like NYSE Rule 124, the proposed rule change would amend Article XXXI, Rule 9 to base odd-lots prices on the adjusted ITS BBO if: (1) The security is included in ITS in the relevant market center, (2) the size of the quotation is greater than 100 shares, (3) the bid or offer is no more than $0.25 away from the bid or offer disseminated by the primary market, (4) the quotation conforms to Exchange requirements regarding minimum trading variations, and (5) the quotation does not result in a locked market. Article XXXI, Rule 9 is also similar to NYSE Rule 124 in that when the adjusted ITS BBO is unavailable due to unusual market conditions the odd-lot market for an ITS security would be determined by the next round-lot sale on the Exchange.

The Commission believes that generally pricing odd-lots for listed securities based on the ITS BBO should improve the execution quality for odd-lot orders. Further, the Commission believes that the proposal should help to ensure that odd-lot executions are based on market activity that is relevant and reliable. The Commission believes that the proposed rule change, as amended, should provide small investors, who may find it difficult to trade orders in round-lot increments, with better executions and should enhance the integrity of the market.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposal, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this rule, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation, consistent with section 3 of the Act. 15 U.S.C. 78c(f).

[11] *See supra* note 5.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR-CHX–2002–18), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26690 Filed 10–18–02; 8:45 am]

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[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46652; File No. SR–NASD–2002–133]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. To Establish an Execution Price Governor in SuperMontage

October 11, 2002.

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 September 30, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change, as described in Items I and II below, which Items have been prepared by the NASD. The NASD amended its proposal on October 9, 2002[3] and October 10, 2002.[4] The Commission is publishing this notice to solicit comments on the proposed rule change and Amendment Nos. 1 and 2 from interested persons and to approve the proposal, as amended, on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated September 27, 2002 (''Amendment No. 1''). In Amendment No. 1, the NASD submitted the proposal on a pilot basis under Section 19(b)(2) of the Act, requested accelerated approval, and replaced in its entirety the original rule filing submitted to the Commission dated on September 27, 2002.

[4] *See* letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 10, 2002 (''Amendment No. 2). In Amendment No. 2, the NASD made minor technical corrections to the rule text.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to establish, for a 60-day pilot period, a SuperMontage execution price governor to prevent inadvertent executions significantly away from the inside market. The text of the proposed rule change is below. Proposed new language is *italicized.*

* * * * *

4710. Participant Obligations in NNMS

(a) No Change.

(b) Non-Directed Orders

(1) General Provisions—A Quoting Market Participant in an NNMS Security shall be subject to the following requirements for Non-Directed Orders:

(A) No Change.

(i) No Change.

(ii) No Change.

(iii) No Change.

(B) Processing of Non-Directed Orders—No Change.

(i) through (iii) No Change.

(iv) Exceptions—The following exceptions shall apply to the above execution parameters:

(a) If a Nasdaq Quoting Market Participant enters a Non-Directed Order into the system, before sending such Non-Directed Order to the next Quoting Market Participants in queue, the NNMS will first attempt to match off the order against the Nasdaq Quoting Market Participant's own Quote/Order if the participant is at the best bid/best offer in Nasdaq.

(b) If an NNMS Market Participant enters a Preferenced Order, the order shall be executed against (or delivered in an amount equal to) both the Displayed Quote/Order and Reserve Size of the Quoting Market Participant to which the order is being directed, if that Quoting Market Participant is at the best bid/best offer when the Preferenced Order is next in line to be delivered (or executed). Any unexecuted portion of a Preferenced Order shall be returned to the entering NNMS Market Participant. If the Quoting Market Participant is not at the best bid/best offer when the Preferenced Order is next in line to be delivered (or executed), the Preferenced Order shall be returned to the entering NNMS Market Participant.

(c) If an NNMS Market Participant enters a Quote or Non-Directed Order that would result in NNMS either: 1) delivering an execution to a Quoting Market Participant(s) that participates in the automatic-execution functionality of the system at a price substantially away from the current inside bid/offer in that security; or 2) delivering a Liability

Order to a Quoting Market Participant(s) that participates in the order-delivery functionality of the system at a price substantially away from the current inside bid/offer in that security, the system shall instead process only those portions of the order that will not result in either an execution or delivery at a price substantially away from the current inside best bid/offer in the security and return the remainder to the entering party. For purposes of this subsection only, an execution or delivery based on a sell order shall be deemed to be substantially away from the current inside bid if it is to be done at a price lower than a break-price established by taking the inside bid, reducing it by 10% of the bid's value, and then subtracting $0.01. For example, in a stock with a current inside bid of $10.00, the maximum price at which a single sell order could be executed would be $8.99 calculated as follows: ($10.00—($10.00 x .10 e.g. $1)—$.01 = $8.99). For offers, an execution or delivery based on a buy order shall be deemed to be substantially away from the current inside offer if it is done a price higher than a break-price established by taking the inside offer, adding 10% of the offer's value to it, and then adding $0.01. For example, in a stock with a current inside offer of $10.00, the highest price at which a single sell order could be executed would be $11.01 calculated as follows: ($10.00 + ($10.00 x .10 e.g. $1) + $.01 = $11.01.

(C) Decrementation Procedures—No Change.

(i) through (iv) No Change.

(D) through (E) No Change.

(2) Refresh Functionality

(A) Reserve Size Refresh—No Change.

(B) Auto Quote Refresh (''AQR'')—No change.

(i) through (iv) No Change.

(3) through (8) No Change.

(c) through (f) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item III below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq's SuperMontage system allows the entry of individual orders of up to 999,999 shares in size and quotes of 99,900 shares. Once entered, SuperMontage immediately processes those quotes/orders against the quotes and orders of other market participants then residing in the system. If warranted by the price of the quote/order, and the trading interest on the other side of the market, the system automatically and continuously moves to inferior price levels until the entered quote/order is executed in full or until there is no longer any quotes or orders that would satisfy the terms of the quote/order.

While this processing dramatically increases the speed and efficiency of the Nasdaq market, in certain limited circumstances it may also have a material negative impact on market quality. This could occur when a very large market quote/order, or a marketable limit order priced significantly away from the inside, is entered into the system and quickly executes through numerous price levels and establishes a new inside wholly unrelated to previous trading activity in the security.[5] In turn, the resulting abnormal execution prices and quotes can create new historic high and/or low prices for the particular security at issue, as well as potentially trigger the automatic execution of other customer orders in electronic systems that monitor the last sale and inside prices disseminated by Nasdaq.

In response, Nasdaq has determined to incorporate into SuperMontage, for a 60-day pilot period commencing on October 14, 2002, an execution price governor to reduce the impact of grossly mis-priced or mis-sized quotes/orders.[6] In short, SuperMontage will, using the formula outlined below, establish a maximum execution or break-point price a little over 10% away from a security's current inside price (for both the bid and offer side) and will execute a single quote/order only up to that price level, and reject the remaining unexecuted portion of the quote/order (if any) back to entering party for re-submission if desired. The following specific threshold formula is proposed:

- For incoming sell quotes/orders, the break price will be the current Inside Bid less 10% less $.01.[7]
- For incoming buy quotes/orders, the break price will be the current Inside Offer plus 10% plus $.01.[8]

For example, in a stock with a current Inside Bid of $10.00, the maximum or break price at which a single sell order could be executed would be $8.99 calculated as follows: ($10.00—($10.00 x .10 *e.g.* $1)—$.01 = $8.99). In turn, this price determines how many shares of a particular quote/order can be executed based on the trading interest on the other side of the market residing in SuperMontage. For example, if the sell order discussed here was for 10,000 shares and there was only a total of 6,000 shares available between the current inside bid price of $10.00 and the threshold price of $8.99, SuperMontage would execute a total of 6,000 shares and reject the remaining 4,000 back to the entering party. Market participants receiving such a reject would be able to re-enter the rejected portion of their original order, if desired, with a new maximum break-point for that quote/order being calculated using the current inside price at the time of re-entry.

Nasdaq believes that the above approach best balances the goals of rapid execution and price discovery while protecting market participants, and the public investors they represent, from excessive volatility and market confusion that can result from the entry and execution of a grossly mis-priced or mis-sized quotes/orders in an automated and linked trading environment.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act[9] in general, and furthers the objectives of Section

[5] Nasdaq's experience with similar orders in the SuperSoes environment indicates that the overwhelming majority of such quote/orders are not entered intentionally, but are generally simple mistakes in price or size terms made by entering party.

[6] Nasdaq has separately filed with the Commission a proposal, pursuant to Section 19(b)(2) of the Act, to make the execution price governor permanent. *See* SR–NASD–2002–142.

[7] Values resulting from the application of the formula will not be taken into consideration beyond two decimal places. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, October 10, 2002.

[8] When approving this formula, the Nasdaq Board of Directors also authorized the Chief Executive Officer of Nasdaq and/or the President of Nasdaq to alter the base percentages used in the threshold formula by 10% in either direction for a particular security or securities if its trading activity or share price warrants it. If Nasdaq Senior Management determines to alter this standard, Nasdaq will submit a proposed rule change to the Commission and alert market participants by posting the new percentages on NasdaqTrader.com. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, October 10, 2002.

[9] 15 U.S.C. 78*o*–3.

15A(b)(6)[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, 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

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change and Amendment Nos. 1 and 2 are 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 NASD. All submissions should refer to file number SR–NASD–2002–133 and should be submitted by November 12, 2002.

IV. Commission Findings and Order Granting Accelerated Approval of the Proposed Rule Change

Nasdaq has asked the Commission to approve the proposal and Amendment Nos. 1 and 2 on an accelerated basis for a 60-day pilot period to reduce the impact of grossly mis-priced or mis-sized quotes/orders.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association and, in particular, with the requirements of section 15A(b)(6) of the Act,[11] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[12] The Commission believes that the establishment of a SuperMontage execution price governor pilot may prevent inadvertent executions significantly away from the inside market. The Commission also agrees with Nasdaq that this approach may act to balance the goals of rapid execution and price discovery while protecting market participants and the public investors they represent from excessive volatility and market confusion that can result from grossly mispriced/sized quotes/orders in an automated and linked trading environment.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the pilot will enable the Commission and Nasdaq to gain experience with the execution price governor before the Commission considers permanent approval of the pilot.[13] Furthermore, the Commission believes that granting accelerated approval to the proposed rule change and Amendment Nos. 1 and 2 would ensure that the execution price governor is in place for the start of the SuperMontage system roll-out scheduled for October 14, 2002.

Accordingly, the Commission believes that there is good cause, consistent with sections 15A(b)(6) and 19(b)(2) of the Act [14] to approve the proposal and Amendment Nos. 1 and 2 on an accelerated basis.

V. Conclusion

It is Therefore Ordered, pursuant to section 19(b)(2) of the Act [15], that the proposed rule change, as amended, (File No. SR–NASD–2002–133) be, and it hereby is, approved until December 13, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26685 Filed 10–18–02; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] Approval of the 60-day pilot should not be interpreted as suggesting that the Commission is predisposed to approving the proposal on a permanent basis.

[14] 15 U.S.C. 78*o*–3(b)(6) and 78s(b)(2).

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46650; File No. SR–NASD–2002–142]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. To Establish an Execution Price Governor in SuperMontage

October 11, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 9, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The NASD amended its proposal on October 10, 2002.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq is filing a proposed rule change, as amended, to establish in SuperMontage a permanent execution price governor to prevent inadvertent executions significantly away from the inside market.

The text of the proposed rule change is below. Proposed new language is *italicized.*

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated October 10, 2002 (''Amendment No. 1''). In Amendment No. 1, the NASD made minor technical corrections to the rule text.

4710. Participant Obligations in NNMS

(a) No Change.

(b) Non-Directed Orders

(1) General Provisions—A Quoting Market Participant in an NNMS Security shall be subject to the following requirements for Non-Directed Orders:

(A) No Change.

(i) No Change.

(ii) No Change.

(iii) No Change.

(B) Processing of Non-Directed Orders—No Change.

(i) through (iii) No Change.

(iv) Exceptions—The following exceptions shall apply to the above execution parameters:

(a) If a Nasdaq Quoting Market Participant enters a Non-Directed Order into the system, before sending such Non-Directed Order to the next Quoting Market Participants in queue, the NNMS will first attempt to match off the order against the Nasdaq Quoting Market Participant's own Quote/Order if the participant is at the best bid/best offer in Nasdaq.

(b) If an NNMS Market Participant enters a Preferenced Order, the order shall be executed against (or delivered in an amount equal to) both the Displayed Quote/Order and Reserve Size of the Quoting Market Participant to which the order is being directed, if that Quoting Market Participant is at the best bid/best offer when the Preferenced Order is next in line to be delivered (or executed). Any unexecuted portion of a Preferenced Order shall be returned to the entering NNMS Market Participant. If the Quoting Market Participant is not at the best bid/best offer when the Preferenced Order is next in line to be delivered (or executed), the Preferenced Order shall be returned to the entering NNMS Market Participant.

(c) If an NNMS Market Participant enters a Quote or Non-Directed Order that would result in NNMS either: 1) delivering an execution to a Quoting Market Participant(s) that participates in the automatic-execution functionality of the system at a price substantially away from the current inside bid/offer in that security; or 2) delivering a Liability Order to a Quoting Market Participant(s) that participates in the order-delivery functionality of the system at a price substantially away from the current inside bid/offer in that security, the system shall instead process only those portions of the order that will not result in either an execution or delivery at a price substantially away from the current inside best bid/offer in the security and return the remainder to the entering party. For purposes of this subsection only, an execution or delivery based on a sell order shall be deemed to be substantially away from the current inside bid if it is to be done at a price lower than a break-price established by taking the inside bid, reducing it by 10% of the bid's value, and then subtracting $0.01. For example, in a stock with a current inside bid of $10.00, the maximum price at which a single sell order could be executed would be $8.99 calculated as follows: ($10.00 − ($10.00 × .10 e.g. $1) − $.01 = $8.99). For offers, an execution or delivery based on a buy order shall be deemed to be substantially away from the current inside offer if it is done a price higher than a break-price established by taking the inside offer, adding 10% of the offer's value to it, and then adding $0.01. For example, in a stock with a current inside offer of $10.00, the highest price at which a single sell order could be executed would be $11.01 calculated as follows: ($10.00 + ($10.00 × .10 e.g. $1) + $.01 = $11.01.

(C) Decrementation Procedures—No Change.

(i) through (iv) No Change.

(D) through (E) No Change.

(2) Refresh Functionality

(A) Reserve Size Refresh—No Change.

(B) Auto Quote Refresh (''AQR'')—No change.

(i) through (iv) No Change.

(3) through (8) No Change.

(c) through (f) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq's SuperMontage system allows the entry of individual orders of up to 999,999 shares in size and quotes of 99,900 shares. Once entered, SuperMontage immediately processes those quotes/orders against the quotes and orders of other market participants then residing in the system. If warranted by the price of the quote/order, and the trading interest on the other side of the market, the system automatically and continuously moves to inferior price levels until the entered quote/order is executed in full or until there is no longer any quotes or orders that would satisfy the terms of the quote/order.

While this processing dramatically increases the speed and efficiency of the Nasdaq market, in certain limited circumstances it may also have a material negative impact on market quality. This could occur when a very large market quote/order, or a marketable limit order priced significantly away from the inside, is entered into the system and quickly executes through numerous price levels and establishes a new inside wholly unrelated to previous trading activity in the security.[4] In turn, the resulting abnormal execution prices and quotes can create new historic high and/or low prices for the particular security at issue as well as potentially trigger the automatic execution of other customer orders in electronic systems that monitor the last sale and inside prices disseminated by Nasdaq.

In response, Nasdaq has determined to incorporate into SuperMontage a permanent execution price governor to reduce the impact of grossly mis-priced or mis-sized quotes/orders.[5] In short, SuperMontage will, using the formula outlined below, establish a maximum execution or break-point price a little over 10% away from a security's current inside price (for both the bid and offer side) and will execute a single quote/order only up to that price level, and reject the remaining unexecuted portion of the quote/order (if any) back to entering party for re-submission if desired. The following specific threshold formula is proposed:

- For incoming sell quotes/orders, the break price will be the current Inside Bid less 10% less $.01.[6]

[4] Nasdaq's experience with similar orders in the SuperSoes environment indicates that the overwhelming majority of such quote/orders are not entered intentionally, but are generally simple mistakes in price or size terms made by entering party.

[5] Nasdaq separately filed a proposal, pursuant to Section 19(b)(2) of the Act, to establish the execution price governor on a 60-day pilot basis. *See* SR–NASD–2002–133.

[6] Values resulting from the application of the formula will not be taken into consideration beyond two decimal places. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, October 10, 2002.

• For incoming buy quotes/orders, the break price will be the current Inside Offer plus 10% plus $.01.[7]

For example, in a stock with a current Inside Bid of $10.00, the maximum or break price at which a single sell order could be executed would be $8.99 calculated as follows: ($10.00 − ($10.00 × .10 *e.g.* $1) − $.01 = $8.99). In turn, this price determines how many shares of a particular quote/order can be executed based on the trading interest on the other side of the market residing in SuperMontage. For example, if the sell order discussed here was for 10,000 shares and there was only a total of 6,000 shares available between the current inside bid price of $10.00 and the threshold price of $8.99, SuperMontage would execute a total of 6,000 shares and reject the remaining 4,000 back to the entering party. Market participants receiving such a reject would be able to re-enter the rejected portion of their original order, if desired, with a new maximum break-point for that quote/order being calculated using the current inside price at the time of re-entry.

Nasdaq believes that the above approach best balances the goals of rapid execution and price discovery while protecting market participants, and the public investors they represent, from excessive volatility and market confusion that can result from the entry and execution of a grossly mis-priced or mis-sized quotes/orders in an automated and linked trading environment.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,[8] in general and with Section 15A(b)(6) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–2002–142 should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

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[7] When approving this formula, the Nasdaq Board of Directors also authorized the Chief Executive Officer of Nasdaq and/or the President of Nasdaq to alter the base percentages used in the threshold formula by 10% in either direction for a particular security or securities if its trading activity or share price warrants it. If Nasdaq Senior Management determines to alter this standard, Nasdaq will submit a proposed rule change to the Commission and alert market participants by posting the new percentages on NasdaqTrader.com. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, October 10, 2002.

[8] 15 U.S.C. 78*o*–3.

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46645; File No. SR–NASD–2002–144]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Directed Orders in the Nasdaq Order Collection and Display Facility (''NNMS'' or ''SuperMontage'')

October 10, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 9, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing a proposed rule change to modify the Directed Order process in Nasdaq's future Order Display and Collector Facility (''SuperMontage''). The text of the proposed rule changes follows.

Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

4706. Order Entry Parameters

(a) No Change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Nasdaq asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

(b) Directed Orders: A participant may enter a Directed Order into the NNMS to access a specific Attributable Quote/Order displayed in the Nasdaq Quotation Montage, subject to the following conditions and requirements:

(1) Unless the Quoting Market Participant to which a Directed Order is being sent has indicated that it wishes to receive Directed Orders that are Liability Orders, a Directed Order must be a Non-Liability Order, and as such, at the time of entry must be designated as:

(A) An ''All-or-None'' order (''AON'') that is at least one normal unit of trading (*e.g.* 100 shares) in excess of the Attributable Quote/Order of the Quoting Market Participant to which the order is directed; or

(B) A ''Minimum Acceptable Quantity'' order (''MAQ''), with a MAQ value of at least one normal unit of trading in excess of Attributable Quote/Order of the Quoting Market Participant to which the order is directed. [Nasdaq will append an indicator to the quote of a Quoting Market Participant that has indicated to Nasdaq that it wishes to receive Directed Orders that are Liability Orders.]

(C) A Directed Order that is entered at a price that is inferior to the Attributable Quote/Order of the Quoting Market Participant to which the order is directed.

Nasdaq will append an indicator to the quote of a Quoting Market Participant that has indicated to Nasdaq that it wishes to receive Directed Orders that are Liability Orders.

(2) No Change.

(3) No Change.

(c) through (f) No Change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and statutory basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq has long intended the SuperMontage Directed Order process to perform essentially the same function that SelectNet performs today. Accordingly, Nasdaq designed the SuperMontage Directed Order process to be a negotiation process primarily for non-liability orders, with the exception of Nasdaq market makers that affirmatively opt to accept Directed Orders on a liability basis. For example, SuperMontage participants will be required to designate Directed Orders as ''All-or-None'' or Minimum Acceptable Quantity'' and to enter such orders for 100 shares greater than the receiving Quoting Market Participant's displayed quote, just as they must do in SelectNet today. Nasdaq has repeatedly stated its intention that SuperMontage Directed Orders mirror SelectNet preferenced orders, as evidenced by how closely it modeled future NASD Rule 4706(b) governing SuperMontage on current NASD Rule 4720(c) governing SelectNet.

In July of 2001, Nasdaq filed, on an immediately effective basis, a proposal that allows for the entry of preferenced SelectNet orders to NNMS market makers if such orders are entered containing prices that are inferior to the quoted bid and/or offers to which they are directed.[6] For example, in the situation where an NNMS market maker is quoting 20.00 bid and 20.03 offer, a market participant would be allowed to preference that market maker with either an order to sell at 20.01 or more, or an order to buy at 20.02 or less. These orders are priced at levels that would not obligate the receiving market maker to execute them under current firm quote standards. Therefore, NNMS market makers may choose to either ignore such orders or negotiate with the sending party to reach an agreement that would allow a trade to take place.[7]

The concept of entering preferenced orders at prices inferior to the recipient's quoted price was not controversial when filed for implementation with SuperSOES in July of 2001. Market participants are accustomed to this functionality and have used it in compliance with current NASD Rule 4720. Nasdaq proposes to incorporate the same functionality into the SuperMontage Directed Order process, which will essentially mirror the current functionality of SelectNet.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[8] in general and with section 15A(b)(6) of the Act,[9] in particular, in that in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A)[10] of the Act and Rule 19b–4(f)(6) thereunder.[11] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

[6] See Exchange Act Release No. 44506 (July 3, 2001), 66 FR 36020 (July 10, 2001).

[7] Market participants executing transactions as the result of such messages remain obligated to protect customer limit orders they hold in conformity with NASD IM–2110–2 (Trading Ahead of Customer Limit Orders).

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. In particular, the proposed rule change provides functionality for the SuperMontage Directed Order process that is equivalent to functionality currently available in SelectNet. In addition, acceleration of the operative date will allow the proposed rule change to become operative with Nasdaq's implementation of the SuperMontage on October 14, 2002. For these reasons, the Commission waives both the 5-day pre-filing requirement and the 30-day operative waiting period.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–144 should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

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[12] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46654; File No. SR–NYSE–2002–01]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Removal of Separate Exchange Requirements Regarding the Use of Consent Solicitations

October 11, 2002.

On January 3, 2002, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), 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 remove separate NYSE requirements regarding the use of consent solicitations. The NYSE submitted Amendment No. 1 to the proposed rule change on May 23, 2002.[3] The proposed rule change was published for comment on June 26, 2002.[4] The Commission received no comments on the amended proposal. This order approves the proposed rule change, as amended.

The proposed rule change would amend Section 306 of the NYSE Listed Company Manual (''NYSE Manual'') to remove separate NYSE requirements regarding the use of consent solicitations. Currently, Section 306 of the NYSE Manual requires NYSE listed companies to obtain NYSE's permission to use consents in lieu of special meetings as proper authorization for shareholder approval of corporate action. In addition, Section 306 of the NYSE Manual currently sets forth the following guidelines that NYSE listed companies must follow in order to receive NYSE's permission: (1) A record date must be used; (2) consent material must be sent to all shareholders; (3) corporate action can not be taken until the solicitation period has expired—even if the required vote is received earlier; (4) a 30-day solicitation period is recommended and a minimum of 20 days is required; and (5) consent material must conform to normal proxy statement disclosure standards. In effect, these guidelines require corporations to solicit the consent of all shareholders.

Under the federal securities laws, when a corporation is permitted under state law to take corporate action without a shareholder meeting upon the written consent of a specified percentage of shareholders, such corporation is not required to solicit the consent of all shareholders. Instead, under certain circumstances, under Section 14(c) of the Exchange Act and Regulation 14C thereunder, the corporation is required to furnish to all shareholders an information statement that contains the same disclosure as a proxy or consent solicitation at least 20 days prior to the earliest date the corporate action can be taken.[5] The NYSE believes that under certain circumstances, the current requirements of Section 306 of the NYSE Manual are more onerous than those of the federal securities laws. Accordingly, the Exchange proposes to modify Section 306 of the NYSE Manual to eliminate the separate Exchange requirements with respect to use of consents in lieu of special meetings. Under the proposal, NYSE listed companies will no longer be required to obtain Exchange approval before using consents in lieu of special meetings as proper authorization for shareholder approval of corporate action. NYSE listed companies will be permitted to either: (1) Hold a special meeting of shareholders, or (2) use consents in lieu of special meetings when and as permitted by applicable law.[6]

The Exchange represents that it would, however, retain its traditional policy that listed companies may not use written consents in lieu of the annual meeting of shareholders at which directors are to be elected.[7]

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[8] and, in particular, the requirements of section 6 of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated May 22, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange: (1) Added the following language to the proposed rule text: ''(including interpretations thereof), including, without limitation,'' and (2) added language to the purpose section clarifying the two options available to listed companies for obtaining shareholder approval.

[4] *See* Securities Exchange Act Release No. 46092 (June 19, 2002), 67 FR 43199.

[5] *See* 15 U.S.C. 78n(c) and 17 CFR 240.14C.

[6] As amended, Section 306 of the NYSE Manual specifically states that listed companies must comply with ''applicable state and federal law and rules (including interpretations thereof), including, without limitation, SEC Regulations 14A and 14C.''

[7] *See* Section 306 of the NYSE Manual.

[8] 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).

Act.[9] The Commission finds specifically that the proposed rule change is consistent with section 6(b)(5) of the Act[10] because the proposed rule change requires NYSE listed companies to obtain shareholder consent in a manner that is consistent with federal securities laws.

As noted above, listed companies would be permitted to hold a special meeting of shareholders to take corporate action and nothing in NYSE rules require companies to use one method over the other to obtain shareholder approval of corporate action. Rather, the changes being approved to the NYSE rules simply permit listed companies to utilize consent as an alternative to shareholder approval only when and as permitted by applicable federal securities laws and state laws. Shareholder approval at a special meeting and consent under the conditions noted above would be the only two ways for listed companies to take corporate action under NYSE rules when shareholder approval is required. In approving the proposal, we note that the federal security law requirements help to ensure, among other things, that all shareholders receive adequate disclosure prior to such corporate action being taken.

Based on the above, the Commission believes the changes should remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

It is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[11] that the proposed rule change (SR–NYSE–2002–01), as amended by Amendment No. 1, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26683 Filed 10–18–02; 8:45 am]

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[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46633; File No. SR–OC–2002–02]

Self-Regulatory Organization; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by OneChicago, LLC Relating to Block Trades

October 10, 2002.

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 September 6, 2002, OneChicago LLC (''OneChicago'' or ''Exchange'') 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 OneChicago. On September 30, 2002, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. OneChicago also has filed the proposed rule change with the Commodity Futures Trading Commission (''CFTC''). OneChicago filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act[4] on September 5, 2002.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

OneChicago is proposing to amend its Rule 417, relating to block trades, in the following two respects: First, paragraph (c) of OneChicago Rule 417 is amended to provide that the parties to a block trade must report specified information regarding such trade to OneChicago promptly, rather than within a time period prescribed by OneChicago on a contract-by-contract basis. In addition, the Exchange proposes to add new paragraphs (e) and (f) into OneChicago Rule 417 to restrict the ability of market participants to engage in certain transactions related to a block trade until such trade has been reported. Finally, OneChicago proposes to redesignate existing paragraph (e) of OneChicago Rule 417 as paragraph (g). The text of the proposed rule change follows; additions are italicized; deletions are [bracketed].

Rule 417 Block Trading

* * * * *

(c) Each Block Trade shall be designated as such, and cleared through the Clearing Corporation as if it were a transaction executed through the OneChicago System. Information identifying the relevant Contract, contract month, price, quantity, time of execution, counterparty Clearing Member for each Block Trade and, if applicable, the underlying commodity must be reported to the Exchange [within the time period set forth in the rules governing the relevant Contract] *promptly.* The Exchange will publicize information identifying the trade as a Block Trade and identifying the relevant Contract, contract month, price, quantity for each Block Trade and, if applicable, the underlying commodity immediately after such information has been reported to the Exchange.

(d) No Change.

(e) *No Clearing Member or Exchange Member that is a party to a Block Trade or has knowledge of a pending Block Trade, may enter an Order or execute a transaction, whether for its own account or for the account of a Customer, for or in the Contract to which such Block Trade relates until after (i) such Block Trade has been reported to and published by the Exchange and (ii) any additional time period from time to time prescribed by the Exchange in its block trading procedures or contract specifications has expired.*

(f) *No Clearing Member or Exchange Member that is a party to a block trade, or has knowledge of a pending block trade, on any other exchange or trading system, may enter an Order or execute a transaction on the Exchange for any Contract which has the same underlying security as the contract to which such block trade relates until after (i) such block trade is reported and published in accordance with the rules, procedures or contract specifications of such exchange or trading system and (ii) any additional time period prescribed by the Exchange in its block trading procedures or contract specifications has expired.*

(g) Any Block Trade in violation of these requirements shall constitute conduct which is inconsistent with just and equitable principles of trade.

* * * * *

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] *See* letter dated September 30, 2002, from C. Robert Paul, General Counsel, OneChicago, to Division of Market Regulation, Commission. In Amendment No. 1, the Exchange added language setting forth the statutory basis for the proposed rule change.

[4] 7 U.S.C. 7a–2(c).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OneChicago 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

OneChicago proposes to amend its block trade rule as set forth in Item I above in order to (i) ensure prompt reporting of information related to block trades and (ii) restrict the ability of market participants to engage in certain transactions related to a block trade until such trade has been reported.

The proposed change to paragraph (c) of OneChicago Rule 417 is designed to tighten the existing requirement relating to the reporting of block trades by market participants and to provide that the requirement applies uniformly to all block trades, regardless of contract type and transaction size. OneChicago believes that obligating market participants to report all block trades promptly is warranted by the important price discovery function that it expects its markets for security futures products will serve. Given that all trading on OneChicago will be conducted electronically, OneChicago does not foresee that market participants will encounter practical difficulties in complying with the tightened reporting requirement.

New paragraphs (e) and (f) to OneChicago Rule 417 are intended to prevent market participants from taking advantage of any non-public information with respect to a block trade, by prohibiting market participants with access to such information from entering orders for execution through OneChicago if such orders relate to the same underlying securities as the block trade in question. This prohibition will generally apply until the block trade in question has been reported to and published by OneChicago. OneChicago expects that a positive side effect of the new paragraphs will be that they create an additional incentive for market participants to report block trades as soon as possible.

2. Statutory Basis

OneChicago is proposing the Proposed Rule Change on the basis of its general rulemaking authority. OneChicago filed the Proposed Rule Change pursuant to Section 19(b)(7) of the Act [5] because such section requires a self-regulatory organization that is an exchange registered with the Commission pursuant to Section 6(g) of the Act [6] to file with the Commission, among other things, copies of any proposed rule change that relates to reporting. The Exchange believes that the proposed rule change is authorized by, and consistent with, Section 6(b)(5) of the Act,[7] because it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

OneChicago believes that the proposed rule change is inherently pro-competitive as it is designed to ensure that (i) relevant market information becomes available to the public as expeditiously as possible and (ii) participants are prevented from taking advantage of any non-public information with respect to block trades.

C .Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments on the proposed rule change have not been solicited.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(7)(B) of the Act,[8] the proposed rule change became effective on September 5, 2002. 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.[9]

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 Exchange 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 OneChicago. Electronically submitted comments will be posted on the Commission's Internet website (*http://www.sec.gov*). All submissions should refer to File No. SR–OC–2002–2 and should be submitted by November 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

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[5] 15 U.S.C. 78s(b)(7).

[6] 15 U.S.C. 78f(g).

[7] 15 U.S.C. 78(f)(b)(5).

[8] 15 U.S.C. 78s(b)(7)(B).

[9] 15 U.S.C. 78s(b)(1).

[10] 17 CFR 200.30–3(a)(75).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46653; File No. SR–OCC–2002–07]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Clearing Security Futures Transactions and Arrangements With Associated Clearinghouses

October 11, 2002.

I. Introduction

On May 9, 2002, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change File No. SR–OCC–2002–07 pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and on August 9, 2002, amended the proposed rule change. Notice of the proposal was published in the **Federal Register** on August 16,

[1] 15 U.S.C. 78s(b)(1).

2002.[2] On October 10, 2002, OCC again amended the proposed rule change. The October 10, 2002, amendment was for clarification and as such did not require publication of notice. No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

Currently, under OCC's Rule 1303, OCC may open one or more omnibus accounts with an associate clearinghouse (''ACH'')[3] for the purposes of enabling the ACH's clearing members that are not OCC clearing members to clear transactions in futures and futures options through the ACH rather than directly through OCC.[4] Affiliates of OCC clearing members are permitted to clear transactions in futures through the ACH through January 1, 2003. The principal purpose of the proposed rule change is to extend this same accommodation to OCC clearing members and to provide that the initial period during which either OCC clearing members or their affiliates may clear through an ACH will end one year from the date when general trading in security futures commences rather than on a specified date. The proposed rule change also seeks Commission approval of the Agreement for Clearing and Settlement Services between OCC and OneChicago (''OCX'') (''OCX Clearing Agreement'') and the ACH Agreement between OCC and the Chicago Mercantile Exchange (''CME'').

1. Background

OCC is preparing to clear security futures for a number of markets, including certain national securities exchanges that presently clear options through OCC and certain futures exchanges that are notice-registered as national securities exchanges under section 6(g) of the Act. In SR–OCC–2001–07, OCC filed detailed rules for the clearance of security futures, including Rule 1303, which provides that OCC may agree with an ACH to carry omnibus accounts for the ACH in which the ACH may clear security futures transactions for certain of its clearing members.[5] In SR–OCC–2001–07, the Commission also approved the Agreement for Clearing and Settlement Services between OCC and Nasdaq Liffe Markets, LLC[6] (''NqLX Clearing Agreement'').

2. Amendments to Rule 1303

Under current Rule 1303(a), an OCC clearing member that is also an ACH clearing member may not have its futures transactions cleared through the ACH's omnibus account at OCC. Additionally, Rule 1303(b) currently provides that affiliates of OCC clearing members that are eligible to become OCC clearing members may not have their futures transactions cleared through an ACH's omnibus account at OCC past January 1, 2003.[7]

OCC has learned that some OCC clearing members may initially have difficulty clearing futures, including security futures, through OCC because the systems these clearing members use to clear futures contracts are configured to interface with the clearing systems of commodity clearing organizations and not with OCC's systems. To accommodate these clearing members while they make the necessary system changes, OCC is amending Rule 1303(a) to allow OCC clearing members that are members of an ACH to clear their futures transactions through the ACH's omnibus account at OCC for a period of time.

As with affiliates of OCC clearing members, an OCC clearing member's futures transactions can be cleared through an ACH's omnibus account at OCC only for the period specified in Rule 1303(b). That period was initially set to end on June 1, 2002, and was later extended to January 1, 2003.[8] Because the commencement of trading in security futures has repeatedly been postponed, OCC is now setting the grace period at ''one year after the commencement of general trading in security futures.'' OCC believes that this is a reasonable period of time for OCC clearing members and their affiliates to make the necessary arrangements to clear futures directly through OCC. OCC nevertheless retains the ability under Rule 1303(b) to consent to a longer grace period if the circumstances of individual firms so require.

3. OCX Clearing Agreement

OCX is a joint venture among CME, the Chicago Board Options Exchange, and the Chicago Board of Trade. OCX and OCC have entered into the OCX Clearing Agreement so that OCC may clear and settle security futures transactions that take place on OCX.[9] OCC seeks Commission approval of the OCX Clearing Agreement because, as discussed below, it varies in several material respects from the NqLX Clearing Agreement approved by the Commission.[10]

New Section 6(b), ''Clearing Members and Associate Clearinghouses,'' of the OCX Clearing Agreement requires OCC to designate CME as an ACH for OCX, subject to the terms of the ACH Agreement between OCC and CME (which terms are summarized below). The NqLX Clearing Agreement contains no similar provision. Section 6(b) of the OCX Clearing Agreement also provides that all present OCC clearing members and their successors may clear trades executed on OCX. However, future OCC clearing members will not be allowed to clear OCX trades without prior approval from OCX. OCX may require that future OCC clearing members become members of OCX as a condition to being allowed to clear trades executed on OCX. The NqLX Clearing Agreement contains no similar provision.

Section 10(b), ''Risk Margin Offsets,'' of the OCX Clearing Agreement states that OCC will not make OCX products fungible with products traded on other markets, exchanges, or electronic trading platforms unless OCC is required to do so by law or has received prior written approval from OCX. The NqLX Clearing Agreement contains no similar provision.

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[2] Securities Exchange Act Release No. 46335 (August 9, 2002), 67 FR 53634.

[3] ''Associate Clearinghouse'' is defined in Section 1 of OCC's By-Laws as ''a derivatives clearing organization regulated as such under the Commodity Exchange Act or a clearinghouse not located in the United States, which, in either case, has agreed with the Corporation to act in clearing transactions in certain cleared securities on behalf of its members. An associate clearinghouse shall be a Clearing Member for purposes of the By-Laws and Rules except to the extent otherwise provided in an agreement between the Corporation and the associate clearinghouse.''

[4] When filed, Chapter XIII of OCC's Rules governed security futures. Subsequently, OCC filed and the Commission approved SR–OCC–2001–16, which amended Chapter XIII so that it now governs futures and futures options, which includes security futures. Securities Exchange Act Release No. 45946 (May 16, 2002), 67 FR 36056 (May 22, 2002).

[5] Securities Exchange Act Release No. 44727 (August 20, 2001), 66 FR 45351 (order approving rules for clearance of security futures.) SR–OCC–2001–07 also amended Article I of OCC's By-Laws to include within the definition of ''associate clearinghouse'' a ''derivatives clearing organization regulated as such under the Commodity Exchange Act.''

[6] Previously Nasdaq LIFFE, LLC.

[7] For purposes of Rule 1303, an entity is deemed to be an affiliated entity of a clearing member if the clearing member owns, directly or indirectly, at least 50% of the equity in such entity or if at least 50% of the equity of the clearing member and in such entity is, directly or indirectly, under common ownership. OCC rule 1303(b).

[8] Securities Exchange Act Release No. 45946 (May 22, 2002), 67 FR 36056 [File No. SR–OCC–2001–16].

[9] The OCX Clearing Agreement is attached as Exhibit A to OCC's filing.

[10] A blackline version showing the differences between the NqLX Clearing Agreement and the OCX Clearing Agreement is attached as Exhibit A–1 to OCC's filing. OCC has filed with the Commission an amended and restated version of the NqLX Clearing Agreement, which has been amended to provide that OCC will clear and settle commodity futures (specifically, broad-based index options) traded on NqLX.

Section 13, ''Financial Arrangements,'' of the OCX Clearing Agreement states that OCC will charge clearing fees for trades executed on OCX to OCX rather than to clearing members. However, OCX will be required to pass OCC's fees through to OCC clearing member(s) on sides of OCX trades that are cleared directly through OCC.[11] OCX negotiated a discount to the fees OCC normally charges for clearing services in exchange for giving up the right to participate in any year-end fee reductions or rebates. OCX may, however, opt into OCC's regular rebate-eligible fee structure on a prospective basis at any time. The discount is greater for trade sides cleared through CME as an ACH reflecting the fact that CME is sharing the clearing function and the associated risk. OCC will charge no clearing fees when both sides are cleared through CME.

Paragraph (b) of Section 14, ''CME as Associate Clearinghouse,'' of the OCX Clearing Agreement prohibits OCX from soliciting or providing incentives for CME members to clear OCX trades through CME rather than OCC. The reason for this restriction is discussed below in connection with related provisions of the ACH Agreement.

4. ACH Agreement

OCC and CME have entered into the ACH Agreement[12] so that CME may act as an ACH for purposes of clearing and settling transactions of certain CME clearing members executed on OCX. The ACH Agreement provides that CME generally will be treated as an OCC clearing member but with important exceptions. First, Section 2, ''CME an Associate Clearinghouse,'' states that CME may clear through its accounts at OCC only security futures traded on OCX. Second, Section 3, ''Applicability of the Rules,'' makes clear that CME is bound only by certain OCC rules, which generally speaking are those that apply to OCC's clearance and settlement of security futures contracts and to OCC's right to suspend clearing members including an ACH with certain modifications set forth in the ACH Agreement. CME is not subject to OCC's by-laws and rules requiring deposits to OCC's clearing fund and requiring risk margin deposits. Likewise, under Section 6, ''Risk Margin; Clearing Fund Contributions; Security Deposits,'' OCC is not required to contribute to CME's clearing fund or to post margin with CME.

Given that each clearing organization has credit exposure to the other, OCC and CME have determined that the cost of mutual posting collateral by each with the other would outweigh any benefits to be obtained. Although OCC is exposed to some uncollateralized credit risk with respect to CME (and vice versa), that risk is considered minimal because CME's clearinghouse division is a registered derivatives clearing organization subject to regulation and oversight by the Commodity Futures Trading Commission (''CFTC'') and is believed by OCC to be well run and highly creditworthy. Sections 3(c), ''Applicability of the Rules,'' and 10, ''Application of Chapter XI of the Rules,'' of the ACH Agreement provide that if CME fails to deliver securities or funds to OCC, breaches certain of its obligations under the Commodity Exchange Act (''CEA'') or the ACH Agreement, or is in such financial or operational difficulty that OCC believes suspension of CME as an ACH is required, OCC may without notice liquidate all positions in the CME ACH omnibus accounts regardless of whether any CME clearing member is in default to CME. OCC may then apply the proceeds from the CME Proprietary Account (described below) against all obligations of CME under the ACH Agreement and the proceeds from the CME Customer Account (described below) against all obligations in that account.

Where both sides of a matched trade are submitted to OCC for the accounts of regular OCC clearing members, CME will have no role in the transaction. Where one side of a matched trade is submitted for the account of a regular OCC clearing member and the other is submitted for the account of a CME clearing member, the CME member's transaction will clear in the ACH account and CME as ACH will be the OCC clearing member on the trade. If both sides of a matched trade are cleared through CME, there will be no effect on the open interest on OCC's books, and OCC will have no obligation on the trade except to the limited extent described below in the case of delivery obligations on physically-settled stock futures. The rights and obligations of CME members with respect to security futures cleared through CME will be determined under the rules of CME, but Section 4(a) of the ACH Agreement requires that CME's rules provide that the terms of security futures cleared by CME will be identical to the terms of security futures cleared by OCC and that any adjustments to the terms of outstanding contracts must be identical and take effect at the same time to ensure fungibility and maintain a balanced open interest at both clearing organizations.

Section 8, ''Allocation of Clearing Responsibilities,'' of the ACH Agreement is consistent with the terms of OCC Rule 1303 as amended in this filing. It is intended to permit the use of the ACH arrangements by CME members only to the extent that clearing through OCC directly might reasonably impose a hardship. An OCC clearing member that is or that has an affiliate that is a CME clearing member may clear through CME until one year after the commencement of security futures trading, at which point all trades of such entity must be cleared through OCC unless OCC consents to an extension of time. However, where a futures affiliate of an OCC clearing member is substantially larger than the clearing member, OCC has agreed to permit the affiliate to clear through CME indefinitely on the ground that where the principal business of the consolidated entities is a futures business it is inappropriate to compel all security futures clearing to be directed through the securities affiliate.[13] A CME clearing member that is not an OCC clearing member and is not an affiliate of an OCC clearing member may clear its security futures trades through CME indefinitely. By generally requiring firms that are OCC clearing members or that have affiliates that are OCC clearing members to take the necessary steps to clear their security futures activity directly through the OCC clearing member, the ACH Agreement limits the mutual uncollateralized exposure between OCC and CME and minimizes the number of transactions that require coordinated clearance and settlement by two clearing organizations.[14] For the same purpose of minimizing unnecessary use of the ACH arrangement, the OCX Clearing Agreement as noted above prohibits the ACH from soliciting its members to clear transactions through the ACH rather than through OCC.

In order to comply with the customer segregation rules under the CEA, Section 9(a), ''Maintenance of CME

[11] This requirement enables OCC to police ''the equitable allocation of reasonable dues, fees, and other charges among its participants' required under section 17A(b)(3)(D) of the Act.

[12] Attached as Exhibit B to OCC's filing.

[13] Interpretations and Policies .01 to Rule 1303.

[14] In approving OCC's previous ACH arrangement with the Associate Clearing House Amsterdam, the Commission stated, ''As a general matter, the Commission believes that OCC-issued options should be cleared through full OCC clearing members and not through intermediaries created only for clearing purposes.'' Securities Exchange Act Release No. 24832 (August 21, 1987), 52 FR 32377, n.16 [File No. SR–OCC–87–9].

Accounts,'' of the ACH Agreement requires CME to have two accounts at OCC, one for proprietary positions and one for customer positions. Each will function as an omnibus account containing the positions and margin carried by CME members for whom CME acts as an ACH. The ''CME Proprietary Account'' will carry only transactions of persons whose accounts on the books of the carrying CME clearing member are ''proprietary accounts'' as defined in CFTC Regulation 1.3(y). The ''CME Customer Account'' will carry only transactions of customers of CME clearing members and will be subject to the customer protection provisions of the CFTC. In accordance with those provisions, Section 9(b) of the ACH Agreement provides that OCC will have a lien on the positions in the CME Customer Account as security for CME's obligations to OCC only with respect to positions and transactions in that account. In contrast, OCC will have a lien on and security interest in the positions in the CME Proprietary Account as security for all obligations of CME to OCC under the ACH Agreement.

As noted above, OCC has agreed in Section 4 of the ACH Agreement to perform a limited role in connection with delivery obligations of CME clearing members arising from physically-settled security futures in CME member accounts. CME will require each of its clearing members that trades physically-settled security futures to enter into arrangements satisfactory to OCC through which an OCC stock clearing member will agree to act on the CME clearing member's behalf for the purpose of settling through the facilities of National Securities Clearing Corporation (''NSCC'') or otherwise delivery obligations arising from maturing security futures contracts in its accounts at CME. Promptly following the close of trading on the last trading day prior to maturity of any series of physically-settled security futures, CME will notify OCC of the identity of each OCC clearing member that will be obligated to receive or to deliver stock on behalf of CME members and the quantity of each underlying stock to be received or delivered. OCC will include these receive and deliver obligations with the other receive and deliver obligations of its clearing members in its reports to NSCC in accordance with OCC Rule 913. In the event that settlement is rejected by NSCC for any reason, settlement will be completed between the delivering and receiving OCC clearing members in accordance with OCC's rules, but CME will be responsible to OCC for any loss reasonably determined by OCC to have been incurred by it as a result of an OCC clearing member default in connection with settlements arising from security futures contracts in CME clearing member accounts. OCC will not require the delivering OCC clearing member or receiving OCC clearing member to deposit margin with OCC with respect to settlements attributable to security futures in CME clearing member accounts but will instead look to the credit of CME.

III. Discussion

Section 19(b)(2) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. For the reasons set forth below, the Commission believes that OCC's proposed rule change is consistent with OCC's obligations under Section 17A(b)(3)(F) which requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[15]

By providing a transition period for those OCC members that are also ACH members to adopt their systems to clear securities futures through OCC and by adopting the OCX Agreement and the ACH Agreement, OCC is further establishing itself as a facility capable of providing for the prompt and accurate clearance and settlement of security futures transactions. Accordingly, the Commission finds that the proposed rule change is consistent with OCC's obligations under section 17A of the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of section 17A of the Act and the rules and regulations thereunder applicable.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–2002–07) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–26682 Filed 10–18–02; 8:45 am]

BILLING CODE 8010–01–P

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4152]

Notice of Meetings: United States International Telecommunication Advisory Committee Preparations for Various Telecommunication Standardization Meetings

The Department of State announces meetings of the U.S. International Telecommunication Advisory Committee (ITAC). The purpose of the Committee is to advise the Department on policy, technical and operational issues with respect to international telecommunications standardization bodies such as the International Telecommunication Union.

The ITAC will meet to prepare for the February 2003 meeting of the Telecommunication Sector Advisory Group (TSAG) on October 30, November 19, and December 19, 2002 from 9:30 to noon at locations in the Washington, DC area to be determined.

Members of the public will be admitted to the extent that seating is available, and may join in the discussions, subject to the instructions of the Chair. Directions to the meeting location and on which entrance to use may be determined by calling the ITAC Secretariat at 202–647–0965, 202–647–2592 or e-mail to *minardje@state.gov.*

Dated: October 17, 2002.

Cecily Holiday,

Director, Radiocommunication Standardization, Department of State.

[FR Doc. 02–26852 Filed 10–18–02; 8:45 am]

BILLING CODE 4710–45–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Public Comment on Review of Employment Impact of United States-Chile Free Trade Agreement

AGENCY: Office of the United States Trade Representative, Department of Labor.

ACTION: Request for comments.

SUMMARY: The interagency Trade Policy Staff Committee (TPSC) gives notice that

the Office of the United States Trade Representative (USTR) and the Department of Labor are initiating a review of the impact of the proposed U.S.-Chile Free Trade Agreement (FTA) on United States employment, including labor markets. This notice seeks written public comment on potentially significant sectoral or regional employment impacts (both positive and negative) in the United States as well as other likely labor market impacts of the FTA.

DATES: USTR and the Department of Labor will accept any comments received during the course of the negotiations of the FTA. However, comments should be received by noon, November 15, 2002, to be assured of timely consideration in the preparation of the report.

ADDRESSES: *Submissions by electronic mail: FR0043@ustr.gov* (written comments). *Submissions by facsimile:* Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at 202/395–6143.

The public is strongly encouraged to submit documents electronically rather than by facsimile. (See requirements for submissions below.)

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning public comments, contact Gloria Blue, Executive Secretary, TPSC, Office of the USTR, 1724 F Street, NW., Washington, DC 20508, telephone (202) 395–3475. Substantive questions concerning the employment impact review should be addressed to Jorge Perez-Lopez, Director, Office of International Economic Affairs, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–4883, or William Clatanoff, Assistant U.S. Trade Representative for Labor, telephone (202) 395–6120.

SUPPLEMENTARY INFORMATION: On November 29, 2000, Presidents Clinton and Lagos announced their intention to negotiate a U.S.-Chile Free Trade Agreement (FTA). Negotiations were launched on December 6, 2000, in Washington, DC On December 14, 2000, USTR issued a public notice of intent to conduct negotiations, initiation of an environmental review under Executive Order 13141, and request for comments (65 FR 78077, Dec. 14, 2000). The negotiations have made substantial progress and are expected to conclude in the coming months.

On November 7, 2001, the Office of the U.S. Trade Representative, through the Trade Policy Staff Committee, published and sought comments on the draft environmental review of the proposed U.S.-Chile Free Trade Agreement (66 FR 56366, Nov. 7, 2001). The draft environmental review was conducted pursuant to Executive Order 13141 and its accompanying guidelines (65 FR 79442, Dec. 19, 2000). Persons seeking to submit comments concerning the review of the FTA's employment impact are referred to the draft environmental review, which contains information on the potential trade and economic effects and a summary of each chapter of the proposed FTA. The draft report may be found on the USTR Web site at *http://www.ustr.gov/environment/draftchileer.pdf.*

Section 2102(c)(5) of the Bipartisan Trade Promotion Act of 2002, 19 U.S.C. 3802(c)(5), directs the President to ''review the impact of future trade agreements on United States employment, including labor markets, modeled after Executive Order 13141 to the extent appropriate in establishing procedures and criteria, report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on such review, and make that report available to the public.'' USTR and the Department of Labor will be conducting the employment review through the interagency Trade Policy Staff Committee (TPSC).

The employment impact review initiated by this **Federal Register** notice will be based on the following elements, which are modeled, to the extent appropriate, after those in Executive Order 13141. The review will be: (1) Written; (2) made available to the public in draft form for public comment, to the extent practicable; and (3) made available to the public in final form.

Comments may be submitted on potentially significant sectoral or regional employment impacts (both positive and negative) in the United States as well as other likely U.S. labor market impacts of the FTA. Persons submitting comments should provide as much detail as possible in support of their submissions.

Submitting Comments: To ensure prompt and full consideration of responses, the TPSC strongly recommends that interested persons submit comments by electronic mail to the following e-mail address: *FR0043@ustr.gov.* Persons making submissions by e-mail should use the following subject line: ''Chile Employment Review.'' Documents should be submitted as either WordPerfect, MSWord, or text (.TXT) files. Supporting documentation submitted as spreadsheets is acceptable as Quattro Pro or Excel. For any document containing business confidential information submitted electronically, the file name of the business confidential version should begin with the characters ''BC-'', and the file name of the public version should begin with the character ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except confidential business information exempt from public inspection in accordance with 15 CFR 2003.6. Confidential business information submitted in accordance with 15 CFR 2003.6 must be clearly marked ''Business Confidential'' at the top of each page, including any cover letter or cover page, and must be accompanied by a non-confidential summary of the confidential information. All public documents and non-confidential summaries shall be available for public inspection in the USTR Reading Room in Room 3 of the annex of the Office of the USTR, 1724 F Street, NW., Washington, DC 20508. An appointment to review the file may be made by calling (202) 395–6186. The USTR Reading Room is generally open to the public from 10–12 a.m. and 1–4 p.m. Monday through Friday. Appointments must be scheduled at least 48 hours in advance.

General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet server (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. 02–26731 Filed 10–16–02; 3:45 pm]

BILLING CODE 3190–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Public Comment on Review of Employment Impact of United States-Singapore Free Trade Agreement

AGENCY: Office of the United States Trade Representative, Department of Labor.

ACTION: Request for comments.

SUMMARY: The interagency Trade Policy Staff Committee (TPSC) gives notice that the Office of the United States Trade Representative (USTR) and the Department of Labor (Labor) are initiating a review of the impact of the proposed U.S.–Singapore Free Trade Agreement (FTA) on United States employment, including labor markets. This notice seeks written public comment on potentially significant sectoral or regional employment impacts (both positive and negative) in the United States as well as other likely labor market impacts of the FTA.

DATES: USTR and Labor will accept any comments received during the course of the negotiations of the FTA. However, comments should be received by 5 p.m., November 8, 2002 to be assured of timely consideration in the preparation of the report.

ADDRESSES:

Submissions by electronic mail: FR0044@ustr.gov (written comments).

Submissions by facsimile: Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–6143.

The public is strongly encouraged to submit documents electronically rather than by facsimile. (See requirements for submissions below.)

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning public comments, contact Gloria Blue, Executive Secretary, TPSC, Office of the USTR, 1724 F Street, NW, Washington, DC 20508, telephone (202) 395–3475. Substantive questions concerning the employment impact review should be addressed to Jorge Perez-Lopez, Director, Office of International Economic Affairs, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, telephone (202) 693–4883, or William Clatanoff, Assistant U.S. Trade Representative for Labor, telephone (202) 395–6120.

SUPPLEMENTARY INFORMATION: On November 29, 2000, USTR issued a public notice of intent to conduct negotiations, initiation of an environmental review under Executive Order 13141, ''Environmental Review of Trade Agreements'' (64 FR 63169, Nov. 16, 1999) and request for comments on a proposed U.S.–Singapore FTA (65 FR 71197, Nov. 29, 2000). Negotiations on the U.S.–Singapore Free Trade Agreement were launched in December 2000. The negotiations have made substantial progress and are expected to conclude in the coming months.

On August 8, 2002, USTR, on behalf of the Trade Policy Staff Committee (TPSC), published and sought comments on a draft environmental review of the proposed FTA (67 FR 53035, Aug. 14, 2002). The draft environmental review was conducted pursuant to Executive Order 13141 and its accompanying guidelines (65 FR 79442, Dec. 19, 2000). Persons seeking to submit comments concerning the review of the FTA's employment impact are referred to the draft environmental review, which contains information on the potential trade and economic effects and a summary of each chapter of the proposed FTA. The draft report is available on the USTR Web site at *http://www.ustr.gov/environment/2002signapore.pdf.*

Section 2102(c)(5) of the Bipartisan Trade Promotion Act of 2002, 19 U.S.C. 3802(c)(5), directs the President to ''review the impact of future trade agreements on United States employment, including labor markets, modeled after Executive Order 13141 to the extent appropriate in establishing procedures and criteria, report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on such review, and make that report available to the public.'' USTR and the Department of Labor will be conducting the employment review through the interagency Trade Policy Staff Committee (TPSC).

The employment impact review initiated by this **Federal Register** notice will be based on the following elements, which are modeled, to the extent appropriate, after those in Executive Order 13141. The review will be: (1) Written; (2) made available to the public in draft form for public comment, to the extent practicable; and (3) made available to the public in final form.

Comments may be submitted on potentially significant sectoral or regional employment impacts (both positive and negative) in the United States as well as other likely U.S. labor market impacts of the FTA. Persons submitting comments should provide as much detail as possible in support of their submissions.

Submitting Comments: To ensure prompt and full consideration of responses, the TPSC strongly recommends that interested persons submit comments by electronic mail to the following e-mail address: *FR0044@ustr.gov.* Persons making submissions by e-mail should use the following subject line: ''Singapore Employment Review.'' Documents should be submitted as either WordPerfect, MSWord, or text (.TXT) files. Supporting documentation submitted as spreadsheets is acceptable as Quattro Pro or Excel. For any document containing business confidential information submitted electronically, the file name of the business confidential version should begin with the characters ''BC-'', and the file name of the public version should begin with the character ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except confidential business information exempt from public inspection in accordance with 15 CFR 2003.6. Confidential business information submitted in accordance with 15 CFR 2003.6 must be clearly marked ''Business Confidential'' at the top of each page, including any cover letter or cover page, and must be accompanied by a non-confidential summary of the confidential information. All public documents and non-confidential summaries shall be available for public inspection in the USTR Reading Room in Room 3 of the annex of the Office of the USTR, 1724 F Street, NW, Washington, DC 20508. An appointment to review the file may be made by calling (202) 395–6186. The USTR Reading Room is generally open to the public from 10 p.m–12 p.m. and 1 p.m–4 p.m. Monday through Friday. Appointments must be scheduled at least 48 hours in advance.

General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet server (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. 02–26732 Filed 10–16–02; 3:46 pm]

BILLING CODE 3190–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[USCG–2002–13487]

Environmental Assessment of Implementation of the Coast Guard Training Center Cape May's Integrated Natural Resource Management Plan

AGENCY: Coast Guard, DOT.

ACTION: Notice of availability and request for comments.

SUMMARY: The Coast Guard announces the availability of an Environmental Assessment (EA) of Implementation of the Coast Guard Training Center Cape May's Integrated Natural Resources Management Plan (INRMP) Cape May, New Jersey. The Coast Guard concluded that the implementation of the INRMP would not have a significant, adverse impact on the environment and therefore has issued a draft Finding of No Significant Impact (FONSI). We request your comments on the EA, INRMP and draft FONSI.

DATES: Comments must reach the Coast Guard on or before November 20, 2002.

ADDRESSES: To make sure your comments and related material are not entered more than once in the docket, please submit them by only one of the following means:

(1) By mail to the Docket Management Facility, (USCG–2002–13487), U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

(2) By delivery to Mr. Chris Hajduk, Chief—Environmental Protection and Safety Section, U.S. Coast Guard Training Center Cape May, 1 Munro Avenue, Cape May, New Jersey, 08204 or by e-mail at *chajduk@tracencapemay.uscg.mil*

(3) By fax to the Docket Management Facility at 202–493–2251.

(4) Electronically through the Web Site for the Docket Management System at *http://dms.dot.gov.*

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as the INRMP, EA, and draft FONSI, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The INRMP, EA, and draft FONSI also will be available for inspection or copying at the Cape May County Library, 30 West Mechanic St., Cape May Court House, NJ 08210, telephone: 609–463–6350. You may also find this docket, including the EA, on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, the proposed project, or the associated INRMP, contact Mr. Chris Hajduk, Chief—Environmental Protection and Safety Section, U.S. Coast Guard Training Center Cape May, telephone 609–898–6889, or via e-mail at *chajduk@tracencapemay.uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Dorothy Beard, Chief, Dockets, Department of Transportation, and telephone 202–366–5149.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to review and submit comments on the Environmental Assessment (EA) of our Integrated Natural Resource Management Plan (INRMP) for the Coast Guard Training Center in Cape May, New Jersey, and our draft Finding Of No Significant Impact (FONSI). If you do so, please include your name and address, identify the docket number (USCG–2002–13478), indicate the specific document and section of that document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Proposed Action

We have prepared an EA. The EA identifies and examines the reasonable alternatives and assesses their potential environmental impact. Our preferred alternative is to implement the Integrated Natural Resources Management Plan (INRMP).

We are requesting your comments on environmental concerns you may have related to the EA and the draft FONSI. This includes suggesting analyses and methodologies for use in the EA or possible sources of data or information not included in the EA. Your comments will be considered in preparing the complete EA.

Environmental Assessment and Draft Finding of No Significant Impact

The EA examines potential effects of the proposed action of implementing the INRMP on 20 resource areas: environmental setting, climate, air quality, noise, topography, geology, soils, water resources, wetlands, floodplain and coastal zones, aquatic habitat, riparian habitat, terrestrial ecosystems, fauna, endangered, threatened, and rare species, land use, facilities, hazardous and toxic materials, socioeconomic resources, and environmental justice. The INRMP integrates all aspects of natural resource management at TRACEN Cape May, and identifies management approaches that would benefit local ecosystems. The INRMP was developed using an interdisciplinary approach that solicited information from a variety of Federal, state, and local agencies and groups. An INRMP Focus Group was formed, which included key Installation personnel and individuals from various agencies and groups that have an interest in TRACEN Cape May and the management of its resources. Agencies involved in the process include U.S. Fish and Wildlife Service and New Jersey Division of Fish and Wildlife Management. Proper utilization of this Plan for the conservation of natural resources should not impair the ability of the Installation to perform its mission(s).

The EA concluded that the implementation of the INRMP would not have a significant, adverse impact on the environment—resulting in the issuance of a draft Finding Of No Significant Impact (FONSI). An Environmental Impact Statement is not required prior to implementation of the proposed action.

Dated: October 10, 2002.

D.S. Klipp,

Commander, U.S. Coast Guard, Facilities Engineer, Coast Guard Training Center Cape May.

[FR Doc. 02–26720 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Tarrant County, TX

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that we are rescinding the Notice of Intent (NOI) to prepare an environmental impact statement (EIS) for proposed improvements to State Highway 199 (S.H. 199) in Tarrant County, Texas.

FOR FURTHER INFORMATION CONTACT: Patrick A. Bauer, P.E., District Engineer, Federal Highway Administration, 300 East 8th Street, Room 826, Austin, Texas 78701; Telephone: (512) 536–5950.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Texas Department of Transportation, is rescinding the NOI published in the **Federal Register** (4910–22) on February 19, 1998, to prepare an EIS for proposed S.H. 199 in Tarrant County, Texas. The NOI is being rescinded because proposed S.H. 121 described as the eastern termini in the NOI has not been

constructed and the North Central Texas Council of Governments has removed the proposed S.H. 199 from the current regional mobility plan. Therefore, the scope of S.H. 199 has been revised and separate environmental documents for future improvements to S.H. 199 will be prepared as needed.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on October 10, 2002.

Patrick A. Bauer,

District Engineer, Austin, Texas.

[FR Doc. 02–26655 Filed 10–18–02; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 11, 2002.

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, Pub. L. 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 November 20, 2002 to be assured of consideration.

Bureau of Alcohol, Tobacco and Firearms (BATF)

OMB Number: 1512–0092.

Form Number: ATF F 5100.31.

Type of Review: Revision.

Title: Application for Certification/Exemption of Label/Bottle Approval Under the Federal Alcohol Administration Act.

Description: The Federal Alcohol Administration Act regulates the labeling of alcoholic beverages and designates the Treasury Department to oversee compliance with regulations. This form is completed by the regulated industry and submitted to Treasury as an application to label their products. Treasury oversees label applications to prevent consumer deception and to deter falsification of unfair advertising practices on alcoholic beverages.

Respondents: Business or other for-profit.

Estimated Number of Recordkeepers: 10,982.

Estimated Burden Hours Per Recordkeeper: 30 minutes.

Frequency of Response: Annually.

Estimated Total Recordkeeping Burden: 41,238 hours.

Clearance Officer: Jacqueline White (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, Room 3200, 650 Massachusetts Avenue, NW., Washington, DC 20226.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Mary A. Able,

Departmental Reports, Management Officer.

[FR Doc. 02–26648 Filed 10–18–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 8, 2002.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before November 20, 2002 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1519.

Form Number: IRS Form 1099–LTC.

Type of Review: Extension.

Title: Long-Term Care and Accelerated Death Benefits.

Description: Under the terms of the Internal Revenue Code sections 7702B and 101g, qualified long-term care and accelerated death benefits paid to chronically ill individuals are treated as amounts received for expenses incurred for medical care. Amounts received on a per diem basis in excess of $175 per day are taxable. Section 6050Q requires all such amounts to be reported.

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

Estimated Number of Respondents: 3,000.

Estimated Burden Hours Per Respondent: 13 minutes.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 18,181 hours.

Clearance Officer: Glenn Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Mary A. Able,

Departmental Reports, Management Officer.

[FR Doc. 02–26649 Filed 10–18–02; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 10, 2002.

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 November 20, 2002 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: New.

Form Number: IRS Form 8874.

Type of Review: New collection.

Title: New Markets Credit.

Description: Investors use Form 8874 to request a credit for equity investments in Community development entities.

Respondents: Individuals or households, Business or other for-profit.

Estimated Number of Respondents/Recordkeepers: 10,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping—8 hr., 7 min.

Learning about the law or the form—53 min.

Preparing and sending the form to the IRS—1 hr., 4 min.

Frequency of Response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 100,900 hours.

OMB Number: 1545–1537.

Regulation Project Number: REG–253578–96 (NPRM).

Type of Review: Extension.

Title: Health Insurance Portability for Group Health Plan; (Temporary) Interim Rules for Health Insurance Portability for Group Health Plans.

Description: The regulations provide guidance for group health plans and the employers maintaining them regarding requirements imposed on plans relating to preexisting condition exclusions, discrimination based on health status, and access to coverage.

Respondents: Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Estimated Number of Respondents: 1,300,000.

Estimated Burden Hours Per Respondent: Varies.

Estimated Total Reporting Burden: 591,561 hours.

Clearance Officer: Glenn Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Mary A. Able,

Departmental Reports, Management Officer.

[FR Doc. 02–26650 Filed 10–18–02; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Treasury Order 180–01; Financial Crimes Enforcement Network

September 26, 2002.

1. By virtue of the USA Patriot Act of 2001 (Pub. L. No. 107–56, Title III, Subtitle B, Section 361(a)(2), 115 Stat. 272, 329–332), and by the authority vested in me as Secretary of the Treasury, it is hereby ordered that the Financial Crimes Enforcement Network (''FinCEN'' or the Bureau'') is re-established as a bureau within the Department. The head of the Bureau is the Director, Financial Crimes Enforcement Network, who shall perform duties under the general supervision of the Secretary and under the direct supervision of the Under Secretary (Enforcement) or the designee of the Under Secretary.

2. *Mission.* The mission of FinCEN shall be to fulfill the duties and powers assigned to the Director, Financial Crimes Enforcement Network, in the USA Patriot Act of 2001, codified in relevant part at 31 U.S.C. 310(b), to support law enforcement efforts and foster interagency and global cooperation against domestic and international financial crimes, and to provide U.S. policy makers with strategic analyses of domestic and worldwide trends and patterns. FinCEN works toward those ends through information collection, analysis, and sharing, as well as technological assistance and innovative, cost-effective implementation of the Bank Secrecy Act and other Treasury authorities assigned to FinCEN.

3. *Duties and Powers.* In addition to the duties and powers established by the USA Patriot Act of 2001, codified in relevant part at 31 U.S.C. 310(b), the Director of FinCEN is authorized to issue regulations and perform other actions for the purposes of carrying out the functions, powers, and duties delegated to the Director. The Director is hereby delegated authority to:

a. Take all necessary and appropriate actions to implement and administer the provisions of Titles I and II of Public Law 91–508, as amended, (the ''Bank Secrecy Act''), which is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–59, and 31 U.S.C. 5311 *et seq.*, including, but not limited to, the promulgation and amendment of regulations and the assessment of penalties;

b. Exercise authority for enforcement of and compliance with the regulations at 31 CFR part 103 with respect to the activities of agencies exercising authority thereunder that has been redelegated to such agencies by FinCEN under paragraph 9 infra; and

c. Design and implement programs of public outreach and communication to the financial community and the general public relating to the functions of the Bureau and the Department's efforts to prevent and detect money laundering and other financial crime.

4. *Authorities.* The Director of FinCEN shall possess full authority, powers, and duties to administer the affairs of and to perform the functions of FinCEN, including, without limitation, all management and administrative authorities similarly granted to Bureau Heads or Heads of Bureaus in Treasury Orders and Treasury Directives. The Director shall also possess authority to request one or more other government agencies to provide administrative support to the Bureau, in the name of the Bureau and under policies adopted by the Director.

5. *Transfer of Records and Property.* There shall be transferred to the Bureau such records and property to be determined by the Assistant Secretary (Management)/CFO, in consultation with the Under Secretary (Enforcement) and the Director, as are necessary or appropriate to carry out the purposes of this Order.

6. *Personnel.* FinCEN's staff shall be comprised of Treasury Department employees as well as other personnel detailed to FinCEN.

7. *Chief Counsel.* The Office of Chief Counsel of FinCEN shall be a part of the Legal Division, under the supervision of the General Counsel.

8. *Regulations.*

a. All regulations prescribed, all rules and instructions issued, and all forms adopted for the administration and enforcement of the Bank Secrecy Act, that were in effect or in use on the date of enactment of the USA Patriot Act of 2001, shall continue in effect as regulations, rules, instructions, and forms of the Bureau until superseded or revised.

b. All regulations prescribed, all rules and instructions issued, and all forms adopted for the administration of FinCEN prior to it becoming a bureau, that were in effect or in use on the date of enactment of the USA Patriot Act of 2001, shall continue in effect as regulations, rules, instructions, and forms of the Bureau until superseded or revised.

c. The terms ''Director, Financial Crimes Enforcement Network,'' ''Director, Office of Financial Enforcement,'' and ''Assistant Secretary (Enforcement)'' wherever used in regulations, rules, instructions, and forms issued or adopted for the administration and enforcement of the Bank Secrecy Act that were in effect or in use on the date of enactment of the USA Patriot Act of 2001, shall be held to mean the Director of FinCEN.

d. All regulations issued or amended by the Director of FinCEN shall be subject to approval by the Under Secretary (Enforcement) or a designee of the Under Secretary. The issuance or amendment of regulations by the Director shall be subject to Treasury Directive 28–01, Preparation and Review of Regulations.''

9. *Redelegation.*

a. The Director of FinCEN may redelegate any authority vested under this Order to an officer or employee of the Treasury Department, including its bureaus.

b. The Director of FinCEN may redelegate any authority vested in the Director to an officer or employee of an agency other than the Treasury Department, when authorized by law.

10. *Ratification.* Any action heretofore taken that is consistent with this Order is hereby affirmed and ratified.

11. *Other Bureaus' Authorities.* This Order does not affect the authorities of the Commissioner of Customs and the Commissioner of Internal Revenue under Treasury Directive 15–23, ''Bank Secrecy Act—U.S. Customs Service'' and Treasury Directive 15–41, ''Bank Secrecy Act—Internal Revenue Service,'' or under successor issuances to those Directives.

12. *Cancellations.*

a. Treasury Order 105–08, ''Establishment of the Financial Crimes Enforcement Network'', dated April 25, 1990, is superseded.

b. Treasury Directive 15–01, ''Bank Secrecy Act Regulations,'' dated December 1, 1992, is canceled;

c. The ''Delegation of Authority to the Director of the Financial Crimes Enforcement Network,'' signed by the Assistant Secretary (Enforcement), dated May 13, 1994, is canceled;

d. All existing Treasury Orders and Directives shall be read in a manner that is consistent with FinCEN's status as a bureau and the authorities vested in the Director of FinCEN as described in this Order.

13. *Authorities.*

a. Public Law 107–56, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, October 26, 2001, Pub. L. 107–56, Title III, Subtitle B, Section 361(a)(2), 115 Stat. 272, 329–332, codified in relevant part at 31 U.S.C. 310(b).

b. 31 U.S.C. 321(b).

14. *Office of Primary Interest.* Director, Financial Crimes Enforcement Network.

Paul H. O'Neill,

Secretary of the Treasury.

[FR Doc. 02–26656 Filed 10–18–02; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

[Docket No. 959; ATF O 1130.34]

Delegation of the Director's Authorities in 27 CFR Part 47, Importation of Arms, Ammunition and Implements of War

To: All Bureau Supervisors:

1. *Purpose.* This order delegates the Director's authorities to subordinate ATF officials and prescribes the subordinate ATF officials with whom persons file documents which are not ATF forms.

2. *Background.* Under current regulations, the Director has authority to take final action on matters relating to procedure and administration. The Bureau has determined that certain of these authorities should, in the interest of efficiency, be delegated to a lower organizational level.

3. *Cancellation.* This ATF order cancels the portion referring to part 47 of ATF O 1130.4, Delegation Order—Delegation of Certain Authorities of the Director in 27 CFR parts 47, 178, and 179, dated 1/15/97.

4. *Delegations.* Under the authority vested in the Director, Bureau of Alcohol, Tobacco and Firearms, by Treasury Department Order No. 120–01 (formerly 221), dated June 6, 1972, and by 26 CFR 301.7701–9, this ATF order delegates certain authorities to take final action prescribed in 27 CFR part 47 to subordinate officials. Also, this ATF order prescribes the subordinate officials with whom applications, notices, and reports required by 27 CFR part 47, which are not ATF forms, are filed. The attached table identifies the regulatory sections, authorities and documents to be filed, and the subordinate ATF officials. The authorities in the table may not be redelegated.

5. *Questions.* If you have questions about this order, contact the Regulations Division at (202) 927–8210.

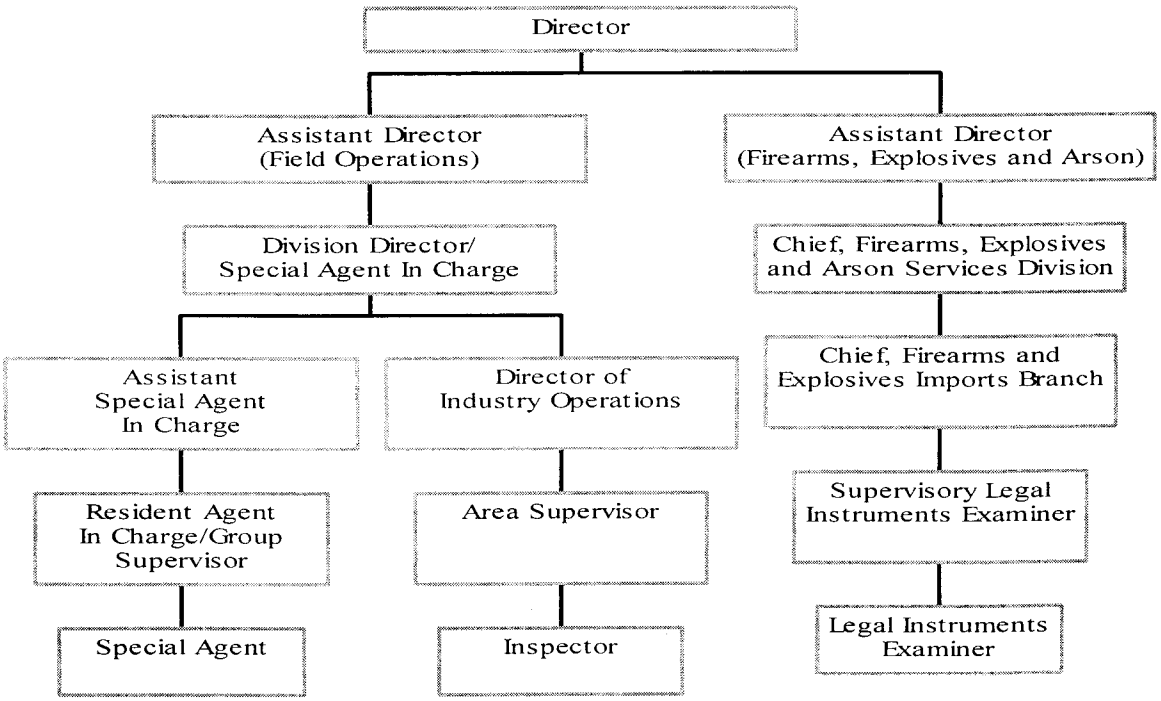
Bradley A. Buckles,

Director.

Regulatory section	Officer(s) authorized to act or receive document
§ 47.32(a) and (c)	Legal Instruments Examiner, Firearms and Explosives Imports Branch (FEIB).
§ 47.33	Legal Instruments Examiner, FEIB.
§ 47.34(b)	Chief, FEIB, to prescribe retention period of less than 6 years. Director of Industry Operations to prescribe retention period of more than 6 years.
§ 47.35(a)	Chief, FEIB.
§ 47.42(a)(2)	Legal Instruments Examiner, FEIB.
§ 47.43(c)	Legal Instruments Examiner, FEIB.
§ 47.44(a) and (b)	Legal Instruments Examiner, FEIB, to deny; Chief, FEIB, to revoke, suspend or revise.
§ 47.44(c)	Chief, Firearms and Explosives Services Division.
§ 47.44(d)	Supervisory Legal Instruments Examiner, FEIB, to receive permits.
§ 47.51	Legal Instruments Examiner, FEIB.
§ 47.52(b)	Legal Instruments Examiner, FEIB.
§ 47.52(f)	Legal Instruments Examiner, FEIB, to determine if documents are acceptable. Supervisory Legal Instruments Examiner, FEIB, with whom certification is filed, and to require additional documents.

BILLING CODE 4810–31–P

ATF Organization



This is not a complete organizational chart of ATF.

[FR Doc. 02–26679 Filed 10–18–02; 8:45 am]
BILLING CODE 4810–31–C

DEPARTMENT OF THE TREASURY

Customs Service

Customs Trade Symposium 2002

AGENCY: Customs Service, Treasury.

ACTION: Notice of symposium.

SUMMARY: This document announces that the Customs Service will convene a major trade symposium that will feature joint discussions by Customs personnel, members of the trade community, and other public and private sector representatives on international trade security initiatives and the agency's transition to the proposed Department of Homeland Security. Customs Commissioner Robert C. Bonner will be the keynote speaker. Members of the international trade and transportation communities and other interested parties are encouraged to attend, and those attending are requested to register early.

DATES: A reception and pre-registration will be held on Wednesday, November 20, 2002, from 6 p.m. until 8 p.m. The symposium will be held on Thursday, November 21, 2002, from 8:30 a.m. until 6 p.m. and will include a special session on Friday, November 22, 2002, from 8 a.m. until 12 p.m. All registrations must be made on-line and confirmed with payment by November 14th.

ADDRESSES: The meeting will be held in Washington, DC at the Ronald Reagan Building and International Trade Center, at 1300 Pennsylvania Avenue, NW.

FOR FURTHER INFORMATION CONTACT: ACS Client Representatives; Customs Account Managers; Regulatory Audit Trade Liaisons; or the Office of Trade Relations at (202) 927–1440 or at *traderelations@customs.treas.gov.* To obtain the latest information on the program or to register on-line, visit the Customs Web site at *http://www.customs.gov/trade2002.*

SUPPLEMENTARY INFORMATION: Customs will be convening a major trade symposium (Customs Trade Symposium 2002) on Thursday, November 21, 2002, from 8:30 a.m. until 6 p.m. and on Friday, November 22, 2002, from 8 a.m. until 12 p.m. at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC. The symposium will feature joint discussions by Customs personnel, members of the trade community, and other public and private sector representatives on international trade security initiatives and the agency's transition to the proposed Department of Homeland Security. Customs Commissioner Robert C. Bonner will be the keynote speaker. Members of the international trade and transportation communities and other interested parties are encouraged to attend.

The cost is $150 per individual and includes all symposium activities. Interested parties are requested to register early. All registrations must be made on-line at the Customs Web site

(*http://www.customs.gov/trade2002*). Registrations will be accepted on a space available basis and must be confirmed with payment by November 14, 2002. The Renaissance Washington DC Hotel, 999 9th Street, NW., has reserved a block of rooms for Wednesday, November 20th through Friday, November 22nd at a rate of US$ 179 per night. Reservations must be confirmed with the hotel by November 5th. Call 202–898–9000 or 1–800–228–9290 and reference the ''U.S. Customs Trade Symposium.''

Dated: October 16, 2002.

Robyn Day,

Acting Director, Office of Trade Relations.

[FR Doc. 02–26672 Filed 10–18–02; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form A

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, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form A, Qualifications & Availability Form.

DATES: Written comments should be received on or before December 20, 2002 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage, (202) 622–3945, or through the internet (*CAROL.A.SAVAGE@irs.gov*), Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Qualifications & Availability.

OMB Number: 1545–1681.

Form Number: Form A.

Abstract: Form A is used by external applicants applying for clerical and technical positions with the Internal Revenue Service. Applicants will complete information relating to their address, job preference, veteran's preference and a series of occupational questions, knowledge and skills along with background information.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

Estimated Number of Responses: 90,000.

Estimated Time Per Response: 30 minutes.

Estimated Total Annual Burden Hours: 45,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 15, 2002.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 02–26729 Filed 10–18–02; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Monday,
October 21, 2002

Part II

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Part 319
Importation of Clementines From Spain; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 02–023–4]

RIN 0579–AB40

Importation of Clementines From Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the fruits and vegetables regulations to allow the importation of clementines from Spain to resume if the clementines are cold treated en route to the United States, and provided that other pre-treatment and post-treatment requirements are met. These requirements include provisions that the clementines be grown in accordance with a Mediterranean fruit fly management program established by the Government of Spain, that the clementines be subject to an inspection regimen that includes fruit cutting prior to, and after, cold treatment, and that the clementines meet other conditions designed to protect against the introduction of the Mediterranean fruit fly into the United States. This final rule also includes restrictions on the distribution of imported Spanish clementines for the 2002–2003 shipping season. We are taking this action based on our finding that the restrictions described in this final rule will reduce the risk of introduction of Mediterranean fruit fly associated with the importation of clementines from Spain.

EFFECTIVE DATE: October 15, 2002.

FOR FURTHER INFORMATION CONTACT: Dr. I. Paul Gadh, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56 through 319.56–8) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction or dissemination of plant pests, including fruit flies, that are new to or not widely distributed within the United States.

Until recently, the Animal and Plant Health Inspection Service (APHIS) authorized the importation of clementines from Spain under the regulations in § 319.56–2(e)(2). As such, clementines from Spain were imported under permit, provided that they were cold treated for the Mediterranean fruit fly (*Ceratitis capitata*) (Medfly). Clementines imported from Spain were not required to meet any additional regulatory requirements in order to be imported into the United States, but were subject to inspection at the port of entry.

Between November 20 and December 11, 2001, several live Medfly larvae were intercepted in clementines from Spain. On December 5, 2001, APHIS notified the Government of Spain that it was suspending the importation of clementines. Beginning December 5, 2001, all shipments of clementines from Spain were refused entry into the United States. APHIS also announced restrictions on the marketing of Spanish clementines that had already been released into domestic commerce.

APHIS believes, based on the available evidence, that there are several possible explanations for the survival of Medfly larvae in imported Spanish clementines during the 2001–2002 shipping season.

In order to address this problem, since December 5, 2001, APHIS has prohibited the importation of clementines from Spain while it considered alternate approaches to mitigating the Medfly risk posed by clementines from Spain.

Revised Risk Mitigation for Spanish Clementines

On April 16, 2002, we published in the **Federal Register** (67 FR 18578–18579, Docket No. 02–023–1) a notice of availability and request for comments on a risk management analysis, ''Risk mitigation for Mediterranean fruit flies with special emphasis on risk reduction for commercial imports of clementines (several varieties of *Citrus reticulata*) from Spain'' (referred to elsewhere in this document as ''risk management analysis'' or ''RMA''). The RMA describes and evaluates the use of certain risk-mitigating measures associated with the importation of clementines from Spain. We solicited comments on the RMA for 30 days ending May 16, 2002.

On May 24, 2002, we published in the **Federal Register** (67 FR 36560–36561, Docket No. 02–023–2) a notice in which we reopened and extended the comment period for our risk management analysis until June 14, 2002. We received a total of 17 comments on the RMA by that date. We considered the comments and described changes made to the RMA in a revision dated July 5, 2002.

On July 11, 2002, we published in the **Federal Register** (67 FR 45922–45933, Docket No. 02–023–3) a proposal to amend fruits and vegetables regulations to allow the importation of clementines from Spain to resume if the clementines are cold treated en route to the United States, and provided that other pre-treatment and post-treatment requirements are met. These requirements included provisions that the clementines be grown in accordance with a Medfly management program established by the Government of Spain, that the clementines be subject to an inspection regimen that includes fruit cutting prior to, and after, cold treatment, and that the clementines meet other conditions designed to protect against the introduction of the Medfly into the United States. We proposed this action based on our finding that the requirements described in the proposed rule would reduce the risk of introduction of Medfly and other plant pests associated with the importation of clementines from Spain. The proposed rule also provided notice of two public hearings related to our proposal and detailed the dates, times, and locations of those hearings.

We solicited comments concerning our proposal for 60 days ending September 9, 2002. We received 33 comments by that date, in addition to testimony provided by 30 persons at the two public hearings. The comments were from officials of State departments of agriculture, officials of foreign Governments, Members of Congress, scientists, representatives of associations such as farm bureaus, marketing associations, consumer groups, and trade associations, and growers, packers, and shippers of fruits and vegetables. Twelve of the commenters supported the rule, and 40 opposed some aspect of it. Fifteen commenters noted that APHIS should ensure that its decision to proceed with a final rule is based on science, and at least 10 commenters stated that APHIS should delay action until additional information is available to eliminate uncertainty in its approach. The issues raised in the comments are discussed below, by topic.

Determination by the Secretary

In this document, APHIS is adopting its proposal to allow the importation of clementines from Spain to resume as a final rule, with the changes discussed in this document.

Under § 412(a) of the Plant Protection Act, the Secretary of Agriculture may prohibit or restrict the importation and entry of any plant product if the Secretary determines that the

prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

The Secretary has determined that it is not necessary to prohibit the importation of clementines from Spain in order to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. This determination is based on the finding that the application of the remedial measures contained in this final rule will prevent the introduction or dissemination of plant pests into the United States. The factors considered in arriving at this determination include: (1) A risk management analysis (revised October 4, 2002), (2) a review of the existing cold treatment for clementines from Spain, ''Evaluation of cold storage treatment against Mediterranean Fruit Fly, *Ceratitis capitata* (Wiedemann) (Diptera: Tephritidae)'' (May 2, 2002) (referred to elsewhere in this document as ''cold treatment evaluation''), (3) a quantitative analysis of available data related to cold treatment for Medfly that was produced by USDA's Office of Risk Assessment and Cost Benefit Analysis (ORACBA), ''Revised Quantitative Analysis of Available Data on the Efficacy of Cold Treatment Against Mediterranean Fruit Fly Larvae'' (September 20, 2002), referred to elsewhere in this document as ''ORACBA analysis,'' and (4) the determinations of USDA technical experts.

Discussion of Public Comments

Clarification of Terms

Several commenters expressed confusion over our use of the terms ''shipment'' and ''lot.'' We discuss this issue in more detail later in this document. In response to those commenters' requests for clarification, we have defined those terms.

In our final rule, a *lot* of clementines is considered to include a number of units of clementines that are from a common origin (*i.e.*, a single producer or a homogenous production unit).[1] The definition of the term *shipment* depends on the context in which it is used. Specifically, the definition depends on whether or not fruit has been treated. The term can refer to one or more lots of clementines that are presented to an APHIS inspector for pre-treatment inspection. Such a shipment may not include more than 200,000 boxes of clementines (555 pallets). The term can also refer to one or more lots of clementines that are imported into the United States on the same conveyance. Our use of these terms in the remainder of this document is consistent with these definitions.

General Comments

Several commenters questioned whether Spain, in just 9 months, has taken the proper steps to ensure their product is free from Medfly, and asked what changes have taken place in Spain's production areas since the shutdown of their exports in December 2001.

The system we have designed for the resumption of imports of Spanish clementines is designed to ensure that APHIS will be able to detect infestation levels of 1.5 percent or greater with a high (95 percent) level of confidence through the pre-treatment cutting of randomly selected fruit.[2] If a single live Medfly in any stage of development is detected during pre-treatment fruit cutting, the shipment of clementines in which the Medfly is found will not be approved for export to the United States.

Conversely, if no infested fruit are detected via fruit cutting, APHIS's analysis shows that the revised cold treatment will eliminate any undetected low-level Medfly infestations. Furthermore, fruit cutting at the port of entry is designed to provide additional assurance that the revised cold treatment was successful.

For these reasons, APHIS believes the new Spanish clementine import program will prevent the introduction or dissemination of Medflies into the United States. Nonetheless, to further ensure that the program does not result in the introduction of Medflies into the United States, we have required Spanish growers, in order to be approved to export to the United States, to enter into the Government of Spain's Medfly management program, which APHIS must approve, and which must ensure low levels of infestation in clementine production areas. We believe the activities required under Spain's program, which include phytosanitary measures that must be followed in the field and at packinghouses, represent a significant improvement over Spain's efforts in 2001.

Several commenters noted that APHIS still does not know ''what went wrong'' in 2001, when there were multiple live larvae finds on Spanish clementines in several different regions of the United States. The commenters suggested that designing a solution when the problem is not fully understood is risky. Specifically, one of those commenters proposed that despite APHIS's determination that there are two possible scenarios that could explain the discovery of live larvae in clementines imported from Spain, a third scenario, that both those things occurred, is also possible.

APHIS acknowledges that the cause of last year's infestations of imported Spanish clementines has not been definitively established; however, we have responded as if the problem resulted from one or both of the following: (1) Despite the assumed mortality rate of the cold treatment (99.9968 percent), any small or partial failure in the application of the cold treatment could have allowed Medflies to survive in clementines imported from Spain due to the above-average levels of Medflies in the growing areas in Spain, or (2) the level of Medfly infestation in imported clementines simply overwhelmed the capabilities of the cold treatment process, even though the treatment was properly applied. These two scenarios have received support from State agricultural officials and domestic stakeholders. We believe the system we have designed addresses all possible explanations for the problem.

In order to address the first explanation for last year's problem, APHIS has extended cold treatment as described in this document, and is confident that the prescribed cold treatment will provide a high level of mortality of target pests (equivalent to probit 9 mortality). The extension of cold treatment also addresses concerns that the cold treatment under the previous schedule may not have provided probit 9 mortality.[3] We have conducted a thorough review of the documentation of cold treatment application and have found no evidence that cold treatment was improperly applied during the 2001 shipping season, although a long-term thermal-mapping study on the application of cold treatment is underway. That study, which was initiated before the Medfly infestations of Spanish clementines occurred in 2001, is described in more

[1] A homogeneous production unit is a group of adjacent orchards in Spain that are owned by one or more growers who follow a homogenous production system under the same technical guidance. The fruit produced by these units is pooled and packed together, and all the orchards in the group are regulated as one unit in the event that traceback of infested fruit is necessary.

[2] We will also be able to detect lower levels of infestation in clementines with varying levels of confidence as described in detail under the heading, ''Infestation Levels, Inspection, and Fruit Cutting.''

[3] A level or percentage of mortality of target pests (*i.e.,* 99.9968 percent mortality or 32 survivors out of a million) caused by a control measure.

detail later in this document under the heading ''Cold Treatment.''

Regarding the second explanation for the problem, we have required that levels of infestation of Spanish clementines presented for export be kept at low levels (levels that cannot be detected via fruit cutting) in order to ensure that high levels of infestation do not cause the treatment to be overwhelmed. Inspection and cutting of clementines prior to cold treatment will ensure that this requirement is met.

One commenter noted that shortly after the interceptions of Medfly larvae in Spanish clementines, APHIS advised that the situation would be handled with transparency, stakeholder involvement, and most critically, that science would be the only determinant relative to developing a protocol and plan for the potential resumption of Spanish clementine shipments into the United States. The commenter stated that APHIS has failed to honor its commitment as a result of a predetermined decision to allow clementines back into the U.S. market for this upcoming season.

APHIS has upheld its commitment to handle the issue of the importation of Spanish clementines with transparency and stakeholder involvement, and the Secretary has based her determination to allow the importation of clementines from Spain to resume on science, and in accordance with the requirements of the Administrative Procedure Act. We have made the documents that support this rule available for public comment, some for as long as 120 days. We have listened to stakeholder concerns in meetings and at public hearings. We have made changes to our supporting documents based on stakeholder review and comments. We have considered all comments received on our proposed rule and its supporting documents and have documented our responses in this final rule. For the reasons outlined in this document, our decision to allow the resumption of clementines from Spain is based on science.

Two commenters claimed that APHIS's characterization of the events leading to the December 5, 2001, suspension of clementine imports from Spain is questionable. They stated that at no time has APHIS produced credible and verifiable evidence of live and viable Medfly larvae in shipments of Spanish clementines.

APHIS takes quarantine action on imported commodities if a given commodity is found to be infested with a live quarantine pest, and APHIS's actions in December 2001 were based on repeated findings of live Medfly larvae in imported Spanish clementines. APHIS believes that it is often impossible and always impractical to determine the true viability of a live pest intercepted in an imported commodity, especially one that has undergone cold treatment. Therefore, APHIS has no other alternative but to take action to protect American agriculture based on the finding of a live pest in any stage of development. This course of action is consistent with our authority under the Plant Protection Act.

Determining the true viability of Medflies would require APHIS to rear them to adults, allow them to mate, lay eggs, etc., all under high security conditions to protect against the escape of the pest to the natural environment. APHIS has no doubt, based on visual inspections by field and headquarters personnel, including expert identifiers, that the larvae were indeed alive upon interception in the United States.

One commenter claimed that there has never been such a catastrophic failure of an APHIS program as there was with Spanish clementines in 2001, and APHIS has no idea what the results of that failure will be. The commenter questioned whether Medfly could be established somewhere in the United States as a result of 2001 imports of Medfly-infested Spanish clementines.

APHIS believes that if clementines imported from Spain caused the establishment of Medfly in the mainland United States, that would indeed represent a catastrophic failure of the APHIS import program. However, APHIS has no evidence to indicate that infested Spanish clementines have resulted in a Medfly establishment in the United States. Despite the events of 2001, APHIS's actions to address the situation appear to have been successful. Since October 2001, the only wild Medfly detected in the mainland United States has been a single female trapped in San Bernardino County, CA, in August 2002. The results of DNA tests to determine the origin of the Medfly were inconclusive, though they did show a banding pattern that may be consistent with Medfly from Central America, South America (except Venezuela and most of Brazil), Mediterranean countries, or Sub-Saharan Africa.[4]

One commenter questioned whether APHIS has the resources available to effectively carry out and enforce the new import program, especially given congressional proposals to transfer the 3,200 APHIS employees at ports of entry to a proposed Department of Homeland Security. The commenter stated that, given the uncertainty surrounding the move of port personnel to the Department of Homeland Security, the reentry of Spanish clementines should be delayed.

APHIS has reviewed its resources and believes it has adequate coverage in Spain and across the United States to ensure compliance with this final rule. We have no reason to believe that inspectors and preclearance personnel will be unable to continue to carry out their current responsibilities in the event that they are moved to the proposed Department of Homeland Security.

One commenter noted that APHIS states that it is imposing a combination of measures aimed at achieving probit 9 protection from entry on Medfly into the United States. These measures comprise (1) pre-export controls in orchards and inspection at point of export, (2) cold treatment, extended by 2 days compared with previous conditions, and (3) post-import inspection. This commenter asked that we explain what contribution each step makes to achieving probit 9 protection.

Probit 9 was established by A.C. Baker in 1939 as a useful concept when trying to assess mortality of commodity treatments against fruit flies.[5]

APHIS considers ''probit 9 protection'' to be relevant only to cold treatment in this case. As stated earlier in this document and in the proposed rule, the term ''probit 9'' refers to a level or percentage of mortality of target pests (i.e., 99.9968 percent mortality or 32 survivors out of a million) caused by a control measure. APHIS has historically used the term ''probit 9'' in association with the mortality rate caused by commodity treatments (including vapor heat, high temperature forced air, methyl bromide, and cold treatments) for fruit flies. We do not believe the term can be assigned generally as a measure of success of a pest-excluding regulatory approach if the term is used as a representation of the risk reduction potential of (1) a systems approach to pest management or (2) any combination of treatment and other types of safeguards other than treatment. This is to say that APHIS uses the term only as a representation of the level of mortality of pests caused by a specific treatment, in this case cold treatment.

[4] DNA tests are actually better at clarifying where Medflies did not originate, as opposed to where they did originate. In this case, DNA tests revealed that banding patterns are not consistent with Medflies in Hawaii, Venezuela, and most of Brazil.

[5] Baker, A.C.. 1939. ''The Basis for Treatment of Products Where Fruitflies are Involved as a Condition for Entry into the United States.'' Circular No. 551. US Department of Agriculture, Washington, DC.

The level of mortality called ''probit 9'' is a historical, well-recognized benchmark in the area of phytosanitary security. It has been useful as a benchmark, but recent findings[6] suggest that requiring a probit 9 treatment may or may not be sufficient in a given case (i.e., in situations where there are significant pest populations). Conversely, the use of probit 9 under other circumstances (i.e., in situations with very low or nonexistent pest populations) may be more restrictive than is necessary to protect against pest infestation of imported fruits or vegetables. In such cases, risk analysis is necessary to determine the effect and role of treatment in a given pest-management approach.

In our RMA, APHIS considered that cold treatment approximated the ''probit 9'' level. We also stated that the risk management analysis for our proposal ''considers other risk-mitigating measures as necessary to ensure that cold treatment has the potential to provide approximately a probit 9 level of quarantine security.'' Upon further consideration, this statement, and other similar statements made in our proposed rule and supporting documents require clarification. The RMA assesses the extent to which other risk-mitigating measures, in combination with cold treatment, reduce the risk that a mated pair of Medflies could enter the United States via imported Spanish clementines. Population levels have significance in the context of the RMA's calculations regarding the probability that a mated pair of Medflies could enter into the United States via Spanish clementines imported under the provisions of the proposed rule. However, the probit 9 efficacy of cold treatment is not dependent on population levels of Medflies in Spanish production areas in the sense that the same proportion of mortality is expected regardless of the Medfly population density. We have revised our RMA to clarify that fact.

To elaborate, if 32 Medflies survive out of each 1 million that are subject to a probit 9 treatment, one should expect that reducing the number of Medflies present to 500,000 would reduce the number of survivors to 16; if 100,000 are treated, then 3 will survive; and so on. We believe this clearly illustrates the relevance and effect of low pest population density, not to cold treatment itself, but to the overall success of a pest-exclusion program.

As a general rule, APHIS has required treatments for fruit flies to provide probit 9 mortality in cases where treatment is the only mitigation measure applied against the pest of concern. This is because the level of mortality represented by this benchmark is considered extremely high and stringent, especially when the field infestation rates are low.[7] In this rule, we are requiring a treatment that we are confident will provide a level of quarantine security that is equivalent to probit 9, but we are also requiring that fruit be consistently at low rates of infestation by Medflies in order to ensure that there is a very low probability that Medflies could survive cold treatment and become established in the United States.

Appropriate Level of Protection and Level of Risk

Several commenters claimed that, according to the court decision on APHIS's rule authorizing the importation of citrus from Argentina (*Harlan Land Company, et al.* vs. *United States Department of Agriculture, et al.,* Case #CV–F–00–6106–REC/LJO (D. Ariz. Sept. 27, 2001)) (referred to elsewhere in this document as *Harlan Land Co.*), as a matter of law, APHIS must define what it considers to be a ''negligible level of risk'' in the context of a rule authorizing the importation of fruit from a disease and pest infested area. The commenters elaborated that APHIS must define what it considers to be a negligible or acceptable level of risk (referred to by one commenter as a ''quarantine security standard''), and it must also adequately explain that determination, and claimed that the proposed rule does not do so, nor has APHIS made any attempt to articulate why the issue is not addressed. The commenters stated that without a discussion of the issue, there is no way to judge whether APHIS is meeting the congressional expectation that its regulations will prevent the movement into and through the United States of commodities that ''could present an unacceptable risk of introducing or spreading plant pests.''

The RMA does not conclude that there is negligible risk associated with such importations. Rather, it concludes that there is a very low likelihood that mated pairs of Medflies could enter the United States via clementines imported from Spain. Furthermore, APHIS does not agree that the *Harlan Land Co.* court decision requires APHIS to define what it considers to be a ''negligible level of risk'' in the context of this rule, or any other rule apart from the rule at issue in *Harlan Land Co.*

The term ''negligible'' is one that was used by APHIS in prior rulemaking and risk analysis documents unrelated to this action to describe risk in a qualitative, descriptive sense. APHIS has never intended that ''negligible level of risk'' should be interpreted as a term of art, but instead has used the term in its plain meaning. APHIS believes that its decisionmaking is tied directly to the authority given to the Secretary of Agriculture by the Plant Protection Act.

Under the Plant Protection Act, the Secretary may prohibit or restrict the importation and entry of any plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. In the case of clementines from Spain, the Secretary has determined that it is not necessary to prohibit the importation of clementines from Spain in order to prevent the introduction into the United States or the dissemination within the United States of a plant pest. This determination is based on the finding that the application of the remedial measures contained in this rule will provide the protection necessary to prevent the introduction or dissemination of plant pests into the United States.

One commenter stated that, under the provisions of the World Trade Organization's (WTO) sanitary and phytosanitary (SPS) Agreement, as well as the standards that have been developed to implement the SPS Agreement by the International Plant Protection Convention (IPPC), a definition of the ''appropriate level of protection'' is the first step that must be taken when a country is considering allowing the importation of a commodity from another country. The commenter claimed that only after the ''appropriate level of protection'' or the ''acceptable level of risk'' is established, will the destination country be in a position to consider what phytosanitary measures, if any, need to be implemented in order to assure that its phytosanitary requirements will be met.

APHIS believes the commenter has misinterpreted provisions of the SPS Agreement and IPPC standards. The commenter appears to suggest that, under the SPS agreement and IPPC standards, the identification of an appropriate level of protection is a kind of procedural requirement that must be

[6] A detailed consideration of the shortcomings associated with any measure that uses a fixed expression of proportion of mortality (such as probit 9) may be found in: Landolt, P., D. Chambers, and V. Chew. 1984. ''Alternative to the use of probit 9 mortality as a criterion for quarantine treatments of fruit fly infested fruit.'' *J. Econ. Entomol.* 77(2): 285–287.

[7] See footnote 6.

fulfilled prior to each individual instance when the United States considers allowing the importation of a commodity from another country. Under the SPS Agreement and IPPC standards, there is no obligation to complete such a task. Furthermore, guidelines on how to implement SPS Agreement Article 5.5 reveal that an indication of a country's appropriate level of protection:

''* * * may be contained in a published statement or other text generally available to interested parties. The statement of the appropriate level of protection may be qualitative or quantitative, and should serve to guide its consistent implementation over time, and also to increase the transparency of the sanitary or phytosanitary regime. Examples might include government policy statements with regard to appropriate levels of protection in response to certain risks, or documents on animal health protection objectives or with respect to plant protection.'' [8]

For plant health in the United States, Congress has expressed the United States' ''appropriate level of protection'' in the Plant Protection Act (a text generally available to interested parties) in the specific discretion provided to the Secretary of Agriculture. The Plant Protection Act authorizes the Secretary to ''prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States.'' The Plant Protection Act further elaborates on the Secretary's discretion in carrying out that determination by stating that the Secretary may promulgate regulations requiring permits, or certificates for importation, and may require remedial measures that ''the Secretary determines to be necessary to prevent the spread of plant pest or noxious weeds.''

The Plant Protection Act ensures that our phytosanitary measures are transparent and implemented consistently over time, and thus is consistent with the guidelines cited above.

There is no obligation to express the ''appropriate level of protection'' quantitatively under either the SPS Agreement or IPPC standards, and Congress, in the Plant Protection Act, did not establish a quantitative expression of the ''appropriate level of protection'' or require APHIS to set such a quantitative expression. The SPS Agreement obligates members to be consistent in the level of protection they consider appropriate in similar cases. Allowing imports of clementines from Spain reflects consistency with our determinations to allow citrus imports from other countries and regions where Medfly is found. Therefore, this final rule is consistent with our obligations under Article 5.5 of the SPS Agreement.

One commenter noted that, in its Regulatory Impact Analysis (RIA) for the proposed rule, APHIS says that it ''attempts to maintain the risk of Medfly introduction at an acceptable level in order to protect U.S. agricultural resources and maintain the marketability of agricultural products,'' but the Agency does not say what an ''acceptable level'' of risk is in that document or in the RMA. The commenter also noted that the Appendix 1 to the RMA defines the term ''acceptable level,'' but it does so tautologically, stating: ''Acceptable level means the presence of a hazard that does not pose the likelihood of causing an unacceptable phytosanitary risk.'' In other words, ''acceptable'' means ''not unacceptable.''

For the reasons stated above, we do not identify an ''acceptable level of risk'' in either the RIA or the RMA because those documents are, respectively, analyses of (1) the economic effects that could occur under this final rule, and (2) the probability that a mated pair of Medflies could enter the United States via a shipment of clementines from Spain. Neither document is intended to provide a decision or judgment as to whether this final rule provides a defined acceptable or appropriate level of protection, i.e., in a qualitative or quantitative sense. The documents are intended simply to inform the decisionmaker in her consideration of whether to allow the importation of Spanish clementines.

Furthermore, Congress stated in § 402(3) of the Plant Protection Act that,

''* * * it is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds.''

APHIS believes the process it follows in evaluating risks prior to rulemaking on a given subject is consistent with the clearly stated intent of Congress.

Regarding the commenter's statement that RMA defines the term ''acceptable level'' tautologically, the SPS Agreement employs a similar approach. The SPS Agreement defines ''appropriate level of * * * phytosanitary protection'' as ''The level of protection deemed appropriate by the Member [country] establishing a * * * phytosanitary measure to protect human, animal or plant life or health within its territory.'' We believe this is further testament to the fact that APHIS has no obligation under any of its authorities or international agreements to set a quantitative level of protection that it believes is acceptable. Again, we believe the United States expresses its appropriate level of protection in the Plant Protection Act, which authorizes the Secretary to prohibit or restrict the importation and entry of any plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

One commenter stated that the RMA does not purport to assess the likelihood of Medfly introduction at all; it simply estimates the probability that a mated pair of Medflies will arrive at a suitable location in the United States, and while this is said to be ''directly related'' to the likelihood of introduction, it is not, according to APHIS, the same thing. The commenters further noted that the RMA does not reach any judgment as to whether the risk of Medfly introduction under the proposed rule is ''acceptable.'' Instead, it merely asserts that the mitigation activities associated with a 1.5 percent maximum infestation rate decrease the risks of introduction as compared to the baseline of cold treatment alone. The proposed rule addresses the issue by saying the Secretary has determined ''that the application of the remedial measures contained in the proposed rule will provide the protection necessary to prevent the introduction or dissemination of plant pests into the United States,'' but APHIS does not say what this necessary level of protection is, or how much risk is compatible with ''preventing the introduction'' of Medflies. The commenter stated that none of the supporting documents conclude that the mitigation measures will ''prevent the introduction'' of Medflies.

While the RMA does not directly assess the likelihood of Medfly introduction quantitatively, it does (1) provide a discussion of the relationship between the likelihood of Medfly introduction and the probability that a mated pair of Medflies could enter the United States in a shipment of Spanish clementines, and (2) provide a baseline

[8] See *http://docsonline.wto.org/DDFDocuments/t/G/SPS/15.DOC.*

figure to which the likelihood of introduction can be compared. In order to quantitatively assess the likelihood of introduction, additional analysis would be required to evaluate the possibility that a mated pair of Medflies that has entered the United States in Spanish clementines and arrived in a suitable area can then (1) find a host, (2) find fruit that is sufficiently mature in which to oviposit, (3) oviposit viable eggs, and (4) avoid death by dessication, heat or cold, or other factors. The effect of these other variables on the ability of a mated pair to survive, reproduce, and spread would, in all cases, further reduce the likelihood that Medfly could be introduced into the United States below the already very low probability that a mated pair of Medflies could enter the United States via Spanish clementines.

One commenter stated that the *Harlan Land Co.* court decision made it clear that ''unless an agency describes the standard under which it has arrived at its conclusion, the court has no basis for exercising its responsibility to determine whether the agency's decision is arbitrary, capricious, an abuse of discretion, or otherwise in avoidance with the law.'' The commenter stated that according to the court's statement, an agency must cite information to support its position; without data the court owes no deference to an agency's line-drawing.

APHIS believes that the standard under which it has arrived at its conclusion is tied directly to the authority given to the Secretary of Agriculture by the Plant Protection Act. Under the Plant Protection Act, the Secretary may prohibit or restrict the importation and entry of any article if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. In the case of clementines from Spain, the Secretary has determined that it is not necessary to prohibit the importation of clementines from Spain in order to prevent the introduction into the United States or the dissemination within the United States of a plant pest. Several analyses (the RMA the cold treatment evaluation, the ORACBA analysis, and the judgment of USDA technical experts), provide the basis for the Secretary's finding that the application of the remedial measures contained in this rule will provide the protection necessary to prevent the introduction or dissemination of plant pests into the United States. Furthermore, the Secretary's determination is consistent with the congressional charge that she ''facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds.''

Trade Issues, International Agreements, and Equivalence

One commenter claimed that any delay that prevents the re-entry of clementines into the United States beyond the beginning of the next shipping season would constitute unreasonable delay in violation of the Administrative Procedure Act and in contravention of the U.S. Government's WTO obligations.

Under the Administrative Procedure Act, USDA's rulemaking review policy, and the requirements of several Executive Orders, APHIS must follow certain procedures in the drafting and review of rulemaking documents. This process takes time. APHIS must consider issues raised in comments submitted before the close of the comment period, and then determine what action to take on its proposal given the issues raised by commenters. It must then draft a rule that documents its response to comments, and must circulate the rule through a significant review and approval process. APHIS is committed to rulemaking based on science and according to the requirements of the Administrative Procedure Act, and will not produce a final rule until we have carefully considered the issues raised by commenters and have followed our formal review process. This is consistent with member obligations under the WTO SPS Agreement.

Three commenters stated that the proposed rule violates WTO prohibitions against discriminatory trade practices by requiring an extra 2 days of cold treatment for Spanish exports that are not required of clementine exports from other countries susceptible to Medfly infestation.

In the October 15, 2002 issue of the **Federal Register**, APHIS published an interim rule (APHIS Docket No. 02–071–1) under which all commodities, including clementines from other countries, that are subject to cold treatment for Medfly must be treated under the same treatment schedule that we are requiring for Spanish clementines.

Two commenters stated that the proposed rule violates WTO prohibitions against discriminatory trade practices by imposing a field treatment regimen for control of Medfly in Spanish clementine orchards, as well as pre- and post-treatment fruit cutting, but does not require an equivalent field treatment regimen for other countries exporting clementines to the United States from areas susceptible to Medfly infestation.

It is true that APHIS has not placed additional pre-treatment, population-limiting requirements on clementines and other Medfly-host fruits and vegetables from other areas where Medflies are present. In the event that emergency measures are required to address a pest risk, APHIS applies them to the extent they are necessary, and APHIS has no evidence to support the conclusion that clementines or other fruits and vegetables from other Medfly-infested areas pose the same risk as clementines from Spain. We have conducted extensive fruit cutting and inspection activities associated with imports of clementines and other fruits and vegetables from other areas, and have not found a single live Medfly larvae. As stated previously in this document and in the proposed rule, given that high Medfly populations in production areas in Spain in 2001 could have caused the infestations discovered that year, APHIS believes it has sufficient reason to adopt specific measures that it believes will ensure against a similar occurence in future years. If we had evidence that suggested an equivalent problem in other regions, we would require equivalent safeguards. The available evidence does not, however, support that course of action.

The interim rule for other cold treated commodities, nonetheless, provides that those commodities, like Spanish clementines, will be subject to post-treatment fruit cutting, though fewer of certain commodities will have to be inspected and cut due to their non-preferred Medfly host status.

Several commenters stated that the technical trapping protocol, type of trap, baits, frequency of inspection, *etc.,* used by the Spanish growers should mirror the same protocol that is used by APHIS within the United States. The commenters claim that should a temporary Medfly infestation occur in a U.S. production area, the citrus within the established quarantine area cannot, under any circumstances, move to market, and they note that, in contrast, APHIS has proposed to allow foreign origin fruit from permanently infested production areas to be brought into the United States with only the provisos that the pest detections in the export groves are relatively low and the fruit is cold treated. Some commenters also questioned whether cold treatment is actually available to domestic producers

in the event of a Medfly outbreak in the United States.

We do not agree that the technical trapping protocol, type of trap, baits, and frequency of inspection and other requirements regarding the Spanish clementine import program should mirror the same protocol that is used by APHIS within the United States for a reason the commenter has pointed out: Different requirements are warranted for fruit moving from Medfly-free areas in which there is an outbreak than for fruit moving from generally infested areas. The Spanish are not attempting to eradicate Medfly, nor does APHIS believe they have to do so in order to export fruit to the United States, provided they can mitigate the pest risk posed to the United States by their exports.

U.S. producers and agricultural officials have a longstanding policy to eradicate Medfly infestations if they are detected in the mainland United States.[9] Spanish producers use trapping as an indicator of the presence of Medflies in production areas, and use that indicator to trigger bait spray applications that are intended to lower Medfly population densities. U.S. producers and agricultural officials employ trapping programs to monitor for the presence of Medflies in free areas. For these reasons, APHIS does not believe there is a demonstrated need for trapping and bait treatment measures to be the same in Spain as they are in the United States. APHIS would, however, require equivalent measures if the intent of the Spanish program was maintaining Medfly freedom.

Furthermore, APHIS disagrees with the commenters' statements that citrus may not move from a U.S. area that is under quarantine for Medfly. In fact, under § 301.78–10(b)(3), APHIS allows the movement of regulated articles, which include citrus fruit, from quarantined areas provided they are treated with the same cold treatment schedule that we use for the importation of Spanish clementines. There are also other treatments available, as specified in § 301.78–10.

Several commenters noted that other countries will not accept U.S. fruit if it is 1.5 percent infested with Medfly.

Some countries will not accept fruit known to be infested with Medfly, and the United States is one of those countries. To clarify, we are not allowing imported Spanish clementines to be 1.5 percent infested or less upon arrival in the United States. Rather, we are requiring inspection and fruit cutting of 200 randomly selected fruit per shipment of clementines prior to cold treatment. If a single live Medfly is found during inspection in Spain, the entire shipment of clementines will not be eligible for export. If no infested fruit is found upon inspection, that provides a very high level of confidence (95 percent) that the shipment sampled has a low level of infestation (a level that cannot be detected via fruit cutting). Furthermore, according to our RMA, fruit that is 1.5 percent infested or less and that is cold treated has a low probability of carrying a mated pair of Medflies into a suitable location in the United States. If we find one live Medfly larva in a shipment of clementines at the port of entry in the United States, we will reject that shipment.

We suspect that the commenters doubt whether other countries would adopt a similar protocol in general for U.S. exports. Such a program would not seem to be necessary, since there currently is no Medfly infestation in the mainland United States. However, we do believe that the Spanish clementine import program could serve as an effective model for exports from Medfly infested areas in the United States to other countries. In the event that such a program is necessary, we would negotiate with foreign Governments to secure export opportunities for citrus and other Medfly hosts from Medfly-infested areas under this same protocol, and we would continue to allow interstate movements of such articles under the requirements of 7 CFR 301.78 through 301.78–10.

Cold Treatment

Several commenters noted that the time-temperature response surface model contained in the ORACBA analysis can be read to suggest that for treatment periods less than 16 days, a probit 9 level of phytosanitary security may not be achieved even at temperatures of 32 °F, 33 °F, or 34 °F, yet APHIS's revised protocol would allow treatment for only 12, 13, and 14 days, respectively, at those temperatures. One commenter recommended that, until the uncertainty is resolved regarding the lower temperatures and durations of cold treatment, the cold treatment protocol be kept at a minimum duration of 14 days. Other commenters urged APHIS to review data relevant to this subject that were recently developed in Australia and South Africa.

APHIS has obtained and evaluated data collected in Australia by its Department of Agriculture and Horticulture Australia regarding time/temperature combinations that provide apparent complete mortality of Medfly.[10] Copies of that data are available from the person listed under **FOR FURTHER INFORMATION CONTACT.** These data have also been factored into an updated version of the ORACBA analysis. In short, the data provide evidence that the longer durations of cold treatment (16 days/35 °F, and 18 days/36 °F) are likely to provide a very high level of quarantine security (probit 9 or above).

The specific South African data cited by commenters were not submitted to APHIS by commenters. We were able to communicate with the persons conducting the study, and the information they provided supports the cold treatment we are requiring under this final rule.

Regarding the question of whether cold treatment provides probit 9 mortality at all the proposed time/temperature combinations, APHIS agrees with the commenters that additional statistical or experimental evidence is necessary to continue to support the conclusion that the 12 days/32 °F and 13 days/33 °F combinations provide probit 9 mortality. However, as evidenced clearly by Figure 3 of the ORACBA analysis, there are sufficient data available to conclude that 14 days/34 °F, 16 days/35 °F, and 18 days/36 °F treatments do provide probit 9 level quarantine security.

Given that the calculations of risk in our RMA depend on the assumption that cold treatment provides probit 9 mortality, we have removed the 12 days/32 °F and 13 days/33 °F cold treatment combinations from this final rule, due to the unavailability of sufficient data to continue to support those time/temperature combinations as providing probit 9 mortality. Thus, the revised T107-a cold treatment schedule for clementines from Spain will require fruits to be treated according to the following schedule:

Temperature	Exposure period (in days)
34 °F or below	14
35 °F or below	16
36 °F or below	18

The revised ORACBA analysis provides statistical justification for our selection of the above schedule, and is based on all available data.

Some commenters noted that Spanish exporters claimed that their fruit was

[9] Hawaii is generally infested with Medfly and uses treatments to certify movements.

[10] De Lima, C.P.F, A. Jessup, and R. McLauchlan. 2002. ''Cold disinfestations of citrus using different temperatures X time combinations.'' Horticulture Australia Ltd. Project Number: CT96020.

cooled to 32 °F for 12 to 14 days in 2001, which is as long or longer than the revised protocol would require, and yet a substantial number of Medfly larvae survived that treatment. If the previous statement is true, asked the commenters, how is APHIS's proposed approach different from 2001?

We have conducted a review of available cold treatment records for shipments of Spanish clementines into the ports of Philadelphia, PA, and Elizabeth, NJ. The results of our review are as follows: (1) There was no clear pattern for the use of specific time/temperature combinations of cold treatment; and (2) though some shipments of clementines were treated for more days than were required at various approved temperatures, there is no evidence to suggest that the treatment time/temperature combinations cited by the commenter were used on more than a few occasions. In fact, the records show that in 2001, the 10 day/32 °F treatment schedule was the least used of the five options available, perhaps because shippers were hesitant to subject the fruit to the damage that can be caused by freezing temperatures.

While our review did reveal that, in some cases, treatments were applied for longer durations (several hours to several days) than was required under the previous treatment schedule, we have no direct evidence that fruit found to be infested with Medfly were treated for more time than was required under the previous treatment schedule.

Upon the detection of Medfly in Spanish clementines in 2001, APHIS was able to trace the initial interceptions to particular sea vessels, including the M/V Japan Senator and the M/V Green Maloy. The records for the M/V Japan Senator, which arrived in Elizabeth, NJ, on November 7, 2001, show that each of the eight sea containers imported on that vessel met only the minimum time/temperature combinations provided under the previous treatment schedule. The records for the M/V Green Maloy, which arrived in Philadelphia on November 11, 2001, show that some time/temperature combinations in the 12 compartments on the vessel met only the minimum standards of the previous treatment schedule, while other compartments were cold treated for as many as 3 extra days. Since APHIS cannot trace back the fruit that was found to be infested to a specific hold on either vessel, we cannot know whether the fruit was exposed to more cold treatment than was required. We do know, however, that the infested fruit was held for at least as long as the previous treatment schedule required, which suggests a failure of the previous schedule to provide near 100 percent mortality, but not necessarily a failure of the revised schedule.

Furthermore, the approach we use in this final rule also addresses the risk posed by high levels of infestation of imported clementines. There were no such restrictions on infestation levels in 2001.

One commenter claimed that APHIS's proposal to extend cold treatment is based exclusively on the recommendation made by a panel put together by APHIS, using studies and scientific literature that are not recent and not credible enough. The commenter stated that cold treatment should not be extended, as any extension should be based upon more detailed scientific studies with internationally accepted credibility.

Upon further analysis of all the available data, as stated above, APHIS is amending the cold treatment schedule to allow cold treatment for Medfly only at the longer time/temperature combinations (14, 16, or 18 days, at the temperatures listed above). This change is based on the results of the ORACBA analysis, which essentially combines the results of available cold treatment research and uses a model to assess and show the ability of certain time/temperature combinations to provide probit 9 mortality of Medfly. The ORACBA analysis does not contradict the recommendations of the cold treatment review panel that drew up the cold treatment recommendation document that was cited in our proposed rule. Rather, the ORACBA analysis shows that data are only available to support cold treatment at the longer time/temperature combinations suggested by the panel. Given the clarity of the available data, including data recently made available by the Australian Government, we are confident that our revised cold treatment is science-based.

Two commenters questioned whether APHIS allows the use of a single fruit temperature probe in a cold treatment container or ship hold, and stated that a single data point does not allow an estimate of the variation in temperature that normally occurs, and the protocol does not incorporate the necessary treatment time adjustment associated with this temperature variation. The commenters stated that there are very little published data on temperature variation in marine shipments, so the actual level of temperature variation in some shipments may be high.

APHIS's cold treatment protocols do not authorize the use of only a single data point in the load. Multiple temperature sensors are required (in the fruit pulp, as well as in the air), and readings from these sensors must print out once an hour during the entire voyage. The larger the cargo space, the more sensors that are required, and sensors must be checked and calibrated before each treatment begins. Furthermore, all cold treatment containers and compartments must be checked and certified by APHIS, and APHIS verifies the treatment records upon arrival of the imported commodity. Given that APHIS requires the use of multiple sensors, given that we require all temperature sensor readings to meet the appropriate treatment schedule, and given the certification requirements for treatment equipment, we are confident that our existing procedure accounts for any temperature variation that may occur during cold treatment.

One commenter expressed concern that fruit subject to break bulk shipment and that is not pre-cooled will take 100 hours to reach desired temperatures. Other commenters asked exactly when cold treatment is considered to begin. Others questioned whether the cold chain is broken when fruit is brought to the port for loading onto the ship. Another commenter noted that, under break bulk shipping, cooling fans are not normally operated until 75 percent of the cargo hold is loaded, and stated that this condition further exacerbates the problem of breaking the cold chain.

Cold treatment is not considered to have begun until all temperature sensors within a particular compartment in a sea vessel or a container reach treatment temperature or below. If the cold chain is broken at any time during treatment, the treatment must start over, and must be completed in its entirety. As stated above, multiple temperature sensors are used (in the fruit pulp, as well as in the air), and readings from each sensor must be printed out once an hour during the entire voyage.

APHIS recommends that the fruit be pre-chilled before loading. However, many foreign seaports have not built cold-storage facilities, and precooling is not essential given that treatment according to the schedules described in this document provide probit 9 mortality. Loading warm fruit mandates a later starting time for the treatment, often several days after the ship has left the port. In some cases, the required number of days may not have elapsed by the time the ship reaches its destination in the United States. This delay may be minimized at the port of embarkation by loading only one compartment at a time, and running the

cooling fans during loading. In cases where the treatment is not complete upon arrival, the ship must either remain in port until the cold treatment is completed in the last compartment, or the fruit is consigned to a cold-treatment warehouse on shore, where treatment can be completed or re-initiated.

Several commenters stated that APHIS should delay the final rule until additional research on the application of cold treatment is completed, as it has not established why the previous program failed. The commenters cited an ongoing APHIS study to investigate temperature distribution in cold treatment holds in ships to see whether it is necessary to increase the number of temperature sensors in the holds.

APHIS's review of the application of cold treatment to shipments of clementines that produced live Medfly larvae yielded no evidence that treatment was improperly applied. Given our analysis of available data on cold treatment, which is documented in the ORACBA analysis, we are confident that the revised cold treatment schedule for Spanish clementines will provide probit 9 mortality. Though there is a temperature mapping study underway regarding the application of cold treatment (which was underway before the 2001 Spanish clementine shipping season), we do not expect the results of the study to suggest dramatic changes to existing guidance on the deployment and placement of sensors in cold treatment compartments and containers. Given the clarity of the available cold treatment data, as discussed in the ORACBA analysis, the probit 9 mortality of cold treatment, and the other mitigating measures contained in this rule, we see no need to delay this final rule.

Two commenters stated that APHIS's cold treatment protocol should require that more temperature data be collected in each container to determine the variation in temperature of a load, as this is the only way to ensure that fruit is subject to disinfestation temperatures for the required time period. They claimed that the current protocol potentially allows significant portions of a load to be delivered without adequate treatment, and that a minimum of three temperature probes per unit of fruit are needed. One of the commenters stated that USDA research reports published in the 1980's indicate that the fruit temperature range in a refrigerated container is typically about 3 °F, and based on that figure, single temperature monitors measuring average temperatures could fail to reveal temperatures above the level permitted by the treatment schedule.

APHIS requires the use of multiple sensors, given that we require all temperature sensor readings to meet the appropriate treatment schedule, and given the certification requirements for treatment equipment, we are confident that our existing procedure accounts for temperature variation that may occur during cold treatment.

For shipping containers, we require a minimum of three temperature sensors to be placed in fruit pulp. For sea vessel compartments, we require a minimum of four temperature sensors, but the number required may be larger, depending on the size of the treatment compartment. See Chapter 6 of the Plant Protection and Quarantine (PPQ) Treatment Manual [11] for additional information.

Several commenters noted that in December 2001, when the Government of Spain proposed that APHIS extend the cold treatment on two of the vessels then docked in U.S. ports with a view to permitting the fruit to enter the United States if the treatment were successful, APHIS rejected the approach, saying it had ''no data to support the efficacy of extending the time or temperature of the approved cold treatment.'' These commenters claimed that APHIS still has no such data.

At the time of the Government of Spain's proposal, APHIS had not conducted its review of the available data on cold treatment, and would not suggest a remedial measure without a basis in science. Furthermore, for the reasons stated previously in this document, we must disagree with the commenters' conclusion. We believe there are adequate data available to support our revised cold treatment protocol.

One commenter stated that the effects of precooling on the ability of Medflies to survive cold treatment are not known and pointed out that the draft workplan for the clementine import program states that ''Additional long-term research will be needed to determine if the rate of precooling has an effect on insect tolerance of the cold treatment.''

Studies on other fruit fly species have shown that pre-cooling does not have a significant effect on fruit fly mortality. Whether pre-cooling would have a beneficial effect with respect to Medfly mortality remains to be determined. If so, it is possible that adjustment (*i.e.*, shortening) of the treatment schedule would be possible, as available evidence shows that the extended cold treatment required under this final rule already provides quarantine security equivalent to the probit 9 level.

Two commenters stated that it is possible that Medflies in Spain may be able to withstand colder temperatures than can more tropical populations of Medflies since most, if not all, cold treatment work has been done on strains of Medfly other than that found in Spain.

While it is possible that Medflies in Spain may be able to withstand colder temperatures than some other Medflies, there is no evidence available to support or verify that supposition. There is, however, evidence, which is cited in our risk mitigation analysis, that Medflies have not established in the colder inland areas of Spain where they would be expected to occur if they had become adapted to colder conditions. Indeed, the distribution of Medflies in Spain is consistent with a Mediterranean climate, not a temperate or cold environment.

One commenter stated that Medfly larvae have the capability to overwinter in freezing conditions.

Larvae may survive brief periods (*e.g.* 2 to 3 days) of exposure to freezing conditions, especially if protected from actual freezing by host fruit. Available evidence (cited in the RMA) indicates that larvae cannot survive long-term exposure (*i.e.*, 3 to 4 days) to freezing temperatures.

One commenter stated that the statement in the proposed rule that APHIS inspectors will examine the cold treatment data prior to clearing an incoming shipment is very troubling, as it infers that this might not have been occurring previously even though the PPQ Treatment Manual cold treatment protocol requires a review of the treatment logs or charts for any irregularities that might have occurred during treatment (and, time permitting, examination of the load and compartments) prior to clearance of any cold treated shipment.

APHIS always reviews the cold treatment records of each compartment or container that contains imported cold treated fruits and vegetables. For each imported shipment, an inspector reviews the treatment charts to ensure that the treatment cold chain was uninterrupted and that the time/temperature combinations meet the required treatment schedule. Our statement in the proposed rule was intended to reinforce this requirement, not to imply it had not been applied.

One commenter stated that methyl bromide fumigation is a proven treatment meeting a probit 9 standard of quarantine security with regard to Medfly infestation, and that based on

[11] See *http://www.aphis.usda.gov/ppq/manuals/pdf_files/TM.pdf.*

applications of methyl bromide to mandarin crops (a citrus fruit similar to clementines), methyl bromide treatment would have minimal aging effects on the fruit and little to no cosmetic effects provided that the fumigation was properly applied. The commenter pointed out that the established PPQ treatment schedules for citrus for methyl bromide use is listed as T101–w–1–2 in the PPQ Treatment Manual.

The treatment referred to by the commenter is listed in the PPQ Treatment Manual as an approved Medfly treatment for citrus moving interstate within the United States. However, APHIS only employs that treatment for use as a precautionary treatment for fruit moving from areas near areas where Medfly has been trapped. Treatment T101–1–2 does not provide probit 9 mortality, and there is no approved methyl bromide treatment for citrus that provides probit 9 mortality of Medfly.

Confidence Building and Limited Distribution

Many commenters had concerns about the potential limited distribution of Spanish clementines. The proposed rule explained that APHIS was considering restricting the distribution of imported Spanish clementines to non-citrus producing States for the first year of the program as a confidence-building measure. With limited distribution, clementines would not be eligible for distribution in California, Arizona, Texas, Florida, Louisiana, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam or American Samoa. Four commenters stated that such a requirement is unwarranted and unjustified given the findings of the RMA, and especially given the new stringent controls included in the proposed rule. One commenter stated that the requirement would be contrary to the provisions of the SPS Agreement, which requires measures to be based on scientific principles. Twelve other commenters stated that limited distribution was warranted, and each had different ideas as to what APHIS's limited distribution protocol should actually entail. Some commenters claimed that distribution should be allowed only in States without Medfly host material and conditions for Medfly survival. Others stated that distribution should not be allowed in citrus-producing States or States that border citrus-producing States. Other commenters agreed with APHIS's original suggestion. One commenter suggested that APHIS limit distribution for 2 years rather than 1 year to build added stakeholder confidence in the new program.

APHIS has determined that, in order to ensure the success of our new approach, it is necessary to limit the distribution of Spanish clementines to non-citrus producing States during the upcoming (2002–2003) Spanish clementine shipping season. This means that, under § 319.56–2jj(i) of this final rule, the importation and distribution of Spanish clementines will not be allowed in Arizona, California, Florida, Louisiana, Texas, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam and American Samoa [12] during the 2002–2003 shipping season, and all boxes of Spanish clementines will be required to bear the following statement: ''Not for distribution in AZ, CA, FL, LA, TX, Puerto Rico, and any other U.S. Territories.'' All labeling must be large enough to clearly display the required information and must be located on the side of the cartons to facilitate inspection. APHIS has determined that this measure is necessary to provide added protection to areas in the United States that are most vulnerable to Medfly establishment.

Our strategy is limited to fewer States than some commenters would have preferred because we do not believe it is necessary, especially given the RMA's characterization of the likelihood that a mated pair could enter the United States via imported Spanish clementines, for us to temporarily prohibit the distribution of Spanish clementines in any States except those where Medfly could become established for the long term. We acknowledge that Medfly attacks many crops other than citrus, and that those crops are produced in some non-citrus producing States, but those States do not have favorable climatic conditions and sufficient host material present throughout the year to support Medfly establishment. APHIS is adopting this requirement on a temporary basis to protect the most sensitive agricultural production areas of the United States from infestation with Medfly. Therefore, we are confident that we are well within our rights as a WTO member country.

Several commenters stated that limited distribution is not good regulatory policy and does not work, as shipments of commodities entering California from other States have been found to contain live Medfly larvae. The commenters noted that the California Department of Food and Agriculture routinely finds exotic pests in parcels handled by the U.S. Postal Service and commercial delivery firms at various locations in California and stated that USDA cannot implement a 100-percent effective program to stop transshipment of clementine fruit from other States into California.

APHIS has had success with compliance systems for limited distribution of fruits and vegetables. The keys to this success have been communication, labeling, trade verification, and enforcement. Communication of regulations for limited distribution has been made via public notice, APHIS Industry Reports, internet websites, direct mailings to members of the Produce Marketing Association and American Trucking Association, and issuance of compliance agreements and permits.

Distribution statements are required on the shipping boxes for all limited distribution commodities, as will be the case for Spanish clementines. These statements inform the importer, shipper, or market owner of the areas in which the products are prohibited from being distributed. Verification of commodity and required labeling takes place at the initial port of entry and at internal markets within the United States. Commodities found to have been moved in violation of limited distribution requirements are recalled and/or destroyed. Reports of illegal movement are investigated and civil penalties are issued to violators as appropriate.

For example, APHIS has monitored importation and compliance with the limited distribution of Mexican avocados since 1997. Compliance has been 98 to 99 percent by volume during the past 5 shipping seasons. In spite of an increased volume of imports, the 2001–2002 season saw a notable decline in violations over past years. In the 2001–2002 shipping season, APHIS had three violations under investigation for illegal transshipment to Tennessee and Georgia. Approximately 85 boxes were found in several unapproved markets, of which 80 (1 shipment) were reported to agricultural officials by the receiver in Georgia and returned.

We are confident that limited distribution of Spanish clementines can be enforced and can work, as shown by past experience.

Two commenters stated that APHIS should consider a trial period during which limited volumes of clementines would be allowed to be imported to northern-tier States for a minimum of one shipping season, so as to ensure that the system works.

[12] Hawaii produces citrus, but is generally infested with Medfly, and therefore is not included in the list of citrus-producing States where distribution of Spanish clementines will be prohibited for the 2002–2003 shipping season.

As stated in previous responses, APHIS is confident that limiting distribution to non-citrus producing States should be adequate to provide confidence that the new approach works, especially given the very low probability of a Medfly infestation identified in the RMA, which does not even consider limited distribution as a mitigation measure.

Operational Workplan

Several commenters stated that, in order to truly understand whether or not the risk mitigation measures chosen will provide an appropriate level of protection, APHIS's analysis must contain the workplan that will be used to implement the mitigation strategy chosen. The commenters said that, without the workplan, there is no way for any cooperator or other stakeholder to ascertain if the measures chosen will be effective.

The workplan referred to by commenters is, in essence, an operational agreement between APHIS and other parties (the Spanish Government and a group representing clementine exporters) as to the responsibilities of each for the operation of the preclearance program. The provisions of the workplan intertwine with the regulations and are more detail-oriented.

When APHIS designs a regulatory approach for a particular issue, it places or proposes to place all measures deemed to be necessary according to risk analysis in the Code of Federal Regulations. If a specific measure is not relevant to our calculations of risk, that measure may be included in the regulations, and it may not. There is no bright line between what is included in a workplan and what is included in the regulations, save that the regulations must include all provisions necessary to properly enforce the approach evaluated by risk analysis.

As a longstanding matter of policy, APHIS does not make preclearance workplans available for public comment, nor does it have the intention of doing so in this case, though APHIS has, on some occasions, consulted stakeholders (who are not signatories of the workplan) on the contents of such workplans. In fact, at the request of stakeholders, APHIS has met with several State plant health officials as to the content of the preclearance workplan for this rulemaking. Nonetheless, APHIS does not believe that the contents of the workplan should be included in the rulemaking at hand.

To elaborate, APHIS has received a number of comments urging specific handling of trapping and monitoring activities in Spain—*i.e.*, commenters have suggested the use of a certain fruit fly traps, and certain spacing of trap locations. APHIS believes that such points do not have to be included in the rulemaking at hand, given that the rule is designed to provide for a measure of performance that will be demonstrated primarily via inspection and fruit cutting. Moreover, regardless of what trap is used and how the traps are spaced, under this rule, growers of Spanish clementines must ensure that products submitted for export to the United States have a low Medfly infestation level (a level that cannot be detected via fruit cutting). If they do not meet this standard, clementines intended for treatment will be rejected. APHIS will reject a shipment of fruit presented for export if it is found to contain live larvae upon fruit cutting. In short, if the fruit is found to be infested, it will be rejected. If fruit is not found to be infested, the extended cold treatment will provide that the fruit can be safely imported.

One commenter stated that without the workplan, there is no way for any cooperator or other stakeholder to ascertain if there is sufficient APHIS oversight planned in Spain. The commenter stated that the workplan should allow APHIS unfettered access to production areas and packing and shipping facilities, regular auditing of Spanish records, and other procedures to ensure that APHIS personnel verify compliance with the terms and conditions of the operational workplan.

The requirements described in the proposed rule and this rule clearly state that the Spanish Medfly management program must provide that clementine producers allow APHIS inspectors access to clementine production areas in order to monitor compliance with the Medfly management program, and that all trapping and control records kept by the Government of Spain or its designated representative must be made available to APHIS upon request. APHIS will have inspectors working full time in Spain on the verification of the Spanish clementine import protocol-including inspections at the port of export and production area monitoring. The inspectors will be present to conduct and monitor fruit cutting at the exporting port, and will be able to review records kept by the Government of Spain regarding its management program. Only APHIS personnel and personnel of Spain's Plant Protection Service will be allowed to conduct fruit cutting, and any fruit cutting performed by the Government of Spain will be supervised by APHIS.

Infestation Levels, Inspection, and Fruit Cutting

Several commenters expressed concern or confusion over our reference to a 1.5 percent level of infestation. One commenter stated that allowing 1.5 percent of imported Spanish clementines to be infested is unacceptable, and that 1.5 percent is a high level of infestation of any pest, even in the field, while several other commenters claimed that our selection of that level of infestation is not supported by science.

We recognize that our reference to a 1.5 percent level of infestation of Spanish clementines may have caused confusion among commenters. To clarify, under this rule, the detection of a single live Medfly during any sampling of clementines will result in the rejection of the shipment sampled. Hence our actual target infestation level of fruit is zero, not 1.5 percent. However, as a practical matter, it is impossible to sample a sufficient number of fruit to arrive at a statistically valid conclusion that the fruit sampled is Medfly-free. Therefore, we have selected a sampling rate (200 fruit per shipment) that provides a high level of confidence that we will be able to detect low levels of Medfly infestation in clementines from Spain. This particular level of inspection was selected because inspection and fruit cutting at lower rates would provide decreased confidence in our ability to detect low-level infestations of fruit, and because inspection and fruit cutting at higher rates would either not be practical from an operational standpoint or would not measurably improve confidence in our ability to detect such infestations. While this sampling rate was represented in the proposed rule as a measure that provided 95 percent confidence that we could detect Medfly in fruit that were no less than 1.5 percent infested, the same sampling rate will also provide a relatively high degree of confidence that even lower levels of Medfly infestation could be detected. For example, based on established hypergeometric sampling rates shown in the table below, we would still have a relatively high level of confidence (75 percent) that we could find an infested fruit if the unit sampled is only 0.70 percent infested with Medflies.

Percentage of fruit infested with Medflies	Confidence in detection, assuming 200 fruit sample [1] (in percent)
0.05	9.52
0.10	18.13

Percentage of fruit infested with Medflies 0.05 9.52%	Confidence in detection, assuming 200 fruit sample [1] (in percent)
0.11	19.76
0.12	21.36
0.20	32.99
0.30	45.17
0.40	55.15
0.50	63.32
0.60	70.00
0.70	75.47
0.80	79.95
0.90	83.61
1.00	86.61
1.10	89.06
1.20	91.06
1.30	92.70
1.40	94.04
1.50	95.14
1.60	96.03
1.70	96.76
1.80	97.36
1.90	97.85
2.00	98.24

[1] Assuming shipments of clementines are within the maximum and minimum sizes described in this final rule (166,000 to 4.5 million fruit).

While this sampling rate (200 fruit per shipment) provides a high level of confidence that we can detect low levels of infestation, we acknowledge that some small percentage of infested fruit may be missed during sampling. However, as discussed elsewhere in this document, the calculations of our RMA suggest that the application of cold treatment to such fruit would result in a very low probability that such fruit could serve as a pathway for Medfly to enter the United States into a suitable area.

If exporters of Spanish clementines are to avoid having shipments of clementines routinely rejected by inspectors, they must ensure that the infestation level of fruit is below detectable levels. Furthermore, given that APHIS may shut down the export program if shipment rejection rates rose above 20 percent in a given month, we believe that an appropriate target maximum infestation level for fruit presented for export would have to be well below 1.5 percent.

Again, we did not intend to identify a 1.5 percent level of infestation as a target infestation level for the fruits in the field. Given this fact, and the confusion expressed by commenters, we believe it is necessary to clarify and revise part of our proposal. Specifically, § 319.56–2jj(c)(1) of our proposed rule required that ''* * * bait treatments * * * be applied in the production areas at a rate appropriate to maintain the level of infestation of clementines by Mediterranean fruit flies at 1.5 percent or less.'' This proposed language was inappropriate, because maintaining levels of infestation at 1.5 percent would result in the majority of shipments of clementines being rejected. In addition, the responsibility for operating the Medfly management program in Spain resides with the Spanish Government, and this rule contains no provisions for APHIS or any other party to verify levels of infestation of clementines in the field. Rather, this rule provides for such verification through examination of clementines at the port of export. Therefore, we are amending § 319.56–2jj(c)(1) in this final rule to require that ''* * * bait treatments * * * be applied in the production areas at the rate specified in Spain's Medfly management program.'' We are making this revision because, while we do believe bait treatments need to be applied in order to ensure low levels of infestation of fruit that are presented for export to the United States, we do not believe it is necessary or appropriate for APHIS to specify the level of infestation that must be maintained in production areas via those bait treatments. We are confident, however, that we can appropriately monitor the infestation level of fruit presented for export via inspection and fruit cutting of 200 randomly selected fruit.

One commenter stated that APHIS last surveyed the Spanish clementine growing regions in December 2001 and has no more recent data. The commenter stated that, given the age and unreliability of Spanish Government data on trapping and pest populations, APHIS cannot determine with any confidence the type of spraying required and the duration and frequency of the treatments necessary to reach the 1.5 percent desired level.

APHIS believes that a well-maintained trapping program can be used as an accurate indicator of the localized prevalence of Medflies. We do not believe that trapping is precise enough to accurately determine infestation levels of fruit, though it is useful as an indicator for when bait treatment applications are necessary. APHIS believes that inspection and fruit cutting provide a more effective means to determine the level of infestation in fruit submitted for cold treatment than can trapping. For this rule, we use inspection and fruit cutting as a means of determining the level of infestation of Spanish clementines.

Two commenters claimed that APHIS has presented no data showing that an infestation rate of 1.5 percent or less, combined with cold treatment, will successfully prevent mated pairs of live Medfly larvae from entering the United States. The commenters noted that direct sampling data compiled by APHIS inspectors from vessels unloaded at ports of entry in 2001 showed an overall average infestation rate (0.16 to 0.18 percent) that is an order of magnitude lower than the maximum infestation rate (1.5 percent) contemplated under the proposed rule, yet there were multiple finds of live Medfly larvae in Spanish clementines last year. The commenters questioned the particular significance of a 1.5 percent infestation level, asked why it is a critical control point, and stated its selection appears to be arbitrary.

As stated in this document, we believe it is highly likely that infestations of imported Spanish clementines were due to the inability of the cold treatment schedule to provide probit 9 mortality. We are confident that the revised treatment schedule, in combination with the reduction in Medfly infestation levels ensured via fruit cutting, provide that needed quarantine security.

Regarding the infestation levels in 2001, APHIS acknowledges that all samples taken after the initial infestations of 2001 were detected revealed low level infestations. It was not possible to randomly (that is, in an unbiased manner) sample fruit from shipments that had already been distributed and/or sold through retail outlets; given that those early-season shipments are the origin of first interceptions of live Medfly larvae in 2001, APHIS is unconvinced that the level of infestation observed in samples taken later in the shipping season are representative of the level of infestations of early season shipments. The unprecedented, numerous reports of live larvae from retail outlets and ports suggest that high densities of live larvae were indeed associated with early season shipments.

As stated earlier in this document, the sampling rate used for inspecting clementines presented for export was selected primarily because it provides a high level of confidence of detecting low level infestations of clementines. For this reason, we do not agree that its selection was arbitrary. We believe that the RMA provides ample evidence that the level of Medfly mortality caused by cold treatment (probit 9 or above), in conjunction with the low levels of pest infestation ensured via fruit cutting reveal that there is an extremely low likelihood that a viable mated pair of Medflies would enter the United States with imported Spanish clementines.

Furthermore, as discussed earlier in this document, APHIS is unconvinced

that the level of infestation observed in samples taken later in the shipping season (presumably, the samples referred to by the commenter) are representative of the level of infestation of early season shipments. APHIS has assumed that the infestations associated with early season shipments were higher than average. This is a reasonable assumption based on the available evidence, which includes the unprecedented and numerous reports of live larvae, the higher than average trap captures in Spain during the growing season, and the higher than average temperatures in Spain during the growing season.

One commenter stated that the 1.5 percent value was chosen not because it was shown to provide any particular level of phytosanitary security, but because 200 fruit per shipment was the maximum amount APHIS felt it was capable of inspecting in a reasonable amount of time and at reasonable expense.

As stated in response to the previous comment and others, the 200 fruit per shipment sample size was selected primarily because it provides a practical means to verify with a high level of confidence that fruit is infested at low levels. We stated in our proposed rule that we consider fruit cutting (200 randomly selected fruit per shipment) to provide a statistical basis on which we can infer whether the shipment inspected is 1.5 percent infested or greater. The use of this measure in combination with cold treatment will result in a very low probability that a viable mated pair of Medflies would enter the United States with imported Spanish clementines.

Several commenters noted that after the first shipping season, the pre-treatment sampling rate would not ensure with 95 percent confidence that sampled fruit is 1.5 percent infested or less, but rather that is 3.0 percent infested or less. The commenters also noted that in future years, the sampling rate could be reduced to 76 fruit per shipment, and the sampling would provide only a 90 percent confidence level that the infestation rate is no greater than 3 percent. The commenters questioned how the findings of the risk management analysis are affected by changing the sample size from 200 to 100 to 76 fruit. Some of the commenters noted that the lower sampling amounts are inconsistent with USDA's Pre-Clearance Program Guidelines, which define ''quarantine security'' as ''a level of control which assures a 95 percent confidence level that a pest population will not become established based on the inspection/treatment certification procedure(s) used when considering the biology and ecology of the pest species.'' Commenters stated that there is no biological justification for reducing the sampling rate in one year based on rejection rates of shipments in the previous year since infestation rates in one year may differ substantially from rates a year earlier, and stated that APHIS has provided no evidence that there is any correlation between infestation rates in different years.

APHIS does not necessarily agree with the commenters' assertion that there is no biological justification for reducing the sampling rate in one year based on rejection rates of shipments in the previous year, though we do acknowledge that we did not provide a clear justification for such a measure in the proposed rule. To elaborate, if orchards in Spanish clementine productions areas are well managed for Medfly on an ongoing basis according to specific measures contained in a pest management program, then there would be a clear connection between the Medfly populations in those areas from one year and the next. Nonetheless, given that the RMA does not consider the effect of decreasing the pre-treatment fruit cutting sample size from one year to the next, in the final rule we are simply requiring that fruit be cut at a rate of 200 fruit per shipment, as that level of inspection is the only one evaluated in the RMA.

Two commenters stated that the maximum size of a shipment or lot should be set according to the number of boxes, not the number of pallets, and noted that the maximum lot size specified in the rule appears to be smaller than that specified in discussions regarding the program workplan. Several commenters expressed concerns over our explanation for what constitutes a ''shipment'' of clementines under the proposed rule. Those commenters suggested that the rule needs a clear definition of the term ''shipment'' as it relates to cutting requirements, and argued that the proposed rule does not specify how it will be made clear, in advance of an inspection, what constitutes the particular ''shipment'' when fruit is presented for inspection.

As pointed out by one commenter, the maximum size of shipment described in the proposed rule was 120 pallets (approximately 43,243 boxes). This figure was incorrect, as we allow a maximum size shipment of 200,000 boxes (555 pallets) under the operational workplan. We have corrected this error in this final rule.[13] Further, due to the confusion caused by our use of the terms ''shipment'' and ''lot,'' we are making changes in the final rule based on these comments. In our final rule, a *lot* of clementines is considered to include a number of units of clementines that are from a common origin (*i.e.*, a single producer or a homogenous production unit[14]). The definition of the term *shipment* depends on the context in which it is used. Specifically, the definition depends on whether or not fruit has been treated. The term can refer to one or more lots of clementines that are presented to an APHIS inspector for pre-treatment inspection. Such a shipment may not include more than 200,000 boxes of clementines (555 pallets). The term can also refer to one or more lots of clementines that are imported into the United States on the same conveyance. These definitions are included in a revised § 319.56–2jj(k). Furthermore, inspectors must be able to easily distinguish one shipment from the next, and exporters are required to present their shipments for inspection in an orderly manner to facilitate inspection.

One commenter stated that the proposed rule does not say what is meant by the term ''orchard,'' and requested that APHIS clarify the term's meaning. The commenter noted that it is unclear how APHIS will determine whether two shipments with infested fruit are from the same ''orchard'' or how APHIS will determine the bounds of the ''orchard'' that is to be removed from the export program.

We have added a definition for the term ''orchard'' to § 319.56–2jj(k). For the purposes of this rule, the term ''orchard'' refers to each plot on which clementines are grown that is separately registered in the Spanish Medfly management program. Some orchards could be owned by one person, and some could be owned by several persons (in Spain, such cooperatives are called ''homogenous production units''). Some orchards could be less than an acre in size, while others could include hundreds of acres. APHIS will be able to determine the origin of infested fruit via box markings that are required

[13] This change has no effect on calculations of risk, as the same level of confidence (95 percent) is provided by inspection and cutting 200 fruit out of either 120 pallets or 555 pallets, according to hypergeometric sampling rates.

[14] A homogeneous production unit is a group of adjacent orchards in Spain that are owned by one or more growers who follow a homogeneous production system under the same technical guidance. The fruit produced by these units is pooled and packed together, and all orchards in the group are regulated as one unit in the event that traceback of infested fruit is necessary.

under this final rule. The box markings will provide a means to identify the particular orchard owner or homogeneous production unit from which infested fruit originated. In order to confirm that fruit are eligible under the export program, APHIS checks the box markings on cartons submitted for cold treatment to verify the orchard's status in the export program.

One commenter noted that the pretreatment fruit cutting sample size represents too small a percentage of the actual sample itself. The commenter noted that the samples represent .0012 percent of the smallest shipment of fruit, and .0002 percent of the largest shipment respectively. The commenter stated that inspecting and cutting a small random sample of fruit does not ensure the shipment is clean prior to cold treatment.

These sampling techniques are not designed to ensure that fruit is pest-free. Rather, sampling is intended to provide confidence that the infestations levels in fruit are low enough to ensure a low probability that a viable mated pair of Medflies would enter the United States via imported Spanish clementines. As stated in response to the previous comment, the maximum size of a shipment would be 200,000 boxes, containing approximately 4.5 million fruit. Even so, according to established hypergeometric sampling rates, whether cutting 200 fruit out of (1) a 166,050 fruit sample or (2) a 4.5 million fruit sample, if samples are randomly selected, the negative results would provide 95 percent confidence that the unit sampled is less than 1.5 percent infested.

One commenter stated that if Medflies at any stage of development are discovered in two or more shipments in one season from the same orchard, the orchard should be removed from the export program until it can certify compliance with Medfly management and commodity export programs, rather than only being removed for the remainder of the shipping season.

APHIS believes that fruit cutting is the most effective means to determine the infestation level of fruit presented for cold treatment, and thus does not agree that such a review is needed to qualify an orchard for re-entry into the export program. If the orchard is not managing Medfly populations effectively, that fact will be evident in fruit cutting required under this rule.

One commenter stated that APHIS should specify the cutting rates and procedures that will be used once the fruit reaches the United States or the basis on which the rates will be determined.

Post-treatment fruit cutting is not considered as a mitigation measure in the calculations of risk of the RMA. Since the RMA estimates a very low probability that a viable mated pair of Medflies would enter the United States with imported Spanish clementines under the other provisions of this rule, we see no need to specify the level of post-treatment fruit cutting in the rule itself. We will continue to require post-treatment fruit cutting of clementines, and will cut 1,500 fruit per bulk shipment and 150 fruit per shipping container for the first shipping season. Sample sizes may decrease in future years based on the success of the program.

Two commenters claimed that the reliability of fruit cutting as a sampling technique is questionable, at best. One of those commenters cited studies indicating that, on average, inspectors will identify only 35 percent of infested fruit, noted that the infestation rate of Spanish clementines could actually be as high as 4.3 percent during the first shipping year when the 1.5 percent limit applies (1.5 percent ÷ 0.35 = 4.3 percent), and argued that cutting a statistically determined sample will not ensure that the infestation rate on fruit accepted for shipment does not exceed 1.5 percent. The other commenter stated that the effectiveness of inspection is dependent on both the skill and qualifications of the personnel carrying out the exercise and the standardization of the activity. The commenter stated that without assurances that the fruit cutting will be undertaken in a uniform, standardized manner and by fully qualified inspectors, there can be no confidence that these procedures, whether applied pre-or post-cold treatment, can accurately measure whether the infestation level in the groves is 1.5 percent or less, or that the Medfly control program, including cold treatment, has been effectively applied.

Inspection is a measure used worldwide to mitigate the risk posed by pests that may be present in imported agricultural commodities. APHIS inspectors are trained to find pests in agricultural commodities, and our pest interception records for the past 17 years support this. Since 1985, we have intercepted 485 fruit flies in *Citrus reticulata*, with 38 of those being Medflies.

The RMA discusses the reliability of fruit cutting, and discusses the effect of that variability on its calculations. Given the characteristics of clementines-they are small, easy to peel and cut, and their pulp is translucent-we believe our inspectors will be able to detect Medfly infestations in imported clementines with a high level of confidence. Further, we wish to clarify again that we are not attempting to determine the level of infestation of fruit in the groves where they grow. We are simply attempting to ensure that fruit presented for treatment is infested with Medflies at low levels (*i.e.*, levels that cannot be detected via fruit cutting), as discussed earlier in this document.

Remedial Measures

Two commenters stated that if live larvae are detected in imported Spanish clementines, the investigation should be performed jointly by APHIS and Spain. The commenters requested that APHIS ensure that access to all relevant data and samples is provided to the importer and the Spanish authorities to permit independent verification of the findings of the U.S. inspectors.

APHIS is not opposed to Spain participating as appropriate in an investigation that may be necessary if Medflies are found in imported Spanish clementines, and we will share data relevant to such findings with the Spanish. However, APHIS will not delay any part of such an investigation based on the availability, or lack thereof, of Spanish Government personnel.

Several commenters stated that fruit should not be destroyed if it arrives at a U.S. port and (1) treatment has not been properly applied or (2) fruit are found to be infested. The commenters expressed concern that the proposed rule allows for the destruction of improperly treated or infested fruit, and suggested that APHIS apply the least drastic measures necessary at the port of entry in the event that Medfly is detected in Spanish clementines.

APHIS gives fruit importers the choice of what to do with shipments of fruit that are found to be infested with pests, unless the exporter's choice poses a risk that pests could be introduced into the United States. For instance, APHIS would not require the destruction of fruit that is found, upon inspection, to be infested with Medflies if the fruit can safely be reexported.

One commenter asked if APHIS has ever considered requiring exporting countries to put up a performance bond to ensure against the devastation of American agriculture in the event that legally imported fruit introduce serious agricultural pests into this country.

The idea of a protective bond to be paid by a foreign region to U.S. producers in the event that imported fruit causes a catastrophic pest emergency in the United States is not a new idea, nor is it a practical one. Such ''insurance'' against pest infestation and loss of agricultural production has been

determined to be contrary not only to the will of foreign exporters, but to the will of domestic exporters, who would be expected by other countries to put up similar bonds for their exports. The matter is further complicated by the fact that it is very difficult to tie an outbreak to a specific source, as per past experience. For these reasons, the use of such bonds is considered impractical.

One commenter stated that the handling of potentially infested cargo at ports of entry is subjective and criteria for suspension of the program is ambiguous.

The regulations do not cite specific courses of action to be followed in the event that infested fruit are intercepted at the port of entry, as each such situation could require a unique reaction. APHIS believes that decisionmaking related to such events is best handled on a case by case basis, and we believe our position is well within the authority given to the Secretary by Congress.

One commenter questioned whether APHIS, upon finding live Medflies in imported Spanish clementines, would allow consignments which are en route to be inspected, possibly at a higher rate, with appropriate action taken on a case by case basis.

As stated in the proposed rule and in this final rule, if a single live Medfly in any stage of development is found in a shipment of clementines being imported into the United States, the shipment will be held until an investigation is completed and appropriate remedial actions have been implemented. If APHIS determines at any time that the safeguards contained in the regulations are not protecting against the introduction of Medflies into the United States, APHIS may suspend the importation of clementines and conduct an investigation into the cause of the deficiency.

Risk Analysis

One commenter stated that the RMA is not (and does not purport to be) a risk assessment, and noted that, according to the IPPC standard, a pest risk assessment—which evaluates the probability of the introduction and spread of a pest—should be performed as a predicate to conducting a risk mitigation analysis to select the most appropriate pest risk management options. The commenter claimed that APHIS has not performed a pest risk assessment as a predicate to conducting the RMA, and thus commenters do not know what APHIS believes to be the probability of the introduction of Medfly under the baseline or mitigated scenario, and it is not possible to determine whether APHIS has selected the most appropriate management options to mitigate the identified pest risk.

The events of the 2001 Spanish clementine shipping season suggested that a review of risk mitigation for Medflies was justified, and the risk mitigation document is such a review. Based on the updated decision sheet [15] contained in Appendix 4 of the RMA, and based on more than 20 years of previous imports of Spanish clementines, we have no reason to believe that there are other pests of quarantine significance that require additional risk mitigation, and therefore disagree with the commenter's claim that we have not conducted a pest risk assessment. Indeed, we evaluated the risk posed by all known pests of clementines, and our analysis is documented in the decision sheet, which was made available to the public when the original draft of the RMA was released for public comment on April 16, 2002.

The decision sheet notes that the following insect pests are known to occur in Spain and are also associated with clementine fruit, and may be imported with the commodity:

Ceratitis capitata (Medfly) (Wiedemann) (Diptera: Tephritidae)
Ceroplastes rusci (L.) (Homoptera: Coccidae)
Ceroplastes sinensis Del Guercio (Homoptera: Coccidae)
Cryptoblabes gnidiella (Milliere) (Lepidoptera: Pyralidae)
Parlatoria cinerea Hadden (Homoptera: Diaspididae)
Parlatoria ziziphi (Lucas) (Homoptera: Diaspididae)
Prays citri Milliere (Lepidoptera: Plutellidae)

The decision sheet concludes that, even though the seven quarantine pests listed above have the potential of being imported with clementines, all pests listed except Medfly would be easily detected by visual inspection during preclearance procedures.

The scale insects, *Ceroplastes rusci*, *Ceroplastes sinensis*, *Parlatoria cinerea* and *Parlatoria ziziphi*, are relatively large and are located on the surface of the fruit. The larval stages of both Lepidopteran pests, *Cryptoblabes gnidiella* and *Prays citiri*, reside in or adjacent to the rind of the fruit. However, these two pests create large entrance holes in the fruit that are easily detected during even a cursory inspection. This is not the case with the larvae of Medfly, which require a careful analysis of the fruit pulp because they feed inside the fruit and the oviposition entrance holes are usually not readily visible. The decision sheet also noted that, of the 20 plant pathogens or the 4 parasitic nematode pests identified, none are of quarantine significance.

Furthermore, we also disagree with the commenter's claim that it is not possible to determine whether APHIS has selected the most appropriate management options to mitigate the identified pest risk, since our RMA is intended to evaluate the risk reduction potential of our approach.

One commenter noted that the ORACBA analysis is not referenced in the RMA, and its conclusions and the conclusions used in the RMA are not the same.

We agree that we did not cite the ORACBA document in the RMA, though we have done so in the October 4, 2002 revision. For the reasons discussed earlier in this document, we are confident that the ORACBA document supports the extension of cold treatment described in this rule, and that its findings provide support the conclusion that the revised treatment will provide the requisite probit 9 mortality assumed in the RMA.

One commenter stated that the RMA should include a qualitative analysis that describes and characterizes the risk elements that are analyzed quantitatively. The commenter noted that, whereas the quantitative analysis allows for any variability, it does not capture the analyst's view of what the variability he/she believes might exist.

We believe that the quantitative analysis captures the variability associated with the clementine pathway. Several of the steps that make up the pathway were evaluated using maximum, and therefore, most conservative, estimates. These conservative estimates isolate the conclusions of the RMA from the effects of variability.

For example, the RMA assumed that the distribution of imported clementines in the United States would, over time, follow population demographic trends that suggest human population levels will increase in southern States where the risk of Medfly establishment is greater. This to say that the RMA assumes exaggerated current and near-

[15] Before we began routinely preparing pest risk assessments to inform our decisionmaking relative to commodity import requests, APHIS based its decisionmaking on documents called ''decision sheets.'' Such documents contained relatively the same information that is contained in modern pest risk assessments, but without the standardized format. We have updated the decision sheet for Spanish clementines to reflect all available pest information and modern pest risk assessment structure, and are confident it considers the risks posed by all pests of Spanish clementines.

term distribution of clementines to southern States, as it evaluates risk based on projected population levels in southern States that will not be realized until approximately 25 years from now. The RMA assumes that an additional 30 percent of clementines are shipped to those areas than is currently the case, to account for population trends assumed to occur in the future.

The RMA also assumed that every shipment of clementines that arrives in a suitable location is equally likely to arrive in an area where suitable hosts for Medfly are present; however, during the fall and winter (when most clementines are shipped) this is a conservative assumption. By assuming conservative values, we were able to account for additional variability beyond that expressed explicitly in the RMA's simulation model (quantitative analysis).

We would, however, like to note that a qualitative analysis of the risk of Medfly introduction into the United States is provided in the RMA under the heading ''Likelihood of Introduction.''

One commenter stated that using the likelihood of the movement of a single container of fruit to a susceptible grove as a means to assess the likelihood of successful invasion is uncharacteristic of Medfly invasion patterns. The commenter noted that clementines are imported for consumption, and historically, infestations have been detected in urban settings where a variety of residential plantings provide fruit year round. Thus, the commenter concluded that infestation of commercial production areas is most likely to occur via natural spread or artificial movement of infested fruit from a residential area to a commercial production area.

We agree with the commenter and have revised our analysis such that it no longer assumes that an entire container is likely to be released into suitable conditions. Rather, we used evidence provided by Wearing *et al.* 2001 and Roberts *et al.* 1998[16] which suggests that a maximum of 5 percent of fruit that ends up in a given region is discarded. Since fruit that is not discarded is assumed to be consumed, we used the value suggested by Wearing *et al.* 2001 and Roberts *et al.* 1998 (the range provided was 0.5 percent to 5 percent) to estimate the actual amount of fruit that is not consumed and therefore, presents risks. Although we used the most conservative estimates (the maximum value for discards), our estimate of the overall probability of a mated pair in shipments was reduced. This is because, prior to consideration of this comment, the RMA's estimates treated all fruit as if it was not going to be consumed, and that all fruit, therefore, was likely to constitute hazards. This was clearly an overestimate, and the available evidence, as suggested by public comments, provided good reason for us to refine our estimates.

One commenter stated that the RMA's statistical calculations are incomplete, and fail to take into account more than one container of clementines. Consideration has not been given to additional shipments.

The RMA estimated the risk associated with (1) a single shipment moving to suitable areas and (2) multiple shipments moving to suitable areas. The probability of a mated pair in a shipment of Spanish clementines arriving in a suitable area was estimated to be low. According to published evidence,[17] a shipment that includes a single container is already a conservative estimate of risk. Landolt *et al.* states:

> ''The most practical point to assess the risk of an introduction occurring is the probability of a potential mating pair or gravid female * * * getting through quarantine. A potential mated pair might be defined as a nonsterile male and a nonsterile female occurring in the same area during the same period such that mating is possible. For our purposes, a pair of fruit flies emerging from the same shipment would be considered a potential mated pair. The additional problems of survival, feeding, dispersal, mate finding and host finding are unknown but add a large degree of safety beyond the probability of a mated pair occurring. The risk of an introduction should then be calculated as the probability of one or more mated pairs per shipment surviving quarantine measures.''

These statements clearly support our approach to using single shipments as the unit of risk. Nonetheless, the effects of multiple shipments (cited above) were still estimated using methods obtained from peer reviewed methodologies cited in the RMA.[18]

One commenter stated that the calculation of the overall probability for a ''mated pair'' relies on a formula that combines the effects of many U.S. domestic shipments, but that formula uses as an input the probability for a mated pair in just a single shipment, whereas APHIS has already indicated that the probabilities differ for different shipments. The commenter claimed that the calculation cannot be correct if it just uses a single value, because that value does not represent all shipments, and therefore does not account for variability.

Our calculations regarding the risk posed by a single shipment use the maximum risk posed by a single shipment, thus causing the figure to represent a worst-case scenario. For instance, we made assumptions regarding the Medfly populations in shipments that would be consistent with relatively high levels of infested fruit. Available evidence (*e.g.*, Agusti, M. 2000. Citricultura. Ediciones Mundi-Prensa. Madrid, Spain. 416 pp. and Ministerio de Agricultura, Pesca y Alimentacion de Spain Trapping records) indicates that as fall arrives, the population levels of Medfly drop precipitously in Spain, thus making late season shipments much less likely to harbor Medfly than assumed by our baseline (maximum) value. Our approach has addressed some of the elements of variability as such via the use of maximum values, as discussed previously in this document.

One commenter stated that, according to the RMA, the chances of live mated pairs of Medfly being introduced into the United States via every imported shipment going at the same time to the same suitable location is an unrealistic scenario. However, the commenter noted, it appears that the RMA calculates the probability for mated pairs of Medfly from any shipment going to any suitable location at any point in time, which is actually a fairly realistic scenario. Why did APHIS choose the scenarios it evaluated, and why did it not use real world scenarios?

As stated earlier in this document, based on scientific research and published evidence, a single shipment is already a conservative unit for which to estimate risk. We estimated the likelihood that a mated pair of fruit flies would be present in a shipment (of 166,050 fruit) in the RMA. However,

[16] Wearing, C.H., J. Hansen, C. Whyte, C.E. Miller, J. Brown. 2001. ''The potential for spread of codling moth (Lepidoptera: Tortricidae) via commercial sweet cherry fruit: a critical review and risk assessment.'' *Crop Protection* 20: 465–488 and Roberts, R.C. Hale, T. van der Zwet, C. Miller, S. Redlin. 1998. ''The potential for spread of Erwinia amylovora and fire blight via commercial apple fruit; a critical review and risk assessment.'' *Crop. Prot.* 19–28.

[17] Landolt, P., D. Chambers, and V. Chew. 1984. ''Alternative to the use of probit 9 mortality as a criterion for quarantine treatments of fruit fly (Diptera: Tephritidae)-infested fruit.'' *J. Econ. Entomol* 77: 285–287.

[18] Wearing, C.H., J. Hansen, C. Whyte, C.E. Miller, J. Brown. 2001. ''The potential for spread of codling moth (Lepidoptera: Tortricidae) via commercial sweet cherry fruit: a critical review and risk assessment.'' *Crop Protecton* 20: 465–488 and Whyte, C.F., R. Baker, J. Cowley, and D. Harte. 1996. ''Pest establishment, a quantitative method for calculating the probability of pest establishment from imported plants and plant products, as a part of pest risk assessment.'' NZ Plant Protection Centre Publications, No. 4, ISSN 1173–6704. Lynfield, NZ.

comments received from stakeholders on the draft RMA requested that we estimate alternative scenarios (for example, millions of fruit being deposited in close proximity such that flies from different shipments and shipped during different times would be assumed to find each other). These scenarios are clearly unrealistic, as the chance that the entirety of one shipping season's Spanish clementines going unconsumed, and ending up in close proximity to each other in a location that has available host material and the right environmental conditions is not likely. The figure calculated, does, however, provide an upper theoretical threshold. Analysts estimated these upper thresholds and noted that if there is a low probability of Medfly entry into a suitable area associated with extreme scenarios (such as those just described), then the probability of Medfly entry under more realistic, constrained scenarios is clearly lower.

Nonetheless, again in response to comments, in our final RMA, we have estimated risk associated with a single container arriving in a suitable location and multiple containers moving to suitable locations.

One commenter stated that it is very difficult to follow where some of the input values used in the RMA originated and why they were chosen, particularly since, in a number of cases, the values selected seem to be inconsistent with the referenced data. The commenter noted that:

- The most likely values for the number of fruit shipped are not shown in Tables 4a and 4b of the RMA, and the volumes that are shown are inconsistent with the volumes assumed in the Regulatory Impact Analysis.
- The evidentiary basis and rationale for selecting the shape of the probability distributions are not transparent.
- In many cases, ''personal communications'' are referenced as the source of information without the precise contents of those communications being disclosed.

To summarize some of the key values of concern to the commenter, we briefly review them here. The values chosen for the different components assume that:

- Approximately 166,050 clementines may be associated with a single shipment,
- A maximum 1.5 percent of fruit will be infested with flies prior to cold treatment,
- No more than 8 flies emerge as viable adults from infested fruit,
- Cold treatment approximates the probit 9 level,
- 44 percent of fruit imported go to States where suitable hosts and conditions are found,
- 5 percent of all fruit imported is discarded and not consumed, and
- More than 6,400 total shipments will arrive in the United States each year.

Our rationale for selecting the above values is detailed in the RMA is also summarized as follows:

The maximum number of clementines was based on the number of fruit that fit in a box (from 20 to 25), the number of boxes contained in a pallet (360), and the number of pallets (20–21) that can fit into a forty-foot ground transport container. This information was obtained through a review of shipping and packing documents and was confirmed via personal communications with experienced port inspectors.

In addition to the total number of fruit in a container, we also estimated the total number of containers that could be exported to the United States. We used historical data and shipping records through 2001 to determine the maximum number of containers shipped to the United States (6,408 shipments). The RIA for this rule, however, considers a maximum number of shipments based on the historical evidence cited above, but also considers future trends. For consistency, we have updated the final RMA to reflect the same maximum number identified in the RIA.

As stated earlier in this document, the 1.5 percent level of infestation was derived from our ability to determine maximum infestation levels of fruit via sampling. Based on a sampling rate of 200 randomly selected fruit per shipment of clementines, APHIS can verify with a high level of confidence (95 percent) that the fruit sampled is 1.5 percent infested or less, based on negative results of sampling. Support for this approach can be found in standard statistical texts.[19]

The maximum level is further supported by evidence from shipping during a presumably ''high density'' year such as 2001. As stated elsewhere in this document, sampling data for 2001 did not provide evidence that infestation levels were above 1.5 percent; however, sampling was not unbiased, and therefore was not representative of the level of infestation of fruit imported during the early part of the shipping season.

In addition to purely statistical evidence, we also consulted with port inspectors and Spanish scientists. There was agreement that, as a practical matter, it was possible to limit the the proportion of infested fruit using the measures required by this rule.

We also used evidence to support our minimum estimated values. The minimum expected pest infestation proportion is 0 percent infested fruit. Prior to 2001, port inspections had never found multiple live Medfly larvae in commercial shipments of citrus from Spain. This level was the minimum value for infestation most commonly cited by inspectors, and was used a minimum value for the purposes of the RMA.

The maximum number of larvae per fruit that are viable (i.e., that grow to fully functional, potentially reproductive adults) was estimated as eight and the minimum was estimated as zero. The values noted were supported by evidence from direct laboratory experiments[20] on clementine fruit. We also used additional evidence from other studies on other related fruit flies[21] because tephritid flies share many common traits, because some family generalizations are appropriate, and because USDA scientists agreed that the commonalities between other tephritid fruit flies and the Medfly would allow us to make some comparisons. We concluded from a review of the evidence that a maximum eight larvae and a most likely three larvae would successfully develop and lead to viable adults from each clementine fruit under typical field conditions such as those studied.

We based our cold treatment parameters on the assumption that the revised treatment schedules, as proposed, would provide a ''probit 9'' level of quarantine security or better. This assumption is supported qualitatively by the cold treatment recommendation and quantitatively by the ORACBA analysis. However, as discussed in detail elsewhere in this document, and as evidenced by the quantitative analysis of available data in the ORACBA analysis, not all of the cold treatment time/temperature combinations suggested in the cold treatment recommendation document will provide probit 9 mortality. As a result, in this final rule, based on the findings of the ORACBA analysis, we are only allowing cold treatment of

[19] See Steel, R. and J. Torrie. 1980 ''Principles and Procedures of Statistics.'' McGraw Hill, Inc. New York, NY. 633 pp.

[20] Santaballa, E., R. Laborda, M. Cerda. 1999. ''Informe sobre tratamiento frigorifico de cuarentena contra *Ceratitis capitata* (Wied.) para exportar mandarinas clementines a Japon.'' Univ. Polytecnica de Velencia. 25 pp.

[21] Leyva, J.L., H. Browning, and F. Gilstrap. 1991. ''Development of *A. ludens* in several hosts.'' Environ.Entomol 20(4): 1160–1165.

clementines at the 14 day/34 °F, 16 day/35 °F, and 18 day/36 °F combinations, as these are the only time/temperature combinations for which there is sufficient evidence available to support a finding that they provide probit 9 mortality.

We only estimated the risk posed by fruit that would arrive at a suitable location where Medflies could become established. We assumed that there are two factors that affect the amount of fruit imported that will arrive at suitable locations; One is tied to the distribution of people who consume clementines, and the other is tied to the rate at which they discard fruit.

For the purposes of our analysis, we assumed that there is small number of States where Medfly could become established. This includes South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California. According to U.S. Census data, some 34 percent of the population currently lives in those States. Furthermore, according to the U.S. Census Bureau, in 25 years, some 44 percent of the population will live in those same States. We used this higher value (44 percent) to estimate how much of the population lives in suitable areas, and assumed that clementines would follow market patterns that are driven by population (i.e., that clementines are distributed evenly with population). For reasons explained in detail elsewhere in this document, we believe the value we used (44 percent) is a conservative estimate.

Further, fruit is intended for consumption, and a large portion can be assumed to be eaten. We therefore assume that fruit that is consumed does not pose risks of Medfly introduction. We investigated the number of fruit that goes unconsumed and provide evidence in the RMA for the fact that, at most, 5 percent of fruit is discarded by consumers in a way such that it might lead to pest introduction.[22] It is this discarded fruit in a suitable area that was the focus of our analysis.

One commenter stated that the understandability and transparency of the RMA's outputs leave much to be desired, and that despite extensive comments provided during the comment period on the draft RMA, there have been no changes to the methodology of risk mitigation, and no justification given for why comments were used or not used. The commenter claimed that despite recommendations made during the comment period for the draft RMA, Table 4D, which intended to reflect the risks of introduction of Medfly under three different scenarios, is still completely incomprehensible.

APHIS believes that, given the detailed technical comments we have received on the proposed rule and its supporting documents, persons who are knowledgeable in the field of risk analysis were certainly able to understand what the RMA's inputs were derived from, and how we calculated its outputs. All calculations contained in the RMA were presented to the public in the actual spreadsheet used by APHIS, and the spreadsheet includes all the input values we used. We have, however attempted to make the outputs in Table 4D easier to understand in response to commenters' concerns, and have made some changes to our methodology where appropriate as described elsewhere in this document and in the RMA. We have also provided evidence and documentation for the scientific basis of our findings and for the use of specific methods that we used throughout the analysis. The changes made in response to comments do not change our conclusion that the combination of cold treatment and the limitation of Medfly infestation in Spanish clementines will result in a minimal likelihood that mated pairs of Medflies will arrive in shipments of Spanish clementines.

One commenter stated that a key holding of the court in *Harlan Land Co.* was that the risk assessment should be transparent, with ''complete and transparent documentation of data used in the assessment,'' and claimed that the risk mitigation analysis that has been prepared for the Spanish clementine import proposal does not meet that test. The commenter claimed that even informed experts are not able to comprehend the analysis contained in that document.

Based on the lengthy and substantive comments we received on the proposed rule and supporting documentation, we believe the documents were sufficiently comprehensible. These comments were considered and helped to strengthen the RMA as described in detail in this document and in the RMA itself.

Several commenters stated that limiting the RMA to citrus is a gross underestimation of the potential economic and social impact that could occur if Medfly is introduced into both agricultural communities and residential communities. The commenter noted that Medfly is not just a citrus pest, but a pest of many agricultural commodities.

The RMA does not assume that the Medfly poses a threat to only citrus. To the contrary, throughout the RMA, APHIS fully acknowledges the multiple hosts and seriousness of this pest. The RMA does, however, focus on the likelihood that this serious and multiple-host pest would occur in association with clementines after they were treated in the field and after harvest, and it does evaluate risk based on the likelihood that the mated pairs of fruit flies enter the United States and arrive in a suitable area. For the purposes of our analysis, we consider citrus-producing States to be the most suitable areas for Medfly establishment because those are the only States that have the climatic conditions and year-round host availability to support an established Medfly population.

One commenter stated that, despite the fact that phytosanitary security in Spanish clementine production areas has been nonexistent, USDA has not required that Spain follow a systems approach to risk mitigation.

We did not refer to our approach regarding the importation of clementines from Spain as a formal ''systems approach,'' though our approach, by definition, could constitute a systems approach by virtue of its two critical control points (Medfly population control and cold treatment). Given that clementines were imported for upwards of 20 years with no significant problems despite only being subject to cold treatment, in this rulemaking, we attempted to simply resolve some of the uncertainty associated with the events of 2001 by tightening existing restrictions, and did not see the value in referring to the revised protocol as a systems approach.

One commenter stated that the Hazard Analysis and Critical Control Point (HACCP) approach to calculating the potential for a Medfly to be exported to the United States from Spain is a risk mitigation tool that is invaluable perhaps in a food safety program, but must be fully considered for its appropriateness when dealing with invasive pests. The commenter claimed that until our trading partners concede or provide reciprocity to such a HACCP-like approach, it seems inappropriate to use this as a tool, and certainly in this instance.

We did not incorporate new risk management paradigms as part of this rulemaking. Rather, in the RMA, we noted that our procedures are consistent with other procedures such as HACCP. HACCP was cited to establish parallels, not as an effort to integrate new procedures into our approach. The mitigations considered by APHIS are supported by scientific evidence, decades of successful experiences, and expert panel recommendations, and, in this case, the mitigations and system

[22] Wearing *et al.*, 2001; Roberts *et al.* 1998.

used by APHIS happen to be consistent with other well-known monitoring programs such as HACCP. As stated in our proposed rule, our analysis does not represent a departure from existing guidelines for the phytosanitary risk analysis, but rather, is a refinement that reflects more emphasis on certain risk mitigating elements of a set of phytosanitary measures (*e.g.,* the critical control points).

One commenter suggested the RMA include a third critical control point. The commenter stated that the additional critical control point could be (1) the review of cold treatment records prior to release of any shipment on arrival, or (2) a program review every 3 to 5 years.

We agree with the commenter that there is a need for stringent oversight of the program, and we intend to conduct program reviews on similar timeline to the one suggested by the commenter. Review of cold treatment records prior to release of any shipment is considered as part of our analysis, and making it a critical control point would have no meaningful effect on our calculations of risk or the actual enforcement of the requirement.

One commenter stated that the RMA fails to define what it means by ''variability.'' The commenter stated that, while certain variabilities are described, such as variations among different populations and carton-to-carton variability in the number of clementines, the key variability—the variation expected in the number of surviving Medflies in each shipment to the United States—is missing. The commenter stated that the modeling has to correctly account for the different pest populations for which the variabilities are defined, and claimed that the RMA currently does not do that.

We have generally discussed the topics of variability and uncertainty in detail in Appendix 3 of the RMA, and elsewhere in this document. Regarding variation expected in the number of surviving Medflies in each shipment to the United States, we believe that is addressed by the parameters of the cold treatment. This is to say that we assumed that cold treatment assures levels of mortality that are equivalent to, or greater than, the probit 9 level. This assumption is supported by recent large scale tests, as evaluated in the ORACBA analysis, and as discussed elsewhere in this document. The recent tests of cold treatment show that, at certain time/temperature combinations, the observed mortality of cold treatment was 100 percent, and additional data support the other approved time/temperature combinations. Again, the ORACBA analysis considers available data, and provides an assessment of where the proposed cold treatment schedule provides probit 9 level quarantine security, and where it does not. We do consider variation in survivors of cold treatment, and this variation is documented in Appendix 3 of the RMA, which cites the minimum, maximum, mean, and 95th percentile values of the distribution used for variation in a shipment. As for the proportion of infested fruit and number of larvae in a shipment, this is explored by multiplying single fruit estimations (*i.e.,* number of Medfly larvae per fruit, which varies from zero to eight) by the proportion of fruit that is infested (varies from zero to 1.5 percent).

One commenter stated that the RMA does not take into account how certain we can be that the calculated results correspond to reality, particularly the calculation concerning the probability that mated pairs of Medflies reach susceptible areas of the United States.

We address the question of how our results correspond to reality by questioning the validity of our assumptions. APHIS believes that the maximum number of shipments of clementines is well described by the values used (6,408 per year), that the number of infested fruit can be realistically kept below 1.5 percent, that the number of viable larvae associated with clementines is low (zero to eight per fruit), that the cold treatment is effective (approximating probit 9), that not all fruit is discarded (most fruit will be consumed), and that the majority of fruit will not be shipped to areas suitable for Medfly development. APHIS strongly believes that these fundamental assumptions are correct.

We also further believe that, by using a system that assures low population densities in fruit prior to cold treatment, and then applying a cold treatment schedule that kills more than 99.9 percent of the Medflies that are present, there is a very low likelihood that a mated pair will be associated with any given shipment of fruit.

We address uncertainty by considering the effects of maximum values of inputs for the system. In essence, the investigation of maximum values helps us establish if our assumptions are realistic and whether the model used is realistic. As such, multiplication of maximum values results in conservative estimates of risk. Though such estimates may not always be realistic, they provide a point of comparison for mean values, and allow us to identify areas of uncertainty in the system.

One commenter stated that the RMA incorrectly compares the effects of two systems—one with field controls in place, and the ''baseline'' without such field controls. The commenter stated that the difference evaluated in the RMA should not be between two inventions of the analysts. Instead, the RMA should start with the baseline scenario, and then add the effect of the controls. The commenter stated that this would modify the baseline distribution for infestation rates by the likelihood of non-detection due to the controls added, and that with such an approach, the effect of the controls can actually be evaluated, not just the inventiveness of the analysts.

The key difference between the two scenarios (the baseline-cold treatment only—and the mitigated scenario employed by this rule) considered in the RMA was the addition of field population limits in the mitigated scenario. These scenarios do not reflect a contrived system but represent USDA's understanding of the key elements that are being refined and that will increase its ability to safeguard against Medfly risks. The parameters used were, therefore, not contrived but linked to the evidence presented. Whereas the values of specific parameters may be subject to refinement, the final conclusions are robust. They are robust because changes in the assumptions and exploration of the effect of changing values (*e.g.*, decreasing the effectiveness of cold treatment, increasing the proportion of infested fruit) did not change our findings that the probability that a mated pair of Medflies could enter into the United States via Spanish clementines is very low. Whereas a comparison to a baseline is useful, the estimation of the likelihood of introduction even without reference to a baseline is valid. That is, if we were to consider a single scenario (cold treatment plus limitation of field populations) we would not find otherwise. Indeed, we would conclude that, the probability that a mated pair of Medflies arrives in a suitable location in the United States as part of multiple shipments is low.

One commenter stated that the RMA fails to track the effect of new controls when everything else is equal. The commenter noted that the RMA compares the difference between averages with and without controls; when what is really required is calculation of a distribution of the differences with and without controls. This requires a single Monte Carlo analysis that evaluates the baseline and new scenario simultaneously, and with

such analysis, it is clearer when the new controls have an effect and the extent of the effect.

We tested two scenarios independently; one scenario included a simulation that used what we termed ''baseline'' input values. Those values were associated with no field controls, which are the only difference between the baseline and the second ''mitigated'' scenario. Both scenarios included cold treatments. The baseline scenario assumed that there could be higher populations (up to a maximum 15 percent infested fruit) than what is allowable in the mitigated scenario. A comparison of the output from these two simulations allowed us to obtain a relative estimate of the impact of the proposed mitigation measures (namely, the addition of field controls as the single key additional mitigation measure).

One commenter noted that the RMA does not consider the possibility of mated Medfly pairs coming from a source other than Spanish clementines. The commenter stated that, if the probability for a Medfly from another source is higher than the probability from a given clementine shipment, it is the single Medfly per shipment, not the probability of a male/female pair within a shipment that will matter most.

Given that Medfly is not established in the mainland United States, we see no need to assess the scenario posed by the commenter.[23] Indeed, the RMA is based on the assumption that Medfly is not established in the mainland United States. The probability that a Medfly from another source would mate with a Medfly from Spanish clementines is even lower than the probability that a mated pair could enter the United States via a shipment of clementines from Spain.

One commenter stated that the RMA evaluates the probability for a mated pair at all locations, and for all suitable locations, using a formula that corresponds to Medflies from different shipments being unable to get together and mate. The commenter claimed that the calculations actually performed do not correspond to the ''worst case'' as APHIS implies; they are not upper bounds on the probabilities, but instead assume the best possible case. Therefore, they are lower bounds.

The possibility that 9 tons of produce (a single container) are distributed within a small area such that output from many containers could in effect coalesce and allow for Medflies from many different containers to emerge, fly to suitable hosts, find their mates, mate, oviposit, etc. is not realistic given the evidence considered in the RMA. The RMA uses a formula that evaluates the probability of a mated pair in any of multiple, independent containers. That probability does not represent a lower bound, but rather a conservative estimate of the likelihood of Medfly entry to a suitable location. Assumptions such as (1) All containers to all suitable locations will find suitable conditions, (2) emerging flies will find suitable hosts at any given time, and (3) that the maximum amount (5 percent) of fruit is discarded by consumers are all conservative assumptions. Our estimates and the formula we used are based on peer reviewed evidence (*i.e.*, Wearing *et al.*).

Trapping, Bait Treatments, Monitoring

A number of commenters raised concerns about the content of the Spanish Medfly management program. One commenter noted that the first of the ''minimum criteria'' for a measure that is a required component of a systems approach is that the measure be ''clearly defined.'' The mitigation requirements of the proposed rule do not meet this standard. The proposed rule does not say what kinds of traps are to be used, or how many, or by whom, or how the traps should be baited and rotated, or what kind of records must be kept. Another commenter claimed that without assurance that trapping activities are adequate to determine the current pest population in Spain, the effectiveness of a spraying program cannot be evaluated.

The Plant Protection Act defines a systems approach as defined set of phytosanitary procedures, at least two of which have an independent effect in mitigating pest risk associated with the movement of commodities. While the regulatory approach employed by this rule could constitute a systems approach by virtue of its two critical control points (Medfly population control and cold treatment), in a simple sense, the measures referred to by the commenter have no real bearing on the calculations of risk contained in the RMA. For this simple reason, we do not agree that these measures should be more clearly defined than they already have been in the proposed rule. To elaborate, we do not believe that a continuing debate about an issue such as what fruit fly trap the Spanish use would result in any significant improvement to the approach we have chosen. As stated previously in this document, details of the Spanish Medfly program, such as the type of trap and bait used, the type of bait sprays required, the spacing of Medfly traps, and the triggers for bait sprays have no connection to our calculations of risk. We also believe that fruit cutting is the best available indicator of the level of Medfly infestation of Spanish clementines, and the success of this measure is not dependent on any of the other measures cited by commenters.

Three commenters stated that APHIS should delay resumption of shipments of Spanish clementines until an aggressive, comprehensive, and consistent trapping program fully operated, monitored, and documented by Spanish Government officials has been in place through a full shipping season.

The operation of such a program for a full year would have little or no bearing on the ability of the safeguards we have chosen to provide the risk reduction identified by our analysis. This is to say that, regardless of pest populations, trap types, and bait spray applications, if Medfly infestations of Spanish clementines are not kept at low levels, APHIS will confirm as much via inspection and fruit cutting and will refuse to allow those clementines to be exported to the United States. If Medfly populations are maintained at low levels (levels that cannot be detected via fruit cutting), we are confident that cold treatment will ensure a low probability that a viable mated pair of Medflies could enter the United States via imported Spanish clementines.

Several commenters expressed concern over servicing and monitoring of Medfly traps, application of bait treatments, and recordkeeping activities associated with these activities. Some of those commenters stated that APHIS should not allow the Spanish citrus industry to service and monitor the traps in the production areas or apply bait treatments, and argued that the Government of Spain should be given those tasks to better ensure compliance with the regulations. Others noted that according to the report of the APHIS Technical Review from the trip made in December of 2001, Spain has not kept the type of records on trapping and bait spraying programs that the work plan required them to keep. The commenters questioned why U.S. stakeholders should now have confidence that there will be a new commitment by the Spanish industry to actually follow an updated protocol when there was a failure to follow the previous protocol, and urged APHIS to insist on scrupulous adherence to the work plan and regulations, and issue steep penalties for not doing so.

[23] Hawaii is generally infested with Medfly, but all Medfly host commodities moving interstate from Hawaii to the mainland must be treated for Medfly prior to movement into a State on the mainland.

Under this rule, the Government of Spain or its designated representative must keep records that document fruit fly trapping and control activities conducted under the Government of Spain's Medfly management program. These records must be kept for all areas that produce clementines for export to the United States. All trapping and control records kept by the Government of Spain or its designated representative must be made available to APHIS upon request. APHIS inspectors may review those records at any time, and therefore, will be able to determine whether the conditions of the regulations and Spain's Medfly management program are being complied within areas that produce clementines for export to the United States. We agree with the commenter that APHIS should be able to insist on compliance with these requirements, and we are clarifying in this final rule that APHIS may suspend the importation of clementines in any case if we determine there is a failure to follow the program requirements. This requirement is reflected in the revised § 319.56–2jj(j).

APHIS has received full cooperation from its Spanish counterparts in this matter, and is confident that they will ensure compliance with all aspects of this new regulatory approach. To clarify, during its site visit in December 2001, APHIS was not able to obtain documentation on trapping and bait sprays in clementine production areas not because the documentation did not exist, but because there was no central repository for the documentation, and because it took some time for the Spanish to assemble the appropriate records and forward them to APHIS. In January/February 2002, during a second site visit, APHIS received all documents requested and these were incorporated into the risk management analysis.

Furthermore, given that we believe trapping is not precise enough to accurately determine infestation levels of fruit, while fruit cutting is, we do not agree that there is a need for the Government of Spain to service and monitor all traps and apply bait treatments. The Government of Spain is, however, responsible for maintaining trapping records for the program.

One commenter stated that the rule does not say how that bait treatment application rate gets determined, or by whom, or when the treatments will be applied. The commenter noted that, according to the RMA, the practice in Spain has been to spray when trapping results reach a rate of 0.5 flies/trap/day, yet APHIS has provided no justification for the 0.5 flies/trap/day trigger for spraying and the rule itself does not require it.

This final rule does not include a trigger for bait sprays in Spain because APHIS believes it is the responsibility of Spanish producers to provide a product that is minimally infested with Medflies. They may accomplish this through whatever bait spraying regimen that they deem appropriate, as we have designed a regulatory approach that simply requires fruit to be infested at low levels upon inspection prior to treatment. The RMA identified the 0.5 fly per trap per day trigger as a ''key phytosanitary measure,'' however, this designation is not appropriate, as the measure has no bearing on the calculations of risk contained in the RMA. We have revised the RMA to clarify this fact.

One commenter noted that the proposed rule specifies that traps must be placed in preferred Medfly hosts at least 6 weeks prior to the harvest of clementines. The commenter suggested that APHIS remove the word ''preferred.''

We agree with the commenter, as preferred hosts may not be available in all areas where trapping may occur, and we have removed the word ''preferred'' from § 319.56–2jj(c)(1) in this final rule.

Several commenters urged APHIS to maintain strict oversight of the Spanish clementine import program at all points in the system, and requested that industry representatives, university researchers, and State Government officials be included in the on-site review process.

As stated earlier in this document, the Spanish Medfly management program must provide that clementine producers allow APHIS inspectors access to clementine production areas in order to monitor compliance with the Medfly management program, and that all trapping and control records kept by the Government of Spain or its designated representative must be made available to APHIS upon request. APHIS will have inspectors working full time on the verification of the Spanish clementine import protocol—including inspections and production area monitoring. The inspectors will be present to conduct and monitor fruit cutting at the exporting port, and will be able to review records kept by the Government of Spain regarding its management program. Only APHIS personnel and personnel of Spain's plant protection service will be allowed to conduct fruit cutting. The salaries of APHIS inspectors are paid by APHIS, but the Government of Spain reimburses APHIS for those costs under the requirements of § 319.56–2jj(a).

APHIS does not see the necessity of including representatives of industry, university researchers, and State Government officials in site visits. We will, however, make it known to stakeholders when we are conducting a site visit, and will invite questions and suggestions that we will follow up on in Spain. Upon our return, we will make a report of our visit available to interested persons.

One commenter stated that APHIS should review documentation of the execution of Medfly trapping and population reduction sprays before fruit is moved into export channels.

APHIS is confident that review of documentation prior to the movement of fruit into export channels is not necessary because our risk management measures are designed to protect against the arrival of a mated pair of Medflies in the United States regardless of the actual infestation level in Spanish production areas. For this reason, we will monitor for compliance with Spain's Medfly management generally, but will not review the control activities of a given production area as a condition of export. As stated previously, we believe that fruit cutting is more accurate indicator of the population of Medflies in production areas than trapping.

Two commenters stated that the rule should require the establishment of buffer zones in Spain.

There is no scientific justification for requiring the establishment of buffer zones in Spain under this rule, as the clementine production areas in Spain are not Medfly-free areas. The approach that APHIS has designed accounts for the presence of Medflies in the production areas in Spain, and is intended to ensure that the prevalence levels remain low, so that fruit presented for export is minimally infested. Buffer zones would only be useful if Spain were trying to establish and maintain pest-free areas.

One commenter noted that the APHIS review team found that no fines or penalties were issued for noncompliance with the ''mandatory'' fruit fly detection and control program in place in 2001, yet the proposed rule does not specify any penalties for non-compliance with the proposed Medfly management program and does not require that the Spanish authorities impose them. The commenter questioned that, given their past record, why should the Spanish regulatory officials be relied on to enforce compliance with the Medfly management program?

APHIS agrees that it should have the authority to suspend growers from

participating in the Spanish export program if the grower is not in compliance with our regulations, which, by extension, also require compliance with Spain's Medfly management program. To provide for this, we have added the following statement to paragraph (c) of the regulations: ''If APHIS determines that an orchard is not operating in compliance with the regulations in this section, it may suspend exports of clementines from that orchard.''

One commenter stated that the proposed rule does not require all orchards in a defined area to participate in the Medfly management program, yet individual clementine orchards in Spain are very small (0.5–2.0 hectares in size), and ''physical barriers to segregate [them] are limited to a ledge about 4 inches wide and 6 inches tall.'' The commenters noted that adult Medflies may be carried by the wind for 2.4 km or more, are reported to have migratory movements up to 72 km, and are known to fly up to 40 miles, and thus, can easily move from one grove to the next; these commenters stated that APHIS has not considered what happens when one grower plans to sell fruit to the United States and participates in the Medfly management program, while a neighboring grower does not.

As stated previously in this document, our regulatory approach is designed to ensure that clementines subjected to cold treatment are minimally infested with Medflies. Since all fruit submitted for export is sampled, and since fruit cutting will provide a means to reject fruit that is found to be infested, we do not believe that the proximity of approved orchards to nonapproved orchards is relevant to our calculations of risk.

One commenter stated that there should be an incentive to encourage Spanish growers to keep Medfly populations in check, such as requiring a previous season average of 1.5 percent infestation, or less, to ship to the United States.

The incentive for the Spanish to keep populations in check is simple: If they do not do so, APHIS will determine as much via fruit cutting, and will reject shipments intended for export to the United States.

One commenter requested that APHIS approve a pesticide for use in the Spanish export program.

We are considering the commenter's request, and will advise the commenter of our findings when our review is complete.

One commenter stated that APHIS should not specify the pesticides to be utilized in Spain's Medfly management program without consulting Spain's Ministry of Agriculture, especially considering that the use of this type of pesticide changes over time. The commenter stated that the regulations should simply state that acceptable pesticides are those approved by both APHIS and Spain's Ministry of Agriculture.

We agree with the commenter that any pesticide used in the Spanish Medfly management program should be approved by both APHIS and the Government of Spain, and have amended § 319.56.2jj(c)(1) in this final rule to reflect this change.

Traceback

Several commenters stated that APHIS's proposal to traceback to the orchard in the event of Medfly detection during fruit cutting is likely to be ineffective because (1) Spanish clementine production is comprised of thousands of small growers who often commingle their fruit with fruit of other small growers at the packinghouse which prevents any reliable traceback to the individual grower; and (2) the season for Spanish clementines is only a few months, so remedial action that would remove a grower from the export program for the remainder of that year would have few consequences for the grower, since the grower would have already shipped all or most of his fruit for the season by the time remedial action was taken. The commenters suggested that remedial action should be taken against the packinghouse, not the grower, and should affect the packinghouse's ability to export for the present and next shipping season, unless the packinghouse provides evidence that controls are in place to prevent further failure of the quarantine measures.

We disagree with the commenter. Under the new Spanish export program, packinghouses are required to ensure that fruit from one orchard is not commingled with fruit from others. In the odd event that traceback of an infested fruit does not lead to a single orchard (a single producer or a homogenous production unit), APHIS will continue traceback to next largest traceable unit. If this means that traceback can only go so far as a group of producers who have shipped fruit to the same packinghouse, then that entire group of producers will be subject to suspension from the program for the shipping season in the event that another infested fruit is traced to their orchard or their group of producers. It is therefore in the interest of Spanish producers to facilitate the accurate traceback of infested fruit to the orchard where it was produced. We believe it is appropriate to suspend only orchards from the program, and not packinghouses, as suggested by the commenter, because packinghouses have no significant role in mitigating any Medfly risk posed by exports. Orchard managers, however, are responsible for maintaining low levels of Medfly infestation in their orchards.

One commenter stated that if fruit is sampled before it is packed in cartons, carton labeling will not help in tracing back infested fruit.

Sampling typically occurs at the port of export, and in some cases, at the packinghouse after fruit have been boxed.

One commenter questioned whether, upon detecting live Medflies in clementines submitted for treatment, it is sufficient to remove just the single orchard (perhaps just a few acres in size) from the export program for the balance of the shipping season since adjacent orchards likely have the same Medfly problems.

As stated in response to previous comments, given our ability to determine infestation levels of fruit via fruit cutting, there is no need to penalize orchards that happen to be adjacent to orchards with higher pest populations. Adjacent orchards may employ very different Medfly treatment regimens, and we believe that inspection and fruit cutting provides sufficient evidence to determine that fruit is minimally infested, even if it is from an orchard adjacent to a highly infested orchard.

Eradication

One commenter stated that the Spanish clementine industry should be required to eradicate Medfly, not simply control it.

As stated earlier in this document, APHIS does not believe the Spanish have to be required to eradicate Medfly from their clementine production areas in order to export fruit to the United States, provided they can adequately mitigate the pest risk posed to the United States by their exports. The RMA supports the Secretary's determination that it is not necessary to prohibit the importation of clementines from Spain, provided that the clementines are subject to the requirements contained in this final rule.

Two commenters stated that, in the event of a Medfly outbreak, eradication strategies used in previous years will not be possible. The commenters suggested that APHIS has to take that into consideration in its analysis, as ''the next Medfly infestation in the

United States may end agriculture as we know it in the infested location.''

APHIS believes that it has sufficient tools to eradicate any new Medfly outbreaks. New technologies, including the use of sterile insects, make it possible to eradicate Medfly infestations in areas where chemical treatments are not acceptable.

Regulatory Impact Analysis

Several commenters noted that, in the Regulatory Impact Analysis (RIA), APHIS states that the ''probability of a Medfly introduction per forty-foot container equivalent is * * * 1.3E–12,'' and it references the RMA as the basis for this estimate. The commenters stated that the RMA shows the mean probability per shipment (or forty-foot container equivalent) to be 2.5E–5, and thus, in the RIA, APHIS incorrectly used a probability value that appears to be off by almost seven orders of magnitude—*i.e.*, the probability estimate used in the RIA is low by a factor of almost 10 million. The commenter claimed that as a result of this discrepancy, the RIA cannot support a finding that the rule would not have a significant economic impact on a substantial number of small entities. The commenters further stated that the RIA also incorrectly interprets the RMA as showing that the most likely infestation rate (based on the 5-percentile infestation rate from the Monte Carlo simulations) is 3.3E–3 percent (0.003 percent).

APHIS believes these comments highlight the fact that the discussion in the economic analysis regarding the infestation rate needs clarification. The first number mentioned by the commenter is the expected number of introductions [24] under the default model (see Table 4 of the RIA). It is not appropriate to compare the mean mated pair probability per shipment reported in the RMA, 2.50E–5, with the expected number of introductions. The RIA does not report a mean mated pair probability. However, the assumptions made in the RIA having to do with risks associated with potential Medfly introductions under the proposed rule are in scientific agreement with the information, data, and parameters reported in the RMA.

The objective of the RMA was to examine how the offshore risk mitigation measures in the proposed rule coupled with cold treatment might reduce mated pair probabilities per shipment in comparison to cold treatment alone. As such, the RMA employed wide ranges for several key parameters, including the infestation rate (the proportion of fruit infested with Medflies). The RMA estimated annual introductions under a worst case scenario, one in which fruit cutting and rejection of shipments did not occur and one in which parameters of the infestation rate distributions were specified conservatively. However, the regulations impose powerful economic incentives that will more than likely lead Spanish growers and exporters to manage Medfly populations and select fruit for export to the United States more effectively than was assumed in the risk analyses.

The other major difference between the RMA and the RIA was that the RMA simulated levels for the biological model's parameters, including the infestation rate, number of larvae per infested fruit, cold treatment survival rate, proportion of larvae reaching a suitable area, and larval viability, by drawing random numbers from probability distributions parameterized using available data (See Tables 4a through 4c in the RMA.) The RIA used expected values for all of the biological model's parameters and therefore employed a certainty-equivalence framework. The certainty-equivalence framework (values for biological and economic parameters were based on expected values) was used to estimate regulatory benefits and costs, based on the RMA and economic incentives facing Spanish parties from the proposed regulations.

The main difference between the RIA and the RMA was that the former estimated regulatory costs and benefits for a typical year and the latter estimated mated pair probabilities under a worst case scenario. In addition, the RIA incorporated the fruit cutting and inspection program in the estimation of mated pair probabilities and relevant information for use in specifying the infestation rate. If Medflies are detected in clementine shipments under the proposed preclearance program, shipments will be diverted to other cheaper markets and growers may lose the ability to take advantage of the much more lucrative U.S. market, which typically offers prices 20 percent higher than prices offered in the rest of the world. In addition, if too many shipments are rejected, the entire clementine import program may be suspended. As a result, exporters will more than likely choose shipments designated for the United States from regions in which growers experience below average infestation rates and in which growers manage Medflies very well.

Although the RIA uses a lower infestation rate, the two mated pair probabilities are not directly comparable, and the divergence is completely consistent with the assumptions of the RMA, the economic incentives facing clementine growers and exporters in Spain and the regulations.

Two commenters stated that the economic and social impacts associated with the proposed rule are not to growers alone, and that APHIS must consider the social and economic impacts to farm workers and their families, packinghouses and their employees, canneries and their employees, the trucking industry and their employees, ports of entry and their workers, and local rural economies.

The economic analysis for the proposed rule did not incorporate Medfly introduction costs on other industries that derive income from Medfly host crops because (1) there were no data to estimate these costs as most Medfly introductions occur in urban areas far removed from commercial agricultural production, and (2) the probability that a mated pair of Medflies could enter the United States via imported Spanish clementines is so low. The analysis for the final rule incorporates costs on these related industries.

One commenter stated that it is critical that USDA evaluate the numerous economic impacts of a Medfly infestation in addition to those impacts on the citrus industry. The commenter claimed that the economic impact analysis should address the fact that other crops are negatively affected by the Medfly, and estimate State eradication costs, quarantine costs, loss of domestic and foreign markets, and producer cultural impacts if Medfly is discovered on U.S. crops.

The economic analysis for the proposed rule incorporates these costs (See section 3.1 Costs Associated with the Proposed Rule, pp. 11–12). Mean costs of eradicating six recent Medfly introductions in 1997 and 1998, $10.93 million in 2000 dollars, which includes Federal and State expenditures, were used to estimate the impact of a potential Medfly introduction on U.S. Federal and State taxpayers. In addition, the analysis incorporates the expected impact of potential Medfly introductions on producers of Medfly hosts crops in the United States. In particular, the $3 million dollar economic impact on producers, during an introduction, includes individual monetary estimates associated with additional field sprays, post-harvest treatments, fruit losses due to yield loss

[24] Refer to the RIA (Sec. 2.1.4) for a discussion of the difference between mated pair probabilities per shipment and Medfly introductions.

and post-harvest treatments, and loss of export markets. The economic analysis did not take into account cultural impacts on producers, because such costs are difficult to quantify.

One commenter stated that the RIA does not specifically consider the effects of a Medfly outbreak on growers who employ IPM practices, and noted that the analysis focuses solely on the cost to the Federal Government should a mistake occur and the benefit to the consumer without any consideration to the impact on farmers, farms, farm workers, families, communities, and the industry.

The analysis incorporated eradication expenditures of Federal and State Governments, which are borne by U.S. Federal and State taxpayers, as well as costs borne by producers of Medfly host crops associated with additional field sprays, post-harvest treatments, fruit losses, post-harvest fruit losses, and loss of export markets during an introduction (See section 3.1 Costs Associated with the Proposed Rule, pp. 11–12). The economic analysis did not take into account potential disruptions of integrated pest management (IPM) programs, because the likelihood of such disruptions is small on average, though it may be large to individual growers. Most Medfly outbreaks in the United States occur in urban areas with little if any commercial crops present. In addition, APHIS uses environmentally friendly eradication techniques, including use of beneficial-insect friendly cover sprays and mass release of sterile adult male Medflies, practices which are completely compatible with IPM practices, and in emergency situations, malathion bait sprays, which are much friendlier to the environment than malathion cover sprays. As a result, current eradication programs, which are extremely successful in eradicating the Medfly, would more than likely not greatly impact the IPM programs of producers of Medfly host crops. The economic analysis for the proposed rule did not incorporate Medfly introduction costs on other industries that derive income from Medfly host crops. The economic analysis for the final rule discusses these costs and points out that, even if every dollar of farmer sales of Medfly host crops generated an additional 10 dollars in associated industries, inclusion of these additional costs does not affect the conclusions of the economic analysis, because the probability that a mated pair of Medflies could enter the United States via imported Spanish clementines is so low.

One commenter noted that the economic analysis for the rule states that the clementine export season runs from mid-September to late February, and stated that the season could actually extend beyond February.

Economic impacts associated with the proposed rule were based on annual data, which are independent of the length of actual shipping seasons. As a result, the fact that the shipping season could extend beyond February will not affect the analysis as written.

One commenter stated that the RIA cites sources and data indicating that imported clementines do substitute for domestic tangerines and that the price for tangerines is sensitive to clementine import volumes—*i.e.*, the price for tangerines goes up when clementine imports are stopped. That being the case, the commenter noted, it seems reasonable to expect that the converse would hold true as well—*i.e.*, the price for tangerines will go down when clementine imports resume, and this should be reflected in the RIA's analysis of competitive impact.

The analysis of the rate of substitution between Spanish clementine (clementine) imports and domestically produced tangerines (tangerines) conducted in the RIA indicates that clementines do not substitute for tangerines in a statistically significant sense (See 3.3.1 Domestic Tangerine Market, p. 17–19). Data examined from the Citrus Advisory Committee indicated that tangerine prices were higher in 2001 relative to 2000, during a period in which clementines were imported in 2000 but were not imported in 2001 due to the ban, but that price differences were not statistically significant. In addition, the coefficient estimate on clementine imports in the inverse demand curve for tangerines was negative, indicating clementines and tangerines may be substitutes; however, the coefficient estimate again was not statistically different from zero. That is, substitutability between clementines and tangerines was only apparent and potentially due to chance variation in the data. As a result, the substitutability between clementines and tangerines could not be confirmed scientifically. Because the substitutability could not be confirmed, more tangerines are consumed than clementines in the United States, and clementines have been imported historically, the RIA did not estimate economic impacts on domestic tangerine producers associated with lifting the ban on clementines under the new import program.

One commenter stated that the RIA's assumption that the total cost of a Medfly introduction to taxpayers and growers would be only $14 million ($11 million for taxpayers and $3 million for growers) is questionable. The commenter noted that an independent analysis by a University of California, Berkeley, economist estimated that a Medfly introduction in California would impose increased production and post-harvest treatment costs ranging from $316 million to $500 million, and that if Japan, Korea, Hong Kong, and Taiwan imposed an embargo on shipments of fresh produce from the affected areas, it would cost the California agricultural industry an additional $564.2 million in lost revenues.[25] The commenter noted that, due to multiplier effects, the independent analysis estimates the impact on the California economy would ''amount to a $1.2 billion loss in income and a loss of 14,190 jobs,'' and stated that this estimate is consistent with historical experience: Twenty years ago, the 1980–1982 Santa Clara Medfly infestation cost $100 million to eradicate and an additional $100 million in lost sales due to embargoes on commodities grown within the quarantined zone.

Mean costs of eradicating six recent Medfly introductions in 1997 and 1998 ($10.93 million in 2000 dollars, which includes Federal and State expenditures) were used to estimate the impact of a potential Medfly introduction on U.S. Federal and State taxpayers. In addition, the RIA incorporates economic impact associated with a large Medfly introduction on producers of Medfly host crops in the United States. The $3 million economic impact on producers during a large introduction includes individual monetary estimates associated with additional field sprays, post-harvest treatments, fruit losses due to yield losses and post-harvest treatments, and loss of export markets (See 3.1 Costs Associated with the Proposed Rule, p. 11–12). The RIA did not incorporate potential impacts in other industries that derive income from Medfly host crops, including processors, canners, shippers, and export operations, because per introduction estimates of these costs were not available; however, the overall conclusions of the analysis are not affected when introduction costs are increased ten-fold from the $14 million specified in the RIA.

The independent analysis referred to by commenters estimates costs associated with Medfly becoming established in California, including those associated with additional

[25] Siebert, J. 1999. Update on the economic impact of Mediterranean Fruit Fly on California agriculture. Subtropical Fruit News. 7(1):16–18.

pesticide use, post-harvest treatments, loss of export markets, and losses in industries that derive income from Medfly host crops. As such, the analysis points out the devastating impacts Medflies can have on producers of Medfly host crops and related industries in California, as well as other regions that can sustain Medfly populations, in the event Medflies become established. APHIS also recognizes the fact that the Medfly is an extremely damaging pest of fruit and vegetable crops and that, if left unchecked, could potentially wreak enormous damages on agricultural producers and related industries. This is why APHIS has developed and instituted the Fruit Fly Cooperative Eradication Program.

However, we do not believe the costs identified in the independent analysis should be used to calculate expected losses to producers of Medfly host crops and associated industries resulting from a single introduction under the new clementine import program. This is because most Medfly introductions occur in urban areas and typically do not lead to long-run establishments that affect large agricultural production regions. Six recent Medfly introductions in Florida and California in 1997 and 1998, the same six introductions that were used to estimate Federal and State taxpayer eradication expenses in the RIA, were eradicated in an average 9.33 months, measured from the initial detection of Medflies to the release of affected areas from quarantine, and affected on average only 2.67 counties [26] Long-run establishments adversely affecting large production regions did not result from these recent introductions.

In addition, the eradication program has been improved considerably since the 1980–1982 Santa Clara Medfly infestation. The primary reason why the Santa Clara infestation was so expensive to eradicate, and expensive for agricultural producers, was because sterile males and sterile females were released and a required 100:1 sterile-to-fertile Medflies ''overflooding'' ratio was not met. Using the current Sterile Insect Eradication Technique (SIT), which has been greatly improved since 1982, careful population monitoring and use of cover sprays are used to reduce populations in quarantined areas to the required 100:1 sterile-to-fertile ratio before the release of sterile males only. APHIS is modifying its rearing facilities to only produce sterile males to allow for a more efficient and effective SIT system to reach the required 100:1 ''overflooding'' ratio. Sterile females are no longer released with sterile males in order to increase the likelihood that only sterile males mate with fertile females. Aerial cover sprays with spinosad, an environmentally- and beneficial-insect friendly compound, are used over affected agricultural production regions to reduce Medfly populations; ground applications of spinosad with backpack sprayers are used in urban areas. In emergency situations, APHIS may use malathion bait sprays, both aerially and using backpack sprayers and may release sterile males in amounts appropriate to achieve an expected 100:1 sterile-to-fertile individual ''overflooding'' ratio. As a result, Medfly introductions, should they occur in the future, will more than likely not lead to the devastating economic losses experienced in 1980–1982.

One commenter stated that the RIA has taken no account of the impacts that pesticide application would have in a variety of areas, including destroying beneficial insects used as part of IPM programs, creating farm worker safety issues, and raising concerns about pesticide residues on the treated produce. For example, the commenter noted, because many export markets have not set residue tolerance limits for newer (less toxic) pesticides like spinosad, growers interested in exporting their product would have to use older, more toxic pesticides (such as organophosphates). The RIA also fails to consider the impacts that would result from an erosion of consumer confidence in the quality and security of the U.S. food supply.

The RIA did not take into account potential disruptions of IPM programs because these costs will more than likely be small, on average. Most Medfly outbreaks in the United States occur in urban areas with little if any commercial crops present. In addition, APHIS coordinates the Medfly eradication program, uses environmentally friendly eradication techniques, including use of beneficial-insect friendly cover sprays (spinosad) and mass release of sterile adult male Medflies, practices which are completely compatible with IPM practices, and in emergency situations, malathion bait sprays, which are much friendlier to the environment than malathion cover sprays. As a result, current eradication programs, which are extremely successful in eradicating the Medfly, would more than likely not adversely affect the IPM programs of producers of Medfly host crops and create farm worker and environmental safety issues.

However, only the parent compound spinosad has been registered for use by organic farmers. The compounds needed to dilute the parent compound into a foliar mixture have not been registered for use by organic farmers. As a result, organic farmers would not be able to market their crops as organic in the event of a Medfly outbreak that required the use of a spinosad cover spray, even though the IPM program would not be adversely affected. The pesticide industry is currently working to get the compounds needed to dilute spinosad into a foliar mixture registered for use by organic growers.

The RIA incorporates costs associated with fruit losses due to yield loss, fruit losses due to post-harvest treatments, and losses of export markets in the calculation of losses potentially borne by agricultural producers in the event of a Medfly introduction. Because spinosad is registered for use by organic growers, spinosad residues will more than likely not affect market access for Medfly host crops in foreign markets, however, such crops might not be marketed as ''organic.'' The RIA does not incorporate ''impacts that would result from an erosion of consumer confidence in the quality and security of the U.S. food supply.'' Instead, the RIA incorporates costs associated with the value of affected commodities lost due to yield and post-harvest treatment losses. As for quality effects, we are aware of only two studies that estimate levels of pesticide residues on fruits and vegetables consumed in the United States, both of which report extremely low pesticide residues on produce (See ''The future role of pesticides in U.S. agriculture.'' (2000) National Research Council. National Academy Press. Washington, D.C., and a reference therein). Unfortunately, we are not aware of any studies that have examined quality impacts on food associated with Medfly introductions and, as a result, cannot incorporate quality impacts quantitatively. The economic analysis for the final rule discusses these costs.

One commenter stated that because of concerns by the U.S. Environmental Protection Agency (EPA) and opposition from the public, it is far from clear that growers and State officials would be permitted to undertake the aerial spraying of pesticides necessary to wipe out a Medfly infestation. If that proved to be the case, Medflies could become established in growing areas on a long-term basis, with enormous cost implications that the RIA does not even begin to consider.

[26] See APHIS. 1999. Exotic fruit fly infestations and eradications in the continental United States. Revised November 9, 1999. Riverdale, MD. P. 15–21.

Aerial spraying of spinosad is approved by EPA for use in production agriculture. In addition, ground application of spinosad using backpack sprayers is approved for urban areas. Further, the EPA has approved malathion bait sprays for emergency situations. Use of these technologies, in concert with the mass release of sterile adult males, has proven extremely effective in eradicating recent Medfly introductions, and APHIS is continuously striving to develop better more environmentally friendly eradication techniques. Because current technologies have proven so effective in eradicating recent Medfly introductions, it is likely that future introductions will not lead to long-run establishments of the Medfly. As such, the RIA incorporates costs potentially borne by Federal and State taxpayers and agricultural producers during an introduction under the assumption that the introduction is eradicated successfully.

Moreover, the RIA assumes that, should an introduction occur, it would occur in an agricultural production area, even though most introductions occur in urban areas. As a result, the RIA estimates Medfly introduction costs conservatively.

Environmental Documentation

One commenter noted that APHIS did not prepare an environmental impact statement (EIS) or an environmental assessment (EA) for the proposed rule, nor did it make a specific finding of no significant impact (FONSI). The commenter stated that since the RIA vastly underestimates the probability of a Medfly introduction, a finding of no significant impact based on the RIA would not be supportable. The commenter further stated that, because of the significant flaws in the RIA, there are serious questions as to the adequacy of APHIS's compliance with the requirements of the Regulatory Flexibility Act and the National Environmental Policy Act (NEPA).

We disagree with the commenter that our RIA is flawed, for reasons stated earlier in this document. APHIS did not prepare and EIS, EA, or FONSI for this rule because we have determined that this action fits within the class of actions identified in 7 CFR 372.5(c) as categorically excluded from further environmental analysis.

As noted in § 372.5(c), categorically excluded actions share many of the same characteristics as the class of actions that normally require EA's but not necessarily EIS's. The major difference between categorically excluded actions and actions that require EA's is that the means through which adverse environmental impacts may be avoided or minimized have actually been built right into the actions themselves.

We believe that this standard is applicable to the importation of Spanish clementines. In this case, we have designed a regulatory approach that results in a very low probability that a mated pair of Medflies could enter the United States via imported Spanish clementines. The only adverse environmental impacts that could be associated with the importation of Spanish clementines relate to the potential introduction of a pest via that commodity. As stated elsewhere in this document, we have determined that risks posed by all pests associated with Spanish clementines are mitigated via the measures employed in this rule. Hence, the means through which adverse environmental impacts are avoided has been built into the rule itself.

Nonetheless, APHIS has considered the environmental impacts associated with eradicating Medflies and other fruit flies from the United States in the event that they are introduced. This analysis can be found in: ''Fruit Fly Cooperative Control Program, Final Environmental Impact Statement'' (2001). (Available on the Internet at: *http://www.aphis.usda.gov/ppd/es/ppq/fffeis.pdf.)*

One commenter stated that APHIS has not discussed the expected economic and environmental impact of its proposal on Spain. The commenter claimed that there is no indication whether Spain would have the necessary resources to carry out an effective eradication and control program and no discussion of the environmental impacts that would occur in Spain in association with the requirements of the rule.

APHIS is not requiring Spain to eradicate Medfly, and therefore, there is no need to assess Spain's ability to carry out an eradication program. The RIA discusses expected economic impacts on Spain in sections 2 (Background) and 3.1 (Costs Associated with the Proposed Rule). The Spanish already have an extensive Medfly management program in place, and according to the RIA, the additional costs associated with following the new risk mitigations called for under the proposed rule were small when compared to the value of clementine exports. This indicates that Spain will have the necessary resources to carry out an effective control program.

We have also considered this rulemaking under the provisions of Executive Order 12114, ''Environmental Effects Abroad of Major Federal Actions,'' which ''represents the United States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.'' Inasmuch as virtually all impact-generating activities associated with this rulemaking will occur outside the United States, the provisions of this executive order may be said to apply. We believe, however, that this rulemaking is exempt from the procedural requirements of the executive order by virtue of the fact that Spain is participating with the United States and is otherwise involved in the action (see § 2–3(b) of the executive order) and because the action will not have a significant effect on the environment outside the United States (§ 2–5(a)(i)).

Additional Specific Comments on the RMA and ORACBA Analysis

One commenter provided a detailed critique of the RMA and the ORACBA analysis. The commenter's submission included analysis of some of the same data used in the ORACBA analysis to evaluate cold treatment and other elements of the model it uses. Several other commenters paraphrased or otherwise cited these comments in their own comments, so some of the points raised by the commenter have already been discussed in detail earlier in this document. We have made changes to the RMA in response to some of the commenter's points, as noted in detail below and elsewhere in this document. The net effect of these changes was an approximate 10-fold decrease in our original estimates of risk, suggesting that our original analysis overestimated the risk. The main reasons for the reduction in the revised risk estimates were due to initial overestimates of the effect of variability and due to overestimates in the proportion of a shipment that constitutes a hazard. Specific comments are addressed below.

Failure To Correctly Account for Variability

The commenter stated that the RMA fails to properly account for variability and uncertainty.

Conceptually, the difference between variability and uncertainty is clear. Variability refers to random variation that cannot be reduced through acquisition of additional information. Uncertainty refers to our state of

knowledge and may be reduced through additional information. A number of leaders in the field of risk analysis have drawn attention to cases where maintaining a rigorous distinction between uncertainty and variability, if possible, may be helpful in risk management decisonmaking. For example, if the statutory decisional criteria is ''reasonable certainty of no harm,'' and this is administratively interpreted to mean protecting a hypothetical individual at the 99th percentile of the distribution of exposure to an environmental contaminant, then it may be useful to consider the uncertainty associated with estimating this percentile in the exposure variability distribution. In this context, performing so-called 2-dimensional uncertainty analysis in which variable and uncertain model inputs are separated can lead to statements such as, ''We are 95 percent confident that the individual at the 99th percentile in the exposure distribution does/not confront serious risk of illness.'' For evaluating the expected risk reduction potential of different risk management strategies, however, it is not clear that such a distinction between variability and uncertainty would be useful.

Furthermore, while the conceptual distinction between uncertainty and variability is clear, the separation can be somewhat artificial or vague in practice. Morgan [27] cautions that while variability and uncertainty are different and sometimes require different treatments, the distinction can be overdrawn. In many contexts, variability is simply one of several sources of uncertainty.[28] The National Research Council Committee that produced *Science and Judgment in Risk Assessment* [29] acknowledged complications that arise because uncertainty and variability work in tandem: Variability in one quantity can contribute to uncertainty in another, and the amount of variability is generally itself an uncertain parameter. Furthermore, this committee recognized that the lack of ''identifiability'' can frustrate efforts to partition variability and uncertainty. In the statistical sense, unidentifiability means that the parameters of a model cannot be estimated from the available information. For example, a single observation consists of a variability component (how this individual varies from the population mean) and an uncertainty component (*e.g.*, measurement error). If there are no matching replicates, a common problem in spatial or time series data, then it is impossible to empirically estimate the separate variability and uncertainty components. This problem has long been recognized, for example, in the field of geostatistics where it is referred to as the ''nugget effect,'' where geological variation at a scale finer than the separation between measurement sites cannot be distinguished from uncertainty due to the survey protocol. Although various procedures have been developed in an effort to partition the ''nugget'' into variability and uncertainty, these procedures are themselves subject to uncertainty. Attempts to model ''uncertainty about uncertainty'' can lead to infinite regress. More recently, the National Research Council [30] observed, ''[a]lthough the distinction between natural variability and knowledge uncertainty is both convenient and important, it is at the same time hypothetical. The division of uncertainty into a component related to natural variability and a component related to knowledge uncertainty is attributable to the model developed by the analyst * * * Modeling assumptions may cause ''natural randomness'' to become knowledge uncertainties, and vice versa.''

Nevertheless, an effort was made to determine whether there was substantial informational value of a two-dimensional uncertainty analysis in the case of the risk management analysis for Spanish clementines. The two-dimensional uncertainty is represented by a figure that is contained in Appendix 3 to the RMA, which includes more detailed discussion of this matter.

As indicated in the figure (and in the Summary Statistics table of Appendix 3 of the RMA report), the 95th percentile of the 1-dimensional analysis is approximately 2×10^{-5} (1.99E–05). Given modeling results of the same order of magnitude (10^{-5}) and the presence of additional, unquantified uncertainties (*e.g.*, the probability of establishment of a Medfly colony, given one or more mated pairs arriving in a suitable location), the difference between the results is probably insubstantial and suggests that, at least in this case, the 2-dimensional analysis provides little more than additional complexity.

Inadequacy of the Chosen Model and Appropriateness of Assumptions

The commenter claimed that the model used to represent the movement of clementines to market appears to be oversimplified to the extent that it is likely to give misleading results. The commenter pointed out that many assumptions used in RMA may not be appropriate.

We agree that some assumptions used in the RMA are a simplification of the real system; however, we did not try to replicate the real system but rather to model it. We aimed to capture key elements that represent the system such that our analysis can be informative for decisionmaking. For example, the commenter notes that we assume, among other things, that all clementines are exactly the same. We acknowledge that not all clementines are the same, that not all larvae are the same, and that biological systems in general rarely come in identical sets. However, our intent was to describe the system in terms of its key elements (listed as C1 to C5 in the RMA model), and characteristics of these elements, while a simplification, were sufficiently descriptive to allow for rational, science-based decisionmaking.

Again, not all clementines are exactly the same, not all shipments are exactly the same, and there are no two boxes of fruit that are identical. However, we believe we have captured the key elements of variability in our simulation. That is, just because fruit are different, it does not follow that such will result in more or less fruit in a container, and thus, APHIS believes it has correctly described the variation associated with fruit in a container. Further, despite the fact that fruit are not the same and may be less or more suitable for a larva to complete development, APHIS believes that it correctly captures this interaction in its stated variation of survival of larvae in fruit to vary from zero to eight.

We agree with the commenter that the system itself and the marketing of fruit has been simplified in our model. We do not agree, however, that the system we used is an oversimplification, because we believe we have captured those elements that are essential to understanding risks posed by imported Spanish clementines. We further believe that additional specification and description of the system will result in lowered estimates of risk.

For example, the commenter stated that the division of the United States into areas that are strictly suitable and

[27] Morgan, G. 1998. Uncertainty Analysis in Risk Assessment. Human and Ecological Risk Assessment 4:25–39.

[28] Morgan, M.G., M. Henrion, and M. Small. 1990. Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Risk and Policy Analysis. Cambridge University Press, Cambridge.

[29] National Research Council. 1994. Science and Judgment in Risk Assessment. National Academy Press, Washington, DC.

[30] National Research Council. 2000. Risk Analysis and Uncertainty in Flood Damage Reduction Studies. National Academy Press, Wash., DC.

unsuitable was an oversimplification. We disagree. It is indeed a simplification, but it allows us to correctly and conservatively capture the essence of the risk. For example, the State of Texas as a whole is considered suitable (as are the entire States of Arizona, Alabama, Georgia, South Carolina, Florida, California). However, the northern part of Texas (*e.g.*, the ''Panhandle'') does not have conditions suitable for Medfly development. That area is arid, winters are cold, there are very few hosts available, and conditions are not suitable for Medfly to establish. Indeed, it is likely that only the areas of Texas that will support Medfly populations are areas where citrus [31] occurs.

The RMA's inclusion of the entire state of Texas (and other States with similarly diverse climatic conditions) as a ''suitable area'' is indeed a simplification. It is not, however, a simplification that would result in USDA's underestimation of risk. This and other similar simplifications employed by the RMA result in conservative estimates, not otherwise. For these reasons, we disagree that we have oversimplified the system.

The commenter stated that the RMA assumes that all areas can be exactly divided into exactly two classes: One hospitable to Medfly, the other completely inhospitable.

We believe the commenter's assessment is correct, but it fails to note that our assumption results in conservative expressions of risk. For example, most of the State of Texas is considered suitable for Medfly development. Yet this is likely an overestimate because suitable hosts do not commonly occur in northern Texas where fruit production is secondary and because the conditions in northern Texas are not climatically suitable for the development of Medflies. Texas is illustrative because large populations of another fruit fly, the Mexican Fruit Fly (*Anastrepha ludens*)(Mexfly) are common and have been trapped in large numbers in southern Texas for the past decade. The Mexfly is also considered more tolerant of cold than the Medfly. Despite its occurrence in south Texas, there never have been establishments (or damages of any kind) recorded outside of the southernmost tip of Texas where citrus is produced. This is empirical evidence, but there is the additional evidence that Medflies have never become permanently established in areas where citrus does not occur. Thus, the partitioning of the United States into areas suitable and unsuitable is an approach that results in conservative estimates because we have identified entire States as suitable areas, when, in reality, only small portions of those States have all the conditions that would provide for the establishment of Medfly.

The commenter also suggested that Medflies might emerge during shipment or transportation. We did not consider this a likely scenario because clementines are stored under refrigeration. Typical refrigeration dramatically slows or stops the development of these insects and thus the emergence during refrigerated storage and transport is not considered a significant system component.

Shapes of Distributions/Construction of Distributions

The commenter suggested that the shapes or constructions of certain distributions require refinement.

We agree with the commenter that one distribution and several parameters could be refined. However, our refinements reduced our estimates of risk. As such, we reviewed the distribution for component 1 (number of fruit in shipments). We had previously assumed that the fruit in a container would vary uniformly. The assumption of a normal distribution is better supported by the evidence. We thus changed the distribution used from a Uniform to a Normal, and that change is reflected in our final RMA.

We also chose to simplify our treatment of component 5 of the RMA (amount of fruit that ends up in suitable areas) in response to suggestions by the commenter. We had previously used a Pert distribution. In the final version, we used constants. We selected maximum values based on evidence. Constant values were used instead of distributions for component 5 because demographic trends represented by a maximum will make our analysis valid (in terms of demographic expectations) for at least a quarter of a century. Other distributions chosen for other components were considered appropriately described by the Pert distribution, as specified previously and were not changed. Changes were made to some of the values used.

For example, we previously had estimated that up to 15 larvae could occur in each fruit. We revised this value to eight maximum larvae based on the evidence provided by Santaballa 1999 and others. We also included the evidence from the proportion of fruit that is not consumed and is discarded from Wearing *et al.* and Roberts *et al.* This evidence was suggested by commenters and APHIS agreed that indeed most fruit is not discarded but is consumed and that it is important to analyze the fruit that constitutes a hazard. By virtue of being eaten, most fruit does not pose a risk of Medfly introduction. For that reason, we used the maximum value of discarded fruit (5 percent) reported in the evidence to determine what proportion of fruit that is shipped to suitable areas actually gets discarded.

We also agreed that our text noted that in estimating the probability of a mated pair in multiple containers, these had to ''coalesce'' in a given area. Whereas, we still believe that all containers of interest (because they may lead to fruit fly introductions) are limited to areas suitable to the Medfly, we clarified in our text that containers do not have to coalesce within a specific or relatively limited area. The estimated probability of a mated pair simply estimates the probability of a mated pair in multiple, independent containers. The commenter provided alternative ways to estimate the probability of a mated pair in multiple containers. In our final draft we continue to use the formula cited in the July 20, 2002, RMA because it is supported by several peer-reviewed scientific articles (*e.g.* Wearing *et al.*).

Finally, several commenters were reportedly confused by our presentation of multiple results. In the final version of our analysis, we present two endpoints: probability of a pair of flies in a single shipment and probability of a mated pair in multiple shipments to suitable areas. A third estimate (probability of a mated pair in all shipments to all areas) presented in the previous draft was eliminated because it did not contribute to our explanation.

The Effects of Mitigation Efforts

The commenter stated that separate Monte Carlo simulations are not representative of the modeled systems. He also noted that the separate simulations ''might be adequate, if the outputs computed are related to quarantine security.''

This comment implies that our approach is only appropriate if we pre-specify a given level of quarantine security or appropriate level of protection and compare our results to that level. As stated elsewhere in this document, that was not the intent of the RMA. The simulations modeled two independent situations; one represents a baseline and employs cold treatment but not field controls, and the other employs cold treatment and field controls.

[31] Citrus is used here as an indicator species, and we acknowledge that it is not the only Medfly host.

We did not attempt to relate our output to pre-set levels of quarantine security in the risk mitigation document. That is, in examining the probability that a mated pair of flies could be associated with single or multiple shipments, we did not have in mind a pre-set level that would be considered appropriate. We simply conducted the analysis, used the simulation process to express our understanding of the variability, and reported our results in terms of the probability of a mated pair in containers of clementines (single and multiple).

Cold Treatment—Extrapolations From Available Evidence

The commenter states that Baker (1939) and Phillips *et al.* (1997) show that under different conditions (*e.g.*, in different fruit) different treatments are required to achieve the same mortality. This is speculative, however. Baker (1939, Fig. 3) indicates different probit slopes for the response of larvae in all fruits tested vs. the response of larvae in all fruits except kamani nut, but the statistical discussion is insufficient to determine whether the differences are statistically significant. The reported differences also may be due to the failure to control for the differential cooling rates among fruits. This factor is controlled for by the T107-a treatment schedule, which requires that treatment time begins once the internal temperature of the fruit has reached the designated temperature. Phillips *et al.* (1997) raises the possibility that ''host fruit may influence mortality of fruit flies exposed to cold treatments,'' but provides no test of this hypothesis. The hypothesized host effect ignores the possibility that variation in larval response to cold treatment within fruit species is comparable to the variation between fruit species. It is equally plausible that reported differences among studies are due to variation among Medfly populations used in different studies or due to different rearing or inoculation methods used prior to cold treatment. The situation is also clouded by the inability—at treatment efficacy levels in the neighborhood of probit 9—of empirically separating variability in response due to different experimental methods and materials (which are unique for each trial) from the uncertainty in the true but unknown proportion of survival. The RMA plausibly assumes that uncertainty dominates variability under the treatment conditions and commodities relevant to T107-a.

The commenter also indicated that the ORACBA analysis has ''probably included'' a 2-day cooldown time. The analysis assumes compliance with the T107-a treatment schedule, which specifies that the duration of treatment begins once the internal fruit temperature has reached the specified treatment temperature.

Outputs and Metrics Used for Comparison

The commenter noted that our analysis evaluates the wrong outputs. Specifically, the commenter argues that a realistic estimate would evaluate the risk that all containers are shipped to all areas.

We disagree that risk is posed by containers sent anywhere in the United States. Most fruit that is directed away from suitable areas will encounter conditions that will not support Medfly development and establishment. We have however, reassessed our presentation of outputs in the final version of the risk mitigation analysis. We have clearly indicated that our output is expressed in terms of the mean and 95th percentile of the distributions. We have also noted that our output emphasizes an endpoint describing the probability of a mated pair in a container or in multiple containers to suitable areas.

Unjustified Extrapolation

The commenter noted that the RMA states that the risk posed by other Spanish citrus may be similar to that of clementines. The commenter claimed that the findings of the RMA might not be applicable to other commodities.

APHIS believes that although the RMA addresses clementines specifically, the risk from other Medfly host citrus from Spain may be comparable, though there are some specific differences. Other citrus are similar, but larger, and thus fewer fruit would be contained in shipments, though the number of pests per shipment may be similar.

Regardless, as a matter of policy, before allowing the importation of another type of citrus from Spain, APHIS would conduct additional risk analyses in support of such a proposal. A new commodity import request would be subject to the rulemaking process.

Analysis of Cold Treatment Data

The commenter questioned the kind and nature of data used in the ORACBA analysis.

The time-temperature response surface model presented in the ORACBA analysis was based on data reported by Back and Pemberton [32] (Table 1). The cold treatment temperatures directly relevant to the T107-a cold treatment schedule are in the 32–36 °F range. The ORACBA analysis correctly listed the cold-storage temperature levels that were included in the analysis, with the temperature data coded as indicated in parentheses: 32 °F (0 °C), 32–33 °F (0.28 °C), 33–34 °F (0.83 °C), 34–36 °F (1.67 °C), 36 °F (2.22 °C), and 36–40 °F (3.33 °C). The ORACBA analysis also indicates that the final storage temperature level (36–40 °F) was included to inform the high temperature and long duration regions of the response surface.

The commenter points out, however, that the ORACBA analysis was unclear about the data that were used in this portion of the analysis. Six—not five, as indicated by the ORACBA analysis—cold storage temperature levels were included in the analysis.

The ORACBA analysis indicated that data from the 40–45 °F treatment level were excluded from the analysis but failed to indicate that data from the 38–40 °F treatment level were also excluded. The ORACBA analysis indicates that the rationale for excluding these data from the analysis was to limit the effect of independent variable measurement error (*i.e.*, treatment temperature) on the multiple regression analysis. Therefore the data used in the response surface analysis remain unchanged and are limited to the temperate range most relevant to the T107-a treatment schedule.

Analysis Methods

The commenter stated that the ORACBA analysis did not describe the procedure used to empirically estimate the extra-binomial dispersion about the cold treatment response surface model.

The extra-binomial dispersion was estimated to relax the default logit regression assumption that the errors about the model are binomially distributed. This estimate was obtained by dividing the deviance goodness of fit statistic by its degrees of freedom. Incorporating the extra-binomial dispersion does not affect the maximum likelihood estimates obtained for the regression model parameters; therefore, the model predictions are unaffected. Failing to correct for over-dispersion, however, causes underestimation of the standard error of the parameter estimates and would have resulted in overstating the statistical significance of

[32] Back, E.A. and C.E. Pemberton. 1916. Effect of cold-storage temperatures upon the Mediterranean fruit fly. Journal of Agricultural Research 5:657–666.

the model inputs. The ORACBA analysis (Table 2) indicates that the response surface model inputs of time and temperature remain statistically significant after allowing for extra-binomial dispersion.

Observed Trends in Data

The commenter, after re-examining cold treatment data, stated that ''binomial uncertainties are insufficient to explain the variations from the proposed model.''

Using the same logit model used in the ORACBA analysis, the commenter indicates a slightly longer predicted time to achieve the probit 9 level of security than presented is presented in Figure 1 of the ORACBA analysis. This difference appears to be due to the inclusion by the commenter of the data reported by Back and Pemberton for 38–40 °F treatment level that was excluded by the ORACBA analysis for the reasons indicated above. (Note that the commenter's analysis represents the logit of probability of survival evaluated using base 10 logarithms so that the probit 9 level of security (a 3.2×10^{-5} probability of survival) takes a value of $^{-}4.5$ logits.)

Based on Figure 3.1 of his comment, the commenter judges that the binomial confidence bounds are insufficient to explain the variations from the proposed logit model. As indicated above, however, the ORACBA analysis estimated the extra-binomial dispersion about the logit model. Figure A below presents the Back and Pemberton data with the model fit according to the ORACBA analysis and extra-binomial confidence bounds. Therefore, not only was the model statistically significant, but based on Figure A, the fit also appears reasonably good. Note that the confidence bounds in Figure A represent uncertainty about the true mean response only (*i.e.*, logit model parameter uncertainty). The confidence interval for the mean response is a range of plausible values for the average of all responses at a given treatment level. The bounds in Figure A do not represent a prediction interval for an individual response, *i.e.* a range of plausible values for any single observation at a given treatment level. The latter is typically much broader than the former because it must account not only for uncertainty about the mean but also for individual random variation about the mean response for the population. Therefore a prediction interval for Figure A would envelope more of the raw data. Only approximate methods are available to estimate prediction intervals for non-linear models, however. The y-axis in Figure A represents the logit of the probability of survival evaluated using the natural logarithm so that the probit 9 level of security takes a value of $^{-}10.3$ logits. As indicated by Figure 3.1 provided by the commenter, one way of graphically presenting zero and 100 percent observed responses is to represent them by error bars that run off the bottom and top of the graph, respectively. Zero and 100 percent responses reported by Back and Pemberton have been omitted from Figure A below to ease visualization. The curves presented in Figure A have also been truncated to avoid extrapolation beyond the range of experimental observation.

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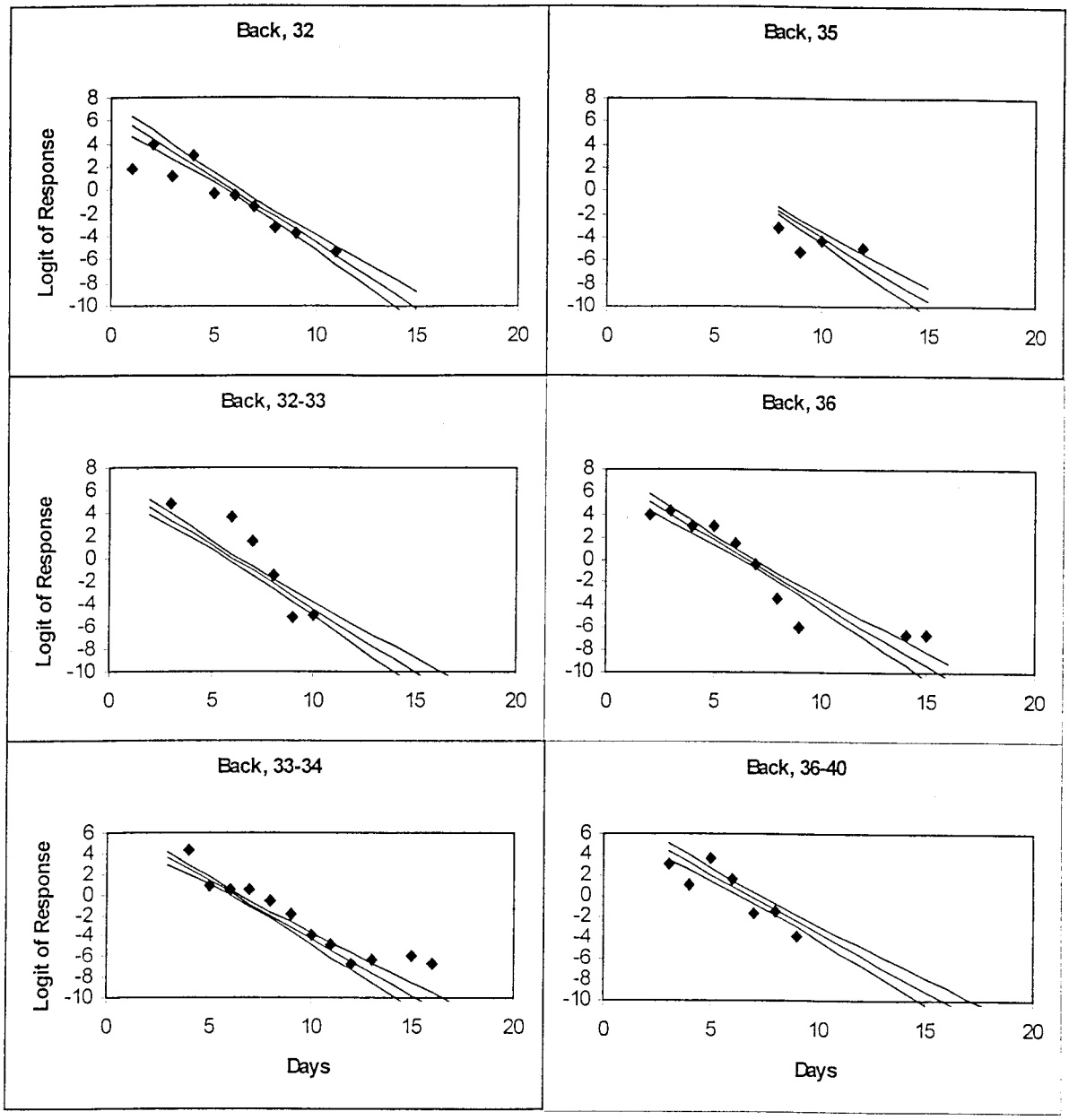
Figure A. Back and Pemberton(5) data, with model fit and confidence bounds.



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Models for Time and Temperature Response

The commenter seems to suggest that only one model form was considered in the ORACBA analysis (in equation 1), and that other link functions and data transformations were not entertained. The ORACBA analysis states, however, that in developing the response surface model, it considered three generalized linear model link functions: The logit, normit, and complementary log-log. Each was fit with and without a logarithmic transformation of time and temperature. Among the models considered, the model based on the untransformed data and the logit link function in equation 1 was selected on the basis of statistical goodness-of-fit criteria.

The commenter suggests that the response surface model developed for the ORACBA analysis is flawed because it fails to take account of both variability and uncertainty. The response surface model, however, represents only a portion of the quantitative analysis of the efficacy of cold treatment. As indicated, the response surface model based on the Back and Pemberton data is not intended to elaborate the definitive model of Medfly larval response to cold treatment. Instead, the primary aim of the analysis was to corroborate whether the existing cold treatment schedule fails to achieve the intended level of protection. To that end, the robustness of the model was assessed. To do this, response surface model predictions (point estimates omitting the unexplained variance consisting of variability and uncertainty) were compared with confidence intervals constructed about the independent results of more recent Medfly larvae cold treatment trials conducted under similar time-temperature combinations, as well as recent surveillance of shipping operations. In this manner, the complete quantitative analysis did take into account both variability and uncertainty regarding the response of Medfly larvae to cold treatment.

As indicated above, the inclusion of the Back and Pemberton data for the 38–40 °F treatment level explains the lack of correspondence between the parameter estimates obtained by the commenter and those reported in the ORACBA analysis.

The commenter stated that it is unclear why a linear effect of temperature was chosen in the response surface model used in the ORACBA analysis. The logit regression analysis assumes a linear relationship between the independent variables and the logit of the observed response. A separate (unreported) analysis testing this assumption rejected the hypothesis of no linear relationship between the logit of survival and temperature. This is consistent with the finding of the commenter that a linear variation between temperature and the logit of response may not be ruled out.

The commenter presents analysis of ''the published data of Baker'' on Medfly; however, Baker [33] only presents figures summarizing data analysis, not raw data. Therefore, it is unclear how the commenter acquired and analyzed the data. Furthermore, Baker seems to have excluded data from treatments where no larvae survived on the basis that the lack of survival was regarded as ''not valid experimental information.'' Without full disclosure of all data, it difficult to judge the analysis.

Based on a regression analysis of data reported by Santaballa *et al.*,[34] the commenter estimates that more than 18 days of cold treatment at 2 °C (35.6 °F) would be required to achieve the probit 9 level of security. This result, however, derives from the assumed statistical model form. Both Figure 3.5 provided by the commenter and Figure 3 of the ORACBA analysis indicate a high level of confidence that a 16-day cold treatment at 2 °C (35.6 °F) provides a high level of confidence of achieving the probit 9 level of security. This observation illustrates that for the purposes of revising the regulatory cold treatment schedule, elaborating a regression model relating time and temperature to survival needs to be interpreted cautiously. The ORACBA analysis notes that uncertainty remains regarding what statistical model form best describes the observed cold treatment data. The biological mechanism of larval mortality due to low temperature is not well understood, but if a critical physiological point exists (*e.g.*, beyond which cell walls rapidly lose integrity), this might suggest using a discontinuous (*e.g.*, splined) model form. Many discontinuous surface modeling approaches suffer, however, from a distinctly ad hoc flavor.

The regression modeling approach employed by the commenter, however, is not the only valid approach to evaluating the efficacy of phytosanitary risk reduction measures. Instead of relying exclusively on a regression results that are contingent on the assumed model form being correct, the ORACBA analysis provides an approach whereby the efficacy of discrete time-temperature combinations (more recent experimental trial and surveillance results) are characterized by constructing confidence intervals obtained assuming only that the probability of larval survival is beta distributed (*i.e.*, arises from a binomial process, as assumed by the commenter's analysis). This approach makes no assumption about the underlying form of the relationship between cold treatment response and time or temperature (*e.g.*, it does not assume that a logit, normit, or complementary log-log data transformation will be linearizing). Thus, limiting the analysis to discrete treatments within the range of time-temperature combinations relevant to regulatory decisionmaking has the advantage of relaxing or simply avoiding the far more numerous statistical assumptions inherent to regression analysis methods. This is of particular concern because predictions at the extremely low survival levels relevant to phytosanitary programs may be dominated not by the observed data but by the assumed statistical model form. For example, a heavy-tailed distribution may fit the data as well as a light-tailed distribution, but the predictions at very low survival levels will differ substantially due to differences in the assumed model form. In this case, therefore, simple data analysis making modest, justifiable assumptions may be preferable to elaborate regression modeling which inherently invokes numerous, often untestable, statistical assumptions.

Miscellaneous Points

The data presented in the ORACBA analysis (Table 4) correctly identify the data for more mature or cold-tolerant larvae used in the analysis. Note the discussion in that analysis regarding the indeterminate evidence regarding the most cold-tolerant larval stage.

Regarding the methods used in the ORACBA analysis for obtaining the beta distribution parameter estimates, both the method of matching moments and the parameterization suggested by the commenter are commonly used in the peer-reviewed literature. Some analysts prefer the method of moments because it obtains a beta distribution with an expected value equal to the sample mean and does not require specifying a subjective prior distribution, which is implicit in the parameterization

[33] Baker, A.C. 1939. ''The Basis for Treatment of Products Where Fruit flies are Involved as a Condition for Entry into the United States.'' Circular No. 551 US Department of Agriculture, Washington, DC.

[34] Santabella, E., R. Laborda, and M. Cerda. 1999. ''Informe sobre tratamiento frigorifico de cuarentena contra Ceratitis capitata (Wied) para exportar mandarinas clementinas a Japon.'' Valencia, Spain, Universidad Politecnica de Valencia.

recommended by the commenter. The method of moments is limited, however, in that it cannot handle zero values for r, the number of survivors observed after treatment. Therefore, the ORACBA analysis employed the method of moments except in the case where r=0.

The commenter criticized the treatment of zero proportion observations as ''bizarre'' and ''misleading,'' but they follow directly from the beta distribution parameterization that he recommends. Zero value observations in the ORACBA analysis (Figure 4), for example, are presented as the median of a beta distribution parameterized as $\alpha=r+1$, $\beta=n-r+1$. It is well recognized that estimated proportions of 0 and 1 pose special difficulties for variance estimation and calculation of confidence intervals. The commenter takes a bounding estimation approach to the problem that handles the ''special case'' of r=0 or 1 by logical reasoning. This reasoning becomes more compelling, however, as the sample size (n) grows larger.

For the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Incorporation by Reference

This final rule requires clementines from Spain to be cold treated in accordance with treatment T107-a of the PPQ Treatment Manual, which is incorporated by reference at 7 CFR 300.1. On October 15, 2002, we published in the **Federal Register** an interim rule (APHIS Docket No. 02–071–1) that revises treatment T107-a and other cold treatment schedules and updates the incorporation by reference for those treatments.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**.

We are taking this action in response to a request from the Government of Spain and after determining that the restrictions described in this final rule will reduce the risk of introduction of Mediterranean fruit fly and other plant pests associated with the importation of clementines from Spain.

Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. The shipping season for Spanish clementines begins approximately in mid-September. Making this rule effective immediately will allow interested persons to begin shipping Spanish clementines to the United States as soon as possible after that time. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon signature.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

For this final rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this rule on small entities, as required under 5 U.S.C. 603. The economic analysis is summarized below. See the full analysis for the complete list of references used in this document. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT,** or on the Internet at *http://www.aphis.usda.gov/oa/clementine/index.html.*

Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, and other articles to prevent the introduction of injurious plant pests.

Summary of Economic Analysis

In our analysis, we report estimates of regulatory benefits and costs for importers, wholesalers, retail consumers, federal and state taxpayers, and Medfly host crop producers in the United States. Regulatory benefits associated with U.S. imports of Spanish clementines and regulatory costs associated with potential Medfly introductions are estimated using an economic model, which incorporates salient features of Medfly biology, Medfly field control in Spanish groves, and fruit cutting and inspection procedures in the regulations. We estimate regulatory benefits and costs with and without limited distribution imposed, while focusing on the latter under the assumption that limited distribution will not be imposed after the first shipping season during a typical year. Regulatory benefits and costs for a typical year in the near future are estimated relative to the ban (baseline one), because the ban is currently in effect, and relative to the previous import program (baseline two), because this provides a useful benchmark for measuring relative benefits and costs.

The economic analysis for the proposed rule (APHIS 2002a) used a certainty-equivalence framework (values for biological and economic parameters were based on expected values) to estimate regulatory benefits and costs, which was based on the risk analysis for the proposed rule (APHIS 2002b), the proposed regulations, and economic incentives facing Spanish parties. Because key biological and economic parameters will likely vary from expected values on an intra- and inter-seasonal basis and, more importantly, because the model is nonlinear in these parameters, we use Monte Carlo simulation to examine benefits and costs in the current analysis, following the approach taken in the risk analyses. Other than this change, as well as some changes in additional default biological parameters, the current analysis is very similar to the economic analysis for the proposed rule. As such, the model used in the current analysis draws heavily from the economic analysis for the proposed rule and the risk analysis for the final rule (APHIS 2002c). In addition, public comments received on the economic analysis for the proposed rule indicated that the methods used to estimate annual Medfly introductions were not adequately explained. Therefore, we provide a detailed discussion of the biological model in the analysis accompanying the regulations, where, in the interest of transparency, we also provide the computer program used to estimate regulatory benefits and costs under the default model.

The results of our analysis indicate that regulatory benefits will outweigh regulatory costs relative to both baselines. Expected regulatory gains per year are roughly $207 million relative to the current ban (baseline one), including $118, $59, and $30 million in expected gains for importers, wholesalers, and consumers, respectively, with practically no increase in expected costs for federal and state taxpayers and agricultural producers in the United States associated with Medfly introductions. In addition, the regulations save an estimated $47,000 in annual Medfly introduction costs potentially incurred under the previous import program. Because import levels under the regulations will more than likely exceed import levels under the previous import program, net welfare associated with international trade in Spanish clementines under the regulations is expected to exceed net welfare under the previous import program by an average $23 million per

year. That is, net regulatory welfare relative to the second baseline is $23 million per year.

Regulatory Costs in Spain

Regulatory costs in Spain include purchases of additional Medfly traps for producers, purchases of baits for the traps, monitoring and record keeping costs, additional bait spray costs, additional cold treatment costs, and trust fund expenses. Total annual trap and bait expenses for all Spanish growers under the regulations are only $660, or 8.39E–04% of average export market value during 1999 and 2000 ($78.69 million, FAS 2002). Total annual trust fund expenses for the Spanish government, or its agent, are estimated to be at least $90,000, including 16.15% administrative overhead (West 2002), or 1.14E–01% of average export market value during 1999 and 2000. Total annual cold treatment expenses for all exporters average $1.12 million (± $13 thousand) per year, which is 1.42% of average export value during 1999 and 2000, representing a significantly larger cost on exporters. Because the U.S. market is lucrative relative to markets in the rest of the world and because dramatic price declines in Europe associated with the Spanish clementine ban in the United States indicate that European markets are saturated at recent export levels, we assume that additional cold treatment expenses will not affect supply in the short run.

We were unable to estimate additional costs associated with monitoring and record keeping in Spanish groves, which producers will be required to pay; however, these costs will likely be low. It is not clear if or by how much annual bait sprays and spray costs may increase; however, these costs may be borne entirely by federal and local governments in Spain and therefore not affect production decisions. Because the preceding regulatory costs are low relative to the gross value of the U.S. market and because alternative foreign markets for Spanish clementine growers appear to be saturated at recent export levels, we assume that export supply is perfectly inelastic with respect to U.S. import prices. As a result, marginal production and export costs borne by Spanish parties are not passed on to U.S. importers, wholesalers, and retail consumers. The assumption of perfectly inelastic supply is appropriate for a short-run analysis such as this and does not substantially affect the results of the analysis. Furthermore, assuming inelastic supply allows us to estimate clementine import levels and therefore Medfly introduction costs conservatively, the latter of which increase with import levels.

Fruit Cutting and Rejection Costs

Fruit cutting and rejections of inspectional units in Spain and fruit cutting in the United States reduces U.S. clementine imports by an average 4.91% under the default model (0.99% of average export value for 1999 and 2000), leading to reductions in revenues for importers and wholesalers, consumer benefits, and expected Medfly introduction costs. Fruit will be cut and inspected in Spain at a rate of 200 clementines per inspectional unit, which can include as many as 555 pallets, with exporters choosing the size of the inspectional unit. Losses may also include rejections of inspectional units, where the rejection rate will depend on the proportion of fruit that is infested with Medflies in inspectional units (the infestation rate). A fruit cutting and rejection program occurs at the U.S. port. The economic model incorporates the effects of the fruit cutting and inspection programs in Spain and in the United States, including the rejection of inspectional units, on U.S. import levels and therefore on regulatory costs and benefits.

Medfly Introduction Costs

Because current techniques and technologies used by APHIS have proven safe and effective in eradicating recent Medfly introductions and because most introductions occur in urban areas, we assume that introductions associated with Spanish clementine imports will not lead to long-run Medfly establishments in the United States. Annual Medfly introduction costs are given by the product of the expected number of introductions and an estimate of the cost of one introduction. We use the mean cost of eradicating six recent Medfly introductions in California and Florida during 1997 and 1998 in 2000 dollars, rounded up to $11 million, as our measure of federal and state taxpayer costs per introduction (APHIS 1999). Additional costs borne by producers of Medfly host crops during an introduction (additional field sprays, post-harvest treatments, fruit losses, post-harvest fruit losses, and loss of export markets) are based on producer cost estimates for a large introduction ($2.56 million) rounded up to $3 million (Vo and Miller 1993). Total taxpayer and industry costs associated with a potential Medfly introduction are therefore $14 million in the default model.

Because eradication technologies are safe and effective and because most introductions occur in urban areas, Medfly introductions resulting from the importation of clementines from Spain will more than likely not lead to long-run establishments adversely affecting agricultural production regions in the United States. As a result, we do not incorporate all of the potential costs associated with a potential Medfly introduction for four reasons. First, we do not have data to estimate all of the potential costs. Second, in the aggregate these additional costs will likely not, on average, increase total regulatory costs significantly. At the same time, however, we recognize that some of these costs may be substantial for individual growers. Third, although most Medfly introductions occur in urban areas, we assume, for the purpose of estimating Medfly introduction costs, that any introduction occurs in a Medfly host production region in the United States. As a result, we may be overestimating Medfly introduction costs in the current analysis. Finally, even if we were to increase Medfly introduction costs by a factor of ten, regulatory costs would not increase significantly and the conclusions of the economic analysis would not be affected. (Please see subsection 2.1.3 Medfly Introduction Costs in the economic analysis accompanying the regulations for more detail on the specification of Medfly introduction costs.)

Medfly Introductions

The number of Medfly introductions per year is given by the product of the number of forty-foot containers imported into areas in the United States suitable for the development of Medfly offspring and the probability that at least one adult male and one adult female (mated pair) survive the export process, in discarded fruit, per forty-foot container. We recognize the fact that, for a Medfly introduction to occur, it will be necessary for mated pairs to survive in their new environments long enough to find suitable hosts, for females to oviposit eggs in fruits that are sufficiently mature, for eggs to survive heat, cold, parasitism and disease, and for the eggs to develop into larvae that survive to adulthood and reproduce successfully. The effect of these other variables on the ability of a mated pair to survive, reproduce, and spread would, in all cases, further reduce the likelihood that Medflies could be introduced into the United States. Because data were not available to estimate the effects of these variables on Medfly introductions, our estimates may overstate the number of Medfly introductions that may actually occur,

leading to conservative estimates of Medfly introduction costs under the regulations and under the previous import program.

We estimate the probability that at least one mated pair survives the export process, in discarded fruit, for each forty-foot container that passes fruit cutting and inspection in Spain and in the United States, using the biological model reported in the risk analyses (APHIS 2002b, c). Importantly, the simulations incorporate likely variability in Spanish clementine export levels to the United States, which will contribute to variability in mated pair probabilities per shipment and therefore regulatory costs associated with Medfly introductions. Specifically, designated export quantities are drawn from a probability distribution with a minimum value of 83,631 metric tons, a most likely value of 90,032 metric tons, and a maximum value of 116,406 metric tons. The minimum value is based on the import quantity for marketing season 2000, the most likely value is based on the rate of growth in imports between marketing seasons 1999 and 2000, and the maximum value is based on the average annual rate of import growth during 1989–2000.

The risk analyses (APHIS 2002b, c) examined how the difference in maximum infestation rates under the regulations and under the previous import program reduces the probability of a mated pair entering the United States, specifying a very wide range for the infestation rate under the regulations and a relatively wider range under the previous import program. The risk analyses estimated annual introductions under a worst case scenario, one in which fruit cutting and rejection of inspectional units did not occur and one in which parameters of the infestation rate distributions were specified conservatively. However, the regulations impose powerful economic incentives that will more than likely lead Spanish growers and exporters to manage Medfly populations and select fruit for export to the United States more effectively than was assumed in the risk analyses.

If Medflies are detected in clementine shipments under the new preclearance program, shipments will be diverted to other cheaper markets and growers may lose the right to take advantage of the much more lucrative U.S. market, which typically offers prices 20% higher than prices offered in the rest of the world. In addition, if too many shipments are rejected, the import program will likely be suspended, leading to significant reductions in clementine prices received worldwide. As a result, exporters will more than likely choose shipments designated for the United States from regions in which growers experience below average infestation rates and in which growers manage Medflies very well. Further, although the risk analyses set the maximum infestation rate in Spanish groves at 1.50E–02 under the regulations in order to estimate mated pair probabilities conservatively, the infestation rate that suspends the import program is 1.60E–03 (0.16% fruit infested with Medflies) when the effectiveness of inspectors in identifying infested fruit is fixed at 75%. Because we estimate regulatory costs and benefits in the current analysis during a typical year, as opposed to regulatory costs and benefits under a worst case scenario, we set the maximum infestation rate at 1.60E–03, under the assumption that APHIS inspectors correctly identify an infested fruit 75% of the time. We believe that this specification of the maximum infestation rate is consistent with Spanish grower and exporter profit maximization under the regulations and therefore more appropriate for use in the current analysis. An implicit assumption made in the risk analyses is that APHIS inspectors never correctly identify an infested fruit in order to provide a conservative estimate of the number of potential Medfly introductions under the regulations. We base the 75% inspection efficacy on data reported in the risk analyses. (See subsection 2.1.2 Fruit Cutting and Rejection Costs in the economic analysis accompanying the regulations for information on the specification of inspection efficacy.)

In addition, according to sources cited in the risk analyses, the infestation rate in fruit received by Spanish packinghouses ranged between zero and 1.50E–03, with the latter being associated with poorly managed fields. The most likely infestation rate in the risk analysis was set at 1.00E–03, which is only 33 and 38% lower than the infestation rate associated with poorly managed fields (1.50E–03) and the infestation rate that suspends the import program (1.60E–03), respectively. In addition, the risk analyses state that the most likely infestation rate could have been set at zero, because live Medflies were never observed in Spanish clementine shipments during 1985–2000. Because the regulations provide strong profit incentives for Spanish growers to manage Medfly populations effectively and for exporters to choose clementines from Spanish groves that are not poorly managed, the most likely infestation rate will more than likely be lower than the specification in the risk analyses, which was chosen conservatively. We therefore set the most likely infestation rate equal to the most likely infestation rate specified in the risk analyses, 1.00E–03, multiplied by (1.60E–03/1.50E–02), the proportional difference between the infestation rate that leads to suspension of the import program and the maximum infestation rate specified in the risk analyses. (See subsection 2.1.4 Medfly introductions in the economic analysis accompanying the regulations for a more detail.) Again, we believe that this specification of the most likely infestation rate is consistent with Spanish grower and exporter profit maximization under the regulations and therefore an appropriate specification for the current analysis. However, we also estimate regulatory benefits and costs using the infestation rate distribution specified in the risk analyses in order to ensure the reader that the same biological models are used in the current analysis and the risk analyses and in order to examine regulatory welfare under the more conservative distributional specification.

Under the default model, that is, under typical Medfly pressure and effective field control in Spain, annual Medfly introduction costs in the United States average less than $10 per year, because the expected number of introductions is very low. Even when the infestation rate distribution is taken from the risk analyses (which do not consider economic incentives facing Spanish growers and exporters under the regulations and which set fruit cutting and inspection efficacy at 0%), introduction costs average less than $300 per year, with expected introductions per year remaining very low. Under the previous import program, Medfly introduction costs average roughly $47 thousand per year, which is 5.93E–02% of average export value during 1999 and 2000. These results indicate that expected Medfly introduction costs increase with the average infestation rate. However, the percent change in Medfly introduction costs for every percent change in the infestation rate (the infestation rate elasticity of introduction costs) declines as the infestation rate increases, because the rate inspectional units are rejected in Spain increases with the infestation rate. In addition, introduction costs stop increasing with infestation rates at or above the rate that leads to rejection of 100% of the inspectional units in Spain. Because the rate inspectional units are rejected increases rapidly with the

infestation rate and because the import program will likely be suspended if too many units are rejected, the regulations will likely be effective in terms of preventing Medfly introductions into the United States, regardless of how high the average annual infestation rate may be.

The Clementine Market

Clementines are not grown domestically in significant quantities; therefore, U.S. consumption during the last 15 years (Snell 2002) has depended on imports from Spain, which contributed 90% of total U.S. imports during 1996–2000 (FAS 2002). Between 1991 and 2000, Spain's annual production of clementines averaged slightly over 1.1 million metric tons. During 1991–2000, Spain exported most of its clementines to Germany, France, the United Kingdom, and the Netherlands; however, exports to the United States grew 45% per year during this period, even though clementine production in Spain grew only 2% per year (FAS 1996–2001, MAPA 1999). The phenomenal growth in exports to the United States has been due to increased demand, leading to higher import prices in the United States relative to import prices in the rest of the world. During 1989–2000, prices offered by U.S. importers averaged 20% higher than prices offered by all other importing countries, providing incentives sufficient for exporters to ship an average annual 6% of total exports to the United States in 1999 and 2000.

Spain typically exports clementines to the United States during mid-September to mid-March. Morocco, Italy, and Israel also export clementines to the United States during this period; however, during 1996–2000, only 2 and 0.1% of U.S. clementine imports were from Morocco and Italy, respectively, and during 1998–2000, only 0.4% of U.S. clementine imports were from Israel. This suggests that exporters in these countries have not established export market infrastructures sufficient to enable significant increases in shipments to the United States in the short run. In addition, clementines from these countries are typically of lower quality as reflected in lower average prices paid by U.S. importers. As a result, it is assumed that exports from Morocco, Italy, and Israel will not be able to fill the void left by the ban on Spanish clementines in the short run.

It is not clear whether clementine imports and domestically produced tangerines (*Citrus reticulata*) may be substitutes for U.S. consumers. Pollack and Perez (2001) have suggested that the two types of citrus may be substitutes; however, they did not estimate a substitution rate. We estimate the rate of substitution using a linear relationship between tangerine prices received by U.S. producers, a constant, wholesale tangerine consumption, and U.S. clementine imports. Substitutability between clementines and tangerines could not be confirmed statistically; that is, the analysis showed little substitution between domestic tangerines and clementines. In addition, there are differences between Spanish clementines and tangerines, which may be important for U.S. consumers. In particular, clementines are seedless and packaged in decorative wooden boxes; whereas domestically produced tangerines are generally not seedless and are marketed in bulk quantities. Moreover, U.S. consumption of domestically produced tangerines (233,147 metric tons) was almost three times higher than consumption of clementines (83,631 metric tons) in 2000. Finally, until the ban in the fall of 2001, clementines had been imported into the United States for 15 years. As a result, we do not estimate regulatory impacts on U.S. tangerine producers.

Results of the Economic Analysis

The results of the analysis indicate that regulatory benefits will likely outweigh regulatory costs relative to both baselines. Expected regulatory gains are roughly $207 million relative to the current ban (baseline one), including $118, $59, and $30 million in expected gains for importers, wholesalers, and consumers, respectively, with practically no increase in expected costs for federal and state taxpayers and agricultural producers in the United States. As a result, expected regulatory gains are much higher than expected regulatory costs relative to the current ban, because imports are positive and introduction costs are minimal under the regulations. In addition, due to the trend exhibited in the import data during 1989–2000, import levels under the regulations will more than likely exceed import levels under the previous import program. Furthermore, expected Medfly introduction costs under the previous import program are much higher than expected Medfly introduction costs under the regulations. As a result, net gains under the regulations are expected to exceed net gains under the previous import program by an average $23 million (baseline two), which is due almost entirely to higher imports under the former. (See chapter 3 in the economic analysis accompanying the regulations for a more complete discussion of regulatory welfare impacts.)

Regulatory Effects on Small Entities

The U.S. Small Business Administration defines a small agricultural producer as one with annual sales receipts less than or equal to $750,000. We do not know whether the majority of producers of Medfly host crops (NAICS 111310 Orange Groves, NAICS 111320 Citrus (except Orange) Groves, NAICS 111331 Apple Orchards, NAICS 111332 Grape Vineyards, NAICS 111333 Strawberry Farming, NAICS 111334 Berry (except Strawberry) Farming, NAICS 111335 Tree Nut Farming, NAICS 111336 Fruit and Tree Nut Combination Farming, and NAICS Other Noncitrus Fruit Farming) in the United States are designated as small entities. However, regulatory costs on producers of Medfly host crops will more than likely not be significant, because Medfly introduction costs are low under the regulations, regardless of Medfly pest pressure and field control in Spain. As a result, the regulations will likely not have a significant economic impact on a substantial number of small Medfly host crop producers in the United States.

There are approximately 15 Spanish clementine importers in the United States, three of which import the majority of clementines. In addition, individuals in foreign countries own at least two of the import companies in this list. It is not clear if the majority of U.S. clementine importers are designated as small entities by the SBA. These entities include fresh fruit and vegetable wholesalers (NAICS 422480) with 100 employees or less. In addition, the number of small wholesalers potentially affected by the regulations is not known. Small wholesalers include wholesalers and other grocery stores (NAICS 445110) with annual sales receipts of $23 million or less, warehouse clubs and superstores (NAICS 452910) with annual sales receipts of $23 million or less, and fruit and vegetable markets (NAICS 445230) with annual sales receipts of $6 million or less. Because the percentage of income derived from the sale of clementines by wholesalers is likely to be low, the regulations will likely not have a significant negative impact on any small wholesalers relative to either baseline. In addition, small importers and wholesalers will likely be better off under the regulations relative to the current ban and, during growing seasons characterized by typical Medfly pressure in Spanish groves and effective field control, better off under the

regulations relative to the previous import program.

As a result, the regulations will likely not have a significant negative impact on small importers relative to either baseline. Further, because import levels will more than likely increase under the regulations, the effect of the average 2.5 days of additional cold treatment expenditures borne by Spanish exporters, which recall amount to 1.42% of average export value during 1999 and 2000, will likely not lead to a significant price increase, even under the unlikely situation in which all of the additional cost is borne by U.S. importers. Because historical markets for Spanish clementines in Europe appear to be saturated at recent import levels, export supply to the United States may not be extremely elastic, at least in the short run, because U.S. prices will remain higher than prices in European markets under the regulations, and Spanish exporters will not be able to divert supplies to other markets in response to the extra cold treatment costs without experiencing concomitant price declines in those markets. As a result, Spanish exporters will likely export similar and increasing quantities of clementines to the United States, until such time that Spanish clementine production has a chance to respond to changes in the world market associated with the regulations. Finally, during growing seasons in which Medfly pressure is atypically high and field control is ineffective, a higher percentage of shipments designated for export to the United States may be diverted to other markets, reducing import levels, raising import prices, and reducing regulatory gains for small importers relative to the previous import program. In addition, because clementine imports will more than likely be lower during the first shipping season, small importers and wholesalers will likely not realize regulatory gains equal to the previous import program, as imports will more than likely be lower than earlier levels.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This final rule allows clementines to be imported into the United States from Spain. State and local laws and regulations regarding clementines imported under this rule will be preempted while the fruit is in foreign commerce. Fresh clementines are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0203.

List of Subjects in 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Logs, Nursery Stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 166, 450, 7711–7714, 7718, 7731, 7732, and 7751–7754; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56–2jj is added to read as follows:

§ 319.56–2jj Administrative instructions; conditions governing the importation of clementines from Spain.

Clementines (*Citrus reticulata*) from Spain may only be imported into the United States in accordance with the regulations in this section.

(a) *Trust fund agreement.* Clementines from Spain may be imported only if the Government of Spain or its designated representative enters into a trust fund agreement with the Animal and Plant Health Inspection Service (APHIS) before each shipping season. The Government of Spain or its designated representative is required to pay in advance all estimated costs that APHIS expects to incur through its involvement in overseeing the execution of paragraphs (b) through (g) of this section. These costs will include administrative expenses incurred in conducting the services enumerated in paragraphs (b) through (g) of this section and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the inspectors in performing these services. The Government of Spain or its designated representative is required to deposit a certified or cashier's check with APHIS for the amount of the costs estimated by APHIS. If the deposit is not sufficient to meet all costs incurred by APHIS, the agreement further requires the Government of Spain or its designated representative to deposit with APHIS a certified or cashier's check for the amount of the remaining costs, as determined by APHIS, before the services will be completed. After a final audit at the conclusion of each shipping season, any overpayment of funds would be returned to the Government of Spain or its designated representative or held on account until needed.

(b) *Grower registration and agreement.* Persons who produce clementines in Spain for export to the United States must:

(1) Be registered with the Government of Spain; and

(2) Enter into an agreement with the Government of Spain whereby the producer agrees to participate in and follow the Mediterranean fruit fly management program established by the Government of Spain.

(c) *Management program for Mediterranean fruit fly; monitoring.* The Government of Spain's Mediterranean fruit fly management program must be approved by APHIS, and must contain the fruit fly trapping and recordkeeping requirements specified in this paragraph. The program must also provide that clementine producers must allow APHIS inspectors access to clementine production areas in order to monitor compliance with the Mediterranean fruit fly management program.

(1) *Trapping and control.* In areas where clementines are produced for export to the United States, traps must be placed in Mediterranean fruit fly host plants at least 6 weeks prior to harvest. Bait treatments using malathion, spinosad, or another pesticide that is approved by APHIS and the Government of Spain must be applied in the production areas at the rate specified by Spain's Medfly management program.

(2) *Records.* The Government of Spain or its designated representative must keep records that document the fruit fly trapping and control activities in areas that produce clementines for export to the United States. All trapping and control records kept by the Government of Spain or its designated representative must be made available to APHIS upon request.

(3) *Compliance.* If APHIS determines that an orchard is not operating in compliance with the regulations in this section, it may suspend exports of clementines from that orchard.

(d) *Phytosanitary certificate.* Clementines from Spain must be accompanied by a phytosanitary certificate stating that the fruit meets the conditions of the Government of Spain's Mediterranean fruit fly management program and applicable APHIS regulations.

(e) *Labeling.* Boxes in which clementines are packed must be labeled with a lot number that provides information to identify the orchard where the fruit was grown and the packinghouse where the fruit was packed. The lot number must end with the letters ''US.'' For the 2002–2003 shipping season, boxes must also be labeled with the following statement ''Not for distribution in AZ, CA, FL, LA, TX, Puerto Rico, and any other U.S. Territories.'' All labeling must be large enough to clearly display the required information and must be located on the outside of the boxes to facilitate inspection.

(f) *Pre-treatment sampling; rates of inspection.* For each shipment of clementines intended for export to the United States, prior to cold treatment, APHIS inspectors will cut and inspect 200 fruit that are randomly selected from throughout the shipment. If inspectors find a single live Mediterranean fruit fly in any stage of development during an inspection, the entire shipment of clementines will be rejected. If a live Mediterranean fruit fly in any stage of development is found in any two lots of fruit from the same orchard during the same shipping season, that orchard will be removed from the export program for the remainder of that shipping season.

(g) *Cold treatment.* Clementines must be cold treated in accordance with the Plant Protection and Quarantine (PPQ) Treatment Manual, which is incorporated by reference at § 300.1 of this chapter. Upon arrival of clementines at a port of entry into the United States, APHIS inspectors will examine the cold treatment data for each shipment to ensure that the cold treatment was successfully completed. If the cold treatment has not been successfully completed, the shipment will be held until appropriate remedial actions have been implemented.

(h) *Port of entry sampling.* Clementines imported from Spain are subject to inspection by an inspector at the port of entry into the United States. At the port of first arrival, an inspector will sample and cut clementines from each shipment to detect pest infestation according to sampling rates determined by the Administrator. If a single live Mediterranean fruit fly in any stage of development is found, the shipment will be held until an investigation is completed and appropriate remedial actions have been implemented.

(i) *Limited distribution.* For the 2002–2003 shipping season, clementines from Spain may not be imported into, or distributed within, the following U.S. States and Territories: Arizona, California, Florida, Louisiana, Texas, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam, or American Samoa.

(j) *Suspension of program.* If APHIS determines at any time that the safeguards contained in this section are not protecting against the introduction of Medflies into the United States, APHIS may suspend the importation of clementines and conduct an investigation into the cause of the deficiency.

(k) *Definitions.*

Lot. A number of units of clementines that are from a common origin (*i.e.,* a single producer or a homogenous production unit [1]).

Orchard. A plot on which clementines are grown that is separately registered in the Spanish Medfly management program.

Shipment. (1) *Untreated fruit.* For untreated fruit, the term means one or more lots (containing no more than a combined total of 200,000 boxes of clementines) that are presented to an APHIS inspector for pre-treatment inspection.

(2) *Treated fruit.* For treated fruit, the term means one or more lots of clementines that are imported into the United States on the same conveyance.

Shipping season. For the purposes of this section, a shipping season is considered to include the period beginning approximately in mid-September and ending approximately in late February of the next calendar year.

(Approved by the Office of Management and Budget under control number 0579–0203.)

Done in Washington, DC, this 15th day of October 2002 .

James G. Butler,

Acting Under Secretary for Marketing and Regulatory Programs, USDA.

[FR Doc. 02–26668 Filed 10–16–02; 11:03 am]

BILLING CODE 3410–34–P

[1] A homogeneous production unit is a group of adjacent orchards in Spain that are owned by one or more growers who follow a homogenous production system under the same technical guidance.

Federal Register

Monday,
October 21, 2002

Part III

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL–7394–7]

RIN 2060–AJ66

National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule, amendments.

SUMMARY: On October 26, 1999, we promulgated the national emission standards for hazardous air pollutants (NESHAP) for publicly owned treatment works (POTW). In this action, we are promulgating amendments which were proposed pursuant to a settlement agreement with the Pharmaceutical Research and Manufacturers of America (PhRMA) regarding their petition for judicial review of the POTW NESHAP. The amendments will rescind an applicability provision; adopt, for all industrial POTW treatment plants that are area sources of hazardous air pollutants (HAP), the same NESHAP requirements that apply to industrial POTW treatment plants that are major sources of HAP; and exempt industrial POTW treatment plants that are area sources of HAP from the permit requirements in section 502(a) of the Clean Air Act (CAA).

EFFECTIVE DATE: October 21, 2002.

ADDRESSES: *Docket.* The administrative record compiled by EPA for this final rule, including public comments on the proposed rule, is located in public docket No. A–96–46 at the following address: Air and Radiation Docket and Information Center, Mail Code 6102T, U.S. EPA, 1301 Constitution Avenue, NW., Room B108, Washington DC 20460. The docket may be inspected from 8 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. Materials related to the final amendments are available upon request from the Air and Radiation Docket and Information Center by calling (202) 566–1742. The FAX number for the Center is (202) 566–1741. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For information concerning applicability and rule determinations, contact your State or local regulatory agency representative or the appropriate EPA Regional Office representative. For information concerning analyses performed in developing the final amendments, contact Mr. Robert Lucas, Waste and Chemical Processes Group, Emission Standards Division (C439–03), Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0884, facsimile number (919) 541–0246, electronic mail address: *lucas.bob@epa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments. The amendments for the POTW NESHAP were proposed on March 22, 2002 (67 FR 13496), and two comment letters were received on the proposed amendments. The comment letters are available in Docket No. A–96–46. The regulatory text and other materials related to the final amendments are available for review in the docket or copies may be mailed on request from the Air Docket by calling (202) 260–7548. A reasonable fee may be charged for copying docket materials.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of the final amendments will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of today's amendments will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: http://www.epa.gov/ttn/oarpg. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Judicial Review. Under CAA section 307(b), judicial review of the final amendments is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before December 20, 2002. Only those objections to the final amendments which were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2)of the CAA, the requirements established by the final amendments may not be challenged separately in any civil or criminal proceeding we bring to enforce such requirements.

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	SIC [a]	NAICS [b]	Regulated entities
Federal Government	4952	22132	Sewage treatment facilities, and federally owned treatment works.
State/local/tribal Governments	4952	22132	Sewage treatment facilities, municipal wastewater treatment facilities, and publicly-owned treatment works.

[a] Standard Industrial Classification.
[b] North American Information Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that could potentially be regulated by the final amendments. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in § 63.1580 of the POTW NESHAP and in 40 CFR 63.1. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Outline

The final amendments are organized as follows:

I. What is the background for this action?
II. What changes to the existing rule are we adopting?
III. What were the comments received on the proposed amendments?
IV. What are the administrative requirements?
A. Executive Order 12866, Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*
D. Unfunded Mandates Reform Act of 1995
E. Executive Order 13132, Federalism
F. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks
H. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act of 1995
J. Congressional Review Act

I. What Is the Background for This Action?

On October 26, 1999 (64 FR 57572), we promulgated the NESHAP for new and existing POTW using our authority under the CAA. In the POTW NESHAP, we required air pollution controls on new or reconstructed treatment plants at POTW that are major sources of HAP. Section 112(a)(1) of the CAA defines a major source as:

> * * * any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

The standards also define the requirements for industrial POTW. Industrial POTW treat regulated waste streams from an industry (*e.g.*, pharmaceutical manufacturing) that may be subject to other NESHAP, and this treatment allows the industry to comply with the NESHAP. The standards include a provision in 40 CFR 63.1580(c) stating that if an industrial major source complies with the other NESHAP by using the treatment and controls at a POTW, then the POTW is considered to be a major source.

On March 23, 2001 (66 FR 16140), we published final rule amendments that clarified and corrected errors in the promulgated rule. The PhRMA filed a timely petition for judicial review of the POTW NESHAP. The PhRMA expressed concern regarding the practical effect of the provision classifying an industrial POTW as a major source if the POTW receives wastewater for treatment from a major source. In particular, PhRMA was concerned that industrial POTW might be subject to permitting requirements that would otherwise not apply, and that such POTW might elect not to accept wastewater for treatment in these circumstances. We entered into settlement discussions with PhRMA and executed a settlement agreement with PhRMA on November 14, 2001.

On March 22, 2002 (67 FR 13496), we proposed amendments to the POTW NESHAP pursuant to the agreement with PhRMA. We received two public comment letters on the proposed amendments. The commenters were the Association of Metropolitan Sewerage Agencies (AMSA) and PhRMA. Copies of these letters are found in docket A–96–46. All of the comments have been carefully considered. Because none of the comments submitted requested any substantive changes to the proposed amendments, the final amendments remain unchanged from those which we proposed.

II. What Changes to the Existing Rule Are We Adopting?

In the settlement agreement we reached with PhRMA, we agreed to propose the following three changes: (1) Rescind the applicability provision set forth in 40 CFR 63.1580(c); (2) adopt, for all industrial POTW treatment plants that are area sources of HAP, the same NESHAP requirements that apply to industrial POTW treatment plants that are major sources of HAP; and (3) exempt industrial POTW treatment plants that are area sources of HAP from the permit requirements in section 502(a) of the CAA. Area sources of HAP are those stationary sources that emit, or have the potential to emit, less than 10 tons per year of any one HAP or less than 25 tons per year of a combination of HAP.

The CAA gives us the authority to adopt an alternative definition of major source in appropriate circumstances. Our original intent in adopting the alternate definition in 40 CFR 63.1580(c) of the POTW NESHAP was to make all industrial POTW subject to direct enforcement under the CAA, thereby providing additional assurance that they would adhere to the treatment and control limits of the applicable industrial NESHAP. The final amendments will still accomplish this goal because all POTW that meet our definition of industrial POTW will remain subject to direct enforcement and will be required to meet the control limits of the applicable industrial NESHAP.

III. What Were the Comments Received on the Proposed Amendments?

Two comment letters were received on the proposed amendments. This section summarizes the comments and provides our response.

The comments on the proposed amendments to the POTW NESHAP supported the following amendments to the POTW NESHAP for area source POTW: the proposal to set generally available control technology under the CAA section 112(k) urban air toxics program at no control for area source new or existing non-industrial POTW and to exempt these area source POTW from the POTW NESHAP notifications requirements at 40 CFR 63.1590; the proposal to require area source industrial POTW to comply with the same maximum achievable control technology (MACT) requirements as are required for major source industrial POTW, accompanied by an exemption from the CAA's title V permitting requirements.

One of the commenters did raise some additional issues. The AMSA questioned whether we have the statutory authority to apply regulations under the urban air toxics section of the CAA (section 112(k)) to rural area source POTW. The AMSA did not oppose our use of a national standard in this particular instance, but stated that it might oppose such a construction of the CAA in the context of a future rulemaking.

We find nothing in the statute to prevent the application of rules promulgated pursuant to CAA section 112(k) to the entire nation. We believe that we have the authority, in appropriate circumstances, to limit such a rule to particular geographic regions, but we do not believe that such an approach would have been appropriate for this situation. As for the effect our construction of the CAA might have in a future rulemaking, that is a hypothetical question beyond the scope of this proceeding.

The AMSA also suggested that we consider adding a provision to the POTW NESHAP amendments to encourage the discharging industry and the receiving POTW to enter into a written agreement in which the parties clearly state that the POTW will fulfill the discharging industry's NESHAP wastewater treatment obligations. We believe that the POTW NESHAP clearly defines an industrial POTW treatment plant. We think that a detailed written agreement between the discharging party and the POTW will generally be beneficial, and we encourage the routine use of such agreements. While we believe that the parties will elect to make a specific contractual agreement in most instances, the final rule does not require such an agreement for a POTW to be considered an industrial POTW.

IV. What Are the Administrative Requirements?

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and, therefore, subject to review of the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligation of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that the final amendments are not a ''significant regulatory action'' under the terms of Executive Order 12866 and are, therefore, not subject to OMB review.

B. Paperwork Reduction Act

An Information Collection Request (ICR) document was prepared for the October 26, 1999 POTW NESHAP by the EPA and was submitted to and approved by OMB. A copy of this ICR (OMB control number 2060–0428) may be obtained from Susan Auby by mail at the Office of Environmental Information, Collection Strategies Division, U.S. EPA (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.*

Burden means total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15. The final amendments will not require additional burden on the affected entities.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) A small business according to the Small Business Administration (SBA) size standards by NAICS code; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The EPA determined that it is not necessary to prepare a regulatory flexibility analysis in connection with these final amendments. The EPA also determined that the amendments will not impose a significant economic impact on a substantial number of small entities. The amendments impose no new requirements on new or existing POTW treatment plants. In addition, by eliminating title V permit requirements, these amendments decrease the compliance costs for a few smaller facilities. Therefore, pursuant to the provisions of 5 U.S.C. 605(b), I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, we generally must prepare a written statement, including cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative with other than the least costly, most cost-effective, or least burdensome alternative if we publish with the final rule an explanation why that alternative was not adopted.

Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the final amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any 1 year. The regulatory revisions in the final amendments have no associated costs and do not contain requirements that apply to small governments or impose obligations upon them. Therefore, the final amendments are not a ''significant'' regulatory action within the meaning of Executive Order 12866 and do not impose any additional Federal mandate on State, local and tribal governments or the private sector within the meaning of the UMRA. Thus, today's final amendments are not subject to the requirements of sections 202, 203, and 205 of the UMRA.

E. Executive Order 13132, Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and

responsibilities among the various levels of Government.''

The final amendments do not have federalism implications. They 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. The amendments apply only to POTW and do not pre-exempt States from adopting more stringent standards or otherwise regulate State or local governments. Thus, the requirements of section 6 of the Executive Order do not apply to the final amendments.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

The final rule amendments do not have tribal implications, as specified in Executive Order 13175. The amendments impose no new requirements on new or existing POTW. Thus, Executive Order 13175 does not apply to the final amendments.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that:

(1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned rule is preferable to other potentially effective and reasonably feasible alternatives that we considered.

The final rule amendments are not subject to Executive Order 13045 because they are not an economically significant regulatory action as defined by Executive Order 12866. In addition, EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health and safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. The final rule amendments are not subject to Executive Order 13045 because they are based on technology performance and not on health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

The final amendments are not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because they are not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, all Federal agencies are required to use voluntary consensus standards (VCS) in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA requires Federal agencies to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable VCS.

The final amendments do not involve any additional technical standards. Therefore, the requirements of the NTTAA do not apply to this action.

J. Congressional Review Act

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. The EPA will submit a report containing the final amendments 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 final amendments in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The final amendments will be effective on October 21, 2002.

List of Subjects in 40 CFR Part 63

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

Dated: October 11, 2002.

Christine Todd Whitman,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

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

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

2. Section 63.1580 is revised to read as follows:

§ 63.1580 Am I subject to this subpart?

(a) You are subject to this subpart if the following are all true:

(1) You own or operate a publicly owned treatment works (POTW) that includes an affected source (§ 63.1595);

(2) The affected source is located at a POTW which is a major source of HAP emissions, or at any industrial POTW regardless of whether or not it is a major source of HAP; and

(3) Your POTW is required to develop and implement a pretreatment program as defined by 40 CFR 403.8 (for a POTW owned or operated by a municipality, State, or intermunicipal or interstate agency), or your POTW would meet the general criteria for development and implementation of a pretreatment program (for a POTW owned or operated by a department, agency, or instrumentality of the Federal government).

(b) If your existing POTW treatment plant is not located at a major source as of October 26, 1999, but thereafter becomes a major source for any reason other than reconstruction, then, for the purpose of this subpart, your POTW treatment plant would be considered an existing source. Note to Paragraph (b): See § 63.2 of the national emission standards for hazardous air pollutants (NESHAP) General Provisions in subpart A of this part for the definitions of major source and area source.

(c) If you reconstruct your POTW treatment plant, then the requirements for a new or reconstructed POTW treatment plant, as defined in § 63.1595, apply.

3. Section 63.1586 introductory text is revised to read as follows:

§ 63.1586 What are the emission points and control requirements for a non-industrial POTW treatment plant?

There are no control requirements for an existing non-industrial POTW treatment plant. There are no control requirements for any new or reconstructed area source non-industrial POTW treatment plant which is not a major source of HAP. The control requirements for a new or reconstructed major source non-industrial POTW treatment plant which is a major source of HAP are as follows:

* * * * *

4. Section 63.1590 is amended by revising paragraph (a)(1) introductory text to read as follows:

§ 63.1590 What reports must I submit?

(a)(1) If you have an existing non-industrial POTW treatment plant, or a new or reconstructed area source non-industrial POTW treatment plant, you are not required to submit a notification of compliance status. If you have a new or reconstructed non-industrial POTW treatment plant which is a major source of HAP, you must submit to the Administrator a notification of compliance status, signed by the responsible official who must certify its accuracy, attesting to whether your POTW treatment plant has complied with this subpart. This notification must be submitted initially, and each time a notification of compliance status is required under this subpart. At a minimum, the notification must list—

* * * * *

5. Section 63.1591 is amended by revising paragraph (a) to read as follows:

§ 63.1591 What are my notification requirements?

(a) If you have an industrial POTW treatment plant or a new or reconstructed non-industrial POTW which is a major source of HAP, and your State has not been delegated authority, you must submit notifications to the appropriate EPA Regional Office. If your State has been delegated authority you must submit notifications to your State and a copy of each notification to the appropriate EPA Regional Office. The Regional Office may waive this requirement for any notifications at its discretion.

* * * * *

6. Section 63.1592 is revised to read as follows:

§ 63.1592 Which General Provisions apply to my POTW treatment plant?

(a) Table 1 to this subpart lists the General Provisions (40 CFR part 63, subpart A) which do and do not apply to POTW treatment plants.

(b) Unless a permit is otherwise required by law, the owner or operator of an industrial POTW which is not a major source is exempt from the permitting requirements established by 40 CFR part 70.

7. Table 1 to subpart VVV is amended by revising the entries ''§ 63.1(c)(2)(i)'' and ''§ 63.9(b)'' to read as follows:

TABLE 1 TO SUBPART VVV OF PART 63.—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV

General provisions reference	Applicable to subpart VVV	Explanation
* *	*	* * * *
§ 63.1(c)(2)(i)	No	State options regarding title V permit. Unless required by the State, area sources subject to subpart VVV are exempted from permitting requirements.
* *	*	* * * *
§ 63.9(b)	Yes	Applicability of notification requirements. Existing major non-industrial POTW treatment plants, and existing and new or reconstructed area non-industrial POTW treatment plants are not subject to the notification requirements.
* *	*	* * * *

[FR Doc. 02–26576 Filed 10–18–02; 8:45 am]

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Federal Register

Monday,
October 21, 2002

Part IV

Department of Agriculture

Commodity Credit Corporation

7 CFR Parts 1405 and 1412
Direct and Counter-Cyclical Program; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Parts 1405, 1412

RIN 0560–AG71

Direct and Counter-Cyclical Program

AGENCY: Commodity Credit Corporation, Agriculture.

ACTION: Final rule.

SUMMARY: This rule implements the provisions of the Farm Security and Rural Investment Act of 2002 (the 2002 Act) regarding direct and counter-cyclical payments for the crop years 2002 through 2007. These payments provide income support to producers of eligible commodities and are based on historically-based acreage and yields and do not depend on the current production choices of the farmer. They replace the Production Flexibility Contract (PFC) payments made under the Federal Agriculture Improvement and Reform Act of 1996 for the crop years 1996 through 2002. In addition to the commodities that were eligible for PFC payments, the 2002 Act also provides for direct and counter-cyclical payments for peanuts, soybeans, sunflower seed and other oilseeds.

EFFECTIVE DATE: October 16, 2002.

FOR FURTHER INFORMATION CONTACT: Lynn Tjeerdsma, Production, Emergencies and Compliance Division, United States Department of Agriculture (USDA), Stop 0517, 1400 Independence Ave, SW, Washington, DC 20250–0517. Phone: (202) 720–6602. E-mail: *lynn_tjeerdsma@wdc.usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Notice and Comment

Section 1601(c) of the 2002 Act requires that the regulations needed to implement Title I of the 2002 Act are to be promulgated without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture effective July 24, 1971, (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking. These regulations are thus issued as final.

Executive Order 12866

This final rule has been determined to be economically significant under Executive Order 12866 and has been reviewed by the Office of Management and Budget (OMB). A cost-benefit assessment was completed and is summarized after the background section explaining the rule.

Federal Assistance Programs

The title and number of the Federal assistance program, as found in the Catalog of Federal Domestic Assistance, to which this final rule applies are: Direct and Counter-Cyclical Program, 10.055.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Review

An environmental assessment is being completed to consider the potential impacts of this proposed action on the human environment in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508), and FSA's regulations for compliance with NEPA, 7 CFR part 799. Section 1601 of the 2002 Act mandated that these regulations be promulgated no later than 90 days after enactment. Further, this rule affects a large number of agricultural producers who are dependent upon its provisions for income support and need to know of its details as soon as possible because it has an effect on their planting and marketing decisions. Thus, CCC is attempting to satisfy both the Congressional mandate and its public missions by publishing this rule now, while continuing a good faith effort to comply with NEPA in as timely a fashion as possible, given the above-mentioned statutory and mission requirements. A copy of the draft environmental assessment will be made available for public review and comment upon request.

Executive Order 12778

The final rule has been reviewed in accordance with Executive Order 12778. The provisions of this final rule preempt State laws to the extent such laws are inconsistent with the provisions of this rule. The provisions of this rule are not retroactive. Before any judicial action may be brought concerning the provisions of this rule, the administrative remedies must be exhausted.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Unfunded Mandates

The provisions of Title II of the Unfunded Mandates Reform Act of 1995 are not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Small Business Regulatory Enforcement Fairness Act of 1996

Section 1601(c) of the 2002 Act requires that the regulations necessary to implement Title I of the 2002 Act must be issued within 90 days of enactment and that such regulations shall be issued without regard to the notice and comment provisions of 5 U.S.C. 553. Section 1601(c) also requires that the Secretary use the authority in section 808 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121 (SBREFA), which allows an agency to forgo SBREFA's usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. These regulations affect the incomes of an extraordinarily large number of agricultural producers. Accordingly, this rule is effective upon the date of filing for public inspection by the Office of the Federal Register.

Paperwork Reduction Act

Section 1601(c) of the 2002 Act requires that these regulations be promulgated and the programs administered without regard to the Paperwork Reduction Act. This means that the information to be collected from the public to implement these programs and the burden, in time and money, the collection of the information would have on the public does not have to be approved by the Office of Management and Budget or be subject to the normal requirement for a 60-day public comment period.

Government Paperwork Elimination Act

FSA is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom to E-File Act, which require Government agencies in general and FSA in particular to provide the public the option of submitting information or

transacting business electronically to the maximum extent possible. The forms and other information collection activities required by participation in the 2002 Direct and Counter-Cyclical Program for historic peanut producers, and Direct and Counter-Cyclical Program for covered commodities are not yet fully implemented for the public to conduct business with FSA electronically.

Applications for all programs may be submitted at the FSA county offices by mail or FAX. At this time, electronic submission is not available. Full implementation of electronic submission is underway.

Background

In addition to implementing the Direct and Counter-Cyclical Program (DCP), this rule also codifies a provision of the 2002 Act related to benefit reductions due to Uruguay Round Agreements.

7 CFR Part 1405—Benefit Reductions Due to Uruguay Round Agreements

Section 1601(e) of the 2002 Act provides that if the Secretary of Agriculture determines that outlays under subtitles A through E of Title I of the 2002 Act will, in any required reporting period, result in expenditures of the United States exceeding the levels for domestic measures of support that were agreed to in the Uruguay Round Agreements, as defined in section 2 of the Uruguay Round Agreements Act, then the Secretary shall, to the maximum extent practicable, make adjustments in the amount of such expenditures to ensure compliance with these commitments. Accordingly, 7 CFR part 1405 is revised to set forth this obligation under the aforementioned circumstances for CCC to reduce, or to collect refunds of, payments and benefits made under these subtitles of the 2002 Act.

7 CFR Part 1412—Direct and Counter-Cyclical Program

The Federal Agriculture Improvement and Reform Act of 1996 (FAIR), which was authorized for the crop years 1996 through 2002, contained several important changes to U.S. farm policy. The most important change was the replacement of deficiency payments under previous programs, which made up the difference between the market price and a target price, with fixed annual Production Flexibility Contract (PFC) payments for producers of grains and upland cotton. PFC payments were based on historical yields and acreage. They were received whether or not a crop was planted, and did not depend on what crop was planted, (except for fruit and vegetable restrictions). This decoupling of payments from production controls was a departure from the earlier Acreage Reduction Program (ARP), which mandated strict acreage limitations and mandatory acreage idling or set-aside requirements.

The 2002 Act authorized for crop years 2002 through 2007 not only fixed, direct payments for wheat, corn, barley, grain sorghum, oats, upland cotton and rice, (the same crops eligible for PFC payments and same type of payment as the PFC payment), but also included oilseed crops, including soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, as additional crops eligible for fixed direct payment. Additionally, the 2002 Act authorized counter-cyclical payments (counter-cyclical payments are similar to the deficiency payments authorized under ARP) for the crop years 2002 through 2007 for these same crops. Because authorization expired September 30, 2002, for PFC payments issued under AMTA, the direct and counter-cyclical payments authorized under the 2002 Act replace the PFC payments that were made to producers on farms with 1996 wheat, corn, barley, grain sorghum, oats, upland cotton and rice crop acreage bases who entered into Production Flexibility contracts with the Commodity Credit Corporation (CCC) for the crop years 1996 through 2002.

The 2002 Act set a precedent, in that soybeans and other oilseeds are eligible for the same program as wheat, feedgrains, cotton, and rice. Peanuts are also eligible for direct and counter-cyclical payments, but have slightly different requirements. The acreage bases used to calculate the 2002 through 2007 direct DCP payments for wheat, feedgrains, cotton, and rice are those that were considered the contract acreage (as defined in section 102 of FAIR) used by the Secretary to calculate the fiscal year 2002 payment authorized under section 114 of FAIR. The yields used to calculate the 2002 through 2007 direct DCP payments for wheat, feedgrains, cotton and rice shall be the farm program payment yield established for the 1995 crop of the crops. If a 1995 yield is unavailable for one of these crops on a farm, the FSA county Committee will establish a direct payment yield for that crop by using three similar farms. Additionally, a farm owner has the opportunity to update the yields for counter-cyclical payments for all applicable crops, provided acceptable production evidence is provided to the county committee for the years 1998 through 2001 for a crop on the farm; and, the owner has selected the base option allowed under the 2002 Act which determines the applicable bases for a farm by using the four-year average of 1998 through 2001 planted or approved prevented-planted acreage of a covered commodity.

The 2002 Act also set forth provisions that allow farm owners multiple options for establishing bases and yields for covered commodities that will be used to calculate 2002 through 2007 direct and counter-cyclical payments. Because of the numerous options available for establishing bases and yields, FSA utilized existing records to determine each applicable covered commodity's 1998 through 2001 acreage history for every farm on record at the FSA county office. This information was provided to farm owners and operators so they could verify the information on record at FSA, and update, or correct, if the county committee determined that sufficient proof of the correct acreage was provided.

The 2002 Act set forth certain requirements to which the producer shall agree to be eligible for direct and counter-cyclical payments. Included in these requirements is the requirement to effectively control noxious weeds and otherwise maintain the land in accordance with sound agricultural practices.

The following table provides information regarding the notification processes FSA has undergone to ensure that farm owners are aware of the provisions of the 2002 Act and that farm owners have all applicable information available on record at FSA to assist them in making base and yield selections for 2002 through 2007 direct and counter-cyclical payments.

Date	FSA action
April 25, 2002	Issued Notices to State and County Offices to prepare for implementation of the 2002 Farm Bill. These notices: • Provided instructions to produce an acreage history report for every producer to ensure 1998 through 2001 acreage history for each farm is correct. • Instructed County Offices to send each farm owner and operator a letter asking them to review the acreage history report for accuracy and completeness and providing instructions on making necessary corrections and additions. • Provided authorization and instructions for producers to correct previously filed acreage reports or to late-file acreage reports.
May 24, 2002	Began mailing of a letter to all farm owners, operators, and producers which contained provisions of the 2002 Act.
July 3, 2002	Issued a DCP Notice which notified County Offices that software was available to print notification letters to historic peanut producers. The letters were printed and mailed to all historic peanut producers on record in FSA County Offices. This letter notified each historic peanut producer of acreage and actual yields for each farm in the county, as recorded with the County Office of origin. Producers were instructed in the letter to notify the county office of any errors or omissions in, or corrections to, the data in the letter.
July 16, 2002	Issued a DCP Notice which notified County Offices that software was available that allowed them to print and mail to each farm owner and operator a Summary Acreage History Report, along with a notification letter, which contained the following information: • 2002 PFC crops and contract acreage. • Acreage history by crop for each of the years 1998 through 2001 for commodities covered under the 2002 Act.
August 9, 2002	Authorization provided to County Offices to process 2002 farm divisions and tract divisions to accommodate need of all owners on a farm to agree to base and yield selections for the Direct and Counter-cyclical Program (DCP).
September 2002	Began accepting production evidence for DCP payment yields.
October 2002	Begin mailing notification letter giving owners and producers base options and minimum yield for their farms.

As provided in the rule, an annual signup deadline of June 1 has been established. Under the AMTA program, producers who did not sign the contract by the established deadline often requested relief to allow the acceptance of the late-filed signature. The processing of those requests involved a great expenditure of time at the county, state, and national levels. Using an average personnel cost of $26.65 per hour at the county level, $28.99 at the State level, and $39.77 at the National level, each case would involve a minimum of $94.91 in associated processing costs if only one hour was expended in processing the case at each level. Most such cases involved more than one hour at each level. Some may have consumed as much as several days in case preparation and review time. In lieu of incurring these costs a $100 fee will be assessed if a producer has not signed a DCP contract by June 1. This fee will cover costs of any necessary site visits to establish that the farm has been in compliance for the months retroactive to the signing of the contract, additional work on the part of the COC and county office, and possibly the State office to ensure that the contract should in fact be approved and to process the approval.

Another important change in Federal farm programs, as a result of the 2002 Act, is that section 1309 of the 2002 Act repealed the marketing quota program for peanuts authorized by Title III of the Agricultural Adjustment Act of 1938 (the 1938 Act). Other provisions of the 2002 Act set forth payment and marketing assistance loan programs for the 2002 through 2007 crops of peanuts that are similar to other major CCC commodity programs. Section 1309 also provides for CCC to pay eligible peanut quota holders as part of the transition from the repealed market quota program to the new programs. The rules for the Peanut Quota Buyout Program were published October 1, 2002, for codification at 7 CFR part 1412. Sections 1301 through 1308 of the 2002 Act set forth direct and counter-cyclical payment provisions for peanuts, beginning with the 2002 crop. For only the 2002 crop of peanuts, direct and counter-cyclical payments will be issued to historic peanut producers. A historic peanut producer is defined in section 1301 of the 2002 Act, and in this rule, as ''a producer on a farm in the United States that produced or was prevented from planting peanuts during any or all of the 1998 through 2001 crop years.'' The 2002 Act set forth provisions for establishing a peanut base and yield for each historic peanut producer that were to be used to calculate the 2002 peanut direct and counter-cyclical payments to 2002 historic peanut producers. Because the previous Peanut Program regulations at 7 CFR part 729, as it was codified on January 1, 2002, required extensive record keeping by peanut producers concerning their prior production of peanuts and related information necessary for the establishment of previous years' quotas, FSA has highly accurate records of 1998 through 2001 peanut planting history and production for each peanut producer. To further ensure that these records are correct, all historic peanut producers on record at FSA were sent a letter with peanut acreage and yield data on file at the FSA office. If more than one historic peanut producer shared in the risk of producing the crop on the farm, the historic peanut producers shall receive their proportional share of the number of acres planted (or prevented from being planted) to peanuts for harvest on the farm based on the sharing arrangement that was in effect among the producers for the crop.

Before March 1, 2003, each historic peanut producer must assign the average peanut yield and average peanut acreage determined for that producer to the cropland on a farm. Beginning with the 2003 crop, after applicable peanut bases and yields are assigned to a farm, peanuts will be included on the Direct and Counter-Cyclical Program (DCP) contract for that farm along with the applicable covered commodities.

In summary, FSA has, in administering the provisions of the 2002 Act, utilized every available means to ensure that farm owners and operators have all necessary information from FSA that FSA is capable of providing to

them, and in such a manner that owners can make educated decisions when determining appropriate DCP base and yield selections for a farm. Because the 2002 Act very explicitly set forth many of the terms and provisions of the DCP, administration of the program is subject to very little variation or flexibility from the statutory authority.

Cost/Benefit Assessment Summary

The underlying policy structure under the 2002 Act is largely unchanged from the policy structure under the 1996 Act. The 2002 Act continues planting flexibility, continues marketing assistance loan provisions at higher levels (except for soybeans, oil-type sunseed, flaxseed, and rice) compared with 2001 levels, replaces production flexibility contract (PFC) payments with direct payments, adds counter-cyclical payments, and includes oilseeds and peanuts as a covered commodity eligible for direct and counter-cyclical payments. The net fiscal impact of the changes made by the 2002 Act and promulgated by this rule compared with continuing PFC payments under the 1996 Act will be to increase governmental outlays as shown in the following table.

AVERAGE ANNUAL CHANGE IN GOVERNMENT OUTLAYS BY PROGRAM, FISCAL YEARS 2002–2007

Program	Average Annual Outlay Change [1] (billion dollars)
Direct Payments [2]	0.8
Counter-cyclical Payments [2]	4.3
Total	5.1

[1] For direct payments represents the difference between direct payments under 2002 Act provisions compared with PFC payments assuming 1996 Act provisions are extended.
[2] Includes payments for wheat, corn, grain sorghum, barley, oats, upland cotton, rice, soybeans, other oilseeds, and peanuts.

Direct and counter-cyclical payments will increase farm income, but will have little impact on planting decisions because these payments are decoupled from the production decisions of individual farmers. These benefits are paid on historically-based acreage and yields and do not depend on the current production choices of the farmer. Nonetheless, there could be some production effects due to increased wealth resulting from these payments as well as reduced revenue risk associated with counter-cyclical payments. However, direct payments and counter-cyclical payments were assumed in this analysis to have no impact on production.

Direct payments are projected to total $3.8 billion in FY 2003 and rise to $5.2 billion in FY 2004 and each of the subsequent fiscal years until the legislation expires with the 2007 crops. These payments represent an increase of about $1.2 billion each crop year compared with PFC payments if the provisions of the 1996 Act were extended during the same period.

Counter-cyclical payments are projected to total $5.8 billion in FY 2003 and increase to $6.6 billion in FY 2004, but then to decline in the remaining years of the 2002 Act, reflecting expected price strengthening in crop year 2004 and until the end of the program in 2007.

FOR FURTHER INFORMATION CONTACT: Phil Sronce, 202–720–2711, *Phil sronce@usda.gov.*

List of Subjects

7 CFR Part 1405

Loan programs-agricultural; Price support programs.

7 CFR 1412

Direct and counter-cyclical payments, Grains, Oilseeds, Peanuts.

Accordingly, 7 CFR parts 1405 and 1412 are amended as set forth below.

PART 1405—LOANS, PURCHASES, AND OTHER OPERATIONS

1. The authority citation for part 1405 is revised to read as follows:

Authority: 7 U.S.C. 7991(e); 15 U.S.C. 714b and 714c.

2. Add § 1405.7 to read as follows:

§ 1405.7 Uruguay Round Agreements Act

In the event the outlays by the United States for domestic support measures will exceed, in any required reporting period, the allowable levels under the Uruguay Round Agreements (as defined in section 2 of the Uruguay Round Agreements Act), CCC will, as determined by the Secretary of Agriculture, reduce the amount of payments and benefits to be made in any such reporting period, and/or collect a refund of payments or benefits previously made with respect to such reporting period, under parts 1412, 1413, 1421, 1427, 1430, 1434 and 1435 of this chapter in order to ensure that the level of domestic support provided by the United States complies with the commitments of the United States in the Uruguay Round Agreements.

PART 1412—DIRECT AND COUNTER-CYCLICAL PROGRAM AND PEANUT QUOTA BUYOUT PROGRAM

3. The authority citation for Part 1412 is revised to read as set forth below.

3a. Redesignate subpart A (§§ 1412.1 through 1412.11) as subpart H (§§ 1412.801 through 1412.811, respectively).

4. Amend part 1412 by revising the part heading and by adding new subparts A and G and by revising subparts B through F to read as follows:

PART 1412—DIRECT AND COUNTER-CYCLICAL PROGRAM AND PEANUT QUOTA BUYOUT PROGRAM

Subpart A—General Provisions

Sec.
1412.101 Applicability.
1412.102 Administration.
1412.103 Definitions.
1412.104 Appeals.

Subpart B—Establishment of Base Acres for a Farm for Covered Commodities

1412.201 Election of base acres.
1412.202 Failure to make election.
1412.203 Base acres and Conservation Reserve Program.
1412.204 Limitation of total base acreage on a farm.

Subpart C—Establishment of Yields for Direct and Counter-Cyclical Payments

1412.301 Direct payment yields for covered commodities, except soybeans and other oilseeds.
1412.302 Direct payment yield for soybeans and other oilseeds.
1412.303 Payment yield for counter-cyclical payments for covered commodities.
1412.304 Submitting production evidence.
1412.305 Incorrect or false production evidence.

Subpart D—Direct and Counter-Cyclical Program Contract Terms and Enrollment Provisions for Covered Commodities 2002 through 2007 and for Peanuts 2003 through 2007.

1412.401 Direct and counter-cyclical program contract.
1412.402 Eligible producers.
1412.403 Reconstitutions.
1412.404 Notification of base acres.
1412.405 Reducing base acreage.
1412.406 Succession-in-interest to a direct and counter-cyclical program contract.
1412.407 Planting flexibility.

Subpart E—Financial Considerations Including Sharing Direct and Counter-Cyclical Payments.

1412.501 Limitation of direct and counter-cyclical payments.
1412.502 Direct payment provisions.
1412.503 Counter-cyclical payment provisions.
1412.504 Sharing of contract payments.
1412.505 Provisions relating to tenants and sharecroppers.

Subpart F—Contract Violations and Diminution in Payments

1412.601 Contract Violations.
1412.602 Fruit, vegetable and wild rice acreage reporting violations.
1412.603 Contract Liability.
1412.604 Misrepresentation and scheme or device.
1412.605 Offsets and assignments.
1412.606 Acreage reports.
1412.607 Compliance with highly erodible land and wetland conservation provisions.
1412.608 Controlled substance violations.

Subpart G—Establishment and Assignment of Peanut Base Acres and Yields for a Farm

1412.701 Determination of 4-year peanut acreage average.
1412.702 Determination of average peanut yield
1412.703 Assignment of average peanut yields and average peanut acreages to farms.

* * * * *

Authority: 7 U.S.C. 7911–7918, 7951–7956; 15 U.S.C. 714b and 714c.

Subpart A—General Provisions

§ 1412.101 Applicability.

This part governs: how crop acreage bases and farm program payment yields are established or updated by owners of a farm for the purpose of calculating direct and counter-cyclical payments for wheat, corn, grain sorghum, barley, oats, upland cotton, rice, peanuts, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, and other oilseeds as determined and announced by the Commodity Credit Corporation (CCC), for the years 2002 through 2007; the month in which producers on a farm may enter into annual Direct and Counter-cyclical Program (DCP) contracts with CCC for each of the years 2002 through 2007; the month in which peanut producers may establish such bases and yields in order to receive 2002 direct and counter-cyclical payments; and the month in which peanut producers may assign such bases and yields to a farm for each of the years 2003 through 2007.

§ 1412.102 Administration.

(a) The program is administered under the general supervision of the Executive Vice-President, CCC, and shall be carried out by Farm Service Agency (FSA) State and county committees (State and county committees).

(b) State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations of this part.

(c) The State committee shall take any action required by the regulations of this part that the county committee has not taken. The State committee shall also:

(1) Correct, or require a county committee to correct any action taken by such county committee that is not in accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No provision or delegation to a State or county committee shall preclude the Executive Vice President, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(e) The Deputy Administrator may authorize State and county committees to waive or modify deadlines, except statutory deadlines, and other non-statutory requirements in cases where lateness or failure to meet such other requirements does not adversely affect operation of the program.

(f) A representative of CCC may execute the FSA forms entitled ''Direct and Counter-Cyclical Program Contract''; and ''2002 Peanut Direct and Counter-Cyclical Program Contract'' only under the terms and conditions determined and announced by the Executive Vice President, CCC. Any contract that is not executed in accordance with such terms and conditions, including any purported execution prior to the date authorized by the Executive Vice President, CCC, is null and void and shall not be considered to be a contract between CCC and the operator or any other producer on the farm.

§ 1412.103 Definitions

The definitions set forth in this section shall be applicable for all purposes of administering the DCP. The terms defined in part 718 of this title and part 1400 of this chapter shall also be applicable, except where those definitions conflict with the definitions set forth in this section.

Base acres means the number of acres established with respect to a covered commodity on a farm by the election made by the owner of the farm in accordance with subpart B of this part.

Base acres for peanuts means the number of acres assigned to a farm by historic peanut producers in accordance with subpart G of this part.

Contract means the CCC-approved standard, uniform forms and appendixes specified by CCC which constitute the agreement for participation in the Direct and Counter-Cyclical Program, and the 2002 Peanut Direct and Counter-Cyclical Program.

Counter-cyclical payment means a payment made to eligible producers on a farm in accordance with subpart E of this part for covered commodities and peanuts and subpart G of this part for 2002 historic peanut producers.

Covered commodity means wheat, corn, grain sorghum, barley, oats, upland cotton, rice, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, and other oilseeds as determined by the Secretary.

DCP cropland means DCP cropland as defined in part 718 of this title.

Deputy Administrator means the Deputy Administrator for Farm Programs, FSA, or a designee.

Direct payment means a payment made to eligible producers on a farm for peanuts and covered commodities in accordance with subpart E and for 2002 historic peanut producers under subpart G.

Dry peas means Austrian, wrinkled seed, yellow, Umatilla, and green, excluding peas grown for the fresh, canning, or frozen market.

Effective price means the price calculated by the Secretary in accordance with § 1412.503 for covered commodities and peanuts to determine whether counter-cyclical payments are required to be made under that section for a crop year.

Excess base acres means the number of base acres established on the farm that exceeds the total 2002 Production Flexibility Contract acres on the farm established under the Federal Agriculture Improvement and Reform Act of 1996.

Historic peanut producer means a producer on a farm in the United States that planted or was prevented from

planting peanuts during any or all of the 1998 through 2001 crop years.

Marketing year means the 12-month period beginning in the calender year the crop is normally harvested as follows:

(1) Barley, oats, wheat, canola, flax, and rapeseed: June 1–May 31;

(2) Upland cotton, peanuts, and rice: August 1–July 31; and

(3) Corn, grain sorghum, soybeans, sunflowers, safflower, and mustard: September 1–August 31.

Other oilseeds means a crop of sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, or, if determined and announced by CCC, another oilseed.

Payment acres means:

(1) For the 2002 crop year, 85 percent of the average acres determined in accordance with § 1412.701 for a historic peanut producer.

(2) For the 2003 through 2007 crop years, 85 percent of the base acres for peanuts assigned to a farm in accordance with § 1412.703.

(3) For the 2002 through 2007 crop years, 85 percent of the base acres of a covered commodity on a farm, as established in accordance with subpart B.

Payment yield means:

(1) For peanuts, the yield determined in accordance with § 1412.702.

(2) For covered commodities, the yield established in accordance with subpart C for a farm for a covered commodity.

Prevented planted means, for the purpose of establishing base acres under § 1412.201, the inability to plant a crop with proper equipment during the established planting period for the crop or commodity. A producer must prove that the producer intended to plant the crop and that such crop could not be planted due to a natural disaster rather than managerial decisions. The natural disaster that caused the prevented planting must have occurred during the established planting period for the crop.

Target price means, for peanuts, the price per ton; and for covered commodities, the price per bushel (or other appropriate unit in the case of upland cotton, rice, and other oilseeds) used to determine the payment rate for counter-cyclical payments.

Updated payment yield means the payment yield of covered commodities, elected by the owner of a farm under § 1412.303, to be used in calculating the counter-cyclical payments for the farm.

§ 1412.104 Appeals.

A producer may obtain reconsideration and review of any adverse determination made under this part in accordance with the appeal regulations found at parts 11 and 780 of this title.

Subpart B—Establishment of Base Acres for a Farm for Covered Commodities

§ 1412.201 Election of base acres.

(a) No later than April 1, 2003, owners on a farm may select one of the following methods to establish base acres for all covered commodities on the farm:

(1) Subject to the limitations in accordance with paragraph (d) of this section and § 1412.204, the base acres for each covered commodity shall be equal to the sum of the following:

(i) For each covered commodity, the 4-year average of the acreage planted to the covered commodity during each of the 1998 through 2001 crop years for harvest, grazing, haying, silage, or other similar purposes, as determined by the Secretary, plus

(ii) For each covered commodity, the 4-year average of the acreage prevented from being planted to covered commodities during each of the 1998 through 2001 crop years, for reasons beyond the control of the producer, as determined by the Deputy Administrator.

(2) The sum of the following:

(i) For each covered commodity, the contract acreage used to calculate the fiscal year 2002 Production Flexibility Contract payment for the covered commodity on the farm in accordance with the regulations of this part in effect on January 1, 2002 (see 7 CFR part 1412 revised as of January 1, 2002), plus

(ii) Subject to paragraphs (b) and (c) of this section, the 4-year average of eligible oilseed acreage on the farm for the 1998 through 2001 crop years, as determined in a manner provided in paragraph (a)(1) of this section, except that the limitation in paragraph (d) of this section shall not apply.

(b) Subject to paragraph (c) of this section, the total acreage of soybeans and other oilseeds on the farm calculated in accordance with paragraph (a)(2)(ii) of this section shall not exceed:

(1) The total acreage determined in accordance with paragraph (a)(1) of this section for the crop year, minus

(2) The total contract acreage for all covered commodities determined in accordance with paragraph (a)(2)(i) of this section.

(c) If the calculation in paragraph (b) of this section results in a negative number, the soybean and other oilseed acreage on the farm for that crop year shall be zero for the purposes of determining the 4-year average, in accordance with paragraph (a)(2)(ii) of this section.

(d) If the acreage planted or prevented from being planted was devoted to a different covered commodity in the same crop year (other than a covered commodity produced under an established practice of double-cropping), the owner may select the commodity to be used for base purposes for that crop year in determining the 4-year average, but shall not select both the initial commodity and subsequent commodity.

(e)(1) An owner may increase the eligible acres of soybeans and other oilseeds on a farm by reducing the contract acreage determined in accordance with paragraph (a)(2)(i) of this section for one or more covered commodities on an acre-for-acre basis, except that the total base acreage for soybeans and each other oilseed on the farm may not exceed the four-year average of each oilseed determined under paragraph (a)(2)(ii) of this section.

(2) For the purpose of determining a 4-year average acreage for a farm under this section, any crop year in which a covered commodity was not planted shall not be excluded.

§ 1412.202 Failure to make election.

If an owner fails to make an election for establishing base acres on a farm by April 1, 2003 in accordance with § 1412.201, that owner shall be deemed to have made the election to determine all base acres for all covered commodities on the farm as set forth in § 1412.201(a)(2).

§ 1412.203 Base acres and Conservation Reserve Program.

(a) Subject to paragraphs (d) and (e) of this section, eligible producers may, at the beginning of each fiscal year, adjust the base acres for covered commodities and peanuts with respect to the farm by the number of crop acreage base acres protected by a Conservation Reserve Program contract entered into under section 1231 of the Food Security Act of 1985 (1985 Act) that expired or was voluntarily terminated on or after May 13, 2002.

(b) Subject to paragraphs (d) and (e) of this section, eligible producers may, at the beginning of each fiscal year, adjust the base acres for covered commodities and peanuts with respect to the farm by the number of cropland acres reduced by a producer on a CCC-approved standard, uniform form designated by CCC in order to enroll such acres in a conservation reserve program contract entered into under section 1231 of the 1985 Act. Eligible producers may adjust base acres only

when the Conservation Reserve Program contract entered into under section 1231 of the 1985 Act expires or is voluntarily terminated on or after May 13, 2002.

(c) Subject to paragraphs (d) and (e) of this section, if neither paragraphs (a) nor (b) of this section apply, the Deputy Administrator may allow eligible producers to adjust base acres for covered commodities and peanuts with respect to the farm in a manner determined acceptable by the Deputy Administrator when a Conservation Reserve Program contract entered into under section 1231 of the 1985 Act expires or is voluntarily terminated on or after May 13, 2002.

(d) The total base acreage on a farm shall not exceed the limitation in accordance with § 1412.204.

(e) Adjustments to base acreage on a farm in accordance with this section must be completed by no later than April 1 of the fiscal year following the fiscal year the conservation reserve program contract expired or was voluntarily terminated.

(f) For the fiscal year in which an adjustment to base acres under this section is made, the owner of the farm shall elect to receive either direct payments and counter-cyclical payments with respect to the base acres added to the farm under this section or a prorated payment under the conservation reserve contract, but not both.

§ 1412.204 Limitation of total base acreage on a farm.

(a) The sum of the following shall not exceed the total DCP cropland acreage on the farm, plus approved double-cropped acreage for the farm:

(1) The sum of all base acres established for the farm in accordance with this subpart, plus

(2) Any base acres established for the farm for peanuts in accordance with subpart G of this part, plus

(3) Any cropland acreage on the farm enrolled in a conservation reserve program contract in accordance with part 1410 of this chapter, plus

(4) Any cropland acreage on the farm enrolled in a wetland reserve program contract in accordance with part 1467 of this chapter, plus

(5) Any other acreage on the farm enrolled in a conservation program for which payments are made in exchange for not producing an agricultural commodity on the acreage.

(b) The Deputy Administrator shall give the owner of the farm the opportunity to select the covered commodity base acres or peanut base acres, against which the reduction required in this section will be made.

(c) In applying paragraph (a) of this section, CCC will take into account the practice of double cropping on a farm, as determined by CCC.

Subpart C—Establishment of Yields for Direct and Counter-Cyclical Payments

§ 1412.301 Direct payment yields for covered commodities, except soybeans and other oilseeds.

(a)(1) The direct payment yield for each covered commodity, except soybeans and other oilseeds, shall be the payment yield established for the commodity for the farm in accordance with the regulations for feed grain, rice, upland cotton and extra long staple cotton, wheat and related programs at part 1413 of this chapter in effect on January 1, 1996 (see 7 CFR part 1413, revised as of January 1, 1996). CCC shall adjust the payment yield to reflect the additional payments made in accordance with 7 CFR 1413.15.

(2) In the case of a farm for which a payment yield in accordance with paragraph (a)(1) of this section is unavailable for a covered commodity, except soybeans and other oilseeds, the county committee shall assign a payment yield for such covered commodity on the farm based upon the direct payment yield for such covered commodity on at least three similar farms physically located in the county with similar yield capability, including similar land and cultural practices.

(i) If fewer than three similar farms are physically located in the county, the State committee shall assign a payment yield for such covered commodity based upon the direct payment yield for such covered commodity on at least three similar farms in the surrounding area with similar yield capability, including similar land and cultural practices, or as determined by the Deputy Administrator.

(ii) Payment yields of similar farms shall be based on the farms' payment yields before such yields are updated in accordance with this section.

(b) [Reserved]

§ 1412.302 Direct payment yield for soybeans and other oilseeds.

(a) The direct payment yield for soybeans and each other oilseed for the farm shall be determined by multiplying the weighted average yield per planted acre for the crop on the farm, as determined in accordance with paragraph (b) of this section, times the ratio resulting from:

(1) The national average yield for the crop for the 1981 through 1985 crop years, as determined by CCC, divided by

(2) The national average yield for the crop for the 1998 through 2001 crop years, as determined by CCC.

(b)(1) The yield per planted acre for soybeans and each other oilseed on the farm, to be used for direct payment purposes, is calculated as follows:

(i) The sum of the production of the crop for the 1998 through 2001 crop years, as determined in accordance with paragraph (b)(2) of this section; divided by

(ii) The sum of the total planted acres of the crop for the 1998 through 2001 crop years.

(2) The production of the crop for each of the 1998 through 2001 crop years shall be the higher of the following, except in a year in which the acreage planted to the crop was zero, in which case the production for the crop for such year shall be zero:

(i) The total production for the applicable year based on the production evidence submitted in accordance with § 1412.304; or

(ii) The amount equal to the product of:

(A) The total planted acres for the crop, times

(B) 75 percent of the harvested average county yield for that crop determined, where practicable, by calculating the weighted 4-year average of the National Agricultural Statistics Service (NASS) harvested acreage yields for the crop using the 1998 through 2001 crop years.

(3) The NASS harvested acreage yield to be used in paragraph (b)(2) of this section shall be based on:

(i) NASS harvested irrigated yield for the crop, if available, for producers who irrigated the crop in the applicable years;

(ii) NASS harvested non-irrigated yield for the crop, if available, for producers who did not irrigate the crop in the applicable years; or

(iii) NASS harvested blended yield for all acreage, regardless of whether or not the acres were irrigated or non-irrigated, for all crops in all counties for which the yields in paragraphs (b)(3)(i) and (ii) of this section are unavailable.

(4) If NASS harvested acreage yield data is not available, the Deputy Administrator shall assign a yield to be used in paragraph (b)(2)(ii)(B) of this section.

§ 1412.303 Payment yield for counter-cyclical payments for covered commodities.

(a)(1) The counter-cyclical payment yield for covered commodities on the farm shall be equal to the direct payment yield for the covered commodity on the farm unless the owner elects to partially update the

yield for all covered commodities on the farm in accordance with paragraph (b) of this section.

(2) Only owners who establish base acres for the farm in accordance with § 1412.201(a)(1) shall have the opportunity to partially update the counter-cyclical payment yield for the covered commodities on the farm.

(3) The partially updated yield shall be used for the calculation of the counter-cyclical payments only. The partially updated counter-cyclical yield shall not be used for the calculation of any direct payments for any covered commodity.

(4) Owners who elect to partially update counter-cyclical payment yields in accordance with this section must:

(i) Make such election at the same time such owner makes the base election in accordance with § 1412.201; and

(ii) Update counter-cyclical payment yields for all covered commodities on the farm using the same method. Updating counter-cyclical payment yields for fewer than all covered commodities on the farm is not allowed. Updating counter-cyclical payment yields for covered commodities on a farm using different methods for different covered commodities is not allowed.

(b) Owners on a farm who established base acres for the farm in accordance with § 1412.201(a)(1) may select one of the following methods to partially update counter-cyclical payment yields for all covered commodities on the farm. The same method must be used to partially update the counter-cyclical payment yield for all covered commodities on the farm.

(1) The sum of the following:

(i) The payment yield calculated for the covered commodity in accordance with §§ 1412.301 or 1412.302, as applicable, plus

(ii) 70 percent of the result of:

(A) The average yield per planted acre for the crop on the farm, as determined in accordance with paragraph (c) of this section, minus

(B) The payment yield calculated for the covered commodity in accordance with §§ 1412.301 or 1412.302, as applicable.

(2) 93.5 percent of the average yield per planted acre for the crop on the farm, as determined in accordance with paragraph (c) of this section.

(c)(1) The yield per planted acre for covered commodities on the farm is calculated as follows:

(i) The sum of the production of the crop for 1998 through 2001 crop years, as determined in accordance with paragraph (c)(2) of this section, divided by

(ii) The sum of the total planted acres of the crop for the 1998 through 2001 crop years.

(2) The production of the crop for each of the 1998 through 2001 crop years shall be the higher of the following, except in a year in which the acreage planted to the crop was zero, in which case, the production for the crop for such year shall be zero:

(i) The total production for the applicable year based on the production evidence submitted in accordance with § 1412.304; or

(ii) The amount equal to the product of:

(A) The total planted acres for the crop, times

(B) 75 percent of the harvested average county yield for that crop determined, where practicable, by calculating the weighted 4-year average of the National Agricultural Statistics Service (NASS) harvested acreage yields for the crop using the 1998 through 2001 crop years.

(3) The NASS harvested acreage yield to be used in paragraph (c)(2) of this section shall be based on:

(i) NASS harvested irrigated yield for the crop, if available, for producers who irrigated the crop in the applicable years;

(ii) NASS harvested non-irrigated yield for the crop, if available, for producers who did not irrigate the crop in the applicable years; or

(iii) NASS harvested blended yield for all acreage, regardless of whether or not the acres were irrigated or non-irrigated, for all crops in all counties where the yields in paragraphs (c)(3)(i) and (ii) of this section are unavailable.

(4) If NASS harvested acreage yield data is not available, the Deputy Administrator shall assign a yield to be used in paragraph (c)(2)(ii)(B) of this section.

§ 1412.304 Submitting production evidence.

(a)(1) Reports of production evidence must be submitted by producers when the owner elects to:

(i) Partially update the yield for all covered commodities on the farm in accordance with § 1412.303; or

(ii) Establish a direct payment yield for soybeans or other oilseeds for the farm in accordance with § 1412.302.

(2) Producer or third-party certification shall not be accepted as proof of production evidence.

(3) Reports of production evidence for all covered commodities shall be provided to the county committee of the county where the farm is administratively located, by farm and crop in such manner as required by CCC on a CCC-approved standard, uniform form designated by CCC.

(b)(1) When disposition of production has been through commercial channels, CCC may require the producer to furnish documentary evidence in order to verify the information provided on the report of production. Acceptable evidence may include, but is not limited to, such items as:

(i) Production approved by the county committee for Loan Deficiency Payments;

(ii) Commercial receipts;

(iii) Gin records;

(iv) Settlement sheets;

(v) Warehouse ledger sheets;

(vi) Elevator receipts or load summaries, supported by other evidence showing disposition, such as sales documents;

(vii) Evidence from harvested or appraised acreage, approved for FCIC or multi-peril crop insurance loss adjustment settlement; or

(viii) Other production evidence determined acceptable by the Deputy Administrator.

(2) Such production evidence must show:

(i) The producer's name,

(ii) The commodity,

(iii) The buyer or name of storage facility,

(iv) The Date of transaction or delivery, and

(v) The quantity.

(c) When production of a covered commodity has been disposed of through non-commercial channels, such as used for feed, grazing, or silage, if Loan Deficiency Payments are not available, but crop insurance records or other FSA records indicate that the use of the crop was for silage, hay, or grazing, then county committee will assign production for that year based on the actual grain yield of three similar farms for the applicable year. If producers cannot meet any of these requirements or their crop suffered a low yield, then 75 percent of the county average yield as determined in accordance with § 1412.302(b)(4) will be used.

(d) CCC may verify the production evidence submitted with records on file at the warehouse, gin, or other entity which received or may have received the reported production.

§ 1412.305 Incorrect or false production evidence.

(a) If production evidence is false or incorrect, as determined by the county committee, the county committee shall determine whether the owner or

producer submitting the production evidence for a farm acted in good faith or took action to defeat the purpose of the program.

(b)(1) If the county committee determines the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence did not act in good faith or took action to defeat the purpose of the program, the county committee shall:

(i) Require a refund of all direct and counter-cyclical payments earned for the farm for the first year such payments were made;

(ii) Reduce the counter-cyclical payment yields for all crops on the farm to equal the direct payment yield for all crops except oilseeds. For all oilseeds on the farm, both the direct and counter-cyclical payment yields shall be reduced to 75 percent of the county average yield as determined in accordance with § 1412.302(b)(4). That yield shall then be reduced by the applicable direct payment yield factor in accordance with § 1412.302(a)(1); and

(iii) Subject to paragraph (a)(2)(i) of this section, require a refund of an amount equal to the following for each covered commodity and peanuts for each year the false, incorrect or unacceptable yield was used to make payments under the contract:

(A) The sum of the direct and counter-cyclical payments made using the false, incorrect or unacceptable evidence, minus

(B) The sum of the direct and counter-cyclical payments that would have been made based on the yields established in paragraph (b)(1)(ii) of this section.

(2) Notwithstanding paragraph (b)(1) of this section, if the county committee determines that the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence did not act in good faith or took action to defeat the purpose of the program, the Deputy Administrator may take further action, including but not limited to any or all of the following:

(i) Make a further yield reduction for part or all of the covered commodities and peanuts on the farm;

(ii) Make further payment reductions or refunds;

(iii) Determine that the owner or producer who submitted the evidence is ineligible for participation in future contracts; or

(iv) Take other legal action.

(c) If the county committee determines the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence acted in good faith and did not take action to defeat the purpose of the program, the county committee shall:

(1) Correct the counter-cyclical yield for the applicable crop to equal the yield that would have been calculated in accordance with § 1412.303 based on accurate production evidence; and

(2) Require a refund of an amount equal to the following for each covered commodity and peanuts for each year the false, incorrect or unacceptable yield was used to make payments under the contract:

(i) The sum of the direct and counter-cyclical payments made using the false, incorrect or unacceptable evidence, minus

(ii) The sum of the direct and counter-cyclical payments that would have been made based on the yields established in paragraph (c)(1) of this section.

Subpart D—Direct and Counter-Cyclical Program Contract Terms and Enrollment Provisions for Covered Commodities 2002 through 2007 and for Peanuts 2003 through 2007

§ 1412.401 Direct and counter-cyclical program contract.

(a)(1) With respect to Fiscal Year 2002 payments, CCC will offer to enter into a contract with eligible producers of covered commodities and historical peanut producers on October 1, 2002 through the date announced by CCC. With respect to Fiscal Years 2003 through 2007, CCC shall offer to annually enter into a contract with an eligible producer on a farm having base acreage with respect to a covered commodity; and for a farm with peanut base acreage and yield assigned in accordance with subpart G of this part, at the beginning of each such fiscal year 2003 through 2007 through the date announced by CCC for each such year.

(2)(i) Eligible producers may execute and submit a contract to the county FSA office where the records for the farm are administratively maintained not later than June 1 of the fiscal year in which the direct and counter-cyclical payments are requested.

(ii) Because CCC will incur additional expenses which may not be possible to quantify with certainty, including the additional cost to ensure payments are issued timely to all producers, a late signup fee in the amount of $100 per farm will be assessed by CCC for any farm enrolled after June 1 of the fiscal year in which the direct and counter-cyclical payments are requested unless the Deputy Administrator determines a waiver of the late signup fee is appropriate. Enrollment is not allowed after September 30 of the fiscal year in which the direct and counter-cyclical payments are requested.

(3) Eligible producers who elect to enter into a contract with CCC must enroll all base acres on the farm. Enrollment of fewer than all base acres on the farm is not allowed.

(b) Eligible producers may withdraw from a contract at any time on or before September 30 of the year of the contract provided all signatories to the contract, including CCC, agree to the withdraw.

(c) All contracts shall expire on September 30 of the fiscal year of the contract unless:

(1) Withdrawn in accordance with paragraph (b) of this section;

(2) Terminated in accordance with paragraphs (d) or (e) of this section; or

(3) Terminated at an earlier date by mutual consent of all parties, including CCC.

(d) A transfer or change in the interest of an owner or producer in the farm or in acreage on the farm subject to a contract shall result in the termination of the contract, and a refund of all direct and counter-cyclical payments issued for the farm. The contract termination shall be effective on the date of the transfer or change. Successors to the interest in the farm or crops on the farm subject to the contract may enroll the farm in a new contract and assume all obligations under the contract, only after all direct and counter-cyclical payments previously issued for the farm have been refunded to CCC.

(e) In the event a farm reconstitution is completed in accordance with part 718 of this title, all producers with an interest in the base acres on the farm must sign a new contract and provide supporting documentation as specified in part 12 of this title, and parts 1400, and 1412 of this chapter not later than September 30 of the fiscal year direct and counter-cyclical payments are requested, after receiving written notification by the county committee indicating the reconstitution is completed. If all producers have not signed the new contract by September 30, no producers on the contract will be eligible for a direct or counter-cyclical payment for that farm for the year the contract was terminated.

§ 1412.402 Eligible producers.

Producers eligible to enter into a contract are:

(a)(1) An owner of a farm who assumes all or a part of the risk of producing a crop;

(2) A producer, other than an owner, on a farm with a share-rent lease for such farm, regardless of the length of the lease, if the owner of the farm enters into the same contract;

(3) A producer, other than an owner, on a farm who cash rents such farm under a lease expiring on or after September 30 of the year of the contract in which case the owner is not required to enter into the contract;

(4) A producer, other than an owner, on an eligible farm who cash rents such farm under a lease expiring before September 30 of the year of the contract. The owner of such farm must also enter into the same contract; or

(5) An owner of an eligible farm who cash rents such farm and the lease term expires before September 30 of the year of the contract, if the tenant declines to enter into a contract for the applicable year. In the case of an owner covered by this paragraph, direct and counter-cyclical payments shall not begin under the contract until the lease held by the tenant ends.

(b) A minor child shall be eligible to enter into a contract only if one of the following conditions exist:

(1) The right of majority has been conferred upon the minor by court proceedings or statute;

(2) A guardian has been appointed to manage the minor's property, and the applicable program documents are executed by the guardian; or

(3) A bond is furnished under which a surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

§ 1412.403 Reconstitutions.

Farms shall be reconstituted in accordance with part 718 of this title.

§ 1412.404 Notification of base acres.

The owner and all producers on a farm shall be notified in writing of the number of base acres eligible for enrollment in a contract, unless such owner or producer requests in writing that such owner or producer not be furnished with the notice.

§ 1412.405 Reducing base acreage.

(a)(1) Subject to the limitation in paragraph (a)(ii) of this section, a permanent reduction of all or a portion of a farm's base acreage shall be allowed when all owners of the farm execute and submit a written request for such reduction on a CCC-approved standard, uniform form designated by CCC to the FSA county office where the records for the farm are administratively maintained.

(2) A permanent reduction of all or a portion of a farm's base acreage to negate or reduce a program violation is not allowed.

(b) When base acres on a farm are converted to a non-agricultural commercial or industrial use, the total base acreage on the farm shall be reduced accordingly regardless of the submission of a request for such reduction.

§ 1412.406 Succession-in-interest to a direct and counter-cyclical program contract.

(a) A succession in interest to a contract may be permitted if there has been a change in the operation of a farm, such as:

(1) A sale of land;

(2) A change of operator or producer, including a change in a partnership that increases or decreases the number of partners;

(3) A foreclosure, bankruptcy, or involuntary loss of the farm;

(4) A change in producer shares to reflect changes in the producer's share of the crop(s) that were originally approved on the contract; or

(5) As otherwise determined by the Deputy Administrator, if the succession will not adversely affect nor defeat the purpose of the program.

(b) A succession in interest to the contract is not permitted if CCC determines that the change:

(1) Results in a violation of the landlord-tenant provisions set forth in § 1412.505; or

(2) Adversely affects or otherwise defeats the purpose of the program.

(c) If a producer who is entitled to receive direct and counter-cyclical payments dies, becomes incompetent, or is otherwise unable to receive the payment, CCC will make the payment in accordance with part 707 of this title.

(d) A producer or owner must inform the county committee of changes in interest in base acres on the farm not later than:

(1) August 1 of the fiscal year in which the change occurs if the change requires a reconstitution be completed in accordance with part 718 of this title; or

(2) September 30 of the fiscal year in which the change occurs if the change does not require a reconstitution be completed in accordance with part 718 of this title.

(e)(1) In any case in which either a direct or counter-cyclical payment has previously been made to a predecessor, such payment shall not be paid to the successor, unless such payment has been refunded in full by the predecessor, in accordance with § 1412.401(d). If the predecessor refunds such payments, such producer shall not be assessed interest in accordance with part 1403 of this chapter.

(2) A succession in interest shall not increase the liability of CCC.

§ 1412.407 Planting flexibility.

(a) Any crop may be planted and harvested on base acreage on a farm, except as limited elsewhere in this section. Any crop may be planted on DCP cropland in excess of the base acreage on a farm.

(b) Base acreage may be hayed or grazed at any time.

(c) Harvesting non-perennial fruits, vegetables (except lentils, mung beans, and dry peas) or wild rice, as determined by the Deputy Administrator, or designee, is prohibited on base acreage of a farm enrolled in a contract. Planting perennial fruits, vegetables (except lentils, mung beans, and dry peas) or wild rice, as determined by the Deputy Administrator, is prohibited on base acreage of a farm enrolled in a contract.

(d) Notwithstanding the provisions of paragraph (c) of this section, perennial fruits, vegetables and wild rice may be planted on base acreage of a farm enrolled in a contract, and non-perennial fruits, vegetables and wild rice may be harvested on base acreage of a farm enrolled in a contract if:

(1) A producer double-crops fruits, vegetables or wild rice with a covered commodity or peanuts in any region described in paragraph (e) of this section, in which case direct and counter-cyclical payments will not be reduced for the planting or harvesting of the fruit, vegetable or wild rice;

(2) The farm has a history of planting fruits, vegetables or wild rice, as determined by CCC, in which case the payment acres for the farm shall be reduced on an acre-for-acre basis ; or

(3) The producer has a history of planting a specific fruit, specific vegetable or wild rice, as determined by CCC, the producer may plant and harvest the specific fruit, specific vegetable or wild rice for which the producer has a planting history, subject to the following:

(i) The acreage harvested shall not exceed the simple average of the sum of acreage of the specific fruit, specific vegetable or wild rice planted for harvest by the producer during the crop years 1991 through 1995 or 1998 through 2001, but not both, as determined by the producer, excluding any year in which the specific fruit, specific vegetable or wild rice was not planted; and

(ii) The payment acres for the farm shall be reduced on an acre-for-acre basis;

(e) Double-cropping for purposes of this section means planting for harvest fruits, vegetables or wild rice on the same acres in cycle with a covered commodity or peanuts planted and

harvested for grain or lint in a 12-month period under normal growing conditions for the region and being able to repeat the same cycle in the following 12-month period. For purposes of this part, the following counties have been determined to be regions having a history of double-cropping covered commodities or peanuts with fruits, vegetables or wild rice. State committees have established the following counties as regions within their respective States:

Alabama

Baldwin, Barbour, Butler, Chambers, Chilton, Clarke, Covington, Cullman, Geneva, Greene, Jackson, Jefferson, Lee, Madison, Mobile, Montgomery, Randolph, Sumter, Talladega, Walker, and Washington.

Alaska

None.

Arkansas

Ashley, Benton, Clay, Crawford, Cross, Faulkner, Franklin, Independence, Jackson, Jefferson, Lee, Lincoln, Logan, Lonoke, Phillips, Pulaski, St. Francis, Sebastian, Woodruff, and Yell.

Arizona

Cochise, Graham, Greenlee, LaPaz, Maricopa, Pima, Pinal, and Yuma..

California

Alameda, Amador, Butte, Colusa, Contra Costa, Fresno, Glenn, Imperial, Kern, Kings, Madera, Merced, Riverside, Sacramento, San Benito, San Joaquin, Santa Clara, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Yolo, and Yuba.

Caribbean Office

None.

Connecticut

None.

Colorado

None.

Delaware

Kent, New Castle, and Sussex.

Florida

All counties except Monroe.

Georgia

All counties.

Hawaii

None.

Idaho

None.

Illinois

Bureau, Calhoun, Cass, Clark, Crawford, DeKalb, Edgar, Effingham, Gallatin, Iroquois, Jersey, Kankakee, Lawrence, LaSalle, Lee, Madison, Marion, Mason, Monroe, Randolf, St. Clair, Union, Vermilion, White, and Whiteside.

Indiana

Allen, Bartholemew, Gibson, Hamilton, Jackson, Knox, LaGrange, Lake, LaPorte, Madison, Miami, Posey, Sullivan, Vandenberg, and Warrick.

Iowa

Kossuth, Mitchell, Palo Alto, and Winnebago.

Kansas

None.

Kentucky

Daviess.

Louisiana

Avoyelles, Franklin, Grant, Morehouse, Rapides, and West Carroll.

Maine

None.

Maryland

Baltimore, Calvert, Caroline, Carroll, Dorchester, Harford, Kent, Queen Annes, St. Mary's, Somerset, Talbot, Wicomico, and Worcester.

Massachusetts

None.

Michigan

None.

Minnesota

Blue Earth, Brown, Carver, Cottonwood, Dakota, Dodge, Faribault, Fillmore, Freeborn, Goodhue, Houston, Kandiyohi, Le Sueur, Martin, McLeod, Meeker, Mower, Nicollet, Olmsted, Redwood, Renville, Rice, Scott, Sibley, Steele, Waseca, Wabasha, Watonwan, and Winona.

Mississippi

Calhoun, Carroll, Coahoma, Covington, DeSota, Georgia, Humphreys, Jefferson Davis, Lowndes, Marshall, Monroe, Montgomery, Prentiss and Rankin.

Missouri

Barton, Butler, Cape Girardeau, Dade, Dunklin, Jasper, Lawrence, Mississippi, New Madrid, Newton, Ripley, Scott, and Stoddard.

Montana

None.

Nebraska

None.

Nevada

None.

New Jersey

Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Salem, Somerset, Sussex, and Warren.

New Hampshire

None.

New Mexico

Chaves, Curry, Dona Ana, Eddy, Hidalgo, Lea, Luna, Quay, Roosevelt, San Juan, and Sierra.

New York

Orange and Suffolk.

North Carolina

Beaufort, Bertie, Bladen, Brunswick, Cabarrus, Camden, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Stokes, Tyrell, Union, Wake, Warren, Washington, Wayne, Wilkes, Wilson, and Yadkin.

North Dakota

None.

Ohio

Champaign, Clermont, Fulton, Lucas, Miami, Morgan, Muskingham, Scioto, and Stark.

Oklahoma

Adair, Alfalfa, Beckham, Blaine, Bryan, Caddo, Canadian, Carter, Cherokee, Cleveland, Cotton, Custer, Delaware, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Haskell, Hughes, Jackson, Jefferson, Kay, Kingfisher, Kiowa, LeFlore, Logan, Love, McClain, McIntosh, Major, Marshall, Mayes, Muskogee, Noble, Nowata, Okmulgee, Osage, Pawnee, Payne, Pittsburg, Pottawatomie, Roger Mills, Rogers, Sequoyah, Stephens, Tillman, Tulsa, Wagoner, Washita, Woods, and Woodward.

Oregon

Benton, Clackamas, Columbia, Jackson, Josephine, Lane, Linn, Marion, Morrow, Multnomah, Polk, Umatilla, Washington, and Yamhill.

Pennsylvania

Adams, Bucks, Centre, Chester, Cumberland, Delaware, Franklin, Indiana, Lancaster, Montgomery, Northumberland, Schuylkill, and York.

Puerto Rico

None.

Rhode Island

None.

South Carolina

All counties.

South Dakota

None.

Tennessee

Bledsoe, Cannon, Cocke, Coffee, Crockett, Dickson, Dyer, Fayette, Gibson, Giles, Greene, Grundy, Hardeman, Haywood, Jefferson, Knox, Lake, Lauderdale, Lawrence, Lincoln, Madison, Maury, Obion, Overton, Pickett, Rhea, Robertson, Rutherford, Sumner, Unicoi, VanBuren, Warren, Washington, Wayne, White, Williamson, and Wilson.

Texas

Atascosa, Bailey, Baylor, Brooks, Cameron, Castro, Cochran, Cottle, Dallam, Dawson, Deaf Smith, Dimmit, Duval, Floyd, Foard, Frio, Gaines, Hale, Hartley, Haskell, Hidalgo, Hockley, Jim Wells, Kleberg, Knox, Lamb, LaSalle, Lubbock, Lynn, Maverick, Medina, Moore, Parmer, Presidio, San Patricio, Sherman, Starr, Swisher, Terry, Uvalde, Webb, Willacy, Wilson, Yoakum, and Zavala.

Utah

None.

Vermont

None.

Virginia

Accomack, Albemarle, Alleghany, Amelia, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Brunswick, Buchanan, Buckingham, Campbell, Caroline, Carroll, Charles City, Charlotte, Chesapeake, Chesterfield, Clarke, Craig, Culpeper, Cumberland, Dickenson, Dinwiddie, Essex, Fairfax, Fauquier, Floyd, Fluvanna, Franklin, Frederick, Giles, Gloucester, Goochland, Grayson, Greene, Greensville, Halifax, Hanover, Henrico, Henry, Highland, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Lee, Loudoun, Louisa, Lunenburg, Madison, Mathews, Mecklenburg, Middlesex, Montgomery, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Patrick, Pittsylvania, Powhatan, Prince Edward, Prince George, Prince William, Pulaski, Rappahannock, Richmond, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Southampton, Spotsylvania, Stafford, Suffolk, Surry, Sussex, Tazewell, Virginia Beach, Warren, Washington, Westmoreland, Wise, Wythe, and York.

Washington

Yakima.

West Virginia

None.

Wisconsin

Adams, Calumet, Columbia, Dane, Dodge, Dunn, Fond du Lac, Green, Green Lake, Iowa, Kenosha, Milwaukee, Portage, Racine, Richland, Rock, St. Croix, Sauk, Walworth, Waukesha, Waushara, and Winnebago.

Wyoming

None.

(f) Any acreage reduction required by paragraph (d) of this section will be applied beginning with the covered commodity with lowest direct payment amount per acre until the acreage reduction amount is satisfied. Producers may agree to adjust the acre reduction between covered commodities on the farm, only to the extent the total acre reduction amount does not change for the farm, and all producers affected by the adjustment agree to the adjustment in writing.

(g) For the purposes of this part, fruits, vegetables and wild rice planted on base acreage of a farm under contract:

(1) Shall be considered harvested at the time of planting, unless the producer pays a fee to cover the cost of a farm visit, in accordance with part 718 of this title, to verify that the fruit, vegetable or wild rice has been destroyed before harvest, as determined by the Deputy Administrator.

(2) Shall not be considered as planted to a fruit, vegetable or wild rice when reported by a producer on the farm with an intended use of green manure or forage, as determined by the Deputy Administrator, and a fee to cover the cost of a farm visit is paid by the producer, in accordance with part 718 of this title, to verify that the crop has not been harvested.

(h) Fruits and vegetables include but are not limited to all nuts except peanuts, certain fruit-bearing trees and: acerola (barbados cherry), antidesma, apples, apricots, aragula, artichokes, asparagus, atemoya (custard apple), avocados, babaco papayas, bananas, beans (except soybeans, mung, adzuki, faba, and lupin), beets—other than sugar, blackberries, blackeye peas, blueberries, bok spare choy, boysenberries, breadfruit, broccoflower, broccolo-cavalo, broccoli, brussel sprouts, cabbage, cailang, caimito, calabaza, carambola (star fruit), calaboose, carob, carrots, cascadeberries, cauliflower, celeriac, celery, chayote, cherimoyas (sugar apples), canary melon, cantaloupes, cardoon, casaba melon, cassava, cherries, chickpeas/garbanzo beans, chinese bitter melon, chicory, chinese cabbage, chinese mustard, chinese water chestnuts, chufes, citron, citron melon, coffee, collards, cowpeas, crabapples, cranberries, cressie greens, crenshaw melons, cucumbers, currants, cushaw, daikon, dasheen, dates, dry edible beans, dunga, eggplant, elderberries elut, endive, escarole, etou, feijoas, figs, gai lien, gailon, galanga, genip, gooseberries, grapefruit, grapes, guambana, guavas, guy choy, honeydew melon, huckleberries, jackfruit, jerusalem artichokes, jicama, jojoba, kale, kenya, kiwifruit, kohlrabi, kumquats, leeks, lemons, lettuce, limequats, limes, lobok, loganberries, longon, loquats, lotus root, lychee (litchi), mandarins, mangos, marionberries, mar bub, melongene, mesple, mizuna, mongosteen, moqua, mulberries, murcotts, mushrooms, mustard greens, nectarines, ny Yu, okra, olallieberries, olives, onions, opo, oranges, papaya, paprika, parsnip, passion fruits, peaches, pears, peas, all peppers, persimmon, persian melon, pimentos, pineapple, pistachios, plantain, plumcots, plums, pomegranates, potatoes, prunes, pummelo, pumpkins, quinces, radiochio, radishes, raisins, raisins (distilling), rambutan, rape greens, rapini, raspberries, recao, rhubarb, rutabaga, santa claus melon, salsify, saodilla, sapote, savory, scallions, shallots, shiso, spinach, squash, strawberries, suk gat, swiss chard, sweet corn, sweet potatoes, tangelos, tangerines, tangos, tangors, taniers, taro root, tau chai, teff, tindora, tomatillos, tomatoes, turnips, turnip greens, watercress, watermelons, white sapote, yam, and yam yu choy.

(i) For 2002 contracts only, fruits, vegetables, and wild rice may be planted on excess base acres. Such plantings shall:

(1) Not be a violation of the contract

(2) Result in a reduction of direct and counter-cyclical payments in accordance with paragraph (f) of this section.

Subpart E—Financial Considerations Including Sharing Direct and Counter-Cyclical Payments

§ 1412.501 Limitation of direct and counter-cyclical payments.

(a) The sum total of all annual direct payment amounts shall not exceed the amounts specified in part 1400 of this chapter.

(b) The sum total of all annual counter-cyclical payment amounts shall not exceed the amounts specified in part 1400 of this chapter.

(c) The amount of 2002 direct and counter-cyclical payments for a farm shall not exceed the maximum amount that would have been paid based on the number of persons as determined in accordance with part 1400 of this chapter on the farm as of May 13, 2002.

(d) The provisions of part 1400 of this chapter apply to this part.

§ 1412.502 Direct payment provisions.

(a) For 2003 through 2007 contracts, a final direct payment shall be made to eligible producers on a farm enrolled in a contract with respect to covered commodities and peanuts for which payment yields and base acres are established on or after October 1 of the fiscal year following the fiscal year of the contract in which the direct payment was earned.

(b) For 2003 through 2007 contracts, at the option of the producer, 50 percent of the direct payment for the farm with respect to covered commodities and peanuts for which payment yields and base acres are established, shall be paid in any month from December through September of the fiscal year of the

contract, as requested by the producer, as an advance direct payment. For any producer to receive an advance direct payment, all producers sharing in the direct payments for the farm must:

(1) Be in compliance with all requirements of the contract and the requirements in this part at the time of the advance payment; and

(2) Sign the contract designating payment shares and provide supporting documentation as specified in part 12 of this title and parts 1400 and 1405 of this chapter, if applicable. If all producers on the farm have not signed the contract designating payment shares in accordance with this paragraph, then no producer shall be eligible for any payment for that farm for that contract.

(c) If a producer declines to accept, or is determined to be ineligible for all or any part of the producer's share of the direct payment computed for the farm in accordance with the provisions of this section:

(1) The payment or portions thereof shall not become available for any other producer; and

(2) The producer shall refund to CCC any amounts representing payments that exceed the payments determined by CCC to have been earned under the program authorized by this part. Part 1403 of this chapter shall be applicable to all unearned payments.

(d) The payment rates used to calculate direct payments with respect to covered commodities and peanuts on a farm enrolled in a contract shall be as follows:

(1) Wheat—$0.52/bu.
(2) Corn—$0.28/bu.
(3) Grain sorghum—$0.35/bu.
(4) Barley—$0.24/bu.
(5) Oats—$0.024/bu.
(6) Upland cotton—$0.0667/lb.
(7) Rice—$2.35/cwt.
(8) Soybeans—$0.44/bu.
(9) Other oilseeds—$0.0080/lb.
(10) Peanuts—$36.00/ton.

(e) For 2003 through 2007 contracts, subject to the limitation in accordance with § 1412.501 and part 1400 of this chapter, the final direct payment amount to be paid to the producers on a farm enrolled in a contract with respect to the covered commodities and peanuts for which payment yields and base acres are established shall be equal to the product of:

(1) The payment rate specified in paragraph (d) of this section, multiplied by

(2) The payment acres of the covered commodity and peanuts on the farm enrolled in a contract, minus any acre reduction in accordance with § 1412.407(g), multiplied by

(3) The payment yield for the covered commodity and peanuts on the farm enrolled in a contract as determined in accordance with § 1412.301, § 1412.302 and subpart G of this part, minus

(4) Any reduction calculated in accordance with subpart F of this part, minus

(5) Any advance payment received in accordance with paragraph (b) of this section.

(f) For 2002 contracts, the direct payment amount to be paid to the producers on a farm enrolled in a contract with respect to the covered commodities for which payment yields and base acres are established shall be equal to the result of the amount calculated in accordance with paragraphs (e)(1) through (3) of this section minus all of the following:

(1) Any amount of payment received under a production flexibility contract for fiscal year 2002 in accordance with the Federal Agriculture Improvement and Reform Act of 1996;

(2) Any reduction calculated in accordance with subpart F of this part, with credit for any amount reduced under the production flexibility contract for the farm for fiscal year 2002 for the same contract violation; and

(3) Any reduction calculated in accordance with § 1412.407(j).

(g)(1) The payment of any amount due any producer on a farm enrolled in a contract shall be made only after all the producers subject to the contract are determined to be in full compliance with the contract and the requirements in this part.

(2) A producer on a farm enrolled in a contract may receive a payment amount due without respect to the eligibility of other producers on the farm if:

(i) The producer is in full compliance with the contract and the requirements in this part;

(ii) The payment of such amount does not affect adversely nor defeat the purpose of the program, as determined by the Deputy Administrator; and

(iii) The payment is approved by the Deputy Administrator.

(h) For 2002 contracts, the direct payment amount to be paid to the historical peanut producer shall be made to the historical peanut producer on the base and yield established for the historical peanut producer, in accordance with subpart G of this part.

§ 1412.503 Counter-cyclical payment provisions.

(a) For the 2002 through 2007 contracts, a counter-cyclical payment shall be made to eligible producers on a farm enrolled in a contract with respect to covered commodities for which payment yield and base acres are established, and with respect to peanuts on a farm enrolled in a contract for 2003 through 2007:

(1) Only if the effective price for the covered commodity or peanuts, as determined in accordance with paragraph (b) of this section, is less than the target price of the covered commodity or peanuts, respectively, as determined in accordance with paragraph (c) of this section.

(2) As soon as practical, as determined by the Deputy Administrator, after the end of the 12-month marketing year for the covered commodity or peanuts, as applicable.

(b) For the purposes of paragraphs (a) and (g) of this section, the effective price for a covered commodity and peanuts, respectively, is equal to the sum of the following:

(1) The higher of:

(i) The national average market price received by producers during the 12-month marketing year for the covered commodity or peanuts, as applicable, as determined by the Secretary; or

(ii) For 2002 and 2003 crop years the following rates:

(A) Wheat—$2.80/bu.
(B) Corn—$1.98/bu.
(C) Grain sorghum—$1.98/bu.
(D) Barley—$1.88/bu.
(E) Oats—$1.35/bu.
(F) Upland cotton—$0.52/lb.
(G) Rice—$6.50/cwt.
(H) Soybeans—$5.00/bu.
(I) Other oilseeds—$0.0960/lb.
(J) Peanuts—$355.00/ton.

(iii) For 2004 through 2007 crop years the following rates:

(A) Wheat—$2.75/bu.
(B) Corn—$1.95/bu.
(C) Grain sorghum—$1.95/bu.
(D) Barley—$1.85/bu.
(E) Oats—$1.33/bu.
(F) Upland cotton—$0.52/lb.
(G) Rice—$6.50/cwt.
(H) Soybeans—$5.00/bu.
(I) Other oilseeds—$0.0930/lb.
(J) Peanuts—$355.00/ton.

(2) The direct payment rate for the covered commodity as provided in § 1412.502(d).

(c) For the purposes of paragraphs (a) and (g) of this section, the target prices are as follows:

(1) For 2002 and 2003 crop years:

(i) Wheat—$3.86/bu.
(ii) Corn—$2.60/bu.
(iii) Grain sorghum—$2.54/bu.
(iv) Barley—$2.21/bu.
(v) Oats—$1.40/bu.
(vi) Upland cotton—$0.7240/lb.
(vii) Rice—$10.50/cwt.
(viii) Soybeans—$5.80/bu.

(ix) Other oilseeds—$0.0980/lb.
(x) Peanuts—$495.00/ton.

(2) For 2004 through 2007 crop years:

(i) Wheat—$3.92/bu.
(ii) Corn—$2.63/bu.
(iii) Grain sorghum—$2.57/bu.
(iv) Barley—$2.24/bu.
(v) Oats—$1.44/bu.
(vi) Upland cotton—$0.7240/lb.
(vii) Rice—$10.50/cwt.
(viii) Soybeans—$5.80/bu.
(ix) Other oilseeds—$0.1010/lb.
(x) Peanuts—$495.00/ton.

(d) The payment rate used to calculate counter-cyclical payments with respect to covered commodities and peanuts for which payment yields and base acres are established on a farm enrolled in a contract is equal to the result of:

(1) The target price of the covered commodity as determined in accordance with paragraph (c) of this section, minus

(2) The effective price of the covered commodity as determined in accordance with paragraph (b) of this section.

(e) For 2002 through 2007 contracts, when counter-cyclical payments are required in accordance with paragraph (a) of this section, subject to the limitation in accordance with § 1412.501 and part 1400 of this chapter, the final counter-cyclical payment amount to be paid to producers on a farm enrolled in a contract with respect to the covered commodities and peanuts for which payment yields and base acres are established shall be equal to the product of:

(1) The payment rate determined in accordance with paragraph (d) of this section, multiplied by

(2) The payment acres of the covered commodity and peanuts, as applicable, minus any acre reduction in accordance with § 1412.407(g), multiplied by

(3)(i) The payment yield for the covered commodity or peanuts on the farm enrolled in a contract as determined in accordance with § 1412.303 and subpart G of this part if the owner of the farm elected base acreage for the farm in accordance with § 1412.201(a)(2), or the owner elected to not update the payment yields for the covered commodities on the farm, or

(ii) The updated payment yield for the covered commodity on the farm enrolled in a contract as determined in accordance with § 1412.303 if the owner of the farm elected base acreage for the farm in accordance with § 1412.201(a)(1) and elected to update the yields for the covered commodities on the farm in accordance with § 1412.303, minus

(4) Any reduction calculated in accordance with subpart F of this part that was not satisfied by a reduction in the direct payments for the farm calculated in accordance with § 1412.502(e), minus

(5) Any partial advance payment received in accordance with paragraphs (f) or (g) of this section.

(f) For 2002 through 2006 contracts, advance counter-cyclical payments shall be paid, at the request of the producer, if the Secretary determines that a counter-cyclical payment for the covered commodity or peanuts, respectively, will be required in accordance with paragraph (a)(1) of this section.

(1) The first advance counter-cyclical payment shall:

(i) Be calculated in accordance with paragraphs (e)(1) through (4) of this section;

(ii) Be an amount determined by the Secretary not to exceed 35 percent of the projected counter-cyclical payment for the covered commodity or peanuts, respectively;

(iii) Not be made earlier than October 1 after the end of the contract year in which the counter-cyclical payment was earned; and

(iv) To the maximum extent practical, be made no later than October 31 after the end of the contract year in which the counter-cyclical payment was earned.

(2) The second partial advance counter-cyclical payment shall:

(i) Be calculated in accordance with paragraphs (e)(1) through (4) of this section.

(ii) Be an amount determined by the Secretary not to exceed the result of:

(A) 70 percent of the projected counter-cyclical payment, including any revision thereof, for the covered commodity or peanuts, respectively, minus

(B) The amount of payment made under paragraph (f)(1) of this section; and

(iii) Not be made earlier than February 1 after the end of the contract year in which the counter-cyclical payment was earned.

(g) For 2002 contract, the counter-cyclical payment amount to be paid to the historic peanut producer shall be made using the base and yield established for the historic peanut producer, in accordance with subpart G of this part.

(h) For 2007 contracts, an advance counter-cyclical payment shall be paid, at the request of the producer, if the Secretary determines that a counter-cyclical payment for the covered commodity or peanuts will be required in accordance with paragraph (a)(1) of this section. The advance payment shall:

(1) Be calculated in accordance with paragraphs (e)(1) through (e)(4) of this section;

(2) Not exceed 40 percent of the projected counter-cyclical payment for the covered commodity or peanuts, respectively, as determined by the Secretary; and

(3) Be made after the first 6 months of the marketing year of the covered commodity or peanuts, as applicable.

(i) If a producer declines to accept, or is determined to be ineligible for all or any part of the producer's share of the counter-cyclical payment computed for the farm in accordance with the provisions of this section:

(1) The payment or portions thereof shall not become available for any other producer; and

(2) The producer shall refund to CCC any amounts representing payments that exceed the payments determined by CCC to have been earned under the program authorized by this part. Part 1403 of this chapter shall be applicable to all unearned payments.

(i)(A) The payment of any amount due any producer on a farm enrolled in a contract shall be made only after all the producers subject to the contract are determined to be in full compliance with the contract and the requirements in this part.

(B) A producer on a farm enrolled in a contract may receive a payment amount due without regard to the eligibility of other producers on the farm if:

(*1*) The producer is in full compliance with the contract and the requirements in this part;

(*2*) The payment of such amount does not adversely affect nor defeat the purpose of the program, as determined by the Deputy Administrator, or designee; and

(*3*) The payment is approved by the Deputy Administrator, or designee.

(j) The producers on a farm who receive any advance counter-cyclical payment shall refund the portion of such advance payments that exceeds the actual counter-cyclical payment to be made for the covered commodity or peanuts, as applicable.

§ 1412.504 Sharing of contract payments.

(a) Each eligible producer on a farm shall be given the opportunity to annually enroll in a contract and receive direct and counter-cyclical payments determined to be fair and equitable as agreed to by all the producers on the farm and approved by the county committee.

(1) Each producer must provide a copy of their written lease to the county committee and, in the absence of a

written lease, must provide to the county committee a complete written description of the terms and conditions of any oral agreement or lease.

(2) A lease will be considered to be a cash lease if the lease provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).

(3) If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such producer would have had if the crop had been produced, or combination thereof, such agreement shall be considered to be a share lease. The leasing of grazing or haying privileges is not considered cash leasing.

(4) If a lease provides for the greater of a guaranteed amount or share of the crop or crop proceeds, such agreement shall be considered a share lease if the lease provides for both:

(i) A guaranteed amount such as a fixed dollar amount or quantity; and

(ii) A share of the crop proceeds.

(5) If the lease is a cash lease, the landlord is not eligible for direct or counter-cyclical payments.

(b) When contract acreage is leased on a share basis, neither the landlord nor the tenant shall receive 100 percent of the contract payment for the farm.

(c) CCC will approve a contract for enrollment and approve the division of payment when all of the following apply:

(1) The landlords, tenants and sharecroppers sign the contract and agree to the payment shares shown on the contract;

(2) CCC determines that the interests of tenants and sharecroppers are being protected; and

(3) CCC determines that the payment shares shown on the contract do not circumvent the provisions of part 1400 of this chapter.

§ 1412.505 Provisions relating to tenants and sharecroppers.

Neither direct nor counter-cyclical payments shall be made by CCC if:

(a) The landlord or operator has adopted a scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program. If any of such conditions occur or are discovered after payments have been made, all or any such part of the payments as the State committee may determine shall be refunded to CCC; or

(b) The landlord terminated a lease in violation of state law as determined by a state court.

Subpart F—Contract Violations and Diminution in Payments

§ 1412.601 Contract violations.

(a) Except as provided in paragraph (b) of this section, violations of contract requirements shall result in the termination of the contract. Upon such termination, all producers subject to the contract shall forfeit all rights to receive direct and counter-cyclical payments on the farm for the contract year and shall refund all direct and counter-cyclical payments received, plus interest, as determined in accordance with part 1403 of this chapter.

(b)(1) If there is a violation of § 1412.407 and CCC determines that a violation is not serious enough to warrant termination of the contract under paragraph (a) of this section, direct and counter-cyclical payments may be made to the producers specified on the contract, but in an amount that is reduced by an amount equal to the sum of:

(i) The per-acre market value of the fruits, vegetables, and wild rice, as determined by the State Committee, times the number of acres in violation, plus

(ii) The direct and counter-cyclical payments for each such acre.

(2) Producers must protect land enrolled in DCP from weeds, including noxious weeds, and erosion, including providing sufficient cover if determined necessary by the county committee. The first violation of this provision will result in a reduction in the direct payments for the farm by an amount equal to three times the cost of maintenance of the acreage, but not to exceed 50 percent of the total direct payments for the farm. The second violation of this provision will result in a reduction in the direct payments for the farm by an amount equal to three times the cost of maintenance of the acreage, not to exceed the total direct payments for the farm.

§ 1412.602 Fruit, vegetable and wild rice acreage reporting violations.

(a)(1) If an acreage report of fruits, vegetables or wild rice planted on base acreage of a farm enrolled in DCP is inaccurate but within tolerance as provided in paragraph (b) of this section and CCC determines the producer made a good faith effort to comply with the provisions of this section, the producers shall accept a reduction in the direct and counter-cyclical payments for each such acre.

(2) If an acreage report of fruits, vegetables or wild rice planted on base acreage of a farm enrolled in DCP is inaccurate and exceeds the tolerance as provided in paragraph (b) of this section, but CCC determines the producer made a good faith effort to comply with the provisions of this section, the producers shall accept a reduction in the direct and counter-cyclical payments for the farm in an amount equal to the sum of:

(i) The direct and counter-cyclical payments for each such acre, plus

(ii) Twice the average dollar value of the direct payment for the covered commodity and peanut base acreage reduced because of the fruit, vegetable, and wild rice plantings on such acreage, multiplied by the total number of acres in violation.

(3) The contract shall be terminated if an acreage report of fruits, vegetables or wild rice planted on base acreage of a farm enrolled in DCP is inaccurate, and the county committee determines the producer did not make a good faith effort to comply with the provisions of this section. Upon such termination, producers subject to such contract shall:

(i) Forfeit all rights to receive direct and counter-cyclical payments for the farm;

(ii) Refund all direct and counter-cyclical payments received for the farm, plus interest as determined in accordance with part 1403 of this chapter; and

(iii) Be ineligible for all program benefits according to part 718 of this title.

(b) For the purposes of this section, tolerance is the amount by which the determined acreage may differ from the reported acreage and still be considered in compliance with program requirements. Tolerance for fruits, vegetables and wild rice plantings is 5 percent of the reported fruit, vegetable and wild rice acreage, not to exceed 50 acres.

§ 1412.603 Contract liability.

All signatories to a contract are jointly and severally liable for contract violations and resulting repayments and penalties.

§ 1412.604 Misrepresentation and scheme or device.

(a) A producer who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part shall not be entitled to either direct or counter-cyclical payments and must refund all such payments received, plus interest as determined in accordance with part 1403 of this chapter.

(b) A producer shall refund to CCC all direct and counter-cyclical payments, plus interest as determined in accordance with part 1403 of this

chapter, received by such producer with respect to all contracts if the producer is determined to have knowingly done any of the following. In addition, the producer's interest in all such contracts shall be terminated.

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

§ 1412.605 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this chapter shall be applicable to contract payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this chapter.

§ 1412.606 Acreage reports.

As a condition of eligibility for direct and counter-cyclical payments, the operator or owner must submit a report of all cropland acreage on the farm in accordance with part 718 of this title. If such operator or owner does not report all cropland acreage on the farm in accordance with part 718 of this title, the contract shall be terminated with respect to such farm unless the provisions part 718 of this title are applicable.

§ 1412.607 Compliance with highly erodible land and wetland conservation provisions.

The provisions of part 12 of this title apply to this part.

§ 1412.608 Controlled substance violations.

The provisions of part 718 of this title apply to this part.

Subpart G—Establishment and Assignment of Peanut Base Acres and Yields for a Farm

§ 1412.701 Determination of 4-year peanut acreage average.

(a) The Deputy Administrator shall determine, for each historic peanut producer under this part, the 4-year average of the following:

(1) The acreage planted to peanuts on each farm on which the historic peanut producer planted peanuts for harvest for the 1998 through 2001 crop years; and

(2) Any acreage on each farm that the historic peanut producer was prevented from planting to peanuts during the 1998 through 2001 crop years because of natural disaster, or any other condition beyond the control of the historic peanut producers, as determined by the Deputy Administrator.

(b) For the purposes of determining the 4-year acreage average for a historic peanut producer under this part, the Deputy Administrator shall not exclude any crop year in which the producer did not plant peanuts.

(c) If more than one historic peanut producer shared in the risk of producing the crop on a farm, the historic peanut producers shall receive the proportional share of the number of acres planted or prevented from being planted to peanuts for harvest on the farm, based on the sharing arrangement that was in effect among the producers for the crop.

(d) When a historic peanut producer is no longer living or when an entity composed of historic peanut producers has been dissolved, and in other similar situations, the Deputy Administrator shall make the base determinations under this subpart in the manner determined to be fair and reasonable.

§ 1412.702 Determination of average peanut yield.

(a) The Deputy Administrator shall determine, for each historic peanut producer, the average yield for peanuts on each farm the historic peanut producer planted peanuts for harvest for the 1998 through 2001 crop years, excluding any crop year in which the producer did not plant or was prevented from planting peanuts. Production information reported according to part 729 of this chapter will be used by the Deputy Administrator for determining yields under this section.

(b)(1) For the purposes of determining the 4-year average yield for a historic peanut producer under paragraph (a) of this section, the historic peanut producer may elect to substitute for a farm for not more than 3 of the 1998 through 2001 crop years in which the historic peanut producer planted peanuts on the farm, the average harvested yield for peanuts produced in the county in which the farm is located for the 1990 through 1997 crop years.

(2) The average harvested yield for peanuts produced in a county which will be used in paragraph (b)(1) of this section shall be the NASS irrigated and non-irrigated yields or, in States and counties where the irrigated and non-irrigated NASS data is unavailable, the NASS blended yield for the county.

(3) If NASS harvested peanut yield data is unavailable, for the purposes set forth in paragraph (b)(1) of this section, the harvested county average peanut yield, determined according to peanut production information reported according to part 729 of this chapter, shall be used.

(c) The average harvested yield, to be used at the producer's option in paragraph (b)(1) of this section, shall be determined by calculating the weighted 7-year average for each type of yield for the years 1990 through 1997 of:

(1) The NASS harvested peanut irrigated yield for the county for each year;

(2) The NASS harvested peanut non-irrigated yield for the county for each year;

(3) The NASS harvested peanut blended yield for all counties where the yields in paragraphs (c)(1) and (c)(2) of this section are unavailable for each year for all acreage regardless of whether or not the acres were irrigated or nonirrigated;

(4) The average yield for the county, determined in accordance with paragraph (b)(3) of this section for each year.

§ 1412.703 Assignment of average peanut yields and average peanut acreages to farms.

(a) The Deputy Administrator shall give each historical peanut producer an opportunity to assign the average peanut yield determined in accordance with § 1412.702 and average acreage determined in accordance with § 1412.701 for each farm of the historic peanut producer to cropland on that farm or another farm in the same State or a contiguous State.

(b) Notwithstanding paragraph (a) of this section, the average acreage determined under § 1412.701 for a farm may be assigned to a farm in a contiguous county only if either of the following apply:

(1) The historic peanut producer making the assignment produced peanuts in that State during at least one of the 1998 through 2001 crop years; or

(2) As of March 31, 2003, the historic peanut producer is a producer on a farm in that State.

(c) The Deputy Administrator shall provide notice to historic peanut producers regarding the opportunity to assign average peanut yields and average acreages to farms under paragraph (a) of this section. The notice shall provide the following information:

(1) Notice that the opportunity to make the assignments is being provided only once;

(2) A description of the limitations in paragraph (b) of this section on their ability to make their assignments; and

(3) Information regarding the manner in which the assignments must be made and the time periods and manner in which notice of the assignments must be submitted to the Deputy Administrator.

(d) Not later than March 31, 2003, an historic peanut producer shall submit to the Deputy Administrator notice of the assignments made by the producer under this section. If a historic peanut producer fails to submit such notice by that date, that base and yield shall be assigned to the most recent farm associated with such base and yield, as determined by FSA records.

(e) The average of all yields assigned by a historic peanut producer under paragraph (a) of this section to a farm shall be considered to be the payment yield for that farm for the purpose of making direct and payments and counter-cyclical payments under this part, beginning with crop year 2003.

(f) Subject to paragraph (g) of this section, the total number acres assigned by historic peanut producers under paragraph (b) of this section to a farm shall be considered to be the farm's base acres for peanuts for the purpose of making direct payments and counter-cyclical payments under this part, beginning with crop year 2003.

Subpart H—Peanut Quota Buyout Program

* * * * *

Signed in Washington, DC, October 15, 2002.

Verle E. Lanier,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 02–26692 Filed 10–16–02; 3:05 pm]

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Federal Register

Monday,
October 21, 2002

Part V

Department of Labor

Pension and Welfare Benefits Adminstration

29 CFR Parts 2520, 2560, and 2570

Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries and Civil Penalties Under ERISA Section 502(c)(7) and Conforming Technical Changes On Civil Penalties Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6); Interim Final Rules

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2520

RIN 1210–AA90

Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Interim final rule with request for comments.

SUMMARY: This document contains interim final rules under new section 101(i) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA). Section 101(i) of ERISA, which was enacted into law on July 30, 2002 as part of the Sarbanes-Oxley Act of 2002 (the SOA), provides that written notice is to be provided to participants and beneficiaries of individual account plans of any ''blackout period'' during which their right to direct or diversify investments, obtain a loan or obtain a distribution under the plan may be temporarily suspended. This interim final rule is published pursuant to section 306(b)(2) of the SOA in order to carry out the provisions of section 101(i) of ERISA, and to invite the public to submit comments on the interim regulation so as to obtain information as to what further guidance in this area would be helpful to plan administrators and their advisors in fulfilling their duties to provide notice of blackout periods.

DATES: *Effective date:* This interim final rule is effective January 26, 2003 and shall apply to blackout periods commencing on or after that date. *Comment date:* Written comments on this interim final rule must be received by November 20, 2002.

ADDRESSES: Written comments on the interim final rule (preferably three copies) should be submitted to: Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Notice Regulation. Written comments may also be sent by Internet to the following address: e-*ORI@pwba.dol.gov.* All written comments will be available for public inspection at the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC, from 8 a.m. to 4:30 p.m. (Monday–Friday).

FOR FURTHER INFORMATION CONTACT: Janet A. Walters, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8510 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

The Sarbanes-Oxley Act of 2002 (the SOA), Pub. L. 107–204, enacted on July 30, 2002, provides that the Secretary of Labor shall promulgate within 75 days of enactment interim final rules necessary to carry out the provisions of section 306(b) of the SOA and, accordingly, these interim final rules will become effective without advance notice and comment.

Section 306(b)(1) of the SOA amended section 101 of ERISA to add a new subsection (i), requiring that administrators of individual account plans provide notice to affected participants and beneficiaries in advance of the commencement of any blackout period. For purposes of this notice requirement, a blackout period generally includes any period during which the ability of participants or beneficiaries to direct or diversify assets credited to their accounts, to obtain loans from the plan or to obtain distributions from the plan will be temporarily suspended, limited or restricted. The most common reasons for imposition of a blackout period include changes in investment alternatives or recordkeepers, and corporate mergers, acquisitions, and spin-offs that impact the pension coverage of groups of participants.

ERISA section 101(i)(6) provides that the Secretary shall issue model notices that meet the requirements of subsection (i). A model notice is included as part of this interim final rule.

Section 306(b)(3) of the SOA amends ERISA section 502 to establish a new civil penalty applicable to a plan administrator's failure or refusal to provide the blackout notice required by section 101(i) of ERISA. Interim final rules implementing this civil penalty also appear elsewhere in today's issue of the **Federal Register**.

The issuance of these interim final rules will help serve to preserve and protect the retirement benefits of American workers and their families.

B. Overview of Interim Final Rules

In general, the rules being adopted in this interim final rule track the provisions of ERISA section 101(i), as added by section 306(b)(1) of the SOA. The following is a general overview of the interim final rule, to be codified at 29 CFR 2520.101–3.

Paragraph (a) of § 2520.101–3 describes the general requirement of section 101(i) of ERISA that administrators of certain individual account plans provide notice of blackout periods to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited or restricted by a blackout period (the ''affected participants and beneficiaries''), as well as to issuers of employer securities held by the plan.

Paragraph (b) of § 2520.101–3 sets forth the requirements for notices to be furnished to affected participants and beneficiaries. Paragraph (b)(1) provides that the notices shall be written in a manner calculated to be understood by the average plan participant and sets forth the specific content requirements applicable to the notices. The content requirements of the regulation essentially track the requirements of section 101(i)(2)(A) of the Act. Paragraph (b)(1)(ii) makes clear that the notice must include a description of the rights otherwise available under the plan to affected participants and beneficiaries that will be temporarily suspended during the blackout period, in addition to the identification of the investments subject to the blackout period. Paragraph (b)(1)(iii) makes clear that the notice must contain the expected beginning and ending date of the blackout period. In the Department's view, an indication of the expected length of the blackout period is intended both to enable participants and beneficiaries to factor the duration of the blackout into their pre-blackout period investment and other decisions and to apprise participants and beneficiaries as to when they will be able to recommence exercising their rights under the plan. Accordingly, it is the view of the Department that the description of the length of the blackout period must include the expected ending date of the blackout period.

Paragraph (b)(1)(iv) requires the inclusion of a statement advising participants and beneficiaries to review their current investments in light of their inability to direct or diversity their assets during the blackout period and provides that use of the advisory statement contained in paragraph 4. of the model notice (at paragraph (e)(2) will satisfy this content requirement for the notice.

Section 101(i)(2)(A)(v) of the Act provides that notice shall contain ''such other matters as the Secretary may require by regulation.'' In this regard,

the Department has added, for purposes of this interim final rule, two informational items.

First, given the importance of adequate advance notice of blackout periods to plan participants and beneficiaries, the Department believes that, in those situations where 30 days advance notice is not furnished, participants and beneficiaries should be furnished an explanation as to why the plan was unable to furnish at least 30 days advance notice. Paragraph (b)(1)(v) of the interim final rule, therefore, provides that, where notices are furnished less than 30 days in advance of the last date on which affected participants and beneficiaries could exercise affected rights immediately before the commencement of the blackout period, the notice must contain a general statement concerning the Federal law requirement of 30 days advance notice and an explanation as to why such notice could not be furnished. The requirement for a general statement in paragraph (b)(1)(v)(A) will be satisfied if the notice contains the general statement appearing in paragraph 5.(A) of the model notice at paragraph (e)(2). Paragraph (b)(1)(v) does not apply to the exceptions in paragraph (b)(2)(ii)(C) involving blackout periods in connection with mergers, acquisitions, divestitures, or similar transactions inasmuch as notices of such blackout periods are required to be furnished as soon as reasonably possible. (See ERISA section 101(i)(3).)

Second, given the potential impact of a blackout period on a participant's or beneficiary's financial planning, it is likely that participants and beneficiaries will have questions about a blackout period. For this reason, the Department has determined that the notice should contain the name, address and telephone number of a person who can answer questions concerning the blackout period. Specifically, paragraph (b)(1)(vi) provides that the notice must contain the name, address and telephone number of the plan administrator or other person responsible for answering questions regarding the blackout period.

The Department specifically invites comments on what, if any, additional information should be required to be contained in the blackout notice furnished to participants, beneficiaries and issuers under this section.

Paragraph (b)(2) describes the timing requirements applicable to furnishing the notice to affected participants and beneficiaries. Paragraph (b)(2)(i) provides that notice shall be furnished at least 30 days, but not more than 60 days, in advance of the last date on which affected participants and beneficiaries could exercise their affected rights immediately before the commencement of any blackout period. It is the view of the Department that Congress, in providing a 30-day advance notice requirement, intended to ensure that each participant and beneficiary affected by a blackout period had an adequate opportunity both to consider the effects of the blackout period on their investments and financial plans and to take action, if appropriate, in anticipation of the blackout period. In order to ensure that each affected participant and beneficiary is afforded an opportunity to assess the potential effects of a blackout, as contemplated by Congress, the interim rule requires that, except to the extent otherwise provided, the 30-day period must be counted back from the last date on which the participant or beneficiary had the right to take action under the terms of the plan in anticipation of the blackout period.

For example, in the case of an individual account plan that provides for daily trading, the 30-day period would be counted back from the date immediately preceding the commencement of a blackout period affecting the right to trade. In the case of a plan that provides participants and beneficiaries the right to direct their investments on a monthly basis, notice would have to be provided at least 30 days prior to the month preceding the month in which a blackout period affecting such rights occurs. For example, under a plan permitting participants to direct their investments during the first fifteen days of each month, it is determined that in order to change recordkeepers, participant direction of their investments will have to be suspended from the 1st to the 15th of May. If the 30-day notice period were counted from the date immediately preceding the commencement of the blackout period, notice could be provided on April 1st, thereby affording participants only 15 days (April 1st–15th) to consider and take action in anticipation of the blackout period. Under the regulation, notice is required to be furnished at least 30 days in advance of the last date on which participants could exercise the affected rights immediately before the commencement of the blackout period. In the immediate example, the last date on which participants could take action in anticipation of the blackout period would be April 15th, accordingly notice would have to be provided to participants not later than March 16th.

The Department notes that all references in the regulation to ''days'' are references to calendar days, not business days, unless specifically noted otherwise. For purposes of the interim final rule, the Department also established an outside maximum period of 60 days preceding the last day on which participants and beneficiaries could exercise the affected rights immediately before the commencement of a blackout period in order to ensure that notice is not furnished so far in advance of the commencement date so as to undermine the importance of the notice to affected participants and beneficiaries. The Department notes that if a plan administrator wishes to provide a longer period for affected participants and beneficiaries to consider the effects of a blackout period on their individual accounts, there is nothing in the interim final rule that precludes an administrator from supplementing the requirements of the regulation, by furnishing earlier or more frequent notices than that required by the interim final rule, provided that at least one notice is provided to participants and beneficiaries that complies with the timing and content of the interim final rule. The Department specifically invites comments on the need for, and length of, such a limitation on advance notice of blackout periods.

Paragraph (b)(2)(ii)(A) and (B) sets forth two circumstances under which the 30-day advance notice requirement does not apply. The first circumstance is where a deferral of the blackout period would result in a violation of the exclusive purpose and prudence requirements of section 404(1)(A) and (B) of the Act. For example, the ABC company has announced that it is filing for bankruptcy. The ABC company's 401(k) plan has ABC common stock as one of its investment options. F, the 401(k) plan administrator, determines that, given this event, it would not be prudent to continue to permit participants to direct investments into ABC company stock, effective immediately. In such a situation, F would not, pursuant to § 2520.101–3(b)(2)(ii)(A), be required to give 30 days notice to the affected participants and beneficiaries, but would be required to notify them in writing as soon as possible of the blackout period.

The second circumstance under which the 30-day advance notice requirement does not apply is where commencement of the blackout period is due to events that were unforeseeable or circumstances that were beyond the control of the plan administrator. For example, the DEF company's profit-sharing plan's recordkeeper has informed plan administrator G that due

to a major computer failure, the computer program for recording and processing loans and distributions from the plan has been incapacitated and that it will take approximately ten days to fix the system. In such a situation, G would not, pursuant to § 2520.101–3(b)(2)(ii)(B), be required to give 30 days' notice to the affected participants and beneficiaries of their temporary inability to receive loans and distributions from the plan, but would be required to notify them as soon as reasonably possible, unless G determines that such notice in advance of the termination of the blackout is impracticable. The Department anticipates that plan administrators will rely on this exception only in rare circumstances.

In both of the foregoing circumstances, the plan administrator must make a written determination with respect to the circumstances precluding compliance with the 30-day advance notice requirement. The interim final rule, at paragraph (b)(2)(iv), requires that such determinations must be dated and signed by the plan administrator.

Section 101(i)(3) generally provides that in any case in which a blackout period applies only to one or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or similar transaction, the 30-day advance notice requirement shall be treated as met if the notice is furnished to such participants and beneficiaries to whom the blackout period applies as soon as reasonably practicable. Paragraph (b)(2)(ii)(C) makes clear that notice to such participants and beneficiaries is an exception to the general rule that the 30-day notice be furnished to all affected participants and beneficiaries.

Paragraph (b)(2)(iii) provides that, in any case in which the 30-day advance notice rule is not required to be applied, the administrator is required to provide notice as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable. If, therefore, a plan administrator concludes under such circumstances that notice could not be furnished in sufficient time in advance of the termination of the blackout period to alert participants and beneficiaries of the termination date and resumption of plan rights, no notice would be required to be provided under this section. Such might be the case where the need for a blackout period is determined only a few days before the beginning of the blackout period and the blackout period is only a few days in duration. The Department invites comments on, and examples of, circumstances under which the furnishing of notice in accordance with the regulation would be impracticable.

Paragraph (b)(3) provides that the blackout notice must be in writing and may be furnished in any manner permitted under 29 CFR 2520.104b–1, including through electronic media. For purposes of this interim final rule, a blackout notice will be considered furnished as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically. The Department specifically invites comments on the appropriateness of such furnishing rule.

Paragraph (b)(4) describes the notice requirements applicable to changes in the beginning or ending date of the blackout period. The interim final rule provides that, under such circumstances, the administrator is required to provide all affected participants and beneficiaries with an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. The updated notice must be provided as soon as reasonably possible, unless such notice in advance of termination of the blackout period is impracticable.

Paragraph (c) of § 2520.101–3 describes the plan administrator's obligation to provide notice of a blackout period to the issuer of employer securities held by the plan and subject to the blackout period. Paragraph (c)(1) generally provides that the content and timing requirements applicable to the furnishing of notices to participants and beneficiaries also apply to the furnishing of notices to the issuer of employer securities. While the interim final rule does not require that all the information required to be included in the notice to participants and beneficiaries be included in the notice to the issuer, it is the view of the Department that a plan administrator may satisfy its obligation to notify the issuer by providing the same notice furnished to participants and beneficiaries under this rule.

Paragraph (c)(2) provides that the notice of the blackout period shall be furnished to the agent for service of legal process for the issuer, unless the issuer has provided the plan administrator the name of another person for service of such notice. Paragraph (c)(2) is intended to ensure that there is no ambiguity as to whom the administrator must serve notice of the blackout period. Pursuant to section 306(a)(6) of the SOA, issuers are required to notify directors, executive officers, and the Securities and Exchange Commission of the blackout period.

Paragraph (d) of § 2520.101–3 sets forth, for purposes of the interim final rule, definitions of: (1) ''blackout period''; (2) ''individual account plan''; and (3) ''one-participant retirement plan'', each of which is identical to the definitions in section 101(i)(7), (8)(A) and 8(B) of the Act, respectively. Paragraph (d)(4) defines the term ''issuer'' for purposes of the notice provisions. Consistent with the provisions of section 2(a)(7) of the SOA, issuer means an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] the securities of which are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

Paragraph (e) of § 2520.101–3 provides a model notice to facilitate compliance with the blackout notice requirements by plan administrators. Use of the model is not mandatory. However, the interim final rule provides that use of the advisory statement set forth at paragraph 4. of the model notice will be deemed to satisfy the notice content requirements of paragraph (b)(1)(iv) of the rule pertaining to advising participants and beneficiaries about the importance of reviewing their plan investments in anticipation of their inability to direct or diversify their investments during the blackout period. The interim final rule also provides that use of the general statement set forth in paragraph 5. of the model notice will be deemed to satisfy the requirement of

[1] Section 3 of the Securities Exchange Act of 1934 defines the term ''issuer'' to mean any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term ''issuer'' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term ''issuer'' means the person by whom the equipment or property is, or is to be, used.

paragraph (b)(1)(v)(A) that the notice contain a general statement that Federal law requires furnishing of blackout notices in advance of the blackout period.

This model is intended to deal solely with the content requirements prescribed in paragraph (b)(1) and not other matters with respect to which disclosure may be required, such as changes in investment options.

Paragraph (f) of § 2520.101–3 sets forth the effective date of the interim final rule. Pursuant to paragraph (f), the rule is effective January 26, 2003—the effective date of the SOA section 306 amendments to ERISA. Paragraph (f) provides that the notice requirements shall apply to blackout periods commencing on or after January 26, 2003, and that, for blackout periods beginning between January 26, 2003 and February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible. This provision is intended to ensure that a statutorily required notice be provided with respect to blackout periods which commence before February 26, 2003.

This interim final rule does not deal with the application of the fiduciary provisions as they relate to the timing and administration of a blackout period.

C. Request for Comments

In addition to the specific requests for comments identified above, the Department encourages all interested persons to submit their comments, suggestions and views concerning the provisions of this interim final rule, including the model notice. In particular, the Department is interested in any area in which additional guidance would facilitate compliance with these important rules.

Written comments on the this rule should be submitted to: Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Notice Regulation. Written comments may also be sent by Internet to the following address: e-*ORI@pwba.dol.gov.* Written comments on this rule must be received no later than November 20, 2002. The comment period is being limited to 30 days to enable the Department to adopt changes to the interim final rule prior to the effective date of the SOA amendments.

D. Regulatory Impact Analysis

Summary

The costs associated with this interim final rule arise primarily from the statutory requirement to prepare and distribute advance notices of the imposition of blackout periods. The aggregate costs for plans required to provide this notice are estimated to be $13.9 million per year. The benefits afforded participants and beneficiaries by the statute and interim final rule cannot be quantified, but are expected to be substantial. This requirement will ensure that notices are always provided, are timely, and have appropriate content. Economic benefits will accrue to participants or beneficiaries as a result of their enhanced ability to exercise control over their retirement plan assets with adequate information to inform their decisions. The assurance of receiving advance notice of events that may be critical to participant decisionmaking will increase confidence in the security of retirement assets and promote new and continued plan participation. This guidance will also assist plan administrators in their efforts to fulfill their obligations to participants and beneficiaries. Finally, the requirement for notice to issuers of employer securities affected by blackout periods will serve to some extent to equalize the rights of plan participants and beneficiaries and the officers and directors of the issuer with respect to those securities.

Benefits and Costs

The SOA amendments to ERISA and this implementing guidance will have several important benefits. First, acknowledging that plan administrators impose blackout periods from time to time in the ordinary course of business, the SOA ensures the communication of critical information to affected participants and beneficiaries. The timing and content of the required notice will ensure that participants and beneficiaries are aware of significant events affecting their ability to make meaningful decisions concerning their retirement savings. While many plan administrators may currently provide disclosures similar to those required by the statute and interim final rule, this new requirement will ensure that appropriate information is provided in a consistent and timely manner.

This advance knowledge will have economic value and increase confidence in the security of retirement savings. Timely notice and an understanding of the reasons for and expected duration of a blackout period will benefit participants and beneficiaries economically by offering them ample opportunity to assess their current investments decisions, and to adjust their exposure to loss if they wish to do so, to the extent possible within the existing options available under the plan. Advance notice of blackout periods cannot eliminate fluctuations of market value during a period when existing investment instructions cannot be modified. However, notice will allow affected participants and beneficiaries to maximize their exercise of control as they deem appropriate under their current circumstances.

Assurance of the opportunity to exercise control with adequate knowledge, in advance of events that will affect their ability to exercise control, will increase participant and beneficiary confidence that the plan is being operated prudently. Participants frequently express concern when significant changes are made to plan options, or when rights previously available are temporarily limited. Assuring knowledge of the timing and reasons for such changes should serve to promote confidence in the security of retirement savings and promote continued growth in participation in the retirement plans offered by plan sponsors.

Guidance on the statutory notice requirement will benefit plan sponsors and administrators by clarifying the manner in which they may discharge their obligation to ensure that participants and beneficiaries have access to information necessary to make informed and meaningful investment decisions. Blackout periods occur for a variety of reasons. Their occurrence and timing are often, but not always, within the control of the plan administrator. The most common reasons for imposition of a blackout period include changes in investment alternatives or recordkeepers, and corporate mergers, acquisitions, and spin-offs that impact the pension coverage of groups of participants. Plan administrators will wish to ensure that proper accounting and record transfer is accomplished as timely and accurately as possible, while at the same time fulfilling their obligation to advise participants about important matters affecting their rights under the plan.

The value of these many benefits cannot be specifically quantified. However, the conclusion that advance notice of blackout periods produces economic benefits is consistent with mainstream economic theory and corroborated by evidence. For example, theory posits that financial market prices respond quickly to new information. Delays in executing trades have been shown to be costly. Advance notice of a blackout in trading enables affected participants to adjust their positions to manage their exposure to such costs. The benefits are expected to

outweigh the costs of the statute and the interim final rule.

Administrators of about 85,150 affected plans are estimated to incur costs of approximately $13.9 million each year to prepare and distribute blackout notices to 12 million covered participants. This total consists of about $8 million per year for 295,000 small plans (an average of about $110 per plan), and $5.8 million per year for 45,000 large plans (an average of about $510 per plan). These costs are primarily attributable to the effect of the statutory provisions, and would in fact be estimated to be greater in the absence of a model notice due to higher notice preparation time. Because plans commonly provide advance notice of blackout periods voluntarily, much of this cost is inherent in normal business practice, and the incremental cost of the advance notice requirement will be less than total estimated here. Because the costs of the statute arise from notice provisions, the data and methodology used in developing these estimates are fully described in the Paperwork Reduction Act section of this statement of regulatory impact.

Request for Comments

The Department is interested in receiving comments from the public concerning the assumptions used in developing these estimates. Additional information as to the likely frequency of blackout periods, and other circumstances that might give rise to blackout periods would be particularly useful for informing any future decisions about the timing or content of the blackout notices. Identification of sources of variability in the costs and benefits of providing notices and of potential differential impacts on small plans would also be useful.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this interim final rule is significant within the meaning of section 3(f)(4) of the Executive Order. OMB has, therefore, reviewed the interim final rule pursuant to the Executive Order.

Paperwork Reduction Act

The Department of Labor has submitted the information collection request (ICR) included in this interim final rule (the Notice of Blackout Period under ERISA) to OMB for review and clearance in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995 (PRA 95). Emergency clearance is likely to be necessary in order to allow time to consider public comments and obtain OMB approval for the ICR by the effective date of the notice requirement of the SOA (180 days after the date of enactment, or January 26, 2003). OMB approval has been requested by November 20, 2002. A copy of the ICR with applicable supporting statement may be obtained by calling the Department of Labor, Ms. Marlene Howze, at (202) 693–4158, or by e-mail to *Howze-Marlene@dol.gov.*

Comments and questions about the ICR should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, ATTN: Desk Officer for the Pension and Welfare Benefits Administration, Room 10235, 725 17th Street, NW, Washington, DC, 20503 ((202) 395–7316). Comments should be submitted to OMB by November 20, 2002 to ensure their consideration.

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

The information collection provisions of this interim final rule are found in paragraphs (a), (b)(2)(ii)(A) and (B), (b)(2)(iv), (b)(4), and (c)(1). A model notice is provided in paragraph (e) to facilitate compliance and moderate the burden associated with supplying notices to participants and beneficiaries as described in the interim final rule. Use of the model notice is not mandatory, and the addition of other relevant information to the advance notice should not be viewed as restricted by the model. This interim final rule provides implementing guidance on the SOA, which, as it pertains to individual account plans under ERISA, generally requires that plan administrators provide affected participants and beneficiaries of individual account plans with advance notice of the commencement of a blackout period. A blackout period is a period of at least 3 business days during which participants' and beneficiaries' otherwise available ability to direct the disposition of assets in their accounts is suspended or restricted. The SOA also requires that the plan administrator provide notice to issuers of employer securities that are subject to a blackout period applicable to a plan. This is a general description for purposes of PRA 95; the provisions of the interim final rule should be relied upon for compliance with the SOA and this implementing guidance.

In order to estimate the potential costs of the notice provisions of section 101(i) of ERISA and this interim final rule, the Department tabulated the number of participant-directed individual account plans and the number of participants, inactive participants and beneficiaries who have not taken distributions, in those plans using the plans' Form 5500 filings for 1998, the most recent year currently available. The Department then projected these counts forward to produce estimates of participant-directed individual account plans and participants for 2002. The projections were based on historical growth of all individual account plans because reliable counts of participant-directed plans are not available for years prior to 1997.

The Department assumed linear growth in the number of plans equal to the rate observed for all small and large individual account plans between 1992 and 1998, producing estimates of 295,000 small and 45,000 large

participant-directed individual account plans in 2002 (totaling 341,000). To project the number of participants in these plans, the Department assumed linear growth in the ratio of participants to total private employment equal to the rate observed in that ratio between 1992 and 1998. The projected ratios for small and large plans in 2002 were applied to total private employment in July 2002 as estimated by the U.S. Bureau of Labor Statistics, producing estimates of 7.4 million small and 40.4 million large plan participants (totaling 47.8 million) in 2002 that would potentially be affected by a blackout period notice requirement.

An assumption was then needed to account for the fact that not all potentially affected plans will impose blackout periods that would trigger the notice requirement, and not all of those imposing blackout periods would do so in any given year. The Department reviewed available literature in an effort to establish a reasonable estimate of the frequency of the imposition of blackout periods that would trigger notice requirements. One small survey of administrators of very large plans indicated that their largest plans had undergone a blackout period at a rate of once each 3 to 4 years. A different survey indicated a lower frequency of blackout periods, at a rate in the area of about 7% of plans per year. No comprehensive statistics on this frequency are available. However, the Department is aware that the imposition of blackout periods is not rare. For this purpose, the Department has assumed that potentially affected plans will impose blackout periods on average once each 4 years. Among these, some will not impose blackout periods, some will impose blackout periods that do not trigger the notice requirement (*e.g.*, a temporary suspension for a period of 3 or less consecutive days), and some may have blackout periods more frequently.

The Department believes that the assumption that 25% percent of potentially affected plans will impose a blackout period in any given year results in a reasonable estimate of the number of plans that will actually be affected. However, the Department requests comments and any additional information that would validate or otherwise inform this assumption. The resulting numbers of plans and participants assumed to be affected by the notice provisions annually are 85,150 and about 12 million, respectively.

It is assumed that the availability of a model notice as provided in paragraph (e) will lessen the time otherwise required to draft a required notice. In developing burden estimates, the Department has allowed one-half hour for drafting of the elements of the form by the plan administrator, and one hour for legal review of the drafted notice, the latter expense to be incurred as a payment of fees for outside services. This accounts for the burden of preparing the notice, which is estimated at 42,600 hours, and $6.4 million. No additional preparation time is accounted for to draft the notice required to be provided to an issuer of employer securities under paragraph (c), because this interim final rule requires the content and timing of that notice to be the same as the notice prepared for the purpose of paragraph (b)(1). The burden of this notice would be driven by the number of plans rather than participants, and the notice would be required in far more limited circumstances than the notice to participants under paragraph (b)(1), as it pertains only to the issuer's securities affected by the blackout period in the plan. Only a small segment of participant directed individual account plans hold employer securities that would be subject to the requirements of paragraph (c), on the order of a maximum of about 500 plans per year. The direct cost of delivering such notices would be negligible.

The estimated burden for distribution of the notices takes several factors into account, including an assumed number of participants affected annually, the number of the notices that will be distributed electronically, and on paper, and the differential costs of electronic and paper distribution methods. Estimates of the rate of use of electronic distribution methods are consistent with those used in determining the savings associated with the Department's Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans (67 FR 17264, April 9, 2002). Those participants not calculated to receive notice electronically are assumed to receive the notice on paper. Paper distribution is estimated to require one minute per notice for copying and mailing, plus $0.40 for paper and postage. No time or direct cost is attributed to electronic distribution methods other than the time required to prepare the notice, because it is assumed that notices are drafted in electronic form, plan administrators use existing infrastructure to communicate electronically, and the cost of electronic transmission is negligible. Paper notice distribution is estimated to require 123,500 hours, and cost about $3 million annually.

The Department considers that this distribution burden estimate is conservatively high due to the fact that many plans already provide advance notices in the event of the imposition of a blackout period, that most blackout periods arise from changes in investment providers or recordkeepers, and that this advance notice either is or will be included with other informational materials that would ordinarily be supplied to participants or beneficiaries to implement that change.

No additional burden is included for the requirements for written documentation that is to be dated and signed under paragraphs (b)(2)(ii)(A) and (B) and (b)(2)(iv). It is assumed that written documentation is normally maintained in the circumstances described, and that the burden of adding a signature or providing a limited number of copies upon request would be negligible.

Further, no additional burden is estimated for subsequent notices required due to changes described in paragraph (b)(4). The Department has no basis for an estimate of the frequency of changes in the length of blackout periods. Further, the Department believes that plan administrators would typically inform participants of changes in the duration of a blackout period as part of their reasonable and customary business practices, although content and timing might be modified based on the provisions of the SOA and this interim final rule.

The resulting estimates of annual respondents, responses, and hour and cost burden are shown below.

Type of Review: New.

Agency: Department of Labor, Pension and Welfare Benefits Administration.

Title: Notice of Blackout Period under ERISA.

OMB Number: 1210–NEW.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 85,150.

Frequency of Response: On occasion.

Responses: 11,956,000.

Estimated Total Burden Hours: 166,129.

Total Annual Cost (Operating and Maintenance): $9,351,400.

OMB will consider comments submitted in response to this request in its review of the request for approval of the ICR; these comments will also become a matter of public record.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes

certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. Because this guidance is issued as an interim final rule pursuant to the authority and deadlines prescribed in section 306(b)(2) of the SOA, RFA does not apply, and regulatory flexibility analysis is not required.

The terms of the statute pertaining to the required notices to plan participants and beneficiaries in the event of a blackout do not vary relative to plan size. This interim final rule addresses the statutory provisions, which are self-executing and do not afford the Department with substantial discretion to exercise regulatory flexibility with respect to small plans. While a cost is expected to be associated primarily with the statutory provisions, the Department believes that the interim final rule imposes no additional cost on small plans. The Department nevertheless wishes to address in its final rulemaking any special issues facing small plans with respect to blackout notices, and any alternatives consistent with the objectives of the statute that may serve to facilitate compliance.

The Department is issuing and requesting comments on a model notice in connection with this interim final rule that is intended to assist with compliance and moderate the administrative burden associated with these required notices. Available data suggest that about 341,000 plans, or 47% of all plans are potentially impacted by the enactment of a blackout notice requirement, in that they are individual account plans that permit any form of individual investment direction.

The statutory blackout notice requirement will potentially affect a significant number of small plans. About 87% of the potentially affected plans are small. However, although most affected plans are small, the participants in those plans represent only about 16% of the 47.8 million potentially affected participants. Based on the assumption that plans will impose a blackout period once every four years on average, about 73,800 small plans and 11,400 large plans will prepare and distribute notices annually. These affected plans represent about 10% and 2% of all plans, respectively. Affected participants (1.9 million in small plans, and 10.1 million in large plans) represent approximately 2% and 9% of all plan participants, respectively.

A required notice is likely to be prepared once for each applicable blackout period and distributed to the multiple affected participants. The fixed cost of preparing the notice is estimated at approximately $100 for both large and small plans. The total cost to affected small plans for both preparation and distribution is expected to be about $110 per year. The comparable annual cost to large plans of about $510 is substantially greater due to the greater numbers of participants in these plans, and the costs attendant to distribution of the notices.

The Department invites interested persons to submit comments on the impact of this interim final rule on small entities, and on any alternative approaches that may serve to minimize impact on small plans while accomplishing the objectives of the statute.

Congressional Review Act

The rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this interim final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This interim final rule does not have federalism implications because it has no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this interim final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Employee Retirement Income Security Act, Pensions, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, amend part 2520 of Title 29 of the Code of Federal Regulations as follows:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for part 2520 is revised to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135; Secretary of Labor's Order No. 1–87.

Sections 2520.102–3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003, 1171–73, 1185 and 1191–94; and under sec. 101(g)(4), Pub. L. 104–191, 110 Stat. 1936.

Sections 2520.104b–1 and 2520.107 also issued under sec. 1510, Pub. L. 105–34, 111 Stat. 788.

Section 2520.101–3 also issued under sec. 306(b)(2), Pub. L. 107–204, 116 Stat. 745.

2. Add § 2520.101–3 to subpart A to read as follows:

§ 2520.101–3 Notice of blackout periods under individual account plans.

(a) *In general.* In accordance with section 101(i) of the Act, the administrator of an individual account plan, within the meaning of paragraph (d)(2) of this section, shall provide notice of any blackout period, within the meaning of paragraph (d)(1) of this section, to all participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by the blackout period (the ''affected participants and beneficiaries'') and to issuers of employer securities subject to such blackout period in accordance with this section.

(b) *Notice to participants and beneficiaries*—(1) *Content.* The notice required by paragraph (a) of this section shall be written in a manner calculated to be understood by the average plan participant and shall include—

(i) The reasons for the blackout period;

(ii) A description of the rights otherwise available to participants and beneficiaries under the plan that will be temporarily suspended, limited or restricted by the blackout period (*e.g.*, right to direct or diversify assets in individual accounts, right to obtain loans from the plan, right to obtain distributions from the plan), including identification of any investments subject to the blackout period;

(iii) The expected beginning date and ending date of the blackout period;

(iv) In the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets in their accounts during the blackout period (a notice that includes the advisory statement contained in paragraph 4. of the model notice in paragraph (e)(2) of this section will satisfy this requirement);

(v) In any case in which the notice required by paragraph (a) of this section is not furnished at least 30 days in advance of the last date on which affected participants and beneficiaries could exercise affected rights immediately before the commencement of the blackout period, except for a notice furnished pursuant to paragraph (b)(2)(ii)(C) of this section:

(A) A statement that Federal law generally requires that notice be furnished to affected participants and beneficiaries at least 30 days in advance of the last date on which participants and beneficiaries could exercise the affected rights immediately before the commencement of a blackout period (a notice that includes the statement contained in paragraph 5. of the model notice in paragraph (e)(2) of this section will satisfy this requirement), and

(B) An explanation of the reasons why at least 30 days advance notice could not be furnished; and

(vi) The name, address and telephone number of the plan administrator or other person responsible for answering questions about the blackout period.

(2) *Timing.* (i) The notice described in paragraph (a) of this section shall be furnished to all affected participants and beneficiaries at least 30 days, but not more than 60 days, in advance of the last date on which such participants and beneficiaries could exercise the affected rights immediately before the commencement of any blackout period.

(ii) The requirement to give at least 30 days advance notice contained in paragraph (b)(2)(i) of this section shall not apply in any case in which—

(A) A deferral of the blackout period in order to comply with paragraph (b)(2)(i) of this section would result in a violation of the requirements of section 404(a)(1)(A) or (B) of the Act, and a fiduciary of the plan reasonably so determines in writing;

(B) The inability to provide the advance notice of a blackout period is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing; or

(C) The blackout period applies only to one or more participants or beneficiaries solely in connection with their becoming, or ceasing to be, participants or beneficiaries of the plan as a result of a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(iii) In any case in which paragraph (b)(2)(ii) of this section applies, the administrator shall furnish the notice described in paragraph (a) of this section to all affected participants and beneficiaries as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable.

(iv) Determinations under paragraph (b)(2)(ii)(A) and (B) of this section must be dated and signed by the fiduciary.

(3) *Form and manner of furnishing notice.* The notice required by paragraph (a) of this section shall be in writing and furnished to affected participants and beneficiaries in any manner consistent with the requirements of § 2520.104b–1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

(4) *Changes in length of blackout period.* If, following the furnishing of a notice pursuant to this section, there is a change in the beginning or ending date of the blackout period (specified in such notice pursuant to paragraph (b)(1) of this section), the administrator shall furnish all affected participants and beneficiaries an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. Such notice shall be furnished to all affected participants and beneficiaries as soon as reasonably possible, unless such notice in advance of the termination of the blackout period is impracticable.

(c) *Notice to issuer of employer securities.* (1) The notice required by paragraph (a) of this section shall be furnished to the issuer of any employer securities held by the plan and subject to the blackout period. Such notice shall contain the information described in paragraph (b)(1)(i), (ii), (iii) and (vi) of this section and shall be furnished in accordance with the time frames prescribed in paragraph (b)(2) of this section. In the event of a change in the beginning or ending date of the blackout period specified in such notice, the plan administrator shall furnish an updated notice to the issuer in accordance with the requirements of paragraph (b)(4) of this section.

(2) For purposes of this section, notice to the agent for service of legal process for the issuer shall constitute notice to the issuer, unless the issuer has provided the plan administrator with the name of another person for service of notice, in which case the administrator shall furnish notice to such person. Such notice shall be in writing, except that the notice may be in electronic or other form to the extent the person to whom notice must be furnished consents to receive the notice in such form.

(d) *Definitions.* For purposes of this section—

(1) *Blackout period*—

(i) *General.* The term ''blackout period'' means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any

period of more than three consecutive business days.

(ii) *Exclusions.* The term ''blackout period'' does not include a suspension, limitation, or restriction—

(A) Which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934);

(B) Which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to all affected plan participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto; or

(C) Which applies only to one or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K) of the Act), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i) of the Act).

(2) *Individual account plan.* The term ''individual account plan'' shall have the meaning provided such term in section 3(34) of the Act, except that such term shall not include a ''one-participant retirement plan'' within the meaning of paragraph (d)(3) of this section.

(3) *One-participant retirement plan.* The term ''one-participant retirement plan'' means a one-participant retirement plan as defined in section 306(b)(1) of the Sarbanes-Oxley Act of 2002.

(4) *Issuer.* The term ''issuer'' means an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), the securities of which are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

(e) Model notice—*(1) General.* The model notice set forth in paragraph (e)(2) of this section is intended to assist plan administrators in discharging their notice obligations under this section. Use of the model notice is not mandatory. However, a notice that uses the statements provided in paragraphs 4. and 5.(A) of the model notice will be deemed to satisfy the notice content requirements of paragraph (b)(1)(iv) and (b)(1)(v)(A), respectively, of this section. With regard to all other information required by paragraph (b)(1) of this section, compliance with the notice content requirements will depend on the facts and circumstances pertaining to the particular blackout period and plan.

(2) *Form and content of model notice.*

Important Notice Concerning Your Rights Under the [Enter Name of Individual Account Plan]

[Enter date of notice]

1. This notice is to inform you that the [enter name of plan] will be [enter reasons for blackout period, as appropriate: changing investment options, changing recordkeepers, etc.].

2. As a result of these changes, you temporarily will be unable to [enter as appropriate: direct or diversify investments in your individual accounts (if only specific investments are subject to the blackout, those investments should be specifically identified), obtain a loan from the plan, or obtain a distribution from the plan]. This period, during which you will be unable to exercise these rights otherwise available under the plan, is called a ''blackout period.'' Whether or not you are planning retirement in the near future, we encourage you to carefully consider how this blackout period may affect your retirement planning, as well as your overall financial plan.

3. The blackout period for the plan will begin on [enter date] and end [enter date].

4. [*In the case of investments affected by the blackout period, enter the following:* During the blackout period you will be unable to direct or diversify the assets held in your plan account. For this reason, it is very important that you review and consider the appropriateness of your current investments in light of your inability to direct or diversify those investments during the blackout period. For your long-term retirement security, you should give careful consideration to the importance of a well-balanced and diversified investment portfolio, taking into account all your assets, income and investments. You should be aware that there is a risk to holding substantial portions of your assets in the securities of any one company, as individual securities tend to have wider price swings, up and down, in short periods of time, than investments in diversified funds. Stocks that have wide price swings might have a large loss during the blackout period, and you would not be able to direct the sale of such stocks from your account during the blackout period.]

5. [*If timely notice cannot be provided (see paragraph (b)(1)(v) of this section) enter:* (A) Federal law generally requires that you be furnished notice of a blackout period at least 30 days in advance of the last date on which you could exercise your affected rights immediately before the commencement of any blackout period in order to provide you with sufficient time to consider the effect of the blackout period on your retirement and financial plans. (B) [Enter explanation of reasons for inability to furnish 30 days advance notice.]]

6. If you have any questions concerning this notice, you should contact [enter name, address and telephone number of the plan administrator or other person responsible for answering questions about the blackout period].

(f) *Effective date.* This section shall be effective and shall apply to any blackout period commencing on or after January 26, 2003. For the period January 26, 2003 to February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible.

Dated: October 11, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 02–26522 Filed 10–18–02; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2560 and 2570

RIN 1210–AA91, RIN 1210–AA93

Civil Penalties Under ERISA Section 502(c)(7) and Conforming Technical Changes on Civil Penalties Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Interim final rules and request for comments.

SUMMARY: This document contains interim final rules under the Employee Retirement Income Security Act of 1974 (ERISA) that implement certain amendments to ERISA added as part of the Sarbanes-Oxley Act of 2002 (SOA). The interim final rules establish procedures relating to the assessment of civil penalties by the Department of Labor (Department) under section 502(c)(7) of ERISA for failures or refusals by plan administrators to provide notices of a blackout period as required by section 101(i) of ERISA. These rules are being published as interim final rules pursuant to the authority granted the Department by section 306(b)(2) of SOA. This document also contains interim final rules making conforming technical changes to the agency's rules of practice and procedure for other civil penalties under section 502(c) of ERISA. The interim final rules affect employee benefit plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: This regulation is effective January 26, 2003. Written comments are invited and must be received by the

Department on or before November 20, 2002.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) to: Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Civil Penalty Regulation. Written comments may also be sent by Internet to the following address: *e-ORI@pwba.dol.gov.* All submissions will be open to public inspection and copying from 8:00 a.m. to 4:30 p.m. in the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Susan Elizabeth Rees, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 693–8505 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

The Sarbanes-Oxley Act of 2002 (SOA), Public Law 107–204, enacted on July 30, 2002, provides that the Secretary of Labor (the Secretary) shall promulgate, within 75 days of enactment, interim final rules necessary to carry out the provisions of section 306(b) of the SOA and, accordingly, these interim final rules will become effective without advance notice and comment.

Section 306(b)(1) of SOA amended section 101 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to add a new subsection (i) requiring that administrators of individual account plans provide notice to affected participants and beneficiaries in advance of the commencement of any blackout period. Elsewhere in the **Federal Register** today, the Department has published an interim final rule, to be codified at 29 CFR 2520.101–3, implementing the notice requirements in ERISA section 101(i).

Section 306(b)(3) of SOA amended section 502(c) of ERISA to add a new paragraph (7) establishing a civil penalty for an administrator's failure or refusal to provide timely notice of a blackout period to participants and beneficiaries. Specifically, section 502(c)(7) provides that the Secretary may assess a civil penalty of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to a participant or beneficiary in accordance with ERISA section 101(i).

This document contains interim final rules to be published at 29 CFR parts 2560 and 2570, that implement the civil penalty provision in ERISA section 502(c)(7). The interim final rules establish procedures relating to the assessment and administrative review of civil penalties by the Department of Labor (Department) under section 502(c)(7) of ERISA for failures or refusals by plan administrators to provide notice of a blackout period as required by section 101(i) of ERISA and § 2520.101–3. This document also contains interim final rules that make changes to the existing civil penalty rules under ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6) to incorporate certain technical improvements being adopted as part of the section 502(c)(7) implementing regulations. Set forth below is a general description of the interim final rules.

B. Description of Regulations

Authority to Assess Civil Penalties for Violations of Section 101(i) of ERISA—§ 2560.502c–7

Section 2560.502c–7(a) addresses the general application of section 502(c)(7) of ERISA. Paragraph (a)(1) provides that the administrator, as defined in ERISA section 3(16)(A), of an individual account plan shall be liable for civil penalties assessed by the Secretary under section 502(c)(7) in each case in which there is a failure or refusal to provide to an affected participant or beneficiary notice of a blackout period as required under section 101(i) of ERISA and § 2520.101–3. Paragraph (a)(2) defines such a failure or refusal as a failure or refusal, in whole or in part, to furnish the blackout notice at the time and in the manner as required under section 101(i) of ERISA and the Department's regulation at § 2520.101–3.

Section 2560.502c–7(b) sets forth the amount of penalties that may be assessed under section 502(c)(7) of ERISA. Paragraph (b)(1) provides that the Department may assess a penalty of up to $100 per day per each affected participant or beneficiary. The amount assessed for each violation under the regulation is computed from the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required. Section 2560.502c–7(b)(2) provides that for purposes of calculating the amount, each violation with respect to each participant or beneficiary shall be treated as a separate violation of section 101(i) of ERISA.

Section 2560.502c–7(c) provides that, prior to assessing a penalty under ERISA section 502(c)(7), the Department shall provide the plan administrator with written notice indicating the Department's intent to assess a penalty under section 502(c)(7), the amount of such penalty, the number of participants and beneficiaries on which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty. The notice is to be served in accordance with § 2560.502c–7(i) (service of notice provision).

Section 2560.502c–7(d) provides that the Department may determine not to assess a penalty, or to waive all or part of the penalty to be assessed, under ERISA section 502(c)(7), upon a showing by the administrator, under paragraph (e), of compliance with ERISA section 101(i) or that there were mitigating circumstances for noncompliance. Under paragraph (e), the administrator has 30 days from the date of service of the notice issued under § 2560.502c–7(c) within which to file a statement making such a showing. When the Department serves the notice under paragraph (c) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed for the filing of the statement (*see* § 2560.502c–7(i)(2)).

Section 2560.502c–7(f) provides that a failure to file a timely statement under paragraph (e) shall be deemed to be a waiver of the right to appear and contest the facts alleged in the Department's notice of intent to assess a penalty for purposes of any adjudicatory proceeding involving the assessment of the penalty under section 502(c)(7) of ERISA, and to be an admission of the facts alleged in the notice of intent to assess. Such notice then becomes a final order of the Secretary 45 days from the date of service of the notice.

Section 2560.502c–7(g)(1) provides that, following a review of the facts alleged in the plan administrator's statement under paragraph (e), the Department shall notify the administrator of its determination whether to assess the penalty, or to waive the penalty, in whole or in part. Under paragraph (g)(2), such notice then becomes a final order 45 days from the date of service of the notice, except as provided in paragraph (h).

Section 2560.502c–7(h) provides that the notice described in paragraph (g) will not become a final order of the Department if, within 30 days of the date of service of the notice, the administrator or representative files a request for a hearing under " 2570.130 *et seq.* (also published as part of this interim final rulemaking) and files an

answer, in writing, supported by reference to specific circumstances or facts surrounding the notice. When the Department serves the notice under paragraph (g) by mail, service is complete upon mailing but five (5) days are added to the time allowed for the filing of a request for hearing and answer (*see* § 2560.502c–7(i)(2)).

Section 2560.502c–7(i)(1) describes the rules relating to service of the Department's notice of penalty assessment (§ 2560.502c–7(c)) and the Department's notice of determination on a statement of reasonable cause (§ 2560.502c–7(g)). Paragraph (i)(1) provides that service by the Department shall be made by delivering a copy to the administrator or representative thereof; by leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or by mailing a copy to the last known address of the administrator or representative thereof. As noted above, paragraph (i)(2) of this section provides that when service of a notice under paragraph (c) or (g) is by certified mail, service is complete upon mailing, but five (5) days are added to the time allowed for the filing of a statement or a request for hearing and answer, as applicable. Service by regular mail is complete upon receipt by the addressee.

Section 2560.502c–7(i)(3), which relates to the filing of statements of reasonable cause, provides that a statement of reasonable cause shall be considered filed (i) upon mailing if accomplished using United States Postal Service certified mail or Express Mail, (ii) upon receipt by the delivery service if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f), (iii) upon transmittal if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment, or (iv) in the case of any other method of filing, upon receipt by the Department at the address provided in the notice. This provision does not apply to the filing of requests for hearing and answers with the Office of the Administrative Law Judge (OALJ) which are governed by the Department's OALJ rules in 29 CFR 18.4.

Section 2560.502c–7(j) clarifies the liability of the parties for penalties assessed under section 502(c)(7) of ERISA. Paragraph (j)(1) provides that, if more than one person is responsible as administrator for the failure to provide the required blackout notice, all such persons shall be jointly and severally liable for such failure. Paragraph (j)(2) provides that any person against whom a penalty is assessed under section 502(c)(7) of ERISA, pursuant to a final order, is personally liable for the payment of such penalty. Paragraph (j)(2) provides that liability for the payment of penalties assessed under section 502(c)(7) of ERISA is a personal liability of the person against whom the penalty is assessed and not a liability of the plan. It is the Department's view that payment of penalties assessed under ERISA section 502(c) from plan assets would not constitute a reasonable expense of administering a plan for purposes of ERISA § 403 and § 404.

Procedures for Assessment of Civil Penalties Under ERISA Section 502(c)(7)—§ 2570.130 et seq.

Section 2570.130 *et seq.*, establishes procedures for hearings before an Administrative Law Judge (ALJ) with respect to assessment by the Department of a civil penalty under ERISA section 502(c)(7), and for appealing an ALJ decision to the Secretary or her delegate. With regard to such procedures, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for purposes of carrying out most of the Secretary's responsibilities under ERISA. *See* Secretary's Order 1–87, 52 FR 13139 (April 27, 1987).

The Department has already published rules of practice and procedure for administrative hearings before the OALJ at 29 CFR part 18 (48 FR 32538 (1983)). As explained in 29 CFR 18.1, those provisions generally govern administrative hearings before ALJs assigned to the Department and are intended to provide uniformity in the conduct of administrative hearings. However, in the event of an inconsistency or conflict between the provisions of 29 CFR part 18 and a rule or procedure required by statute, executive order or regulation, the latter controls.

The Department has reviewed the applicability of the provisions of 29 CFR part 18 to the assessment of civil penalties under ERISA section 502(c)(7) and has decided to adopt many, though not all, of the provisions thereunder for ERISA 502(c)(7) proceedings. The interim final rule relates specifically to procedures for assessing civil penalties under section 502(c)(7) of ERISA and is controlling to the extent it is inconsistent with any portion of 29 CFR part 18. The final rule is designed to maintain the rules set forth at 29 CFR part 18 consistent with the need for an expedited procedure, while recognizing the special characteristics of proceedings under ERISA section 502(c)(7). For purposes of clarity, where a particular section of part 18 would be affected by the final rule, the entire section (with appropriate modifications) has been set out in this document. Thus, only a portion of the provisions of the procedural regulations set forth below involves changes from, or additions to, the rules in 29 CFR part 18. The specific modifications to the rules in 29 CFR part 18, and their relationship to the conduct of these proceedings generally, are outlined below.

The general applicability of the procedural rules under section 502(c)(7) of ERISA is set forth in § 2570.130. The definition section (§ 2570.131) incorporates the basic adjudicatory principles set forth at 29 CFR part 18, but includes terms and concepts of specific relevance to proceedings under ERISA section 502(c)(7). For instance, § 2570.131(c) defines the term ''Answer,'' as ''a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–7(g) of this chapter.'' Also, § 2570.131(p) states that the term ''Secretary'' means the Secretary of Labor and includes various individuals to whom the Secretary may delegate authority. The Department contemplates that the duties assigned to the Secretary under the procedural regulation will in fact be discharged by the Assistant Secretary for Pension and Welfare Benefits or his or her delegate.

In general, the burden to initiate adjudicatory proceedings before an ALJ will be on the party (respondent) against whom the Department is seeking to assess a civil penalty under ERISA section 502(c)(7). However, a respondent must comply with the procedures relating to agency review set forth in § 2560.502c–7 before initiating adjudicatory proceedings. Section 2570.131(c) and (d), together with § 2560.502c–7(h), provide that a notice issued pursuant to § 2560.502c–7(g) will not become the final order of the Department, if, within 30 days from the date of the service of the notice, the administrator or representative thereof files a request for a hearing under § 2570.130 *et seq.*, and files an answer to the notice.

The service of documents by the parties to an adjudicatory proceeding, as well as by the ALJ, are governed by § 2570.132. Section 2570.133 describes how the parties are designated and provides a procedure for interested parties other than the complainant (the Department) and the respondent (the party against whom the civil penalty is sought) to participate. Section 2570.134 provides that if the respondent fails to request a hearing and file an answer to

the Department's notice of determination (§ 2560.502c–7(g)) within the 30 day period provided by ''2560.502c–7(h), such failure shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice and shall be deemed to constitute an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(7) of ERISA. Section 2570.134 also, in conjunction with § 2570.131(g), makes clear that, in the event of such failure, the assessment of penalty becomes final 45 days from the service of the notice of determination.

Section 2570.135 provides that the ALJ's decision shall include the terms and conditions of any consent order or settlement which has been agreed to by the parties. This section also prescribes the content of any such agreement, and provides for settlements without the consent of all parties. This section provides that the decision of the ALJ which incorporates such consent order shall become a final agency action within the meaning of 5 U.S.C. 704.

The rules in 29 CFR part 18 concerning the computation of time, pleadings, prehearing conferences and statements, and settlements are adopted in these procedures for adjudications under ERISA section 502(c)(7). However, § 2570.136 states that discovery may be ordered by the ALJ only upon a showing of good cause by the party seeking discovery. This differs from the more liberal standard for discovery contained in 29 CFR 18.14. In cases in which discovery is ordered by the ALJ, the order shall expressly limit the scope and terms of discovery to that for which good cause has been shown. To the extent that the order of the ALJ does not specify rules for the conduct of the discovery permitted by such order, the rules governing the conduct of discovery from 29 CFR part 18 are to be applied in any proceeding under section 502(c)(7) of ERISA. For example, if the order of the ALJ states only that interrogatories on certain subjects may be permitted, the rules under 29 CFR part 18 concerning the service and answering of such interrogatories shall apply. The procedures under 29 CFR part 18 for the submission of facts to the ALJ during the hearing are also to be applied in proceedings under ERISA section 502(c)(7).

The section on summary decisions (§ 2570.137) provides authorization for an ALJ to issue a summary decision which may become final when there are no genuine issues of material fact in a case arising under ERISA section 502(c)(7). The section concerning the decision of the ALJ (§ 2570.138) differs from its counterpart at § 18.57 of this title in that § 2570.138 states that the decision of the ALJ in an ERISA section 502(c)(7) case shall become the final agency action unless a timely appeal is filed.

The procedures for appeals of ALJ decisions under ERISA section 502(c)(7) of ERISA would be governed solely by §§ 2570.139 through 2570.141, as acknowledged in 29 CFR 18.58. Section 2570.139 establishes the time limit within which such appeals must be filed, the manner in which the issues for appeal are determined and the procedure for making the entire record before the ALJ available to the Secretary. Section 2570.140 provides that review of the Secretary shall not be on a *de novo* basis, but rather on the basis of the record before the ALJ and without an opportunity for oral argument. Section 2570.141 sets forth the procedure for establishing a briefing schedule for such appeals and states that the decision of the Secretary on such an appeal shall be a final agency action within the meaning of 5 U.S.C. 704. As required by the Administrative Procedure Act (5 U.S.C. 552(a)(2)(A)) all final decisions of the Department under section 502(c)(7) of ERISA shall be compiled in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Conforming Changes to Existing Civil Penalties Rules

This document also contains interim final rules amending the existing civil penalty assessment regulations under ERISA section 502(c)(2), 502(c)(5) and 502(c)(7) in part 2560 and part 2570 of subchapter G, to conform them to the rules of practice and procedure being adopted for penalty proceedings under ERISA section 502(c)(7) in 29 CFR 2560.502c–7 and part 2570 subpart G. The amendments, described below, affect certain rules for penalty assessment and administrative review in § 2560.502c–2, § 2560.502c–5, § 2560.502c–6, and subparts C, E, and F of part 2570.

The primary amendments are intended to conform the filing and service rules under § 2560.502c–2, § 2560.502c–5 and § 2560.502c–6 to those being adopted for proceedings under § 2560.502c–7. Specifically, § 2560.502c–2(i)(2), § 2560.502c–5(i)(2) and § 2560.502c–6(i)(2) are being amended to provide an additional five days in which to file a statement of reasonable cause or a request for hearing and answer, as applicable, when the Department serves a notice of intent to assess a penalty or a notice of penalty determination by certified mail, and to provide that service of a notice by the Department by regular mail is complete upon receipt. Sections 2560.502c–2(i)(3), 2560.502c–5(i)(3), and 2560.502c–6(i)(3) are also amended to conform to the provisions in § 2560.502c–7 under which statements of reasonable cause are treated as filed on mailing or on transmittal under certain circumstances.

The remaining amendments were necessary to accommodate those changes in the filing and service rules, or were technical clarifications. Specifically, § 2560.502c–2(f), § 2560.502c–5(f), and § 2560.502c–6(f) are being amended to provide that if an administrator failed to timely file a statement of reasonable cause, notices of intent to assess became final orders 45 days from the date of service of the notice. Sections 2560.502c–2(g) and (h), 2560.502c–5(g) and (h) and 2560.502c–6(g) and (h) are being amended to provide that notices of determination would become final orders 45 days from the date of service except that the determinations do not become final orders if the administrator files a timely request for a hearing and an answer. Corresponding amendments are being made to § 2570.64, § 2570.94, and § 2570.114, which describe the ''consequences of default'' for ERISA section 502(c)(2), section 502(c)(5), and section 502(c)(6) civil penalty proceedings, respectively.

Sections 2560.502c–2(d) and (e), 2560.502c–5(d) and (e), and 2560.502c–6(d) and (e) are being amended to use the clarifying language adopted in §§ 2560.502c–7(d) and (e) that better describes the statement of reasonable cause and penalty waiver procedures.

Finally, section 2570.61(c) is being amended to clarify that for purposes of a civil penalty proceeding under ERISA section 502 (c)(2), ''*Answer*'' is defined as a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–2(g) of this chapter.

These amendments are made under section 505 of ERISA which authorizes the Department to prescribe such regulations as the Secretary finds necessary or appropriate to carry out the provisions of Title I of ERISA. These technical changes affect rules of agency practice and procedure which the Secretary has determined are appropriate to issue in interim final form in order to conform the penalty assessment and administrative hearing procedures under section 502(c) of

ERISA and ensure the Secretary's ability to continue to effectively enforce the requirements of section 502(c) of ERISA.

C. Request for Comments

The Department invites all interested persons to submit their comments, suggestions and views concerning any of the provisions of any of these interim final rules. Written comments (preferably three copies) should be submitted to: Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Civil Penalty Regulation. Written comments may also be sent by Internet to the following address: *e-ORI@pwba.dol.gov.* Comments must be received by the Department on or before November 20, 2002. The comment period is being limited to 30 days to enable the Department to adopt changes to the interim final rule prior to the effective date of the SOA amendments.

All submissions will be open to public inspection and copying from 8:00 a.m. to 4:30 p.m. in the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

D. Regulatory Impact Analysis

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that these interim final rules relating to the assessment of civil monetary penalties under section 502(c)(7) of ERISA are significant in that they provide guidance on the administration and enforcement of the notice provisions of section 101(i) of ERISA. Separate guidance on the notice requirements of section 101(i) (Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries), also published in today's issue of the **Federal Register**, is also considered significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the interim final rules pertaining to both the blackout notice and the related civil penalty pursuant to the terms of the Executive Order.

The principal benefit of the statutory penalty provisions and these interim final rules will be greater adherence to the requirement of ERISA section 101(i) that plan administrators provide advance written notice to participants and beneficiaries in individual account retirement plans whose existing rights to direct investments in their accounts or to obtain loans or distributions will be suspended or limited. The implementation of orderly and consistent processes for the assessment of penalties and the review of such assessments will also be beneficial for plan administrators. The procedures established in these interim final rules will also allow facts and circumstances related to a failure or refusal to provide appropriate notice to be presented by a plan administrator and to be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(7).

The rate of failure or refusal to provide blackout notices where required, and the dollar value of penalties to be assessed in those cases cannot be predicted. The civil penalty provisions of the statute and these interim final rules impose no mandatory requirements or costs, except where a plan administrator has failed to provide the notice required in ERISA section 101(i).

The technical amendments conforming the existing regulatory provisions relating to the assessment of civil penalties under sections 502(c)(2), (c)(5), and (c)(6) of ERISA are procedural in nature, and similarly impose no additional requirements or costs.

Paperwork Reduction Act

This interim final rule on assessment of civil penalties under ERISA section 502(c)(7) is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*) because it does not contain a collection of information as defined in 44 U.S.C. 3502(3). Information otherwise provided to the Secretary in connection with the administrative and procedural requirements of these interim final rules is excepted from coverage by PRA 95 pursuant to 44 U.S.C. 3518(c)(1)(B), and related regulations at 5 CFR 1320.4(a)(2) and (c). These provisions generally except information provided as a result of an agency's civil or administrative action, investigation, or audit. This exception also applies to the conforming amendments to administrative and procedural rules pertaining to the civil penalty provisions of ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. Because this guidance is issued as an interim final rule pursuant to the authority and deadlines prescribed in sections 306(b)(2) of SOA, RFA does not apply, and regulatory flexibility analysis is not required. However, the Department wishes to address in its final rulemaking any special issues facing small plans with respect to the assessment of civil penalties under ERISA section 502(c)(7) and the conforming amendments to existing administrative and procedural regulations relating to the assessment of civil penalties under ERISA sections 502(c)(2), (c)(5), and (c)(6).

The terms of the statute pertaining to the assessment of civil penalties for failure to provide notices to plan participants and beneficiaries in the event of a blackout do not vary relative to plan or plan administrator size. The operation of the statute will normally result in the assessment of lower penalties where small plans are involved because a violation with respect to a single participant or beneficiary is treated as a separate violation for purposes of calculating the penalty. The opportunity for a plan administrator to present facts and

circumstances related to a failure or refusal to provide appropriate notice that may be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(7) may offer some degree of flexibility to small entities subject to penalty assessments. Penalty assessments will have no direct impact on small plans because the plan administrator assessed a civil penalty is personally liable for the payment of that penalty pursuant to section 2560.502c–7(j).

The Department invites interested persons to submit comments on the impact of this interim final rule on small entities, and on any alternative approaches that may serve to minimize the impact on small plans or other entities while accomplishing the objectives of the statutory provisions.

Congressional Review Act

The rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure, or administration and enforcement provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects

29 CFR Part 2560

Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

In view of the foregoing, Parts 2560 and 2570 of Chapter XXV of title 29 of the Code of Federal Regulations are amended as follows:

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for Part 2560 is revised to read as follows:

Authority: 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

Section 2560.503–1 also issued under 29 U.S.C. 1133.

Section 2560.502(c)(7) also issued under sec. 306 (b)(2) of Pub. L. 107–204, 116 Stat. 745.

2–3. Revise § 2560.502c–2, paragraphs (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c–2 Civil penalties under section 502(c)(2).

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(b)(1) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of the determination on statement of reasonable cause.* (1) The Department, following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.61(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this

section will not become a final order, within the meaning of § 2570.61(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.60 through 2570.71 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.62 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

* * * * *

4. Revise § 2560.502c-5, paragraphs (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c-5 Civil penalties under section 502(c)(5).

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(g) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.91(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of the determination on statement of reasonable cause* (1) The Department, following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section, and a brief statement of the reasons for assessing the penalty. This notice is a ''pleading'' for purposes of § 2570.91(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.91(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.91(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.90 through 2570.101 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.92 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the

Department at the address provided in the notice of intent to assess a penalty.

* * * * *

5. Revise § 2560.502c–6, paragraphs (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c–6 Civil penalties under section 502(c)(6).

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 104(a)(6) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the 30-day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.111(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination not to assess or to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.111(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.111(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.91(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.110 through 2570.121 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.112 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

* * * * *

6. Add a new § 2560.502c–7 to read as follows:

§ 2560.502c–7 Civil penalties under section 502(c)(7).

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(7) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator (within the meaning of section 3(16)(A) of the Act) of an individual account plan (within the meaning of section 101(i)(8) of the Act and § 2520.101–3(d)(2) of this chapter), shall be liable for civil penalties assessed by the Secretary under section 502(c)(7) of the Act for failure or refusal to provide notice of a blackout period to affected participants and beneficiaries in accordance with section 101(i) of the Act and § 2520.101–3 of this chapter.

(2) For purposes of this section, a failure or refusal to provide a notice of blackout period shall mean a failure or refusal, in whole or in part, to provide notice of a blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of the Act and § 2520.101–3 of this chapter.

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(7) of the Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to provide a notice of blackout period. However, the amount assessed for each violation under section 502(c)(7) of the Act shall not exceed $100 a day, computed from the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required.

(2) For purposes of calculating the amount to be assessed under this section, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary shall be treated as a separate violation under section 101(i) of the Act and § 2520.101–3 of this chapter.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(7) of the Act, the Department shall provide to the

administrator of the plan a written notice indicating the Department's intent to assess a penalty under section 502(c)(7) of the Act, the amount of such penalty, the number of participants and beneficiaries on which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty.

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(i) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the 30 day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(7) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts in a statement of reasonable cause alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination on the statement of reasonable cause and its determination whether to waive the penalty in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty assessment, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.131(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's determination to assess a penalty, shall become a final order, within the meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.131(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.130 through 2570.141 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.132 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

(j) *Liability.* (1) If more than one person is responsible as administrator for the failure to provide a notice of blackout period under section 101(i) of the Act and its implementing regulations (§ 2520.101–3 of this chapter), all such persons shall be jointly and severally liable for such failure.

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(7) of the Act, pursuant to a final order, within the meaning of § 2570.131(g) of this chapter, shall be personally liable for the payment of such penalty.

(k) *Cross-reference.* See §§ 2570.130 through 2570.141 of this chapter for procedural rules relating to administrative hearings under section 502(c)(7) of the Act.

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

7. Revise the authority citation for Part 2570 to read as set forth below:

Authority: 29 U.S.C. 1021, 1108, 1132, 1135, 5 U.S.C. 8477; Reorganization Plan No. 4 of 1978; Secretary of Labor's Order 1–87.

Subpart G is also issued under sec. 306(b)(2) of Pub. L. 107–204, 116 Stat. 745.

8. Revise § 2570.61(c) to read as follows:

§ 2570.61 Definitions.

* * * * *

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–2(g) of this chapter.

* * * * *

9. Revise § 2570.64 to read as follows:

§ 2570.64 Consequences of default.

For 502(c)(2) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–2(g) of this chapter within the 30-day period provided by § 2560.502c–2(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and

contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.61(g) of this subpart, forty-five (45) days from the date of service of the notice.

10. Revise § 2570.94 to read as follows:

§ 2570.94 Consequences of default.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–5(g) of this chapter within the 30 day period provided by § 2560.502c–5(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.91(g) of this subpart, forty-five (45) days from the date of the service of the notice.

11. Revise § 2570.114 to read as follows:

§ 2570.114 Consequences of default.

For 502(c)(6) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–6(g) of this chapter within the 30 day period provided by § 2560.502c–6(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.111(g) of this subpart, forty-five (45) days from the date of service of the notice.

12. Add a new Subpart G to Part 2570 to read as follows:

Subpart G—Procedures for the Assessment of Civil Penalties under ERISA Section 502(c)(7)

Sec.
2570.130 Scope of rules.
2570.131 Definitions.
2570.132 Service: Copies of documents and pleadings.
2570.133 Parties, how designated.
2570.134 Consequences of default.
2570.135 Consent order or settlement.
2570.136 Scope of discovery.
2570.137 Summary decision.
2570.138 Decision of the administrative law judge.
2570.139 Review by the Secretary.
2570.140 Scope of review.
2570.141 Procedures for review by the Secretary.

Subpart G—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(7)

§ 2570.130 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(7) civil penalty proceedings'' (as defined in § 2570.131(n) of this subpart) under section 502(c)(7) of the Employee Retirement Income Security Act of 1974, as amended (the Act). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges at Part 18 of this title will apply to matters arising under ERISA section 502(c)(7) except as modified by this subpart. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.131 Definitions.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title:

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–7(g) of this chapter;

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means any written document containing a specified proposed remedy or other relief acceptable to the Department and consenting parties;

(f) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended;

(g) *Final order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(7) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in § 2560.502c–7(e) of this chapter within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, by either oral presentation or written submission, to the administrative law judge;

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(7);

(j) *Party* includes a person or agency named or admitted as a party to a proceeding;

(k) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization;

(l) *Petition* means a written request, made by a person or party, for some affirmative action;

(m) *Pleading* means the notice as defined in § 2560.502c–7(g) of this chapter, the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) *502(c)(7) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(7) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(7);

(p) *Secretary* means the Secretary of Labor and includes, pursuant to any delegation of authority by the Secretary, any assistant secretary (including the Assistant Secretary for Pension and Welfare Benefits), administrator, commissioner, appellate body, board, or other official; and

(q) *Solicitor* means the Solicitor of Labor or his or her delegate.

§ 2570.132 Service: Copies of documents and pleadings.

For 502(c)(7) penalty proceedings, this section shall apply in lieu of § 18.3 of this title.

(a) *General.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, NW, Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Department shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA section 502(c)(7) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made by regular mail to the last known address.

(d) *Form of pleadings.* (1) Every pleading shall contain information indicating the name of the Pension and Welfare Benefits Administration (PWBA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (*e.g.*, notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

§ 2570.133 Parties, how designated.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.10 of this title.

(a) The term ''party'' wherever used in this subpart shall include any natural person, corporation, employee benefit plan, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency. A party against whom a civil penalty is sought shall be designated as ''respondent.'' The Department shall be designated as the ''complainant.''

(b) Other persons or organizations shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties, and that in the discretion of the administrative law judge the participation of such persons or organizations would be appropriate.

(c) A person or organization not named as a respondent wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person who or organization that has been made a party at the time of filing. Such petition shall concisely state:

(1) Petitioner's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for petitioner;

(4) The issues on which petitioner wishes to participate; and

(5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioner has the requisite interest to be a party in the proceedings, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner, as well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as *amicus curiae.*

§ 2570.134 Consequences of default.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.5 (a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–7(g) of this chapter within the 30 day period provided by § 2560.502c–7(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(7) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.131(g) of this subpart, forty-five (45) days from the date of service of the notice.

§ 2570.135 Consent order or settlement.

For 502(c)(7) civil penalty proceedings, the following shall apply in lieu of § 18.9 of this title.

(a) *General.* At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such a deferral and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge;

(4) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(5) That the order and decision of the administrative law judge shall be final agency action.

(c) *Submission*. On or before the expiration of the time granted for negotiations, but, in any case, at least five (5) days prior to the date set for hearing, the parties or their authorized representative or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge; or

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action subject to compliance with the terms of the settlement; or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition*. In the event a settlement agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge shall issue a decision incorporating such findings and agreement within 30 days of his receipt of such document. The decision of the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become final agency action within the meaning of 5 U.S.C. 704.

(e) *Settlement without consent of all parties*. In cases in which some, but not all, of the parties to a proceeding submit a consent agreement to the administrative law judge, the following procedure shall apply:

(1) If all of the parties have not consented to the proposed settlement submitted to the administrative law judge, then such non-consenting parties must receive notice, and a copy, of the proposed settlement at the time it is submitted to the administrative law judge;

(2) Any non-consenting party shall have fifteen (15) days to file any objections to the proposed settlement with the administrative law judge and all other parties;

(3) If any party submits an objection to the proposed settlement, the administrative law judge shall decide within 30 days after receipt of such objections whether he shall sign or reject the proposed settlement. Where the record lacks substantial evidence upon which to base a decision or there is a genuine issue of material fact, then the administrative law judge may establish procedures for the purpose of receiving additional evidence upon which a decision on the contested issues may reasonably be based;

(4) If there are no objections to the proposed settlement, or if the administrative law judge decides to sign the proposed settlement after reviewing any such objections, the administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section.

§ 2570.136 Scope of discovery.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.14 of this title.

(a) A party may file a motion to conduct discovery with the administrative law judge. The motion for discovery shall be granted by the administrative law judge only upon a showing of good cause. In order to establish ''good cause'' for the purposes of this section, a party must show that the discovery requested relates to a genuine issue as to a material fact that is relevant to the proceeding. The order of the administrative law judge shall expressly limit the scope and terms of discovery to that for which ''good cause'' has been shown, as provided in this paragraph.

(b) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials or information in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials or information by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning the proceeding.

§ 2570.137 Summary decision.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.41 of this title.

(a) *No genuine issue of material fact*. (1) Where no issue of a material fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to §§ 2570.139 through 2570.141 of this subpart, shall become a final order.

(2) A decision made under paragraph (a) of this section shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of any decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact*. Where a genuine question of a material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.138 Decision of the administrative law judge.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.57 of this title.

(a) *Proposed findings of fact, conclusions, and order*. Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge*. Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(7) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(7) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.139 through 2570.141 of this subpart.

§ 2570.139 Review by the Secretary.

(a) The Secretary may review a decision of an administrative law judge. Such a review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such decision. In all other cases, the decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of a notice of appeal, the Secretary shall request the Chief Administrative Law Judge to submit to him or her a copy of the entire record before the administrative law judge.

§ 2570.140 Scope of review.

The review of the Secretary shall not be a *de novo* proceeding but rather a review of the record established before the administrative law judge. There shall be no opportunity for oral argument.

§ 2570.141 Procedures for review by the Secretary.

(a) Upon receipt of the notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in his or her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be final agency action within the meaning of 5 U.S.C. 704.

Signed at Washington, D.C., this 11th day of October, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 02–26523 Filed 10–18–02; 8:45 am]

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The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

H.J. Res. 123/P.L. 107–244

Making further continuing appropriations for the fiscal year 2003, and for other purposes. (Oct. 18, 2002; 116 Stat. 1503)

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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, 2001, through January 1, 2002. The CFR volume issued as of January 1, 2001 should be retained.

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