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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 880

[Docket No. 01N–0339]

Medical Devices; Classification for Medical Washer and Medical Washer-Disinfector

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the medical washer and medical washer-disinfector intended for general medical purposes to clean and dry surgical instruments, decontaminate or disinfect anesthesia equipment, hollowware, and other medical devices into class II (special controls). FDA is also identifying the guidance document entitled ''Class II Special Controls Guidance Document: Medical Washers and Medical Washer-Disinfectors'' (the guidance) as the special control that, in addition to general controls, the agency believes will reasonably ensure the safety and effectiveness of the device. This action is being taken under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments), the Safe Medical Devices Act of 1990 (the SMDA), and the Food and Drug Administration Modernization Act of 1997 (the FDAMA).

DATES: This rule is effective December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Chiu S. Lin, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8913.

SUPPLEMENTARY INFORMATION:

I. Background

The act (21 U.S.C. 301 *et seq.*), as amended by the 1976 amendments (Public Law 94–295), the SMDA (Public Law 101–629), and the FDAMA (Public Law 105–115), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until: (1) The device is reclassified into class I or II; (2) FDA issues an order classifying the device into class I or II in accordance with new section 513(f)(2) of the act, as amended by the FDAMA; or (3) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval. Consistent with the act and the regulations, FDA consulted with the General Hospital and Personal Use Devices Panel (the Panel), an FDA advisory committee, regarding the classification of this device.

II. Regulatory History of the Device

In the **Federal Register** of February 7, 2002 (67 FR 5750), FDA proposed to classify the medical washer and medical washer-disinfector into class II (special controls). This device is intended for general medical purposes to clean and dry surgical instruments, decontaminate or disinfect anesthesia equipment, hollowware, and other medical devices.

Interested persons were given until May 8, 2002 to comment on the proposed regulation.

FDA received a total of three comments from one health professional, a consumer group, and one consumer. All three comments agreed with the proposed rule. In addition, one comment suggested that FDA require manufacturers to include testing to monitor cleaning efficacy.

III. Summary of Final Rule

FDA believes that in order to reduce the potential for confusion, the identification terms ''general use'' washer and ''general use washer-disinfector'' as recommended by the Panel should be changed to ''medical washer'' and ''medical washer-disinfector.'' The new terms will distinguish these devices from ''general purpose article'' washers and washer-disinfectors that are exempt from section 510(k) of the act requirements. FDA also believes that decontamination and disinfection are distinct intended uses that require FDA to distinguish washers from washer-disinfectors in classification descriptions.

FDA concurred with the Panel that the medical washers and washer-disinfectors should be classified into class II because special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance. FDA identified the guidance entitled ''Class II Special Controls Guidance Document: Medical

Washers and Medical Washer-Disinfectors'' as the special control for these devices. Following the effective date of this final classification rule, any firm submitting a section 510(k) of the act premarket notification for a medical washer or medical washer disinfector will need to address the issues covered in the special control guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

As the Panel initially recommended, FDA believes that the medical washer is exempt from section 510(k) of the act requirements and that some medical washer-disinfectors can also be exempt from section 510(k) of the act requirements, depending on intended use. The medical washer-disinfector intended to clean and provide high level disinfection to medical devices should be subject to section 510(k) of the act requirements because the reusable devices subject to a high level disinfection process may pose a high risk of infection and other serious sequelae if the washer-disinfector is unsafe or ineffective. The medical washer-disinfector intended to clean and provide low or intermediate level disinfection can be exempt from 510(k) requirements because the reusable devices subject to low or intermediate disinfection pose a relatively lower risk of infection and other serious sequelae if the washer-disinfector is unsafe or ineffective.

In order to receive the guidance entitled ''Class II Special Controls Guidance Document: Medical Washers and Medical Washer-Disinfectors'' via your fax machine, call the CDRH Facts-on-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. At the first voice prompt press 1 to enter the system. At the second voice prompt press 1 to order a document. Enter the document number (1252) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes the civil money penalty guidance documents package, device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH home page may be accessed at http://www.fda.gov/cdrh. The document entitled ''Class II Special Controls Guidance Document: Medical Washer and Medical Washer-Disinfector'' is available on the Internet at http://www.fda.gov/cdrh/ode/guidance/1252.pdf.

IV. Analysis of Comments and FDA's Response

FDA received three comments. All three comments agreed with the classification. One comment also suggested that FDA require manufacturers to include testing to monitor cleaning efficacy.

Currently, there is no standard for validating cleaning efficacy. Manufacturers can include in their manuals recommendations for routine monitoring of cleaning efficacy and frequency of testing. The guidance document does not prevent them from doing this. Once standardized test methods are available, FDA will review and recognize those standardized test methods as appropriate.

Therefore, under section 513 of the act, FDA is adopting the summary of reasons for the Panel's recommendation and the summary of data upon which the Panel's recommendation is based, in its entirety. FDA is also adopting the assessment of the risks to public health stated in the proposed rule published on February 7, 2002. Furthermore, FDA is issuing this final rule that classifies the generic type of device, medical washer and medical washer-disinfector into class II.

V. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4)). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages, distributive impacts, and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The special controls guidance document does not impose any new burdens on these or future manufacturers. It merely assures that, in the future, devices of this generic type will be at least as safe and effective as the presently marketed devices. These devices are already subject to premarket notification and labeling requirements. The guidance document merely advises manufacturers on appropriate means of complying with these requirements. The agency therefore certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In addition, this final rule will not impose costs of $100 million or more on either the private sector or state, local, and tribal governments in the aggregate, and therefore a summary statement or analysis under section 202(a) of the Unfunded Mandates Reform Act of 1995 is not required.

VII. Federalism

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

VIII. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520) is not required.

The information collections addressed in the special control guidance document identified by this rule have

been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions, 21 CFR part 807, subpart E, OMB control number 0910–0120.

IX. Reference

The following reference has been placed on display in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. This reference may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Transcript of General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee Meeting, September 14, 1998.

List of Subjects in 21 CFR Part 880

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 880 is amended as follows:

PART 880—GENERAL HOSPITAL AND PERSONAL USE DEVICES

1. The authority citation for 21 CFR part 880 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 880.6991 is added to subpart G to read as follows:

§ 880.6991 Medical washer.

(a) *Identification.* A medical washer is a device that is intended for general medical purposes to clean and dry surgical instruments, anesthesia equipment, hollowware, and other medical devices.

(b) *Classification.* Class II (special controls). The special control for this device is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Medical Washers and Medical Washer-Disinfectors.'' The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 880.9.

3. Section 880.6992 is added to subpart G to read as follows:

§ 880.6992 Medical washer-disinfector.

(a) *Identification.* A medical washer-disinfector is a device that is intended for general medical purposes to clean, decontaminate, disinfect, and dry surgical instruments, anesthesia equipment, hollowware, and other medical devices.

(b) *Classification.* Class II (special controls). The special control for this device is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Medical Washers and Medical Washer-Disinfectors.''

(1) Medical washer-disinfectors that are intended to clean, high level disinfect, and dry surgical instruments, anesthesia equipment, hollowware, and other medical devices.

(2) Medical washer-disinfectors that are intended to clean, low or intermediate level disinfect, and dry surgical instruments, anesthesia equipment, hollowware, and other medical devices are exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 880.9.

Dated: October 28, 2002.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 02–28942 Filed 11–14–02; 8:45 am]

BILLING CODE 4160–01–S

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in December 2002. Interest assumptions are also published on the PBGC's Web site (*http://www.pbgc.gov*).

EFFECTIVE DATE: December 1, 2002.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

Three sets of interest assumptions are prescribed: (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in Appendix B to part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in Appendix B to part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in Appendix C to part 4022).

Accordingly, this amendment (1) adds to Appendix B to Part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during December 2002, (2) adds to Appendix B to part 4022 the interest assumptions for the PBGC to use for its own lump-sum payments in plans with valuation dates during December 2002, and (3) adds to Appendix C to part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology for valuation dates during December 2002.

For valuation of benefits for allocation purposes, the interest assumptions that the PBGC will use (set forth in Appendix B to part 4044) will be 5.30 percent for the first 25 years following the valuation date and 4.25 percent thereafter. These interest assumptions represent an increase (from those in effect for November 2002) of 0.30 percent for the first 25 years following the valuation date and are otherwise unchanged.

The interest assumptions that the PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 4.00 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. These interest assumptions represent an increase (from those in effect for November 2002) of 0.25 percent for the period during which a benefit is in pay status and are otherwise unchanged.

For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by the PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect, as accurately as possible, current market conditions.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during December 2002, the PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. In appendix B to part 4022, Rate Set 110, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	*
110	12–1–02	1–1–03	4.00	4.00	4.00	4.00	7	8

3. In appendix C to part 4022, Rate Set 110, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	*
110	12–1–02	1–1–03	4.00	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

5. In appendix B to part 4044, a new entry, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4044—Interest Rates Used To Value Benefits

* * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
* * *	*		*	*		*
December 2002	.0530	1–25	.0425	>25	N/A	N/A

Issued in Washington, DC, on this 8th day of November 2002.

Joseph H. Grant,

Deputy Executive Director and Chief Operating Officer, Pension Benefit Guaranty Corporation.

[FR Doc. 02–29024 Filed 11–14–02; 8:45 am]

BILLING CODE 7708–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 918

[LA–022–FOR]

Louisiana Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Louisiana regulatory program (Louisiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Louisiana proposed revisions to its regulations concerning revegetation success standards for post-mining land uses of pastureland and wildlife habitat. Louisiana also proposed to add to its program a policy document that describes the criteria and procedures for determining reclamation phase III ground cover and tree and shrub stocking success for areas developed for wildlife habitat. Louisiana revised its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: November 15, 2002.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581–6430. Internet: *mwolfrom@osmre.gov.*

SUPPLEMENTARY INFORMATION:

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

I. Background on the Louisiana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Louisiana program on October 10, 1980. You can find background information on the Louisiana program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the October 10, 1980, **Federal Register** (45 FR 67340). You can also find later actions concerning the Louisiana program and program amendments at 30 CFR 918.15 and 918.16.

II. Submission of the Amendment

By letter dated October 2, 2001 (Administrative Record No. LA–367), Louisiana sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Louisiana sent the amendment in response to our letters dated March 24, 1999, and August 16, 2000 (Administrative Record Nos. LA–365 and LA–365.01, respectively), that we sent to Louisiana in accordance with 30 CFR 732.17(c). Louisiana proposed revisions to the Louisiana Surface Mining Regulations found in the Louisiana Administrative Code, Title 43, Part XV (LAC) concerning revegetation success standards for post-mining land uses of pastureland and wildlife habitat. Louisiana also proposed to add to its program a policy document that describes the criteria and procedures for determining reclamation phase III ground cover and tree and shrub stocking success for areas developed for wildlife habitat.

We announced receipt of the proposed amendment in the November 2, 2001, **Federal Register** (66 FR 55609). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on December 3, 2001. We received comments from two Federal agencies. One of these agencies, the U. S. Fish and Wildlife Service (FWS), offered several comments on the proposed amendment. We forwarded these comments to Louisiana on January 25, 2002 (Administrative Record No. LA–367.06). By telephone, the State informed us that it would have to study the comments before responding to them (Administrative Record No. LA–367.08). We received Louisiana's response to the FWS comments in a letter dated June 11, 2002 (Administrative Record No. LA–367.05). Louisiana stated that it felt that its proposed revegetation success standards are consistent with SMCRA and no less effective than the Federal surface mining regulations. Therefore, we are proceeding with the final rule **Federal Register** document.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment. Any revisions that we do not discuss below concern nonsubstantive wording or editorial changes or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

A. Section 5423. Revegetation: Standards for Success

Louisiana added new paragraph B.1.e. stating that the criteria and procedures for determining ground cover and production success for pastureland are found at Section 5424. Louisiana also added new paragraph B.8.a. stating that the criteria and procedures for determining ground cover and stocking success for fish and wildlife habitat are found at Section 5425. There are no Federal counterpart regulations stating where to find in the regulations criteria and procedures for determining ground cover and production success for areas

developed for use as pastureland. Also, there are no Federal counterpart regulations stating where to find in the regulations criteria and procedures for determining ground cover and stocking success for areas developed for fish and wildlife habitat. We are approving the addition of these two new paragraphs because they merely direct readers to where they can find specific criteria and procedures for determining ground cover and production success for pastureland or ground cover and stocking success for fish and wildlife habitat.

B. Section 5424. Revegetation: Standards for Success—Post-Mining Land Use of Pastureland

1. Section 5424.A. Introduction

Louisiana proposed regulations that describe the criteria and procedures for determining ground cover and production success for areas being restored to pastureland. According to Section 5423, ground cover and production success on pastureland determinations must be based on the following criteria: (1) General revegetation requirements of the approved permit, (2) ground cover density, and (3) production. Also, the permittee is responsible for determining and measuring ground cover and production and for submitting this data to the Commissioner of Conservation (Commissioner) for evaluation.

The Federal regulation at 30 CFR 816.116(b) provides that the standards for revegetation success must be applied in accordance with the approved post-mining land use. It also provides that the ground cover and vegetation production parameters must be measured and compared to an appropriate revegetation standard in order to determine if the post-mining land use area has been successfully revegetated. We find that Louisiana's proposed regulation concerning the requirement to measure post-mining vegetation cover and production for the land use of pasture is no less effective than the Federal regulation at 30 CFR 816.116(b). Therefore, we are approving the proposed Louisiana regulation.

2. Section 5424.B. Success Standards and Measurement Frequency

a. *Ground Cover and Forage Production.* In paragraphs B.1. and B.2., Louisiana proposed regulations for ground cover and forage production, respectively. In paragraph B.1., Louisiana sets forth the criteria and procedures for determining ground cover and production success on pastureland. The criteria include an acceptable ground cover that is at least 90 percent of the approved success standard at a 90-percent confidence interval. The success standard is 90 percent. The criteria also include how to measure the ground cover; what types of species mixtures are required; sampling techniques for measuring success; when and how often to sample; and the length of the responsibility period. In paragraph B.2., Louisiana sets forth the criteria and procedures for determining forage production success on pastureland. The criteria include the success standard for hay production; when and how often to sample; and the length of the responsibility period.

The Federal regulation at 30 CFR 816.116(a)(2) provides the requirements for establishing revegetation success standards for ground cover and forage production for pastureland and the sampling techniques for measuring success. The Federal regulation at 30 CFR 816.116(c)(2) provides the length of the responsibility period and the time frame for sampling. We find that Louisiana's proposed regulations meet the requirements of the Federal regulations at 30 CFR 816.116(a)(2) and (c)(2) and are no less effective. Therefore, we are approving them.

b. *Reference Area Requirements.* In paragraphs B.3., Louisiana proposed regulations for reference area requirements. Louisiana proposed that reference areas must be representative of soils, slope, aspect, and vegetation in the pre-mined permit area. However, in cases where differences exist because of mixing of several soil series on the reclaimed area or unavailability of a reference area, yields must be adjusted. Reference area pastureland must also be under the same management as pastureland in the reclaimed area and must consist of a single plot (whole plot) at least four acres in size. Forage yields for the reference plot must be at a level that is reasonably comparable to the parish average for a given crop. Reference areas may be located on undisturbed acreage within permitted areas. When release areas and reference plots fall on different soil series, adjustments must be made to compensate for the productivity difference.

The Federal regulation at 30 CFR 816.116(a)(2) requires standards for success to include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. At 30 CFR 816.116(b), the Federal regulation requires that standards for success must be applied in accordance with the approved post-mining land use. Also, for areas developed for use as pastureland, the ground cover and production of living plants on the revegetated area must be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

Louisiana proposed regulations that provided details for using reference areas as a standard for comparison with areas reclaimed to pastureland. The use of reference areas is consistent with standard scientific studies that use reference areas for studying vegetation. We find that Louisiana's proposed regulations concerning the use of these reference areas are not inconsistent with and are no less effective than the Federal regulations. Therefore, we are approving them.

3. Section 5424.C. Sampling Procedures

a. *Random Sampling and Sampling Techniques for Ground Cover.* In paragraphs C.1. and C.2.a., Louisiana proposed regulations for random sampling procedures and ground cover sampling techniques to assure that the samples truly represent the vegetative characteristics of the whole release or reference area. The regulations require permittees to use methods that will provide the following: (1) A random selection of sampling sites, (2) a sampling technique unaffected by the sampler's preference, and (3) sufficient samples to represent the true mean of the vegetation characteristics. The regulations instruct the permittees on how to select sampling points. They also require permittees to notify regulatory personnel ten days before conducting sampling or other harvesting operations to allow them an opportunity to monitor the sampling procedures. In addition, the regulations list the three approved statistically valid sampling techniques for measuring ground cover on pastureland and provide instructions for using them. The approved sampling techniques are pin method, point frame method, and line intercept method.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for vegetation success and statistically valid sampling techniques for measuring vegetation success. Louisiana proposed regulations requiring a random sampling technique to ensure that sample selection used for measuring success is not biased and will result in a statistically valid sample of adequate size. Also, Louisiana proposed regulations that allow the use of three separate statistically valid sampling methods that can be used to measure ground cover on pastureland. The

proposed regulations are not inconsistent with and are no less effective than the Federal regulations and we are approving them.

b. *Sampling Techniques for Productivity.* In paragraph C.2.b., Louisiana proposed regulations for measuring vegetation productivity on pastureland. The proposed regulations set forth procedures for controlling two components (time of harvest and moisture content) that may potentially influence production yield. The proposed regulations also set forth the following two statistically valid sampling methods that can be used to evaluate production: (1) Sampling frames for harvesting plots, or (2) whole field or whole area harvesting.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana proposed procedures for controlling for two components that may influence vegetation production and set forth two statistically valid sampling methods that can be used to evaluate production. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

c. *Sample Adequacy.* In paragraph C.3., Louisiana proposed regulations for sampling adequacy. The proposed regulations set forth the procedure and formula to use for determining the actual number of samples needed to measure ground cover and productivity. The regulation requires the collection of data using a multi-staged sampling procedure. The proposed formula is a standard scientific formula for determining sample adequacy in order to ensure that vegetation sampling is statistically valid.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana's proposed regulations contain a procedure and a standard scientific formula to use for determining sample adequacy and to ensure that vegetation sampling is statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

4. Section 5424.D. Data Submission and Analysis

Louisiana proposed the following regulations: (1) When to submit data to the Commissioner for review, (2) what is successful vegetation ground cover and production for the release area, (3) what to do when data indicates that average ground cover and average forage production for the release area is insufficient, and (4) making adjustments to forage production yields to account for moisture content before making statistical comparisons.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana is adopting requirements for data submission and analysis in order to ensure that vegetation sampling will be statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

5. Section 5424.E. Maps

Louisiana proposed regulations requiring permittees to submit maps with their requests for reclamation phase III bond release. The maps must show the location of the proposed release area, the location of the reference plots, and all permit boundaries. When permittees submit data from a previously approved reclamation plan, maps must accompany the data. The maps must show the location of reference plots and each sampling point, the area covered by the sampling, and all permit boundaries.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana is adopting requirements for submission of maps as part of the bond release application in order to ensure that vegetation sampling will be statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

6. Section 5424.F. Mitigation Plan

Louisiana proposed a set of criteria for developing a new phase III release plan in the event that the operator cannot demonstrate successful forage productivity and ground cover on the release area after the full five years of the phase III responsibility period.

The Federal regulations at 30 CFR 816.116(c)(1) and (c)(2) require that ''the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work * * *.'' In areas where the annual average precipitation is more than 26.0 inches, the period of responsibility must continue at least five full years. Vegetative ground cover and production for pasture land must also equal or exceed the approved success standard during the growing season of any two years of the responsibility period, except the first year. Louisiana is adopting requirements for the development of a mitigation plan in the event that the operator is not able to demonstrate revegetation success during the phase III responsibility period. The proposed regulations are not inconsistent with and are no less effective than the Federal regulations. Therefore, we are approving them.

C. Section 5425. Revegetation: Standards for Success—Post-Mining Land Use of Wildlife Habitat

1. Section 5425.A. Introduction

Louisiana proposed regulations that describe the criteria and procedures for determining ground cover and stocking success for areas being developed for wildlife habitat. According to Section 5423, ground cover and stocking success on wildlife habitat determinations must be based on the following criteria: (1) General revegetation requirements of the approved permit, (2) ground cover density, and (3) tree or shrub stocking and survival. Also, the permittee is responsible for determining and measuring ground cover and production and for submitting this data to the Commissioner for evaluation.

The Federal regulation at 30 CFR 816.116(b) provides that the standards for revegetation success must be applied in accordance with the approved post-mining land use. Also, for areas developed for wildlife habitat, the success of vegetation must be determined on the basis of tree and shrub stocking and vegetative ground cover. We find that Louisiana's proposed regulation concerning the requirement to measure post-mining vegetation cover and stocking for the land use of wildlife habitat is no less effective than the Federal regulation at 30 CFR 816.116(b). Therefore, we are approving the proposed Louisiana regulation.

2. Section 5425.B. Success Standards and Measurement Frequency

Ground Cover and Tree and Shrub Stocking Rate

In paragraphs B.1. and B.2., Louisiana proposed regulations for ground cover and tree and shrub stocking rate, respectively. In paragraph B.1.,

Louisiana sets forth the criteria and procedures for determining ground cover on wildlife habitat. The criteria include a ground cover of at least 70 percent density with a 90-percent statistical confidence interval for the last year of the 5-year responsibility period. The criteria also include how to measure the ground cover and what types of species mixture are required.

In paragraph B.2., Louisiana sets forth the criteria and procedures for determining tree and shrub stocking success on wildlife habitat. The criteria require that the State consult with and receive approval from the Louisiana Department of Wildlife and Fisheries, on a permit-specific basis, when determining the stocking rate for trees and shrubs. Also, the trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement must have utility for the approved post-mining land use. When these two aspects of the criteria are met and acceptable ground cover is achieved, the 5-year responsibility period begins. The success standard for tree and shrub stocking rate is equal to or greater than 90 percent of the stocking rate approved in the permit at a 90-percent statistical confidence interval. The criteria for the stocking rate also provides the following: (1) When and how often to sample, (2) what physical condition the trees and shrubs must be in to be counted, and (3) what percent of the trees and shrubs used to determine success must be in place and for how long.

The Federal regulation at 30 CFR 816.116(a)(2) provides that ground cover and stocking is considered equal to the approved success standard when they are not less than 90 percent of the success standard at a 90-percent statistical confidence interval. The Federal regulation at 30 CFR 816.116(b) requires that standards for success must be applied in accordance with the approved post-mining land use and, at a minimum, the success of vegetation must be determined on the basis of tree and shrub stocking and vegetative ground cover. The regulatory authority must specify the minimum stocking and planting arrangements on the basis of local and regional conditions. However, the regulatory authority must first consult with and receive approval from the State agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur on either a program-wide or a permit-specific basis. Trees and shrubs to be used in determining the success of stocking and the adequacy of the plant arrangement must have utility for the approved post-mining land use. Trees and shrubs counted in determining such success must be healthy and have been in place for not less than 2 growing seasons. At the time of bond release, at least 80 percent of the trees and shrubs used to determine such success must have been in place for 60 percent of the applicable minimum period of responsibility. The Federal regulation at 30 CFR 816.116(c)(2) requires the period of extended responsibility for successful revegetation to begin after the last year of augmented seeding, fertilizing, irrigation, or other work. In areas that receive more than 26.0 inches of annual average precipitation, the period of responsibility must continue for not less than 5 years. Areas approved for wildlife habitat must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

In its amendment, Louisiana proposed the requirement for revegetation success standards, measurement techniques, local wildlife agency consultation and approval, and liability period requirements for wildlife habitat. We find that the State's proposed revisions are not inconsistent with and are no less effective than the Federal regulations. Therefore, we are approving them.

3. Section 5425.C. Sampling Procedures

a. *Random Sampling and Sampling Technique for Ground Cover.* In paragraphs C.1. and C.2.a., Louisiana proposed regulations for random sampling procedures and ground cover sampling techniques, respectively, to assure that the samples truly represent the vegetative characteristics of the whole release or reference area. The regulations require permittees to use methods that will provide the following: (1) A random selection of sampling sites, (2) a sampling technique unaffected by the sampler's preference, and (3) sufficient samples to represent the true mean of the vegetation characteristics. The regulations instruct the permittees on how to select sampling points. They also require permittees to notify regulatory personnel ten days before conducting sampling or other harvesting operations to allow them an opportunity to monitor the sampling procedures. In addition, the regulations list the three approved statistically valid sampling techniques for measuring ground cover on wildlife habitat and provide instructions for using them. The approved sampling techniques are pin method, point frame method, and line intercept method.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program, standards for vegetation success and statistically valid sampling techniques for measuring vegetation success. Louisiana proposed regulations requiring a random sampling technique to ensure that sample selection used for measuring success is not biased and will result in a statistically valid sample of adequate size. Also, Louisiana proposed regulations that allow the use of three separate statistically valid sampling methods that can be used to measure ground cover on wildlife habitat. The proposed regulations are not inconsistent with and are no less effective than the Federal regulations and we are approving them.

b. *Sampling Technique for Sampling Circles.* In paragraph C.2.b., Louisiana proposed instructions on how to count trees and shrubs using sampling circles. Louisiana also provided criteria on which trees and shrubs to count. The tree or shrub to be counted must be healthy and must have been in place for at least two years. At the time of liability release, 80 percent of the trees and shrubs must have been in place for three years.

The Federal regulation at 30 CFR 816.116(a)(1) requires the regulatory authority to select the standards for success and the statistically valid sampling techniques for measuring success. The selected standards and sampling techniques must be included in the regulatory authority's approved regulatory program. Louisiana proposed the use of sampling circles as a statistically valid sampling method for measuring tree or shrub stocking on the wildlife habitat. The proposed regulation is not inconsistent with and is no less effective than the Federal regulation, therefore, we are approving it.

c. *Sample Adequacy.* In paragraph C.3., Louisiana proposed regulations for sampling adequacy. The proposed regulations set forth the procedure and formula to use for determining the actual number of samples needed to measure ground cover and productivity. The regulation requires the collection of data using a multi-staged sampling procedure. The proposed formula is a standard scientific formula for determining sample adequacy in order to ensure that vegetation sampling is statistically valid.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana's proposed regulations contain a procedure and a standard scientific formula to use for

determining sample adequacy and to ensure that vegetation sampling is statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

4. Section 5425.D. Data Submission and Analysis

Louisiana proposed the following regulations: (1) When to submit data to the Commissioner for review, (2) what is successful vegetation ground cover and stocking for the release area, and (3) what to do when data indicates that average ground cover and average tree and shrub stocking density for the release area is insufficient.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana proposed to adopt requirements for data submission and analysis in order to ensure that vegetation sampling will be statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

5. Section 5425.E. Maps

Louisiana proposed regulations requiring permittees to submit maps with their requests for reclamation phase III bond release. The maps must show the location of the proposed release area, the location of the reference plots, and all permit boundaries. When permittees submit data from a previously approved reclamation plan, maps must accompany the data. The maps must show the location of each transect and sampling circle location, the area covered by the sampling, and all permit boundaries.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana is adopting requirements for submission of maps as part of the bond release application in order to ensure that vegetation sampling will be statistically valid. Therefore, we find that Louisiana's proposed regulations are not inconsistent with and are no less effective than the Federal regulations.

6. Section 5425.F. Mitigation Plan

Louisiana proposed a set of criteria for developing a new phase III release plan in the event that the operator cannot demonstrate successful vegetation ground cover and tree and shrub stocking on the release area after the full five years of the phase III responsibility period.

The Federal regulations at 30 CFR 816.116(c)(1) and (c)(2) require that ''the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work * * *.'' In areas where the annual average precipitation is more than 26.0 inches, the period of responsibility must continue for at least five full years. Vegetative ground cover for wildlife habitat must also equal or exceed the approved success standard during the growing season of the last year of the responsibility period. Louisiana is adopting requirements for the development of a mitigation plan in the event that the operator is not able to demonstrate revegetation success during the phase III responsibility period. The proposed regulations are not inconsistent with and are no less effective than the Federal regulations. Therefore, we are approving them.

D. Reclamation Phase III Revegetation Success Standards for Post-Mining Land Use of Wildlife Habitat (Policy Document)

Louisiana submitted revegetation success guidelines in a policy document that describe the standards and procedures for determining revegetation success on wildlife habitat. The Federal regulations at 30 CFR 816.116(a)(1) require that each regulatory authority select revegetation success standards and statistically valid sampling techniques for measuring revegetation success and include them in its approved regulatory program. Louisiana developed its revegetation success guidelines for wildlife habitat to satisfy this requirement. The guidelines for wildlife habitat include revegetation success standards and statistically valid sampling techniques for measuring revegetation success of reclaimed wildlife habitat in accordance with Louisiana's counterpart to 30 CFR 816.116. Louisiana's standards, criteria, and parameters for revegetation success on wildlife habitat reflect the extent of vegetative cover, species composition, and soil stabilization required in the Federal regulations at 30 CFR 816.111. As required by the Federal regulations at 30 CFR 816.116(a)(2) and (b), Louisiana's revegetation success standards include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover and trees and shrubs stocking and production suitable to the approved postmining land use of wildlife habitat. Louisiana's guidelines specify the procedures and techniques to be used for sampling, measuring, and analyzing vegetation parameters. Ground cover, production, and stocking suitable to the approved postmining land use of wildlife habitat is considered equal to the approved success standard when they are not less than 90 percent of the success standard. Sampling techniques for measuring success use a 90-percent statistical confidence interval. We find that use of these procedures and techniques will ensure consistent, objective collection of vegetation data.

Appendices are included in the policy document. Appendix A—Selection of Random Sampling Sites includes procedures for selecting random sampling points, a set of random numbers, and an example of how to perform a random sample locations grid overlay. Appendix B—Data Form for Measuring Ground Cover Using a Pin Method and Appendix C—Example Data Form for Sampling Circles are data forms used for recording data and calculating the results from performing ground cover measurements and tree and shrub stocking measurements, respectively. Appendix D—T-Table, provides the t-values that are used for the sample adequacy calculations. Appendix E—Example Use of Sample Adequacy Formula for Ground Cover Measurements and Appendix F—Example Use of Sample Adequacy Formula for Tree and Shrub Counts give examples of how to determine sample adequacy for ground cover and tree and shrub counts, respectively. Appendix G—Statistical Analysis on Ground Cover Measurements and Appendix H—Statistical Analysis on Tree and Shrub Stocking Measurements describe how to perform statistical analyses on the ground cover and tree and shrub stocking data, respectively, to determine if there is a statistically significant difference between the data and the success standards if the data do not meet the success standards. Appendix I—Acceptable Plant Species for Revegetation of Wildlife Habitat Land Use lists plant species that are acceptable for use on land reclaimed for wildlife habitat. Appendix J—References provides a list of reference materials. Appendix K—Measuring Ground Cover Using a Pin Method is the last appendix in the policy document. This appendix describes how to perform ground cover measurements using a metal pin or a cross-hair sighting device.

The Federal regulation at 30 CFR 816.116(a)(1) requires a regulatory authority to select and include in its

approved regulatory program standards for success and statistically valid sampling techniques for measuring success. Louisiana proposed to adopt a detailed policy illustrating the methods permittees may use to measure revegetation success for wildlife habitat. The policy document is not inconsistent with and is no less effective than the Federal regulations. Therefore, we are approving it.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment, but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Louisiana program (Administrative Record No. LA–367.04). We received comments from two Federal agencies, the FWS and the U.S. Army Corps of Engineers (Administrative Record Nos. LA–367.02 and LA–367.03, respectively).

All of the FWS comments pertained to wildlife habitat. The FWS stated that it is pleased that Louisiana is developing post-mining reclamation and revegetation success standards for wildlife habitat. The agency also made several recommendations and suggestions concerning the following topics: (1) Control of noxious plants on reclaimed sites, (2) the time frame for when to begin stocking of trees and shrubs, (3) unacceptable vegetation not approved in the permit, and (4) scientific and commons names of acceptable plant species for revegetation of wildlife habitat. In a specific comment regarding the time frame for when to begin stocking of trees and shrubs, the FWS believed that Louisiana's proposed regulations at Section 5425.B. implied that it would take five years to determine acceptable ground cover and that woody vegetation could not be planted until after this 5-year period. The FWS's concern was that because it takes many years for tree species to reach maturity it believed that an effort should be made to plant woody vegetation as soon as possible. Louisiana's proposed regulations at Section 5425.B. do not require delaying the planting of trees and shrubs until after the determination of successful ground cover is made. Therefore, woody vegetation can be planted before this determination is made thereby resolving any concerns the FWS may have regarding this matter. On January 25, 2002 (Administrative Record No. LA–367.06), we forwarded the FWS's comments to Louisiana. By telephone, the State informed us that it would have to study the comments before responding to them (Administrative Record No. LA–367.08). In a letter dated June 11, 2002 (Administrative Record No. LA–367.05), we received Louisiana's response to the FWS comments. Louisiana stated that it felt that its proposed revegetation success standards are consistent with SMCRA and no less effective than the Federal surface mining regulations. As stated in III. OSM's Findings, we find that Louisiana's proposed amendment is no less effective than the Federal regulations. Therefore, we are approving it.

The U.S. Army Corps of Engineers stated in a letter we received on November 19, 2001, that it found Louisiana's proposed amendment satisfactory (Administrative Record No. LA–367.03).

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from the EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Louisiana proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask the EPA to concur on the amendment.

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. LA–367.04). The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On October 16, 2001, we requested comments on Louisiana's amendment (Administrative Record No. LA–367.04), but neither responded to our request.

V. OSM's Decision

Based on the above findings, we approve the amendment as submitted by Louisiana on October 2, 2001, with the provision that they be fully promulgated in identical form to the regulations submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 918, which codify decisions concerning the Louisiana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

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

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws

regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

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

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

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior 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.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 918

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 10, 2002.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 918 is amended as set forth below:

PART 918—LOUISIANA

1. The authority citation for Part 918 continues to read as follows:

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

2. Section 918.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 918.15 Approval of Louisiana regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publicationl	Citation/description
*	*	*
October 2, 2001	November 15, 2002	LAC Sections 5423.B.1.e. and 8.a.; 5424; 5425; and policy document titled, ''Reclamation Phase III Revegetation Success Standards for Post-Mining Land Use of Wildlife Habitat.

[FR Doc. 02–28799 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD08–02–030]

RIN 2115–AE47

Drawbridge Operation Regulation; Portage Bayou, Pass Christian, MS

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the draw of the Portage bascule bridge across Portage Bayou, mile 2.0, at Pass Christian, Mississippi. The existing bridge has been removed from service and a replacement bridge will be constructed on the same alignment. Since the bridge is being removed, the regulation controlling the opening and closing of the bridge is no longer necessary.

DATES: This rule is effective November 15, 2002.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at Eighth Coast Guard District, Bridge Administration Branch, 501 Magazine Street, New Orleans, Louisiana 70130–3396, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking.

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

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. Public comment is not necessary since the bridge that the regulation governed is out of service and is being completely removed. The bridge no longer affects navigation through the area.

Good Cause for Making Rule Effective in Less Than 30 Days

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. There is no need to delay the implementation of this rule because the bridge it governs is already out of service and is being removed.

Background and Purpose

The existing bascule bridge across Portage Bayou, mile 2.0, which had previously serviced the area is in the process of being removed and no longer affects navigation. The regulation governing the operation of the pontoon bridge is found in 33 CFR 117.684. The purpose of this rule is to remove 33 CFR 117.684 from the Code of Federal Regulations since it governs a bridge that is no longer in service and is being removed.

Regulatory Evaluation

This 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, l979).

This rule removes the special regulation for a bridge that is already out of service and is being removed.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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 rule will not have a significant economic impact on a substantial number of small entities.

This rule will have no impact on any small entities because the regulation being removed applies to a bridge that has already been taken out of service and is being removed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls 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 effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect 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 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this 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 have considered the environmental impact of this rule and concluded that under figure 2–1, paragraph (32)(e), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation. This final rule only involves removal of the drawbridge operation regulation for a drawbridge that has been removed from service. It will not have any impact on the environment. 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 is amending 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 P. L. 102–587, 106 Stat. 5039.

§ 117.684 [Removed]

2. Section 117.684 is removed.

Dated: November 5, 2002.

Roy J. Casto,

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

[FR Doc. 02–28965 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD08–02–031]

RIN 2115–AE47

Drawbridge Operation Regulation; Industrial Seaway Canal, Gulfport, MS

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the draw of the Lorraine-Cowan Road Bridge across the Industrial Seaway Canal, mile 11.3, at Gulfport, Mississippi. A replacement bridge has been constructed and the existing bridge has been removed from service. Since the bridge is being removed, the regulation controlling the opening and closing of the bridge is no longer necessary.

DATES: This rule is effective November 15, 2002.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at Eighth Coast Guard District, Bridge Administration Branch, 501 Magazine Street, New Orleans, Louisiana 70130–3396, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking.

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

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. Public comment is not necessary since the bridge that the regulation governed is out of service and is being completely removed. The bridge no longer affects navigation through the area.

Good Cause for Making Rule Effective in Less Than 30 Days

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. There is no need to delay the implementation of this rule because the bridge it governs is already out of service and is being removed.

Background and Purpose

A new SR 605 bascule bridge across the Industrial Seaway Canal, mile 11.3, at Gulfport, was opened to traffic in October of 2002. The existing bascule bridge which had previously serviced the area is in the process of being removed and no longer affects navigation. The regulation governing the operation of the pontoon bridge is found in 33 CFR 117.680. The purpose of this rule is to remove 33 CFR 117.680 from the Code of Federal Regulations since it governs a bridge that is no longer in service and is being removed.

Regulatory Evaluation

This 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, l979).

This rule removes the special regulation for a bridge that is already out of service and is being removed.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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 rule will not have a significant economic impact on a substantial number of small entities.

This rule will have no impact on any small entities because the regulation being removed applies to a bridge that has already been taken out of service and is being removed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls 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 effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect 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 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this 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 have considered the environmental impact of this rule and concluded that under figure 2–1, paragraph (32)(e), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation. This final rule only involves removal of the drawbridge operation regulation for a drawbridge that has been removed from service. It will not have any impact on the environment. 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 is amending 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.

§ 117.680 [Removed]

2. Section 117.680 is removed.

Dated: November 5, 2002.

Roy J. Casto,

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

[FR Doc. 02–28964 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–01–187]

RIN 2115–AA84, AA97

Regulated Navigation Area, Safety and Security Zones; Long Island Sound Marine Inspection and Captain of the Port Zone

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule; change in effective period.

SUMMARY: The Coast Guard is extending the effective period of a regulated navigation area (RNA) and certain safety and security zones published January 4, 2002. This change will extend the effective period of the temporary final rule through March 15, 2003, allowing adequate time for informal rulemaking to develop a permanent rule. This rule will continue to regulate the conditions under which certain vessels may enter, transit or operate within the regulated navigation area and will exclude all vessels from operating within 700 yards of the Millstone Nuclear Power Plant or 100 yards of anchored Coast Guard vessels.

DATES: The amendments of §§ 165.T01–153 and 165.T01–154 in this rule are effective November 15, 2002. Sections 165.T01–153 and 165.T01–154, added at 67 FR 519 and 520, January 4, 2002, effective December 10, 2001 until June 15, 2002, and extended at 67 FR 40861, June 14, 2002 through November 15, 2002, as amended in this rule, are extended in effect through March 15, 2003.

ADDRESSES: Documents indicated in this preamble are available for inspection and copying at Waterways Management, Coast Guard Group/Marine Safety Office Long Island Sound, 120 Woodward Ave., New Haven, CT 06512, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant A. Logman, Waterways Management, Coast Guard GP/MSO Long Island Sound at (203) 468–4429.

Regulatory Information

On January 4, 2002, we published a temporary final rule (TFR) entitled ''Regulated Navigation Areas, Safety And Security Zones: Long Island Sound Marine Inspection Zone and Captain of the Port Zone'' in the **Federal Register** (67 FR 517). The effective period for that rule was from December 10, 2001 until

June 15, 2002 and it was then extended through November 15, 2002. (67 FR 40859, June 14, 2002).

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The original TFR was urgently required to prevent terrorist strikes within and adjacent to waters within the Long Island Sound Marine Inspection Zone and Captain of the Port Zone. It was anticipated that we would assess the security environment at the end of the effective period to determine whether continuing security precautions were required and, if so, propose regulations responsive to existing conditions. We have determined that the need for continued security regulations exists. The Coast Guard will utilize the extended effective period of this TFR to engage in notice and comment rulemaking to develop permanent regulations tailored to the present and foreseeable security environment within the Ports of Long Island Sound.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule were intended to prevent future terrorist attacks. The delay inherent in the NPRM process for developing a permanent rule is contrary to the public interest insofar as it may render individuals, vessels and facilities within and adjacent to the Long Island Sound Marine Inspection Zone and Captain of the Port Zone vulnerable to subversive activity, sabotage or terrorist attack. The Coast Guard will be publishing a NPRM to establish permanent safety and security zones that are temporarily effective under this rule. This revision preserves the status quo within the Port while permanent rules are developed. The present TFR has not been burdensome on the maritime public. The Coast Guard has not received written comments or suggestion to modify the scope of the existing TFR.

Background and Purpose

On September 11, 2001, two commercial aircraft were hijacked from Logan Airport in Boston, MA and flown into the World Trade Center in New York, NY inflicting catastrophic human casualties and property damage. A similar attack was conducted on the Pentagon with a plane launched from Newark, NJ on the same day. National security and intelligence officials warn that future terrorist attacks against civilian targets may be anticipated. The Coast Guard established RNA's and safety and security zones within defined areas of water as part of a comprehensive, port security regime designed to safeguard human life, vessels and waterfront facilities from sabotage or terrorist acts. As mentioned in the original TFR, these regulations were designed to provide the Captain of the Port of Long Island Sound with maximum flexibility to respond to emergent threats and dangerous conditions. When less stringent security measures are required, the Captain of the Port communicates relaxed enforcement policies to the public. As a result, the full scope of these regulations is rarely imposed. Nevertheless, the flexibility to utilize those measures permitted by the TFR and required by the circumstances is vital to ensure port security in the present environment.

A change in the effective period of this rule was published on June 14, 2002 (67 FR 40859), which extended the rule through November 15, 2002. This change was necessary in order to conduct rulemaking for the establishment of permanent safety and security zones and regulated navigation area. Additional time is necessary to ensure the public has sufficient time to participate in the rulemaking process. The Coast Guard is extending the effective date of this rule until March 15, 2003, to allow the establishment of permanent safety and security zones, and a regulated navigation area by notice and comment rulemaking.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12886, Regulatory Planning and Review, 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).

The Coast Guard expects the economic impact of this final 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 finding is based on that the sizes of the zones are the minimum necessary to provide adequate protection for the public, vessels, and vessel crews. Any vessels seeking entry into or movement within the safety and security zones must request permission from the Captain of the Port or his authorized patrol representative. Any hardships experienced by persons or vessels are considered minimal compared to the national interest protecting the public, vessels, and vessel crews from the further devastating consequences of the aforementioned acts of terrorism, and from potential future sabotage or other subversive acts, accidents, or other causes of a similar nature.

The Coast Guard will be publishing a NPRM to establish permanent safety and security zones and the regulated navigation area that are temporarily effective under this rule.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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.

For the reasons addressed under the ''Regulatory Evaluation'' above, the Coast Guard expects the impact of this regulation to be minimal and certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601–612) that this final rule will not have a significant economic impact on a substantial number of small entities. Maritime advisories will be initiated by normal methods and means and be widely available to users of the area.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant A. Logman, Waterways Management, Coast Guard GP/MSO, Long Island Sound, (203) 468–4429.

Small Businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates

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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect 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 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Environment

We have considered the environmental impact of this rule and concluded that under figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under **ADDRESSES.**

Energy Effects

We have analyzed this 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.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

2. Revise temporary § 165.T01–153(c) to read as follows:

§ 165.T01–153 Regulated Navigation Area; Long Island Sound Marine Inspection Zone and Captain of the Port Zone

* * * * *

(c) *Effective dates.* This section is effective from December 10, 2001 through March 15, 2003.

* * * * *

3. Revise temporary § 165.T01–154(b) to read as follows:

§ 165.T01–154 Safety and Security Zones; Long Island Sound Inspection Zone and Captain of the Port Zone.

* * * * *

(b) *Effective dates.* This section is effective from November 15, 2002 through March 15, 2003.

* * * * *

Dated: November 7, 2002.

V.S. Crea,

Rear Admiral, Coast Guard, Commander, First Coast Guard District.

[FR Doc. 02–29069 Filed 11–12–02; 4:49 pm]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2001–2A]

Notice of Termination

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is publishing a final rule amending its regulation governing notices of termination of transfers and licenses covering the extended renewal term. The current regulation is limited to notices of termination made under section 304(c) of the copyright law. The Sonny Bono Copyright Term Extension Act created a separate termination right under section 304(d). The final rule establishes procedures governing notices of termination of the extended renewal term under either section 304(c) or section 304(d).

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Kent Dunlap, Principal Legal Advisor for the General Counsel. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

1. Background

Under the 1909 copyright law, works copyrighted in the United States before January 1, 1978, were subject to a renewal system in which the term of copyright was divided into two consecutive terms. Under the system initially established by the 1909 legislation, the duration of copyright protection was for an original copyright term of 28 years and a renewal term of an additional 28 years. The Copyright Act of 1976, Public Law 94–554, retained the renewal system for works that were copyrighted before 1978, and were still in their first term on January 1, 1978. However, under section 304 of the copyright law, the renewal term was extended to 47 years, creating a total potential duration period of 75 years.

Besides generally extending the renewal term to 47 years, Congress also provided a termination procedure authorizing the termination of transfers or licenses during the extended portion of the renewal term. Established under section 304(c) of the copyright law, this provision created a means for authors and heirs of authors to secure the benefits of the additional 19 years added to the renewal term. In 1977, the Copyright Office adopted a regulation establishing the procedures for exercising the termination right. 37 CFR 201.10.

On October 27, 1998, President Clinton signed into law the Sonny Bono Copyright Term Extension Act, (''CTEA''), Public Law 105–298, 112 Stat. 2827 (1998). The CTEA amended the copyright law, title 17 of the United States Code, to extend for an additional 20 years the term of copyright protection in the United States. For works for which the duration of protection was determined under section 304 of title 17, the renewal term was extended from 47 years to 67 years. Like the Copyright Act of 1976, CTEA also contained a termination provision covering the newly extended portion (in this case, the last twenty years) of the extended renewal term. Established under section 304(d), this new right of termination was available only if the termination right under section 304(c) had expired by the effective date of CTEA, and if no termination had been previously exercised under section 304(c).

2. Proposed Regulation

On May 3, 2001, the Copyright Office published a proposed regulation modifying the termination regulation to include terminations made under section 304(d), in addition to terminations under section 304(c). 66 FR 22139. This was to be accomplished by making several adjustments to existing Copyright Office regulations.

Most of the changes involved 37 CFR 201.10, which governs notices of termination of transfers and licenses covering the extended renewal term. The proposed regulation added introductory text clarifying that the scope of the regulation covers terminations under either section 304(c) or section 304(d). In provisions where the existing regulation referred to section 304(c), the proposed regulation added an alternative reference to section 304(d).

The Office proposed substantive changes in only two areas. First, subsection (c)(i) of the proposed regulation provided that if the termination is made under section 304(d), the notice will provide a statement to that effect. Most of the notices of termination made under 304(d) which have been received in this Office already contained such a statement. No corresponding requirement was imposed in notices of termination issued under section 304(c) because such a requirement would have upset established legal practices in issuing notices under that section.

The second substantive change in the proposed regulation created new subsection (c)(vi), requiring that notices under section 304(d) contain a statement that termination of rights for the extended renewal term had not been previously exercised. This is a statutory requirement imposed in subsection 304(d), and including the requirement as part of the notice made it less likely that second notices of terminations would be filed.

The proposal further included a provision modifying 37 CFR 201.4(a)(v), regarding recordation of transfers and certain other documents, to include a reference to section 304(d).

3. Comments and Modifications

The Copyright Office received one comment on the proposed modification of the regulations. Professor Tyler Ochoa of Whitter Law School suggested two modifications in the content of the termination notice to make it consistent with the statute. First, he noted that since terminations cannot be made for works made for hire, notices of termination for both section 304(c) and (d) should affirmatively state that the work is not a work made for hire. Second, he pointed out that in order to be eligible to terminate under section 304(d), the termination right under section 304(c) must have expired by the effective date of the Sonny Bono Copyright Term Extension Act. Since CTEA took effect on October 27, 1998, Professor Ochoa calculated that termination under section 304(d) would only be available for works first published between January 1, 1923, and October 27, 1939. Accordingly, he asserted that notices of termination under section 304(d) should affirmatively assert that the work was originally published between these dates.

The Copyright Office has considered Professor Ochoa's comments carefully. The requirement in section 304(d) that the termination right under section 304(c) must have expired at the time CTEA took effect was not a provision reflected in the proposed regulation. We agree in principle with Professor Ochoa's comments on this point. However, we disagree with some of the details of his analysis. First, he states that the relevant dates are January 1, 1923, and October 27, 1939. In fact, although Professor Ochoa is correct in calculating that January 1, 1923, (the copyright date of the earliest works the terms of which were extended by CTEA) is the first of the two relevant dates, he appears to be a day late in his calculation of the second date. The better reading of section 304(d) is that copyright must have been secured no later than October 26, 1939. That is the last date on which copyright could have been secured for any work for which the section 304(c) termination right had already expired by October 27, 1998, the effective date of CTEA.

We calculate this date by noting that termination of a transfer or license under section 304(c) may be effected during a period of five years commencing ''fifty-six years from the date copyright was originally secured,'' 17 U.S.C. 304(c)(3), meaning that termination may be effected up to 61 years (56 + 5) after copyright was secured. However, in order to effect a termination, an author or an author's successor must serve a notice of termination ''not less than two years before'' the effective date, *i.e.*, up to 59 years (61 − 2) after copyright was secured. 17 U.S.C. 304(c)(4)(a). Therefore, the termination right will have ''expired,'' see 17 U.S.C. 304(d), 59 years after copyright was secured. See S. Rep. No. 104–315, at 22 (1996) (purpose of section 304(d) was to ''provide a revived power of termination for individual authors whose right to terminate prior transfers and licenses of copyright under section 304(c) has expired, provided the author has not previously exercised that right''). On the effective date of CTEA, October 27, 1998, an author of a work for which copyright had first been secured on October 27, 1939, could still have served an effective notice of termination under section 304(c). Therefore, there would have been no need to give that author the additional right to serve a notice of termination under section 304(d). But an author of a work for which copyright had first been secured on October 26, 1939, could not have served an effective notice of termination on October 27, 1998, because the 59-year deadline for serving a notice of termination would have expired at the end of the previous day, *i.e.*, on October 26, 1998. Hence, works for which copyright was secured between January 1, 1923, and October 26, 1939, (and for which the section 304(c) termination right was not exercised) are eligible for the section 304(d) termination right.

Second, Professor Ochoa states that the requirement is that the work was first published between the relevant dates in 1923 and 1939. In fact the requirement is somewhat broader: copyright must have been secured on or between those dates. See 17 U.S.C. 304(d)(2). Although publication with notice was the most common means of securing copyright under the Copyright Act of 1909, copyright could also be secured for certain unpublished works by registering those works with the Copyright Office. See section 11 of the 1909 Act, 17 U.S.C. 12 (repealed effective Jan. 1, 1978).

Although we agree in principle with Professor Ochoa's observation, we note that the regulation already requires that the notice of termination designate the date on which copyright was originally secured. To add to this requirement an additional statement that the copyright was secured between January 1, 1923, and October 26, 1939, would be redundant. Nevertheless, it would be useful for parties involved in a termination under section 304(d) to be aware of this requirement. For this reason, we are adding the following sentence to the introductory paragraph of § 201.10: ''a termination under section 304(d) is possible only if no termination was made under section 304(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939.''

With regard to the proposal to add a statement in the notice of termination that the work was not a work made for hire, the Copyright Office has decided not to adopt this suggestion. The regulation on notice of termination has never required that a notice of termination recite all of the statutory requirements underlying termination. The current regulation has been in effect since 1977, and no practitioner has reported a problem because the notice does not affirmatively state that the work being terminated is not a work made for hire. For this reason, the Copyright Office has decided not to disrupt settled practice in this area.

In reviewing generally the proposed regulation, the Copyright Office has also decided to adopt a number of technical corrections. In the proposed regulation, a new subsection (b)(vi) required that notices under section 304(d) contain a statement ''that termination of rights for the extended renewal term has not been previously exercised.'' This provision was intended to apply to the 19-year extended renewal term under section 304(c), rather than the 20-year extended renewal term under section 304(d). In order to clarify this matter, the language has been revised to read: ''If termination is made under section 304(d), a statement that termination of renewal term rights under section 304(c) has not been previously exercised.''

In order to give authors and practitioners sufficient time to learn of these new requirements, the effective date of these amendments to the regulation is January 1, 2003. Notices of termination served on or after January 1, 2003, must comply with the amended regulation. Of course, authors and their representatives who serve notices of termination prior to that date are encouraged, although not required, to include the information that will be required in the amended regulation.

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulation

In consideration of the foregoing, the Copyright Office is amending part 201 of 37 CFR, chapter II in the manner set forth below:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 is revised to read as follows:

Authority: 17 U.S.C. 702.

Section 201.10 also issued under 17 U.S.C. 304.

§ 201.4 [Amended]

2. In § 201.4(a)(1)(v), add ''and (d)'' after ''304(c).''

§ 201.10 [Amended]

3. Section 201.10 is amended as follows:

a. by adding introductory text before paragraph (a);

b. by redesignating paragraphs (b)(1)(i) through (v) as (b)(1)(ii) through (v) and (vii), respectively;

c. by adding new paragraphs (b)(1)(i) and (vi);

d. by removing ''paragraph (v)'' in newly redesignated paragraph (b)(1)(vii) and adding ''paragraph (vii)'' in its place; and

e. by revising paragraphs (c)(2), (d)(2), (d)(4) and (e).

The revisions and additions to § 201.10 read as follows:

§ 201.10 Notices of terminations of transfers and licenses covering extended renewal term.

This section covers notices of termination of transfers and licenses covering the extended renewal term under sections 304(c) and 304(d) of title 17, of the United States Code. A termination under section 304(d) is possible only if no termination was made under section 304(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939.''

* * * * *

(b) * * *

(1) * * *

(i) If the termination is made under section 304(d), a statement to that effect;

* * * * *

(vi) If termination is made under section 304(d), a statement that termination of renewal term rights under section 304(c) has not been previously exercised; and

* * * * *

(c) * * *

(2) In the case of a termination of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or by his or her duly authorized agent. If that author is dead, the notice shall be signed by the number and proportion of the owners of that author's termination interest required under section 304(c) or section 304(d), whichever applies, of title 17, U.S.C., or by their duly authorized agents, and shall contain a brief statement of their relationship or relationships to that author.

* * * * *

(d) * * *

(2) The service provision of either section 304(c) or section 304(d) of title 17, U.S.C., whichever applies, will be satisfied if, before the notice of termination is served, a reasonable investigation is made by the person or persons executing the notice as to the current ownership of the rights being terminated, and based on such investigation:

(i) If there is no reason to believe that such rights have been transferred by the grantee to a successor in title, the notice is served on the grantee; or

(ii) If there is reason to believe that such rights have been transferred by the grantee to a particular successor in title, the notice is served on such successor in title.

* * * * *

(4) Compliance with the provisions of paragraphs (d)(2) and (3) of this section will satisfy the service requirements of either section 304(c) or section 304(d) of title 17, U.S.C., whichever applies. However, as long as the statutory requirements have been met, the failure to comply with the regulatory provisions of paragraph (d)(2) or (d)(3) of this section will not affect the validity of the service.

(e) *Harmless errors.* (1) Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of either section 304(c) or section 304(d) of title

17, U.S.C., whichever applies, shall not render the notice invalid.

(2) Without prejudice to the general rule provided by paragraph (e)(1) of this section, errors made in giving the date or registration number referred to in paragraph (b)(1)(iii) of this section, or in complying with the provisions of paragraph (b)(1)(vii) of this section, or in describing the precise relationships under paragraph (c)(2) of this section, shall not affect the validity of the notice if the errors were made in good faith and without any intention to deceive, mislead, or conceal relevant information.

* * * * *

Dated: October 28, 2002.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 02–28920 Filed 11–14–02; 8:45 am]

BILLING CODE 1410–30–P

POSTAL SERVICE

39 CFR Part 501

Authorization To Manufacture and Distribute Postage Meters

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations for checking postage meters out of service and for handling faulty meters. The need to ensure the security of Postal Service revenues mandates these changes. The changes will clarify the responsibilities of the meter provider and improve the secure handling of faulty postage meters.

DATES: The rule is effective November 15, 2002.

FOR FURTHER INFORMATION CONTACT: Wayne Wilkerson, Manager of Postage Technology Management, at 703–292–3782, or by fax at 703–292–4050.

SUPPLEMENTARY INFORMATION: The United States Postal Service is seeking to improve the secure handling of faulty postage meters by the approved postage meter providers and to enhance the accuracy of determinations by the postage meter providers of the proper amounts of postage to be refunded from faulty postage meters. We are amending the regulations for checking postage meters out of service and for handling faulty meters to address these concerns and to align the regulations with changes to the *Domestic Mail Manual* (DMM) regarding postage meters published in the **Federal Register** on November 8, 2001 (Vol. 66, No. 217, pages 56432–56447). We have deleted references to mechanical meters from the amended section since all mechanical postage meters have been decertified since 1999 and should no longer be in service. In this final rule, the Postal Service clarifies the definition of ''faulty'' as it applies to postage meters. In the proposed rule, the manufacturer sent all faulty meters to a special, secure facility for examination to determine the additional processing required to withdraw each meter. In this final rule, the initial examination of a faulty meter occurs in the field where the manufacturer or the manufacturer's agent determines whether the faulty meter can be withdrawn in accordance with procedures for a nonfaulty meter, or needs to be handled at the special, secure facility. We are also revising the regulation to allow 7 business days to prepare and file the report on faulty meters when the meter registers cannot be read, a summary report of the appropriate redundant electronic register memory readouts cannot be retrieved, and there is no evidence of tampering. We will amend the remaining sections of CFR part 501 in the near future so that they reflect the changes in the postage meter population and changes in the DMM.

The proposed rule was published in the **Federal Register** on May 2, 2002 (Vol. 67, No. 85, pages 22025–22027), with a request for submission of comments by June 3, 2002. We received three submissions from postage meter manufacturers in response to the solicitation of public comments. The Postal Service gave thorough consideration to the comments it received, modified the proposed rule as appropriate, and now announces the adoption of the final rule.

Discussion of Comments

1. The three commenters requested clarification of the term ''faulty.''

The Postal Service clarified the definition of ''faulty'' as it applies to postage meters. Faulty meters include those that are inoperable, those that are misregistering or the registers are unreadable, those that inaccurately reflect their current status, those that show any evidence of tampering or abuse, and those for which there is information or other indication that the meter has some mechanical or electrical malfunction of any critical security component, such as any component the improper operation of which could adversely affect Postal Service revenues, or of any memory component, or that affects the accuracy of the registers or the accuracy of the value printed. The proposed rule is revised in response to these comments.

2. One commenter assumed that the requirement for manufacturers to ''(e)nsure that faulty meters are not presented to the licensing Post Office for checkout or withdrawal'' meant that nonfaulty meters could be presented to the licensing Post Office.

This assumption is incorrect. The meter licensee returns all meters to the manufacturer or the manufacturer's agent for withdrawal, as directed in DMM 57, section P030.3.13, Returning a Postage Evidencing System or PSD. The manufacturer or its agent checks nonfaulty meters out of service under § 510.23(g) and either has an approved process for withdrawal, or ensures that the meter is examined by a Postal Service employee. Faulty meters are returned to the manufacturer and handled by the manufacturer in accordance with the procedures in § 501.23(h). To clarify the withdrawal process, we deleted the paragraph referenced in this comment from the proposed rule.

3. Two commenters noted the difficulty of complying with the requirements for obtaining the licensee's signature to complete PS Form 3601–C, Postage Meter Activity Report, for faulty meters.

The Postal Service understands that as of the effective date of this rule, PS Form 3601–C does not include a specific place for the licensee's signature confirming that the information on the form is correct, as required by the proposed regulation. However, until the form is revised and widely distributed, and the inventory of old versions of the form is depleted, the manufacturer's representative should ensure that the licensee (or the licensee's approved representative) signs the form and prints his or her name clearly under items C3 and C5. The Postal Service suggests that when the licensee is unavailable, the licensee's representative or agent who is responsible for releasing the meter to the manufacturer and signing the manufacturer's paperwork should also be responsible to review and sign the Postal Service form. There is no change to the proposed rule as a result of this comment.

4. Some commenters requested more information on the reporting requirements for faulty meters. Commenters also requested additional time to submit the reports.

Postage Technology Management will notify manufacturers when there are any changes from current reporting requirements for faulty meters. The Postal Service has reviewed the request

for additional time to submit required reports and agrees that additional time should be allowed. The regulation is revised to allow 7 business days to prepare and file the report on faulty meters when the meter registers cannot be read, a summary report of the appropriate redundant electronic register memory readouts cannot be retrieved, and there is no evidence of tampering.

5. One commenter suggested that instead of requiring licensees to submit daily usage logs whenever register values cannot be read, the logs should only be required when the manufacturer is unable to obtain the systems report from the meter.

The Postal Service wants to encourage meter licensees to keep daily usage logs. Providing adequate backup for register values is the manufacturer's responsibility and the logs can provide the information when the meter is faulty. There is no change to the proposed rule as a result of this comment.

6. One commenter asked if there can be more than one dedicated secure facility for handling faulty meters that cannot be handled under the procedures used for nonfaulty meters.

A manufacturer can have multiple secure facilities for handling faulty meters that cannot be handled under the procedures used for nonfaulty meters. However, the Postal Service must inspect and approve each such facility. No change is made to the proposed rule as a result of this comment.

7. Some commenters questioned the requirement to ship faulty meters via Registered Mail service, Express Mail® service, or Priority Mail® service with Delivery Confirmation™ service.

The initial examination of a faulty meter occurs in the field where the manufacturer or the manufacturer s agent determines whether the faulty meter can be withdrawn in accordance with procedures for a nonfaulty meter, or needs special handling. However, when the registers cannot be read, or a summary report of the appropriate redundant electronic register memory readouts is not available using Postal Service-approved methods, or there is evidence of tampering, or there is some information or other indication that the meter has some mechanical or electrical malfunction that affects the accuracy of the registers or the accuracy of the value printed, the meter must be returned to the special, secure facility for processing. Shipment of these meters poses a special risk. No manufacturer has or will be granted written Postal Service approval to ship these faulty meters using means other than Registered Mail service, Express Mail service, or Priority Mail service with Delivery Confirmation service. If these meters are shipped by alternative (non-Postal Service) means, the Postal Service will not authorize payment of refunds for postage value left on the meter, since a lack of security in shipping could make the faulty meter vulnerable to tampering. However, nonfaulty meters, and faulty meters that can be withdrawn using the same procedures as for nonfaulty meters, may be shipped using alternate carriers when the manager of Postage Technology Management, Postal Service Headquarters, gives written permission to ship by another means or service, based upon an assessment of the security of the proposed alternative. No change is made to the regulation in response to these comments.

8. One of the commenters questioned the use of ''highest average daily usage'' in calculating refund amounts, especially for seasonal users, and asked that the regulation recognize other means to retrieve meter register readings.

The methods for developing other data to support the request for Postal Service approval of a refund amount are given as examples of approved approaches and are not meant to preclude the use of other approaches. No change is made to the regulation in response to this comment.

9. One of the commenters suggested the Postal Service consider a minimum hold period for faulty meters to be sure all Postal Service questions are answered.

The manufacturer should hold the faulty meter for as long as it believes necessary to respond to any questions from the Postal Service or to appeal a Postal Service decision on a postage adjustment amount. No change is made to the regulation in response to this comment.

10. Commenters asked for clarification of when the Postal Service would require the manufacturer, rather than the Postal Service, to issue the refund of any postage value said to remain in a faulty meter. One commenter suggested that the Postal Service give prior notice to the manufacturer before requiring the manufacturer to issue the refunds. The commenters also suggested alternative methods for handling refunds for postage value remaining on a faulty meter.

The Postal Service reimburses remaining postage value in a defective postage meter because the funds are Postal Service funds. Normally, the Postal Service handles the refund and processes the reimbursement for customer convenience. However, when a meter or meter model is defective, the manufacturer, rather than the Postal Service, is responsible for the defect and should be responsible for handling the refund of Postal Service funds to the customer subject to reimbursement by the Postal Service. The Postal Service may not have prior notice that a meter model was defective and susceptible to malfunctioning until it sees a pattern of excessive refund requests. Excessive defects may require resubmission of the meter model in question for additional testing to ensure that it meets all performance criteria and maintains the security of Postal Service funds. The regulation does not specify or limit the choice of payment mechanism to be used when the manufacturer issues the refund of any postage value remaining in a faulty meter. No change is made to the regulation as a result of these comments.

List of Subjects in 39 CFR Part 501

Administrative practice and procedure, Postal Service.

The Amendment

For the reasons set out in this document, the Postal Service is amending 39 CFR part 501 as follows:

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE METERS

1. The authority citation for part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605; Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); and 5 U.S.C. App. 3.

2. Revise paragraphs (g) and (h) of § 501.23 to read as follows:

§ 501.23 Distribution controls.

* * * * *

(g) Check a nonfaulty meter out of service in accordance with the procedures that the Postal Service has approved for that meter when the meter is to be removed from service for any reason. Ensure that a Postal Service employee certifies the register readings and clears the descending register when the meter is checked out of service, unless the Postal Service has approved other procedures for the specific meter model. Complete the checkout process in a timely manner and transmit the required data to the appropriate Postal Service information systems. Ensure that no employee of the meter manufacturer or any third-party changes, interferes with, or performs

any element of the Postal Service employee's established checkout and withdrawal process for any meter, unless approval for the change in procedures is granted in writing by the Postal Service.

(h) Handle faulty meters, including those that are inoperable, those that are misregistering or the registers are unreadable, those that inaccurately reflect their current status, those that show any evidence of tampering or abuse, and those for which there is information or other indication that the meter has some mechanical or electrical malfunction of any critical security component, such as any component the improper operation of which could adversely affect Postal Service revenues, or of any memory component, or that affects the accuracy of the registers or the accuracy of the value printed, as follows:

(1) Ensure that all functions required to handle faulty meters are completed in a timely manner and in accordance with Postal Service regulations and procedures.

(2) Begin the process to retrieve any faulty meter within 2 business days of being notified of a problem.

(3) Complete PS Form 3601–C, Postage Meter Activity Report, in the presence of the licensee and obtain the licensee's signature on the form confirming that the information is accurate.

(i) Include the register information on the form when the registers can be read.

(ii) Print the system report, if available for the meter, and attach the report to PS Form 3601–C when the register values cannot be read.

(iii)Have the licensee provide any original daily usage logs with PS Form 3601–C for refund calculation when the register values cannot be read.

(4) Identify and tag the meter as faulty as soon as the manufacturer or the manufacturer's agent receives it from the customer. Keep the identification tag and the PS Form 3601–C, which was completed under paragraph (h)(3) of this section, with the faulty meter until processing is completed and the meter is returned to service or is scrapped.

(5) Secure all faulty meters and maintain the integrity of the meter and of the information residing on the meter. Maintain control of the meter until processing is completed.

(6) Ensure that under no circumstance are registers on a faulty meter cleared or any funds refunded or transferred until examination and processing are completed, the Postal Service has reviewed and analyzed the manufacturer's report and determined the appropriate postage adjustment, if any, and approved refund procedures are followed.

(7) Maintain a record of the faulty meter and all changes in its custody, state, and condition (including availability of register information) from the time the meter is reported as faulty until processing is completed under paragraphs (h)(9), (12), or (14) of this section. Make the record available to the Postal Service for its review upon request.

(8) Examine each meter withdrawn for faulty operation as soon it is received from the customer to determine if the registers can be read and if there is any evidence of tampering.

(9) When the registers can be read or a summary report of the appropriate redundant electronic register memory readouts is available using Postal Service-approved methods, and there is no evidence of tampering or any problem covered by paragraph (h)(13) of this section:

(i) Check out the meter and withdraw it from service under paragraph (g) of this section.

(ii) Submit a report to the Postal Service by the 15th of each month listing all faulty meters with readable displays and no other problems received in the prior month, identifying the meter and including an explanation of the meter malfunction.

(10) Maintain a dedicated, secure facility, approved by the Postal Service, for handling faulty meters that cannot be handled under paragraph (h)(9) of this section.

(11) Ship faulty meters not handled under paragraph (h)(9) of this section directly to the secure facility described in paragraph (h)(10) of this section for processing. Ship these faulty meters via Registered Mail service, Express Mail service, or Priority Mail service with Delivery Confirmation service.

(12) If there is no evidence of tampering, if the meter registers cannot be read, and if a summary report of the appropriate redundant electronic register memory readouts cannot be retrieved:

(i) Develop other data to support the request for Postal Service approval of a postage adjustment amount, such as a manual calculation of the estimated value of the descending register based on estimated highest average daily usage, or applicable system-generated register documentation. Include the original daily usage logs maintained by the customer, if any, with the supporting data.

(ii) Furnish a report explaining the malfunction to the Postal Service within 7 days of receiving the meter. Accompany the report with a recommendation of the postage adjustment amount that includes all data developed to support the recommendation.

(iii) Maintain control of those meters that have unreadable registers and hold them in the manufacturer's dedicated, secure facility described in paragraph (h)(10) of this section until a representative of the Postal Service approves the postage adjustment amount or verifies the condition of the meter before proceeding with the meter repair or destruction.

(13) In some instances, even though the registers can be read, there is information or other indication that the meter has some mechanical or electrical malfunction that affects the accuracy of the registers or the accuracy of the value printed. Handle such meters under paragraph (h)(12) of this section.

(14) If there is evidence or suspicion of tampering:

(i) Ensure that the meter is handled in a secure manner and maintained in its original state until the Postal Service or its agent can be present during the examination.

(ii) After examination, if approved by the Postal Service or its agent, process the meter under paragraph (h)(12) of this section.

(15) Issue the refund of any postage value said to remain in a faulty meter, after Postal Service approval of the amount of the refund, when the Postal Service requires it. Request reimbursement from the Postal Service for these refunds by periodically submitting a reimbursement request letter to the Postal Service. Accompany the letter with listings and support documentation for each refund and indicate the cause of failure for each incident.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 02–28937 Filed 11–14–02; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA–079–SIPS; FRL–7408–5]

Motor Vehicle Emissions Budgets in Progress, Attainment, and Maintenance State Implementation Plans for Ozone, Carbon Monoxide, and Nitrogen Dioxide; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to limit the duration of our approvals of motor vehicle emissions budgets (''budgets'') in certain existing California state implementation plans (SIPs) that provide for progress, attainment, and maintenance of the 1-hour ozone, 8-hour carbon monoxide (CO), and annual nitrogen dioxide (NO2) national ambient air quality standards (NAAQS). Specifically, we are limiting our approvals of the existing budgets to last only until the effective date of our adequacy finding for new budgets that replace the existing approved budgets for the same pollutant, Clean Air Act (CAA) requirement, and year. The State of California will submit new budgets as part of comprehensive revisions to certain approved progress, attainment, and maintenance plans that reflect updated information and a new version of California's motor vehicle emission factor model. On the effective date of EPA's adequacy finding for a new budget, our approval of the existing budget would terminate and thus the new adequate budget would apply instead of the existing budget for transportation conformity purposes.

EFFECTIVE DATE: This rule is effective on December 16, 2002.

ADDRESSES: You can inspect copies of the docket for this action at EPA's Region 9 office during normal business hours. You can inspect copies of the SIP materials at the following locations:

U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901.

California Air Resources Board, 1001 I Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Dave Jesson, EPA Region 9, (415) 972–3957, or *Jesson.David@epa.gov*

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

I. Proposed Action

On July 16, 2002 (67 FR 46618), we proposed to limit the duration of our prior approvals of existing motor vehicle emissions budgets associated with the SIPs for the areas listed below in Table 1—California SIPs Whose Budget Approvals Are Being Modified. Under this modification, the existing budgets will be approved and apply for transportation conformity purposes only until we have found the new budgets that California submits to be adequate. The proposed action provides background information on the California SIPs, the State's request, the federal rule (40 CFR part 93) and current policies to implement the transportation conformity provisions of CAA section 176(c), and our process for determining adequacy of motor vehicle emission budgets.[1]

TABLE 1.—CALIFORNIA SIPS WHOSE BUDGET APPROVALS ARE BEING MODIFIED

Area	Pollutant	Plan	Adoption	Submittal	FR approval
Antelope Valley (SE Desert).	Ozone	Attainment Plan	9/9/94	11/15/94	1/8/97, 62 FR 1150.
			12/9/94	12/29/94	
			4/12/96	7/10/96	
Bakersfield	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Chico	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Coachella (SE Desert)	Ozone	Attainment Plan	9/9/94	11/15/94	1/8/97, 62 FR 1150.
			12/9/94	12/29/94	
			12/29/94	7/10/96	
Fresno	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Kern (SE Desert)	Ozone	Attainment Plan	12/1/94	1/28/94	1/8/97, 62 FR 1150.
Lake Tahoe—North	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Lake Tahoe—South	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Modesto	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Mojave (SE Desert)	Ozone	Attainment Plan	10/26/94	11/15/94	1/8/97, 62 FR 1150.
Monterey	Ozone	Maintenance Plan	5/25/94	7/14/94	1/17/97, 62 FR 2597.
			10/19/94	11/14/94	
Sacramento	Ozone	Attainment Plan	12/1/94	12/29/94	1/8/97, 62 FR 1150.
			12/12/94		
			12/13/94		
			12/14/94		
			12/20/94		
Sacramento	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
San Diego	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
San Francisco Bay Area	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
South Coast	Ozone	Attainment Plan	11/15/96	2/5/97	4/10/00, 65 FR 18903.
			12/10/99	2/4/00	
South Coast	NO_2	Maintenance Plan	11/15/96	2/5/97	7/24/98, 63 FR 39747.
Stockton	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Ventura	Ozone	Attainment Plan	11/8/94	11/15/94	1/8/97, 62 FR 1150.
			12/19/95	7/12/96	

Note: The Attainment plans typically also address CAA provisions relating to progress.

Our proposed action was requested by the California Air Resources Board (CARB) because the State is in the process of making comprehensive updates and enhancements to most of its air quality plans and budgets, which will include much more accurate motor vehicle emission information than existing SIPs. California wishes to replace the existing approved budgets as soon as possible so that the new budgets can be used in conformity. Normally, new budgets that replace existing budgets in approved plans cannot be used until the corresponding plans have

[1] The adequacy process is explained at 40 CFR 93.118(e)(4) and (5), and in a May 14, 1999 memo from Gay MacGregor, Director, Regional and State Programs Division, Office of Mobile Sources, entitled, ''Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision.''

been fully approved as part of the SIP. However, if approval of the existing budgets expires when we determine that the new budgets are adequate (as we proposed), the superior new budgets can be then employed in transportation conformity determinations within a few months of their submission, rather than only when the SIP is finally approved, which could take as long as 18 months.

In a June 14, 2002, letter from Mike Kenny, CARB Executive Officer, to Wayne Nastri, EPA Region 9 Regional Administrator, CARB states that the new plan revisions will benefit air quality and strengthen the SIPs by incorporating: New federally enforceable commitments and control measures; new and updated data that reflect the various emission control rules adopted since the old SIPs were developed; recent vehicle test data for cars and trucks to better represent real-world emissions; and updated vehicle registration data and activity data. The CARB letter concludes: ''Without the ability to replace existing budgets with submitted ones using the budget adequacy process, the benefits of using the updated data from the stronger, more effective SIPs would not be realized for a year or more after the SIPs are submitted, due to the SIP approval process.'' In response, we proposed to modify our approvals of the California SIPs in light of the age of the motor vehicle data in the existing SIPs and the improvements to be included in the new SIPs.

Today's final action is not intended to modify the generally applicable rules regarding when submitted budgets become effective for the purposes of transportation conformity. Rather, today's action sets forth a means to accommodate the State's request to allow for the prompt use of new more accurate budgets in California within the bounds of existing regulatory and statutory requirements.

II. Public Comments

We received three comments: one letter of support, one letter requesting clarification, and one letter opposing the proposed action. We summarize and respond to the comments below.

A. Comments From Georgia

A letter of support was submitted jointly by the Environmental Protection Division of the Georgia Department of Natural Resources, the Georgia Regional Transportation Authority, and the Atlanta Regional Commission. These agencies supported the flexibility being proposed for California and encouraged its wide application for other nonattainment and maintenance areas:

The Agencies are in complete support of the proposed EPA action, in California and elsewhere, as it will eliminate the lengthy SIP approval process currently needed to replace existing SIP budgets, and will enable a quicker, smoother transition to motor vehicle emissions budgets which more accurately reflect current conditions-with the ultimate end being improved alignment between mobile source emission estimates used in both the SIP and the transportation plan and program. By reducing the potential delay experienced before new budgets may be utilized and by reducing the associated risk to the transportation planning process, we believe that this rulemaking also provides an incentive for nonattainment and maintenance areas to revisit their approved budgets more frequently. This would improve the air quality planning process, and ultimately air quality, by causing newer and better planning assumptions to be incorporated into SIPs more often. Therefore, we encourage EPA to provide the flexibility contained in this rulemaking throughout the country, especially in those areas, such as Atlanta, where there is an active and effective interagency consultation process.

Response: We appreciate the support of the Environmental Protection Division of the Georgia Department of Natural Resources, the Georgia Regional Transportation Authority, and the Atlanta Regional Commission for this action on SIPs in California. In response to their request that we extend this flexibility to all nonattainment and maintenance areas, we can only do so under certain specific circumstances. First, a state must acknowledge that its currently approved budgets have become outdated or are deficient. Second, the state must make a commitment to update these budgets as part of a comprehensive update of its SIP. Third, a state must request that EPA limit the duration of the approval of the state's current approved SIPs. If a state meets all of these criteria, it would be appropriate to allow that state also to take advantage of this flexibility.

California has committed to undertake comprehensive updates of nearly two dozen attainment demonstrations and/or maintenance plans. Many of these plans have not been updated in the last eight years. In that time much has been learned about motor vehicle emissions and many planning assumptions have been updated. As discussed above, California has sent a letter to EPA formally requesting that we limit the duration of the State's currently approved SIPs. Therefore, California has fulfilled the criteria necessary to receive this flexibility and we believe it is now appropriate to limit our prior SIP approvals and allow new budgets that come from these revised SIPs and reflect much better information to be used for conformity after they are found adequate.

B. Comments From Miwok Indians

The following comments were submitted on behalf of the Shingle Springs Band of Miwok Indians (''Tribe'').

1. *EPA should clarify that projects from federally approved transportation plans may continue if new budgets apply.*

Response: In general, the establishment of new applicable budgets would not affect projects incorporated in approved regional transportation plans (RTPs) and transportation improvement plans (TIPs). A conformity determination remains valid even if we later, upon further analysis, find new budgets applicable. The fact that new information became available that changed the applicable budgets does not affect a prior conformity determination; a subsequent conformity determination would take the new information into account. However, whether or not a new budget applies, a project carried forward into a new RTP or TIP must be analyzed, together with all other federally supported highway and transit activities, to demonstrate that the RTP or TIP as a whole is consistent with the SIP, using the latest planning assumptions, the approved motor vehicle emissions factor model, and the currently applicable budgets. Also, regardless of which budget applies, the Metropolitan Planning Organization (MPO) may elect not to include any project in the next RTP or TIP for the area.

2. *EPA failed to include proposed regulatory language in the proposal.*

Response: We are not obligated to issue rule language in a proposed rulemaking, and generally do not do so in actions on State plans. We believe that the proposed rulemaking was clear in expressing our intended action.

C. Comments From Marc Chytilo

Marc Chytilo submitted comments on behalf of Transportation Solutions Defense and Education Fund, Communities for a Better Environment, Our Children's Earth Foundation, Earthjustice, Sierra Club, Latino Issues Forum, and Urban Habitat. Mr. Chytilo objected to the proposal for several reasons, which are summarized and discussed below.

1. *EPA's rulemaking record must disclose that ARB's proposed action is being undertaken to avoid statewide conformity issues by replacing the emissions budgets used to demonstrate attainment in currently approved SIPs with enlarged emissions budgets that have no demonstrated relationship to attainment of the NAAQS. ARB has apparently not clearly committed to review the adequacy of prior attainment demonstrations, or submit new demonstrations, as part of its current plan to develop revised MVEBs using current estimates of motor vehicle emissions.*

Response: The purpose of our action is to expedite use of new budgets based on updated planning data and models, and consistent with comprehensive new progress, attainment, and maintenance plans. We expect that the new budgets would have a demonstrated relationship to attainment and maintenance of the NAAQS, and we would not find the new budgets adequate if that were not the case. We can find the budgets adequate only if the plans meet all the criteria in § 93.118(e)(4), as discussed below in response to comment 3. In fact, we expect that the use of updated information on motor vehicle emissions, emissions of other pollutant categories, air quality data, and air quality assessments in revised plans should strengthen the relationship of the budgets to the demonstrations of attainment and maintenance in each affected area.

2. *The proposed action is inconsistent with the statute, judicial interpretations, and EPA's previous interpretations. a. CAA section 176(c) requires conformity using the EPA approved or promulgated implementation plan.*

Response: Our proposal to terminate the approval of existing budgets in certain California SIPs at the time of an adequacy finding for new budgets does not conflict with judicial interpretations or CAA section 176(c). As discussed below, our transportation conformity regulations do allow for submitted budgets to apply following our determination of adequacy but before SIP approval, under circumstances detailed in 40 CFR 93.118(e). Although the court in *Environmental Defense Fund* v. *EPA et al.*, 167 F.3d 641 (D.C. Cir. 1999) remanded 40 CFR 93.118(e)(1), the offending provision was an automatic assumption of adequacy 45 days after the SIP was submitted, unless before that date we determined that the budgets were inadequate. The court did not remand the other regulatory provisions relating to use of adequate budgets, and our proposal is entirely consistent with the our current regulations. In addition, the fourth circuit also recently found it appropriate to use submitted budgets that had been found adequate where no prior approved budget was in place. *See* 1000 *Friends of Maryland* v. *Browner*, 265 F.3d 216 (4th Cir. 2001).

Our proposal provides a mechanism for enhancing compliance with the CAA section 176(c)(1) requirement that ''[t]he determination of conformity shall be based on the most recent estimates of emissions. * * *'' Absent our proposed mechanism, transportation conformity determinations in these areas of California would need to be based on budgets and air quality plans that may have been prepared more than eight years ago until we complete comprehensive review of the air quality plans, propose rulemaking, and issue final approval of the budgets and plans. This period may take as much as 18 months from the date on which the plans and budgets were submitted. Under our proposed mechanism, transportation planning organizations must use new budgets that are based upon updated air quality plans using the most recent emissions estimates, as soon as we find these budgets to be adequate under the provisions of 40 CFR 93.118, a process that is generally completed within approximately 90 days from the submittal date.

b. *EPA's conformity regulations (40 CFR 93.118(e)) provide that submitted SIPs do not supersede budgets in approved SIPs for the period of years addressed by the approved implementation plan.*

Response: As mentioned, our proposal to terminate the approval of existing budgets in certain SIPs at the time of an adequacy finding for new budgets does not change our transportation conformity regulations, which allow for use of a budget prior to SIP approval in cases where there is no budget approved in the SIP for the same year and CAA requirement (40 CFR 93.118(e)). By terminating our approval of the existing budgets on the date that we find new, revised budgets to be adequate, we eliminate the old budgets from the approved SIP and thus allow the new budgets to apply under the conformity rules for purposes of transportation conformity. In this manner, our proposed action provides an option, within the framework of our existing regulations, for accelerating the air quality and transportation benefits of basing transportation plans and conformity determinations on California's new and improved plans and budgets, in lieu of the outdated SIPs and budgets that were developed and adopted, in many cases, eight years ago.

Before the revised budgets may go into effect, however, we must first review both the budgets and the air quality plans and make a finding that these updated budgets are adequate. Our finding must follow the procedures and criteria in 40 CFR 93.118 (e)(4) and (5), and the guidance contained in the EPA Guidance Memorandum from Gay MacGregor to Regional Air Directors entitled ''Conformity Guidance on the Implementation of the March 2, 1999 Conformity Court Decision'' (May 14, 1999). Therefore, our proposed mechanism for allowing use of these new budgets complies with the 40 CFR 93.118(e) provisions in our transportation conformity regulations, and our findings on the adequacy of the budgets in the submittals will comply with all applicable provisions of the regulations.

3. *EPA may attempt to find budgets adequate based on incomplete and/or patently inadequate SIPs, creating great uncertainty in air quality and transportation planning processes while compromising air quality and public health.*

Response: We will follow the statutory criteria and the regulatory criteria in 40 CFR 93.118(e)(4) and (5) for finding submitted budgets adequate. Among other mandated findings, we must analyze the budget and air quality plan and determine that the following provisions of 93.118(e)(4) have been met:

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins * * *; and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

If the SIPs are incomplete or inadequate or otherwise fail to meet applicable requirements in our transportation conformity regulations, we will not determine the new budgets

adequate, and the existing budgets will continue to apply. Additionally, the public will have the opportunity to comment on both California's proposed SIP revisions and on our adequacy findings. We will take all submitted comments into account when making adequacy determinations.

4. *EPA previously rejected this interpretation in the 1997 conformity regulations: ''Although EPA acknowledges that using updated budgets may be preferable, EPA does not believe that it is legal to allow a submitted SIP to supersede an approved SIP for years addressed by the approved SIP. As stated in the proposal, Section 176(c) specifically requires conformity to be demonstrated to approved SIPs.'' 62 FR 43783.*

Response: Again, our proposal would not amend the existing regulation, which provides that ''submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.'' 40 CFR 93.118(e)(1). California has requested that we approve its request to terminate the approval of the existing budgets when we find new budgets to be adequate, as a means of complying with the regulation while reducing the period of time before which the new budgets can be used for transportation planning purposes. There is nothing in the law or regulations that prohibits us from limiting the duration of a SIP approval if it is requested by the state. If our approval expires and there is no approved SIP with budgets for a given year and CAA purpose, then adequate budgets for that year and CAA purpose can apply for conformity. We agree with the State that, for the SIPs identified above in Table 1, the benefits of speeding the applicability of the new budgets are considerable. This is primarily because the existing California SIPs and budgets were developed, adopted, and approved many years ago, and new budgets and SIPs for these areas are expected to be based on comprehensively updated and enhanced information and control measures. We are taking this action because California has acknowledged the age of the information in the existing SIPs, has requested that we limit the duration of the approval, and has committed to submit new SIPs which include superior motor vehicle emissions data. We continue to agree with the State that in these cases it would provide an advantage to air quality and public health protection if the new budgets could be used once we find them to be adequate before comprehensive rulemaking on the new attainment, progress, and maintenance submittals can be completed.

5. *Budget adequacy can only be based on valid, modeled attainment demonstrations. Budgets must be demonstrated through modeling to be consistent with attainment, maintenance, and rate of progress.*

Response: We expect that the new SIP submittals will document the consistency of the budgets and the attainment, maintenance, and rate of progress plan elements, as applicable, and we cannot find them adequate if they do not. However, while ambient modeling is required for most attainment plans, it is not mandatory for maintenance plans and it is not a relevant exercise for rate of progress plans, which address CAA-specified schedules of emission reductions from a SIP emissions baseline level.

6. *The proposed rulemaking is silent on the standards that EPA will employ in determining the adequacy of control strategies achieving emissions reductions necessary to accomplish attainment. The proposed strategy is unlawful to the extent that the State relies on enforceable commitments to submit later demonstrations that the NAAQS will be attained if higher estimates of motor vehicle emissions are allowed, and subsequent enforceable measures will be submitted to make up for excess emissions resulting from enlarged budgets. EPA's reliance upon mere ''enforceable commitments'' to accomplish further emissions reductions necessary for attainment, maintenance or rate of progress is patently illegal.*

Response: The standards we use to determine whether control strategies in a submitted SIP are approvable were not explicitly set forth in the proposal. As mentioned earlier, the standards for finding budgets adequate are found in the conformity rule at 40 CFR 93.118(e)(4) and (5). Since areas can account for the air quality benefit of control measures not yet implemented but which are defined in a written commitment, it is appropriate to find a SIP adequate for conformity purposes even if it contains written commitments.

The comment raises potential SIP approval issues, which could be germane to our future rulemaking on the new plan submittals. If the commenter believes that these approval issues arise at that time, we invite the commenter to submit comments specific to the submitted SIPs during the public comment periods associated with our rulemaking on the plans. In today's action, we are simply limiting the time frame of prior approvals of budgets and are not approving any new plan submittals.

7. *EPA cannot rely on its failure to conform its regulations to the Court's remand in EDF* versus *EPA as a basis for conducting a state-specific rulemaking that attempts to avoid the national rulemaking process required by Congress for promulgation of conformity regulations.*

Response: The commenter indicates that we are taking this action to limit the approval of California's SIPs because we have not yet revised the conformity regulation to reflect the court's March 2, 1999, decision on the EDF lawsuit. However, this action is not connected to the March 2, 1999, court decision. We are taking this action in response to a request from California to revise the approval of attainment demonstrations and maintenance plans within the State based upon the age of the information in those plans. We would have to act on this request whether or not we had revised the conformity regulation in response to the court's March 2, 1999, decision.

Our action to limit the approval of California's SIPs does not make any change to the existing transportation conformity rule or to the way it is normally implemented with respect to other submitted and approved SIPs, but rather applies narrowly to the specific SIPs and circumstances as discussed above. Since we are not changing the federal conformity regulation we do not need a national rulemaking. We are acting appropriately in that we are taking a local action to amend the approval of attainment demonstrations and maintenance plans within one state at the request of that state. In any event, we are conducting rulemaking proceedings, are considering all submitted comments, and have coordinated with the U.S. Department of Transportation on this action.

We are approving California's commitment to revise the currently approved budgets; therefore, we want our approval of the current budgets to last only until adequate revised budgets are submitted pursuant to the commitment. We believe the revised budgets should apply as soon as we find them adequate; we do not believe it is appropriate to wait until we have approved the revised attainment demonstrations and/or maintenance plans. This is because we know now that once we have confirmed that the revised budgets are adequate, they will be more appropriate than the originally approved budgets for conformity purposes.

Specifically, once California has updated the currently approved SIPs to

reflect all current control measures and the latest information on vehicle emissions, the appropriate motor vehicle emissions budgets should reflect those measures and vehicle emission information. Otherwise, the budget would not be the level of motor vehicle emissions that is consistent with the attainment demonstrations or maintenance plans.

If we do not clarify our approval of the current budgets, California will revise the budgets as committed, but they would not be able to use them for conformity purposes until the SIPs were approved. This would defeat the purpose of California's commitment for the budgets to be revised quickly to incorporate updated more accurate information. In contrast, according to today's proposal, the revised budgets could be used for conformity after we have completed our adequacy review process, which we generally complete within 90 days after revisions are submitted, provided they are adequate. Today's action is consistent with the court's decision. The court held that budgets could not automatically become adequate after a certain period of time, but that we must make an affirmative finding on the adequacy of budgets after allowing the public the opportunity to comment. We will be making a finding of adequacy before the new submitted budgets are used.

8. *Enforceability issues are muddled. If revised control strategies are not fully consistent with strategies in the approved SIP, industry may be able to sue to enforce the approved SIPs' less effective control measures until the effective date of EPA's approval of revised SIPs.*

Response: We do not believe that this comment is relevant to our proposed rulemaking, which deals with the replacement of budgets, not control measures. In addition, we do not anticipate that this will be a problem since the control measures in the submitted SIPs would have to be enforceable at the State level prior to submission to EPA.

9. *Commenter is adversely affected by EPA's action, which will permit the expenditure of federal transportation funds on projects that fail to reduce air pollution emissions and thus cause or contribute to unhealthful air quality. EPA's action will promote single occupancy vehicle travel rather than creating viable alternative transportation systems.*

Response: The commenter did not explain how our proposed action would promote single occupancy vehicle travel or fail to promote alternative transportation systems. Our proposed action does not permit the expenditure of federal transportation funds. We merely propose to terminate the approval of existing budgets for specified SIPs on the effective date of our adequacy finding, if any, on new budgets. Further, we cannot find any new budgets adequate unless they are consistent with attainment, progress, and maintenance of the air quality standards. Before federal transportation funds are awarded, the MPO must make a conformity determination on its long range plan and transportation improvement program. The public has the opportunity to comment on the content of the long range plan, transportation improvement program and conformity determination. The Federal Highway Administration and Federal Transit Administration must also determine the conformity of federally funded or approved highway and transit plans, programs, and projects to the applicable budget, based on the conformity determination prepared by the metropolitan planning organization for the area prior to awarding any federal funds.

10. *The venue for any petition for review of the proposed action will lie in the U.S. Court of Appeals for the Ninth Circuit pursuant to Section 307(b).*

Response: We agree with this comment.

11. *Transportation plans, programs, and project approvals based on budgets that are subsequently determined to not be adequate as part of a judicial proceeding or SIP disapproval without a protective finding are subject to suspension, unless the project demonstrates a net air quality improvement or conformity exemption.*

Response: We are not proposing any change in the transportation conformity regulations, which set out the consequences of SIP disapproval at 40 CFR 93.120(a). However, under 40 CFR 93.118(e)(3), conformity determinations made to adequate budgets are not disturbed by subsequent findings of inadequacy.

12. *Because the proposed action deviates from each area's SIP relating to conformity criteria, procedures, and regulations, each area's SIP will need to be revised to reflect the ad hoc exemption from the national conformity rules.*

Response: The San Francisco Bay Area has approved SIP regulations for transportation conformity. The remaining responsible California air quality agencies for the areas listed in Table 1 do not have approved SIP rules addressing transportation conformity, but rather comply with the Federal transportation conformity regulations at 40 CFR part 93, Subpart A. As mentioned above, we are not changing these Federal regulations in this action. We will ensure that the responsible California agencies, if they elect to adopt a revision to their attainment, progress, or maintenance SIPs and establish replacement budgets, do so through a process consistent with the applicable transportation conformity regulations, and that this process clearly identifies that one of the consequences of adopting and submitting a revised budget would be the termination of our approval of the existing budget if and when we find the replacement budget adequate.

13. *Commenter calls upon the State to aggressively develop statewide transportation control measures for the 2003 SIPs, including the commuter choice program; state and federal tax incentives for parking cash out; promotion of regional transit systems; and smart growth.*

Response: While we support the development of transportation control measures (TCMs) as components of SIPs, including such measures as the commenter advocates, we do not consider the comment germane to our action to limit approval of past SIPs, nor do we have a position with respect to the appropriateness of statewide TCMs as opposed to regional or local TCMs.

III. Final Action

For the reasons stated above, and in the July 16, 2002, proposal, we are taking final action to limit the duration of our approvals of budgets in the existing SIPs identified in Table 1. In all other respects, the Table 1 SIPs will remain federally approved and enforceable unless and until we finalize approval of revised plans, and our limitations apply only to the extent that any new plans that we find adequate explicitly supersede the approved SIPs.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (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 regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

C. Executive Order 13132

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. Executive Order 13132 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'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely modifies certain previous SIP approval actions and imposes no additional requirements beyond those imposed by state law. The rule does not therefore alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

D. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (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.''

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, 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 in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

E. Executive Order 13211

This rule 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.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because these modifications of SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements. Therefore, because the Federal modification of certain previous SIP approvals does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

G. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the modification of certain prior SIP approvals does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today's action because it does not require the public to perform activities conducive to the use of VCS.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small

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

J. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2003. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 5, 2002.

Alexis Strauss,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the CFR is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

2. Section 52.244 is added to read as follows:

§ 52.244 Motor vehicle emissions budgets.

(a) Approval of the motor vehicle emissions budgets for the following ozone rate-of-progress and attainment SIPs will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) Antelope Valley, approved January 8, 1997;

(2) Coachella, approved January 8, 1997;

(3) Kern, approved January 8, 1997;

(4) Mojave, approved January 8, 1997;

(5) Sacramento, approved January 8, 1997;

(6) South Coast, approved April 10, 2000;

(7) Ventura, approved January 8, 1997.

(b) Approval of the motor vehicle emissions budgets for the following ozone maintenance SIP will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) Monterey, approved January 17, 1997.

(2) [Reserved].

(c) Approval of the motor vehicle emissions budgets for the following carbon monoxide maintenance SIPs will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) Bakersfield, approved March 31, 1998;

(2) Chico, approved March 31, 1998;

(3) Fresno, approved March 31, 1998;

(4) Lake Tahoe-North, approved March 31, 1998;

(5) Lake Tahoe-South, approved March 31, 1998;

(6) Modesto, approved March 31, 1998;

(7) Sacramento, approved March 31, 1998;

(8) San Diego, approved March 31, 1998;

(9) San Francisco Bay Area, approved March 31, 1998;

(10) Stockton, approved March 31, 1998.

(d) Approval of the motor vehicle emissions budgets for the following nitrogen dioxide maintenance SIP will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) South Coast, approved on July 24, 1998.

(2) [Reserved].

[FR Doc. 02–28919 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 419

[CMS–1206–CN]

RIN 0938–AL19

Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2003 Payment Rates; and Changes to Payment Suspension for Unfiled Cost Reports; Correction

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

ACTION: Correction of final rule with comment period.

SUMMARY: This document corrects errors that appeared in the final rule with comment period published in the **Federal Register** on November 1, 2002 entitled ''Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2003 Payment Rates; and Changes to Payment Suspension for Unfiled Cost Reports.'' This notice is a supplement to the November 1, 2002 final rule with comment period.

EFFECTIVE DATE: November 1, 2002.

FOR FURTHER INFORMATION CONTACT: Anita Heygster, (410) 786–0378.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 02–27548 of November 1, 2002 (67 FR 66718), we omitted addresses and instructions for submitting public comments and language that justified waiving notice and comment procedures for two specific policies. This notice is a supplement to the November 1, 2002 final rule with comment period, and sets forth our rationale for waiving the notice and comment period for certain provisions. More detail regarding this correction is provided in the Correction of Errors section below. The provisions in this correction notice are effective as if they had been included in the document published November 1, 2002. Accordingly, the corrections are effective January 1, 2003.

II. Correction of Errors

In FR Doc. 02–27548 of November 1, 2002 (67 FR 66719), make the following corrections:

1. On page 66718, at the top of the second column, immediately preceding the heading **FOR FURTHER INFORMATION CONTACT**, insert the following language:

''**ADDRESSES:** In commenting, please refer to file code CMS–1206–FC.

Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. Mail written comments (one original and two copies) to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1206–FC, P.O. Box 8018, Baltimore, MD 21244–8018.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850. (Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.) Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, call (410) 786–7197.''

2. On page 66813, at the end of the first column, insert the following section:

''XVI. Waiver of Proposed Rulemaking

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

While this final rule with comment finalizes provisions set forth in the August 9, 2002 proposed rule (67 FR 52092), the following policies were not included in that rule and are subject to comment. We are issuing APC assignments for codes that are new for 2003 as final with comment because we believe that it is necessary to avoid harm to hospitals and beneficiaries and because it is necessary to implement the requirements of the HIPAA when it becomes effective for all providers and payers in October 2003. Specifically, APC assignments for new codes are necessary for hospitals to be able to report the services they furnish and to be properly paid for them. To do otherwise would leave hospitals no other option but to report incorrect codes and to receive incorrect payments for the services that should be reported under the new codes. New HCPCS codes for the forthcoming year are not announced by the American Medical Association (with regard to the current procedural terminology, CPT portion of HCPCS) and by CMS (with regard to the alpha numeric portion of HCPCS) until September of each year for the forthcoming year. Hence, CMS is not able to include most new codes and proposed APC assignments in its annual notice of proposed rulemaking for OPPS. Where possible, we do include mid year G codes and proposed codes in the proposed rule but these represent a very limited subset of the many changes that occur in HCPCS coding each year.

Similarly, recognition of new codes for 2003 is necessary for both CMS and hospitals to comply with the requirements of HIPAA that will require all providers to use HCPCS codes no later than October 16, 2003. For CMS to not recognize HCPCS codes that are new for 2003 until 2004 would be to violate these requirements.

We are issuing the change to our policy regarding influenza and pneumococcal pneumonia vaccines as final with comment because we believe that this change in policy is necessary to protect the health of the Medicare population. As we discussed previously this notice is a supplement to the November 1, 2002 final rule with comment period. In this preamble, we have had considerable discussions in which we have been advised by providers that OPPS payment was insufficient for them to be able to guarantee that they would be able to offer these important vaccines to the Medicare patients they treat. They cited the timing of updates to the OPPS (which go into effect in January, 9 months before the start of the flu and PPV immunization season) and the volatility of the costs as a result of irregular supplies as their main concern. Each year a new vaccine is produced; the cost of the vaccine is frequently higher than the previous year's cost. Thus from September through December, providers paid under the OPPS for administering flu vaccines (which include home health agencies, which immunize many beneficiaries, homebound and otherwise) do not receive benefit of the update that will occur the following January. We believe that paying for influenza and PPV vaccines based on reasonable cost is the best way we can ensure that we maximize the potential for providers to secure the vaccine they need to immunize the Medicare population and that therefore, implementing this change as a final policy with public comment is justified.

Therefore, we find good cause to waive notice and comment procedures and to implement these policies as final with a comment period. We are providing a 60-day public comment period.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect. We can waive this procedure, however, if we find good cause that notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporate a statement of the finding and the reasons for it into the rule issued.

For the two policies addressed above in Section II., Correction of Errors, and for the reasons set forth in that section, we find it unnecessary to undertake notice and comment rulemaking. Therefore, we find good cause to waive notice and comment procedures.

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

Dated: November 6, 2002.

Ann Agnew,

Executive Secretary to the Department.

[FR Doc. 02–29075 Filed 11–14–02; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 011109274–1301–02; I.D. 101602E]

Fisheries of the Northeastern United States; Black Sea Bass Fishery; Commercial Quota Harvested for Quarter 4 Period

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS announces that the black sea bass commercial quota available in the Quarter 4 period to the coastal states from Maine through North Carolina has been harvested. Commercial vessels may not land black sea bass in these states north of 35°15.3' N. lat. for the remainder of the 2002 Quarter 4 quota period (through December 31, 2002). Regulations governing the black sea bass fishery require publication of this notification to advise the coastal states from Maine through North Carolina that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing black sea bass in these states north of 35°15.3' N. lat.

DATES: Effective 0001 hrs local time, November 20, 2002, through 2400 hrs local time, December 31, 2002.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson, Fishery Policy Analyst, at (978) 281–9279.

SUPPLEMENTARY INFORMATION: Regulations governing the black sea bass fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is allocated into four quota periods, based upon percentages of the annual quota. The Quarter 4 (October through December) commercial quota is distributed to the coastal states from Maine through North Carolina. The process to set the annual commercial quota is described in § 648.140.

The total commercial quota for black sea bass for the 2002 calendar year was initially set at 3,332,000 lb (1,511,370 kg) and then adjusted downward to 3,294,758 lb (1,494,477 kg) to account for research quota set-asides (66 FR 66351; December 26, 2001). The Quarter 4 period quota, which is equal to 12.33 percent of the annual commercial quota, is 651,374 lb (295,458 kg). The quota did not have to be adjusted to compensate for 2001 Quarter 4 landings in excess of the 2001 Quarter 4 quota. However, the 2002 Quarter 4 commercial quota was increased by 4,900 lb (2,223 kg), due to the disapproval of a research project for which quota had been set aside (67 FR 56229, September 3, 2002). The final adjusted 2002 Quarter 4 quota is 656,274 lb (297,681 kg).

The Regional Administrator, Northeast Region, NMFS (Regional Administrator) monitors the commercial black sea bass quota for each quota period using dealer reports, state data, and other available information to determine when the commercial quota has been harvested. NMFS is required to publish a notification in the **Federal Register** advising and notifying commercial vessels and dealer permit holders that, effective upon a specific date, the black sea bass commercial quota has been harvested and no commercial quota is available for landing black sea bass for the remainder of the Quarter 4 period, north of 35°15.3' N. lat. The Regional Administrator has determined, based upon dealer reports and other available information, that the black sea bass commercial quota for the 2002 Quarter 4 period has been harvested.

The regulations at § 648.4(b) provide that Federal black sea bass moratorium permit holders agree, as a condition of the permit, not to land black sea bass in any state after NMFS has published notification in the **Federal Register** stating that the commercial quota for the period has been harvested and that no commercial quota for black sea bass is available. The Regional Administrator has determined that the Quarter 4 period for black sea bass no longer has commercial quota available. Therefore, effective 0001 hrs local time, November 20, 2002, further landings of black sea bass in coastal states from Maine through North Carolina, north of 35°15.3' N. lat., by vessels holding commercial Federal fisheries permits, are prohibited through December 31, 2002. The 2003 Quarter 1 period for commercial black sea bass harvest will open on January 1, 2003. Effective November 20, 2002, federally permitted dealers are also advised that they may not purchase black sea bass from federally permitted black sea bass moratorium permit holders who land in coastal states from Maine through North Carolina, north of 35°15.3' N. lat., for the remainder of the Quarter 4 period (through December 31, 2002).

The regulations at § 648.4(b) also provide that, if the commercial black sea bass quota for a period is harvested and the coast is closed to the possession of black sea bass north of 35°15.3' N. lat., any vessel owners who hold valid commercial permits for both the black sea bass and the NMFS Southeast Region snapper-grouper fisheries may surrender their black sea bass moratorium permit by certified mail addressed to the Regional Administrator (see table 1 at § 600.502) and fish pursuant to their snapper-grouper permit, as long as fishing is conducted exclusively in waters, and landings are made, south of 35°15.3' N. lat. A moratorium permit for the black sea bass fishery that is voluntarily relinquished or surrendered will be reissued upon the receipt of the vessel owner's written request after a minimum period of 6 months from the date of cancellation.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 8, 2002.

Bruce C. Morehead,

Acting Director, Office of Sustainable FisheriesNational Marine Fisheries Service.

[FR Doc. 02–29084 Filed 11–12–02; 3:33 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 67, No. 221
Friday, November 15, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1, 60, 61, 63, 141, and 142

[Docket No. FAA–2002–12461; Notice No. 02–11]

RIN 2120–AH07

Flight Simulation Device Initial and Continuing Qualification and Use

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: This action extends the comment period for an NPRM that was published on September 25, 2002. In that document, the FAA proposed requirements to establish flight simulation device qualification requirements in a new part. This extension is a result of requests from Air Transport Association and Covington & Burling, on behalf of CAE.

DATES: Comments must be received on or before February 24, 2003.

ADDRESSES: Comments on this document should be mailed or delivered, in duplicate, to: U.S. Department of Transportation Dockets, Docket No. FAA–2002–12461, 400 Seventh Street, SW., Room Plaza 401, Washington, DC 20590. Comments may be filed and examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays, except Federal holidays. Comments also may be sent electronically to the Dockets Management System (DMS) at the following Internet address: *http://dms.dot.gov* at any time. Commenters who wish to file comments electronically should follow the instructions on the DMS Web site.

FOR FURTHER INFORMATION CONTACT: Edward Cook, National Simulator Program Staff (AFS–205), Flight Standards Service, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone (404) 305–6100.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in the NPRM, Notice No. 02–11. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the web address in the **ADDRESSES** section.

Before acting on the proposals in the NPRM, Notice No. 02–11, we will consider all comments we receive on or before the closing date. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change the proposals in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Background

On September 25, 2002, the FAA published NPRM, Notice No. 02–11, Flight Simulation Device Initial and Continuing Qualification and Use (67 FR 60284). Comments to that document were to be received on or before December 24, 2002.

By letter dated October 16, 2002, the Air Transport Association requested that the FAA extend the comment period for Notice No. 02–11 until March 31, 2003. In addition, by letter dated October 24, 2002, Covington & Burling, on behalf of CAE (a flight simulation manufacturer), requested that the FAA extend the comment period for Notice No. 02–11 until March 31, 2003. The commenters noted that the NPRM was large and that a 90-day comment ending December 24, 2002, was not sufficient in order to make substantive and comprehensive comments.

The FAA agrees that additional time for comments may be needed because of the timing of the 90-day comment period. However, the FAA believes that a 90-day extension would be excessive. Therefore, the FAA believes an additional 60 days would be adequate for these entities to provide comment to Notice No. 02–11.

Extension of Comment Period

In accordance with § 11.47 of Title 14, Code of Federal Regulations, the FAA has reviewed the requests made by Air Transport Association and Covington & Burling, on behalf of CAE, for extension of the comment period to Notice No. 02–11. The FAA has found good cause for extending the comment period for 60 days. The FAA also has determined that extension of the comment period is consistent with the public interest.

Accordingly, the comment period for Notice No. 02–11 is extended until February 24, 2003.

Issued in Washington, DC, on November 7, 2002.

Louis C. Cusimano,

Acting Director, Flight Standards Service.

[FR Doc. 02–29067 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–CE–63–AD]

RIN 2120–AA64

Airworthiness Directives; Robert E. Rust Models DeHavilland DH.C1 Chipmunk 21, 22, and 22A Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain Robert E. Rust (R.E. Rust) Models DeHavilland

DH.C1 Chipmunk 21, 22, and 22A airplanes. This proposed AD would require you to inspect the fuselage to determine if a steel fuselage center-section tie bar fitted with bushings in the end lug bolt holes is installed. If this bushed steel fuselage center-section tie bar is installed, this proposed AD would decrease the safe life limit. This proposed AD is the result of reports that certain replacement steel fuselage center-section tie bars installed on the affected airplanes could fail before the originally published safe life limit. The actions specified by this proposed AD are intended to prevent early failure of these bushed steel fuselage center-section tie bars, which could result in reduced structural integrity of the wings. Such a condition could lead to loss of control of the airplane.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before January 22, 2003.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–CE–63–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. 2000–CE–63–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 DeHavilland Support Limited, Duxford Airfield, Bldg. 213, Cambridgeshire, CB2 4QR, United Kingdom, telephone: +44 1223 830090, facsimile: +44 1223 830085, e-mail: *info@dhsupport.com.* You may also view this information at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Cindy Lorenzen, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia; telephone: (770) 703–6078; facsimile: (770) 703–6097.

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. 2000–CE–63–AD.'' We will date stamp and mail the postcard back to you.

Discussion

What Events Have Caused This Proposed AD?

The FAA has received reports that an unsafe condition may exist on certain R.E. Rust Models DeHavilland DH.C1 Chipmunk 21, 22, and 22A airplanes. After a review of several of these airplanes, we have determined that steel fuselage center-section tie bars, part number RD.C1.FS.107, are being installed as replacements parts. Some of these part numbers have been fitted with bushings in the end lugs to cover scored or oversized holes.

The use of bushings in the end of the lugs on these parts severely reduces the safe life limit. The original safe life limit established for the steel fuselage center-section tie bar was 30,000 fatigue hours. Fatigue hours are hours time-in-service multiplied by the role factor (operational use).

What Are the Consequences If the Condition Is Not Corrected?

This condition, if not corrected, could result in failure of the steel fuselage center-section tie bar. Such failure could lead to loss of control of the airplane.

Is There Service Information That Applies to This Subject?

British Aerospace (now DeHavilland Support Limited) has issued Mandatory Technical News Sheet No. 175, Issue: 1, dated August 1, 1985 and Mandatory Technical News Sheet No. 138, Issue 5, dated August 1, 1985.

What Are the Provisions of This Service Information?

These Technical News Sheets include procedures for inspecting the steel fuselage center-section tie bar to determine if the bolt holes in the lug have bushings and procedures for calculating fatigue hours.

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 R.E. Rust Models DeHavilland DH.C1 Chipmunk 21, 22, and 22A airplanes of the same type design;

—The actions specified in the previously-referenced service information should be accomplished on the affected airplanes; and

—AD action should be taken in order to correct this unsafe condition.

What Would This Proposed AD Require?

This proposed AD would require you to check the airplane logbook to determine if a steel fuselage center-section tie bar, part number RD.C1.FS.107, is installed on the airplane. If this part number is installed, this proposed AD would require you to inspect the end lugs to determine if bushings are installed in the bolt holes. If bushings are present, this proposed AD would also reduce the safe life of that part from 30,000 fatigue hours to 16, 000 fatigue hours.

Cost Impact

How Many Airplanes Would This Proposed AD Impact?

We estimate that this proposed AD affects 54 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
12 workhours × $60 per hour = $720	No parts required	$720	$720 × 54 = $38,880

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

Labor cost	Parts cost	Total cost per airplane
80 workhours × $60 per hour = $4,800	$2,250	$4,800 + $2,250 = $7,050

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 adding a new airworthiness directive (AD) to read as follows:

Robert E. Rust: Docket No. 2000–CE–63–AD.

(a) *What airplanes are affected by this AD?* This AD affects R.E. Rust Models DeHavilland DH.C1 Chipmunk 21, 22, and 22A airplanes, serial numbers C1–001 through C1–1014, that are type certificated in any category.

Note 1: We recommend all owners/operators of DeHavilland DH.C1 Chipmunk 21, 22, and 22A airplanes, serial numbers C1–001 through C1–1014, with experimental airworthiness certificates comply with the actions required in this AD.

(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 prevent failure of the steel fuselage center-section tie bar prior to the originally published safe life, which could result in reduced structural integrity of the wings. Such a condition could lead to loss of control of the airplane. Steel fuselage center-section tie bars fitted with bushings in the end lug bolt holes have a reduced safe life of 16,000 fatigue hours.

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

Actions	Compliance	Procedures
(1) Check the airplane logbook to determine if a steel fuselage center-section tie bar, part number (P/N) RD.C1.FS.107, is installed. Initial steel tie bar fitments were done under cover of Repair Drawings R.C1.FS.191 and RD.C1.FS.106. Later these drawings were included in Modification H.288 so fitment may be logged under either.	Upon accumulating 16,000 fatigue hours or within the next 100 hours time-in-service (TIS) after the effective date of this AD, whichever occurs later.	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may check the airplane logbook. Calculate fatigue hours by multiplying the TIS by the role factor in accordance with British Aerospace Mandatory Technical News Sheet Series: Chipmunk (C1), No. 138, Issue: 5, dated August 1, 1985.
(2) If, by checking the airplane logbook, you can positively determine that a steel fuselage center-section tie bar, P/N RD.C1.FS.107, is not installed: (i) you must make an entry into the aircraft records that shows compliance with paragraphs (d)(1) and (d)(2) of this AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9); and (ii) continue to comply with the published life limits of the installed tie bar.	Not applicable	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may check the airplane logbook.

Actions	Compliance	Procedures
(3) If, by checking the airplane logbook, you determine that a steel fuselage center-section tie bar, P/N RD.C1.FS.107, is installed, or cannot positively show that one is not installed: (i) inspect the lug bolt holes to determine if bushings have been installed; (ii) if bushings have been installed, the safe life limit for that part is now 16,000 fatigue hours; (iii) if bushing have not been installed, the safe life limit for that part remains at 30,000 fatigue hours; and (iv) make an entry into the aircraft records that shows compliance with this portion of the AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).	Prior to further flight after the logbook check required in paragraph (d)(1) of this AD.	In accordance with British Aerospace Mandatory Technical News Sheet No. 175, Issue 1, dated August 1, 1985.
(4) The following are the safe life limit for steel fuselage center-section tie bars, P/N RD.C1.FS.107: (i) If fitted with bushings in the end lug bolt holes: 16,000 fatigue hours; and (ii) If not fitted with bushings in the end lug bolt holes: 30,000 fatigue hours.	As of the effective date of this AD.	Not applicable.

(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 Manager, Atlanta 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, Atlanta ACO.

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 Cindy Lorenzen, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia; telephone: (770) 703–6078; facsimile: (770) 703–6097.

(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 DeHavilland Support Limited, Duxford Airfield, Bldg. 213, Cambridgeshire, CB2 4QR, United Kingdom, telephone: +44 1223 830090, facsimile: +44 1223 830085, e-mail: info@dhsupport.com. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on November 6, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–28999 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–27–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration (FAA) proposes to adopt a new airworthiness directive (AD) that is applicable to Pratt & Whitney JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR turbofan engines. This proposal would require removal from service of certain part number (P/N) 3rd–4th and 4th–5th stage compressor rotor spacer assemblies and incorporation of a new tierod retention configuration. This proposal is prompted by two reports of uncontained failure of JT8D turbofan engines, caused by turbine rotor overspeed resulting from first and second stage fan section separation from the low pressure compressor (LPC). The actions specified by the proposed AD are intended to prevent first and second stage fan section separation from the LPC, resulting in turbine rotor overspeed, uncontained engine failure, and damage to the airplane.

DATES: Comments must be received by January 14, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–27–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''*9-ane-adcomment@faa.gov*''. Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in the proposed rule may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503. This information may be examined, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace

Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action 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 comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NE–27–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–27–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

The FAA has received two reports of turbine rotor overspeed resulting in uncontained engine failure on JT8D turbofan engines. The overspeeds resulted from separation of the first and second stage fan section from the rear stages of the LPC. The separations resulted from LPC tierod fractures, which were caused by fretting due to spacer-to-disk snap diameter looseness. The manufacturer has determined that incorporating a tighter snap diameter fit by installing new design or modified parts and incorporating increased sleeve-to-tierod clearances will reduce the number of tierod fractures due to fatigue initiated by fretting. Installation of the new tierod retention configuration will reduce the likelihood of a single tierod fracture damaging the remaining tierods. This condition, if not corrected, could result in a first and second stage fan section separation from the LPC, uncontained engine failure, and damage to the airplane.

Manufacturer's Service Information

The FAA has reviewed and approved the technical contents of Pratt & Whitney Service Bulletin (SB) No. JT8D 6429, dated August 23, 2002, that describes procedures for incorporating a new tierod retention configuration. Pratt & Whitney SB's No. 5409, No. SB 5716, and No. SB No. 5734 are referenced in this proposal because they provide information on modification of the parts requiring removal to make them serviceable.

FAA's Determination of an Unsafe Condition and Proposed Actions

Since an unsafe condition has been identified that is likely to exist or develop on other JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR turbofan engines of the same type design that are used on airplanes registered in the United States, the proposed AD would require at the next accessibility:

- Removing from service of 3rd–4th stage compressor rotor spacer assemblies part numbers (P/N's) 479927, 522194, 583385, 656814, 656815, 660649, 660655, 716851, 716853, 716854, 762140, 762145, 762271, 762468, 789554, and 789752 and replacement with a serviceable part.
- Removing from service of 4th–5th stage compressor rotor spacer assemblies P/N's 479929, 522196, 656816, 656817, 660650, 660656, 716855, 762138, and 762142 and replacement with a serviceable part.
- Removing from service 4th-5th stage compressor rotor spacer assemblies P/N 628778 that do not incorporate SB 5409 and replacement with a serviceable part.
- Incorporating a new tierod retention configuration in accordance with the service bulletin described previously.

Economic Analysis

There are approximately 4,180 engines of the affected design in the worldwide fleet. The FAA estimates that 1,800 engines installed on aircraft of U.S. registry would be affected by this proposed AD. The FAA also estimates that it would take approximately 41 work hours per engine to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $3,600 per engine. Based on these figures, the total cost of the proposed AD to U.S. operators is estimated to be $10,908,000.

Regulatory Analysis

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because it 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Pratt & Whitney: Docket No. 2002–NE–27–AD.

Applicability: This airworthiness directive (AD) is applicable to Pratt & Whitney JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR turbofan engines. These engines are installed on, but

not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes.

Note 1: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines 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: Compliance with this AD is required as indicated, unless already done.

To prevent first and second stage fan section separation from the low pressure compressor (LPC), resulting in turbine rotor overspeed, uncontained engine failure, and damage to the airplane, do the following:

(a) At the next accessibility, do the following:

(1) Remove from service 3rd–4th stage compressor rotor spacer assemblies part numbers (P/N's) 479927, 522194, 583385, 656814, 656815, 660649, 660655, 716851, 716853, 716854, 762140, 762145, 762271, 762468, 789554, and 789752 and replace with a serviceable part.

(2) Remove from service 4th–5th stage compressor rotor spacer assemblies P/N's 479929, 522196, 656816, 656817, 660650, 660656, 716855, 762138, and 762142 and replace with a serviceable part.

(3) Remove from service 4th–5th stage compressor rotor spacer assemblies P/N's 628778 that do not incorporate SB 5409, and replace with a serviceable part.

Note 2: Information on modifying parts listed in paragraphs (a)(1), (a)(2), and (a)(3) of this AD into servicable parts is contained in Pratt & Whitney (PW) SB's No. 5409, No. SB 5716, and No. SB No. 5734.

(4) Incorporate new tierods, retaining rings, 2nd stage compressor air seal or spacer assembly, flat washers and tierod nuts in the LPC in accordance with the Accomplishment Instructions of PW SB JT8D 6429, dated August 23, 2002.

(b) After the effective date of this AD, do not install 3rd–4th or 4th–5th stage compressor rotor spacer assemblies listed in paragraphs (a)(1), (a)(2), and (a)(3) of this AD into any engine.

Definition

(c) For the purpose of this AD, accessibility means removal of the LPC from the engine and disassembly that provides piece-part exposure to the parts listed in paragraph (a) of this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office (ECO). Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ECO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the ECO.

Special Flight Permits

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

Issued in Burlington, Massachusetts, on November 8, 2002.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–29002 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–43–AD]

RIN 2120–AA64

Airworthiness Directives; SOCATA—Groupe AEROSPATIALE Models TB 9, TB 10, TB 20, TB 21, and TB 200 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to all SOCATA—Groupe AEROSPATIALE (Socata) Models TB 9, TB 10, TB 20, TB 21, and TB 200 airplanes. This proposed AD would require you to inspect the aileron control gimbal joint for correct alignment and correct operation, and replace any misaligned or defective gimbal joint. This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified by this proposed AD are intended to prevent failure of the aileron control gimbal joint. Such failure could lead to loss of control of the airplane.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before January 3, 2003.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–43–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 1 electronically must contain ''Docket No. 2002–CE–43–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 SOCATA Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930—F65009 Tarbes Cedex, France; telephone: 011 33 5 62 41 73 00; facsimile: 011 33 5 62 41 76 54; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 893–1400; facsimile: (954) 964–4141. You may also view this information at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

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–43–AD.'' We will date stamp and mail the postcard back to you.

Discussion

What Events Have Caused This Proposed AD?

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified FAA that an unsafe condition may exist on all Socata Models TB 9, TB 10, TB 20, TB 21, and TB 200 airplanes. The DGAC reported an incident involving a Model TB 9 airplane. During flight, the pilot experienced loss of aileron control. Loss of aileron control resulted because the gimbal joint became disconnected from the aileron.

The gimbal joint became disconnected from the aileron because the safety pin broke. The cause of the safety pin breaking is being investigated by the manufacturer. The result of the investigation may result in a future design change.

What Are the Consequences if the Condition Is Not Corrected?

This condition, if not corrected, could result in failure of the aileron control gimbal joint. Such failure could lead to loss of control of the airplane.

Is There Service Information That Applies to This Subject?

Socata has issued TB Aircraft Mandatory Service Bulletin SB 10–130 27, dated April, 2002.

What Are the Provisions of This Service Information?

The service bulletin includes procedures for:

—Repetitively inspecting the aileron control gimbal joint for correct alignment and correct operation; and
—Replacing misaligned or defective gimbal joints.

What Action Did the DGAC Take?

The DGAC classified this service bulletin as mandatory and issued French AD 2002–225(A), dated May 15, 2002, in order to ensure the continued airworthiness of these airplanes in France.

Was This in Accordance With the Bilateral Airworthiness Agreement?

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Pursuant to this bilateral airworthiness agreement, the DGAC has kept FAA informed of the situation described above.

The FAA's Determination and an Explanation of the Provisions of This Proposed AD What Has FAA Decided?

The FAA has examined the findings of the DGAC; reviewed all available information, including the service information referenced above; and determined that:

—The unsafe condition referenced in this document exists or could develop on other Socata Models TB 9, TB 10, TB 20, TB 21, and TB 200 airplanes of the same type design that are on the U.S. registry;
—The actions specified in the previously-referenced service information should be accomplished on the affected airplanes; and
—AD action should be taken in order to correct this unsafe condition.

What Would This Proposed AD Require?

This proposed AD would require you to incorporate the actions in the previously-referenced service bulletin.

Is There a Modification I Can Incorporate Instead of Repetitively Inspecting the Aileron Control Gimbal Joint?

The FAA has determined that long-term continued operational safety would be better assured by design changes that remove the source of the problem rather than by repetitive inspections or other special procedures. With this in mind, FAA will continue to work with Socata in collecting information and in performing fatigue analysis to determine whether a future design change may be necessary.

Cost Impact

How Many Airplanes Would This Proposed AD Impact?

We estimate that this proposed AD affects 346 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 initial inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhour × $60 per hour = $120	No parts required for the inspection	$120	$120 × 346 = $41,520.

The FAA has no method of determining the number of repetitive inspections each owner/operator would incur over the life of each of the affected airplanes so the cost impact is based on the initial inspection.

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

Labor cost	Parts cost	Total cost per airplane
6 workhours × $60 per hour = $360	$469	$360 + $469 = $829.

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 adding a new airworthiness directive (AD) to read as follows:

SOCATA—Groupe AEROSPATIALE: Docket No. 2002–CE–43–AD

(a) *What airplanes are affected by this AD?* This AD affects Models TB 9, TB 10, TB 20, TB 21, and TB 200 airplanes, all serial numbers, 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 prevent failure of the aileron control gimbal joint. 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 control gimbal joint for correct alignment and correct operation.	Upon accumulating 300 hours time-in-service (TIS) on the aileron control gimbal joint or within the next 30 hours TIS after the effective date of this AD, whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 100 hours TIS.	In accordance with the Accomplishment Instructions in Socata TB Aircraft Mandatory Service Bulletin SB 10–130 27, dated April 2002.
(2) Replace misaligned or defective gimbal joints during any inspection required in paragraph (d)(1) of this AD.	Prior to further flight after the inspection where a misaligned or defective gimbal joint was found. The inspection requirements of paragraph (d)(1) start over after each replacement.	In accordance with the Accomplishment Instructions in Socata TB Aircraft Mandatory Service Bulletin SB 10–130 27, dated April 2002, and the applicable maintenance manual.

(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 Manager, Standards Office, 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 Manager, Standards Office.

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 Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; 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 §§ 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 SOCATA Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930–F65009 Tarbes Cedex, France; telephone: 011 33 5 62 41 73 00; facsimile: 011 33 5 62 41 76 54; or the Product Support Manager, SOCATA Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 893–1400; facsimile: (954) 964–4141. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Note 2: The subject of this AD is addressed in French AD 2002–225(A), dated May 15, 2002.

Issued in Kansas City, Missouri, on November 8, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–29004 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–240–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. This proposal would require installing speedbrake limitation placards in the flight compartment; and revising the Limitations Section of the Airplane Flight Manual to ensure the flightcrew is advised not to extend the speedbrake lever beyond the flight detent. For certain airplanes, this proposal would require modifying the elevator and elevator tab assembly. This action is necessary to prevent severe vibration of the elevator and elevator tab assembly, which could result in severe damage to the horizontal stabilizer, followed by possible loss of the elevator tab and consequent loss of controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 30, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–240–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002-NM–240-AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Nancy H. Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2028; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002-NM–240-AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–240–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received several reports of excessive in-flight vibrations of the elevator and elevator tab on certain Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. The FAA responded to these reports by issuing several rulemaking actions (listed below). These actions were identified as interim action until a modification for the elevator and elevator tab assemblies was developed, approved, and available. The intent of such a modification is to reduce the reliance on inspections to assure the continued airworthiness of the affected airplanes and to relieve certain significant operational restrictions imposed on the affected airplanes. The manufacturer now has developed such a modification, and the FAA has determined that further rulemaking action is indeed necessary; this proposed AD follows from that determination.

The elevator and elevator tab are susceptible to excessive vibration and, under certain conditions, limit-cycle flutter. These vibration events have been attributed to loose or missing components, excessive wear, or excessive freeplay of the tab. Elevator tab vibrations following deployment of the speedbrakes can result in wear to the elevator tab hinges and components of the elevator tab control system. Such wear can cause the elevator tab assemblies to become loose. Continued exposure to spoiler buffeting can cause excessive wear to the elevator tab components. Continued operation of these airplanes in such conditions could result in severe damage to the horizontal stabilizer, followed by possible loss of the elevator tab and consequent loss of controllability of the airplane.

Terminating Action for Related Rulemaking

The requirements of this AD are intended to be terminating action for the following ADs:

- AD 99–15–09, amendment 39–11229 (64 FR 40514, July 27, 1999), was issued on July 13, 1999, and is applicable to certain Boeing Model 737–600 series airplanes. That AD requires revising the Airplane Flight Manual (AFM) to prohibit operation of the airplane under certain conditions; repetitive inspections of the tab mast fittings of the elevator tab assemblies to detect cracking; an elevator tab freeplay check; and corrective actions, if necessary. That AD also requires installing an additional fastener on the elevator tab mast fitting, which terminates the AFM revision and

extends certain repetitive inspections. That AD also requires replacement of the elevator tab mast fitting with a new, improved fitting, which terminates the required actions.

• AD 99–18–01, amendment 39–11267 (64 FR 46259, August 25, 1999), was issued on August 18, 1999, and is applicable to certain Boeing Model 737–700 and –800 series airplanes. That AD supersedes AD 99–13–51, amendment 39–11213 (64 FR 34976, June 30, 1999), to continue to require revising the AFM to prohibit operation of the airplane under certain conditions; repetitive inspections of the tab mast fitting of the elevator tab assemblies to detect cracking; an elevator tab freeplay check; and corrective actions, if necessary. AD 99–18–01 also continues to provide for optional terminating action only for certain repetitive inspections; and installing an additional fastener on the elevator tab mast fitting, which terminates the AFM revision and extends certain repetitive inspection intervals.

• AD 2001–08–09, amendment 39–12186 (66 FR 20194, April 20, 2001), was issued on April 13, 2001, and is applicable to certain Boeing Model 737–600, –700, –800, and –700C series airplanes. That AD supersedes AD 2001–04–08, amendment 39–12127 (66 FR 13229, March 5, 2001), to continue to require initial and repetitive inspections of the elevator tab assembly to detect any damage or discrepancy; and corrective actions, if necessary. AD 2001–08–09 also clarifies the applicability and certain requirements of AD 2001–04–08.

• AD 2001–09–51, amendment 39–12251 (66 FR 31141, June 11, 2001), was issued on May 25, 2001, and is applicable to certain Boeing Model 737–600, –700, –700C, and –800 series airplanes. That AD requires inspection of the small jam nut on the elevator tab control rods to detect inspection putty and to determine its condition; a torque check of the small and large jam nuts on the tab control rod, if necessary; and corrective actions, as applicable. For certain airplanes, that AD also requires a one-time inspection for torque of the small and large jam nuts on the tab control rods; and corrective actions, as applicable.

• AD 2001–12–51, amendment 39–12294 (66 FR 34098, June 27, 2001), was issued on June 20, 2001, and is applicable to all Boeing Model 737–800 series airplanes. That AD requires revising the AFM to prohibit operating the airplane at speeds in excess of 300 knots indicated airspeed (KIAS) with speedbrakes extended. That AD also provides for optional terminating action for the AFM revision.

• AD 2001–14–05, amendment 39–12315 (66 FR 36145, July 12, 2001), was issued on July 2, 2001, and is applicable to all Boeing Model 737–600, –700, –700C, and –800 series airplanes. That AD prohibits installation of repairs of the elevator tab using previously approved repair procedures.

• AD 2002–08–52, amendment 39–12727 (67 FR 20626, April 26, 2002), was issued on April 19, 2002, and is applicable to all Boeing Model 737–600, –700, and –700C series airplanes. That AD requires revising the AFM to ensure that the flightcrew is advised of the potential hazard associated with extending the speedbrakes at speeds in excess of 300 KIAS. That AD also provides for optional modification or retrofit of the elevator tab assembly.

• AD 2002–08–20, amendment 39–12732 (67 FR 20628, April 26, 2002), was issued on April 19, 2002, and is applicable to all Boeing Model 737–600, –700, –700C, and 800 series airplanes. That AD requires inspecting the airplane following any suspected limit cycle oscillation (LCO) of the elevator tab; and revising the AFM to limit airspeeds under certain conditions and to provide the flight crew with information regarding elevator tab LCO. That AD also requires repetitive cleaning of the elevator tab and a one-time cleaning of the elevator balance bays. That AD provides for the option to repetitively clean the elevator tab and balance bays following every deicing/anti-icing of the horizontal stabilizer, which would temporarily allow airspeeds exceeding those limited by the AFM revision. For certain airplanes, that AD requires trimming the elevator balance panel seals, which will terminate the optional repetitive cleaning procedures for the balance bays.

Related AD

AD 2001–23–01, amendment 39–12498 (66 FR 56989, November 14, 2001), was issued on November 5, 2001, and is applicable to certain Boeing Model 737–600, –700, and –800 series airplanes. That AD supersedes AD 2001–06–08, amendment 39–12155 (66 FR 16116, March 23, 2001), to continue to require repetitive inspections of certain elevator hinge plates, and corrective action, if necessary. That AD also requires accomplishment of the previously optional replacement of the elevator hinge plates with new, improved hinge plates, as terminating action for the repetitive inspections. The requirements of AD 2001–23–01 are prerequisite to the requirements contained in the proposed AD.

Explanation of Relevant Service Information

We have reviewed and approved Boeing Alert Service Bulletin 737–11A1109, dated March 28, 2002, which, for certain airplanes, describes procedures for installation of a speedbrake limitation marker (placard) on the P1–1 and P3–3 panel assemblies. For Group 1 airplanes, the placard is centered directly over the Captain's and the First Officer's clocks; for Group 2 airplanes, the placard is centered directly over the Captain's clock, and directly under the First Officer's clock.

We also have reviewed and approved Boeing Alert Service Bulletin 737–55A1080, dated September 19, 2002, which describes procedures for modification of the elevator and elevator tab assembly. The modification includes installation of a new clevis fitting and a new tab mechanism on the horizontal stabilizer and, for certain airplanes, examination of the hinge plates on the stabilizer trailing edge to make sure the specified hinges are installed. The modification also includes changes to the seals in the balance bays and installation of new elevators and tab assemblies, followed by adjustments and tests of the new installation.

Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Differences Between Proposed AD and Service Information

Boeing Alert Service Bulletin 737–11A1109

Although the service bulletin recommends accomplishing the installation of the placards ''at the first maintenance period when material and manpower are available,'' we have determined that such an imprecise compliance time would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for the installation in this proposed AD, we considered not only the manufacturer's recommendation, but the degree of

urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the modifications. In light of all of these factors, we find a compliance time of 90 days for completing the required installation to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Additionally, the service bulletin does not recommend a corresponding change to the Limitations Section of the AFM to reflect the speedbrake limitation on the placards; however, this proposed AD requires that, for certain airplanes, such a change be made within 90 days to instruct the flightcrew not to extend the speedbrake lever beyond the flight detent in flight.

Boeing Alert Service Bulletin 737–55A1080

The service bulletin specifies accomplishment of certain actions required by this proposed AD in accordance with either the Boeing 737 Airplane Maintenance Manual (AMM) or an ''operator's equivalent procedure.'' However, this proposed AD requires that the actions required by those paragraphs be accomplished in accordance with the procedures specified in the Boeing 737 AMM. ''Operators' equivalent procedures'' may be used only if approved as an alternative method of compliance in accordance with paragraph (e) of this AD.

Cost Impact

There are approximately 1,174 airplanes of the affected design in the worldwide fleet. We estimate that 550 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 1 work hour per airplane to accomplish the proposed placard installation, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the proposed installation on U.S. operators is estimated to be $33,000, or $60 per airplane.

It would take approximately 1 work hour per airplane to accomplish the proposed AFM revision, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the proposed revision on U.S. operators is estimated to be $33,000, or $60 per airplane.

It would take approximately 88 work hours per airplane to accomplish the proposed modification of the elevator and elevator tab assembly, at an average labor rate of $60 per work hour. The FAA has been advised by Boeing that the manufacturer will provide parts for the elevator/tab retrofit, including shipping, at no cost to operators. The manufacturer will have operators ''exchange'' their existing parts for new parts to support the retrofit program. Based on this information, the cost impact of the proposed modification on U.S. operators is estimated to be $2,904,000, or $5,280 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 2002–NM–240–AD.

Applicability: Model 737–600, –700, –700C, –800, and –900 series airplanes; line numbers 1 through 1174 inclusive; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent severe vibration of the elevator and elevator tab assembly, which could result in severe damage to the horizontal stabilizer, followed by possible loss of the elevator tab and consequent loss of controllability of the airplane, accomplish the following:

Airplane Flight Manual (AFM) Revision/ Placard Installation

(a) For Model 737–600, –700, –700C, –800, and –900 series airplanes having line numbers 1 through 1043 inclusive: Within 90 days after the effective date of this AD, do the actions specified in paragraphs (a)(1) and (a)(2) of this AD.

(1) Install a speedbrake limitation placard on the P1–1 and P3–3 panel assemblies per Figure 1 or Figure 2, as applicable, of paragraph 3.B., ''Work Instructions,'' of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–11A1109, dated March 28, 2002.

(2) Revise the Limitations Section of the FAA-approved AFM to include the following statement (this may be accomplished by inserting a copy of this AD in the AFM): ''Do not extend the speedbrake lever beyond the flight detent in flight.''

Modification

(b) For Model 737–600, –700, –700C, and –800 series airplanes having line numbers 1 through 1174 inclusive: Before the accumulation of 18,000 total flight cycles, or within 2 years after the effective date of this AD, whichever occurs first, modify the elevator and elevator tab assemblies (including installation of a new clevis fitting

and a new tab mechanism on the horizontal stabilizer and, for certain airplanes, examination of the hinge plates on the stabilizer trailing edge to make sure the specified hinges are installed; changes to the seals in the balance bays; and installation of new elevators and tab assemblies, followed by adjustments and tests of the new installation), per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–55A1080, dated September 19, 2002.

(c) Accomplishment of the modification required by paragraph (b) of this AD terminates the actions required by the ADs specified in the table below.

AD No.	Amendment No.
AD 99–15–09	39–11229
AD 99–18–01	39–11267
AD 2001–08–09	39–12186
AD 2001–09–51	39–12251
AD 2001–12–51	39–12294
AD 2001–14–05	39–12315
AD 2002–08–52	39–12727
AD 2002–08–20	39–12732

Operator's Equivalent Procedure

(d) If the Accomplishment Instructions of Boeing Alert Service Bulletin 737–55A1080, dated September 19, 2002, specify that the actions may be accomplished in accordance with an operator's ''equivalent procedure:'' The actions must be accomplished per the applicable chapter of the Boeing 737 Airplane Maintenance Manual specified in the alert service bulletin.

Alternative Methods of Compliance

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

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permit

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

Issued in Renton, Washington, on November 8, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–29005 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–12–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Model RB211 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration (FAA) proposes to adopt a new airworthiness directive (AD) that is applicable to Rolls-Royce plc (RR) model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines. This proposal would require removal from service of certain high pressure (HP) turbine discs before they reach newly established life limits. This proposal is prompted by the manufacturer's inspections and analysis of HP turbine discs that have accumulated high cycles. The analysis reveals these discs to be sensitive to corrosion-induced cracking in the disc rim cooling hole area, which could result in uncontained HP disc failure. The actions specified by the proposed AD are intended to prevent corrosion-induced cracking of the HP turbine disc which could cause an uncontained HP turbine disc failure and damage to the airplane.

DATES: Comments must be received by January 14, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–12–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''*9-ane-adcomment@faa.gov*''. Comments sent via the Internet must contain the docket number in the subject line.

Information regarding this action may be examined, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Keith Mead, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299, telephone (781) 238–7744; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action 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 comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NE–12–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–12–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

The manufacturer has inspected and analyzed some HP turbine discs that have accumulated high cycles that were installed in model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines. The inspection and analysis reveals these discs to be sensitive to corrosion and crack propagation in the disc rim cooling hole area, which could result in uncontained HP turbine disc failure. The manufacturer has determined that the affected HP turbine discs are unable to achieve the previously published life limit of 20,000 cycles-since-new (CSN), due to the potential for corrosion-induced cracking

to occur at or near that published life limit.

Proposed Requirements of This AD

Since an unsafe condition has been identified that is likely to exist or develop on other RR model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines of the same type design that are used on airplanes registered in the United States, the proposed AD would require removing from service HP turbine discs, P/N's UL27680, UL27681, UL39766, and UL39767 before reaching the new life limit of 15,000 CSN.

Economic Analysis

There are approximately 400 RR model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines in the worldwide fleet containing the affected HP turbine discs, P/N's UL27680, UL27681, UL39766, and UL39767. The FAA estimates that 346 engines installed on airplanes of U.S. registry will be affected by this AD, that it will take approximately 112 work hours per engine to replace an affected disc, and that the average labor rate is $60 per work hour. The FAA estimates that the prorated cost of the life reduction per engine would be approximately $64,000. Based on these figures, the total cost of the AD to remove from service the HP turbine discs at the new life limit of 15,000 CIS, rather than the former life limit of 20,000 CIS, is estimated to be $24,469,120.

Regulatory Analysis

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because it 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Rolls-Royce plc: Docket No. 2002–NE–12–AD.

Applicability: This airworthiness directive (AD) is applicable to Rolls-Royce plc (RR) model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines with high pressure (HP) turbine disc, P/N UL27680, UL27681, UL39766, or UL39767 installed. These engines are installed on, but not limited to Boeing 757 and Tupolev Tu204 airplanes.

Note 1: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines 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: Compliance with this AD is required as indicated, unless already done. To prevent corrosion-induced cracking of the HP turbine disc which could cause an uncontained HP turbine disc failure and damage to the airplane, do the following:

(a) Remove HP turbine disc from service before accumulating 15,000 cycles-since-new (CSN).

(b) After the effective date of this AD, do not install any HP turbine disc listed in this AD that exceeds 15,000 CSN.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office (ECO). Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ECO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the ECO.

Special Flight Permits

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

Issued in Burlington, Massachusetts, on November 6, 2002.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–28954 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–13–P?≤

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulations No. 4 and 16]

RIN 0960–AF79

Claimant Identification Pilot Projects

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We propose to conduct pilot projects wherein we will request photographic identification from individuals filing for title II and title XVI disability benefits in specified geographic areas covered by the pilot projects. In addition, we would require individuals to allow us to take their photograph and we would make these photographs a part of the claims folder. We would permit an exception to the photograph requirement when an individual has a sincere religious objection. This process would strengthen the integrity of the disability claims process by helping to ensure that the individual filing the application is the same individual examined by the consultative examination (CE) physician.

DATES: To consider your comments, we must receive them no later than January 14, 2003.

ADDRESSES: You may give us your comments by using: our Internet site facility (*i.e.*, Social Security Online) at *http://www.ssa.gov/regulations*, e-mail to *regulations@ssa.gov*; by telefax to (410) 966–2830; or by letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703.

You may also deliver them to the Office of Process and Innovation Management, Social Security Administration, 2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site for your review, or you may inspect them on regular business days by making arrangements with the contact person shown under **FOR FURTHER INFORMATION CONTACT.**

Electronic version: The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.access.gpo.gov/su_docs/aces/aces140.html*. It is also available on the Internet site for SSA (*i.e.*, Social Security Online) at *http://www.ssa.gov/regulations.*

FOR FURTHER INFORMATION CONTACT: Georgia E. Myers, Regulations Officer, Office of Process and Innovation Management, 2109 West Low Rise Building, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, *regulations@ssa.gov*, 410–965–3632 or TTY 410–966–5609 for information about these rules. For information on eligibility or filing for benefits: call our national toll-free numbers, 1–800–772–1213 or TTY 1–800–325–0778 or visit our Internet web site, Social Security Online, at *http://www.ssa.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Pilot Project

The purpose of the claimant identification pilots is to test and gather information in the use of photographic identification to address the issue of complicit impersonation in the disability claims process. Complicit impersonation is accomplished when an individual, posing as the intended claimant, and with the consent of the claimant, responds to a consultative examination appointment in order to misrepresent the claimant's true medical condition or provides false or misleading information that affects eligibility during interviews with SSA field office employees. SSA and the Office of the Inspector General (OIG) have noticed an upward trend in the number of such instances. It has become apparent that we need to strengthen our procedures for identity verification. We believe that the technology for the photographic identification process is currently available and could be implemented over a short time frame. The photographic identification process should give SSA an economical yet effective means of providing improved identity documents to CE physicians. We anticipate that it will be readily accepted by the public. We will evaluate the results of the pilot and expand or modify the procedures accordingly.

How We Would Conduct the Pilot Project

We propose to conduct the pilots in the following designated geographic areas:

(1) All SSA field offices in the State of South Carolina.

(2) The Augusta, Georgia SSA field office.

(3) All SSA field offices in the State of Kansas.

(4) Selected SSA field offices located in New York City.

The pilots would be in effect for a six-month period of time and would begin upon the effective date of the final rules.

Who Would Be Affected

Individuals filing for title II and/or title XVI disability benefits at a Social Security office in the designated areas noted above would be required to participate in the claimant identification pilots. Individuals filing via the Internet or by telephone would also be included. We will be monitoring any possible impact that the pilot procedures might have on SSA's initiative to encourage the filing of applications online via the Internet.

Providing Photographic Identification

While not part of the regulatory requirement, each individual would be asked to provide some form of photographic identification. This identification would be photocopied and the copy made a part of the SSA claims folder. SSA personnel would continue to follow regular identification procedures by asking the individuals questions based on information in the SSA database to ensure that the individuals are who they hold themselves out to be. SSA personnel would obtain additional identifying information if there is a doubt about the identity of the individual. If the individual does not have photographic identification available or does not wish to provide it to us, SSA personnel would not require it but will still follow regular identification procedures as before the pilots went into effect.

Photographs Taken by SSA

Also as part of the claimant identification pilots, each individual filing for disability benefits at a location participating in the pilot program would be required to have a photograph taken by SSA personnel, regardless of whether the individual provides the photographic identification discussed above. A copy would be made of this image and placed in the SSA claims folder. Images would also be stored electronically and accessed by authorized SSA and Disability Determination Service (DDS) personnel.

If We Request a Consultative Examination

If DDS personnel request a consultative examination (CE) for the individual, a hard copy image of the photograph would be made available to the person conducting the CE. This would help to determine whether the individual presenting himself or herself for examination is the same individual who presented himself or herself as the individual filing for disability benefits. We would ask the CE physician to copy the individual's own photographic identification when the physician was not provided with a photo or a copy of a photographic identification previously taken by SSA personnel.

Other Situations

This same procedure would be used to verify the identity of pilot participants in the following situations:

- After allowance, subsequent interviews for payment purposes.
- Continuing Disability Reviews (CDR).
- SSI Redeterminations.
- If denied, appeals and any associated CE.

Explanation of Proposed Changes

Section 404.617 Pilot Program for Photographic Identification of Disability Benefit Applicants in Designated Geographic Areas

In this new section we are proposing to require individuals filing for title II disability benefits to have their photograph taken by the Social Security Administration. We would permit an exception to the photograph requirement when an individual has a sincere religious objection.

Section 416.327 Pilot Program for Photographic Identification of Disability Benefit Applicants in Designated Geographic Areas

In this new section we are proposing to require individuals filing for title XVI disability benefits to have their photograph taken by the Social Security Administration. We would permit an exception to the photograph requirement when an individual has a sincere religious objection.

Federal Register Notice for Modifying Privacy Act System of Records

A formal notice that will modify the Privacy Act system of records for the

Claims Folder System will be published in the **Federal Register** to reflect the new information to be collected during the pilot projects.

Regulatory Procedures

Clarity of These Regulations

Executive Order 12866, as amended by Executive Order 13258, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

Executive Order 12866, as Amended by Executive Order 13258

The Office of Management and Budget (OMB) has reviewed these proposed rules in accordance with Executive Order 12866, as amended by Executive Order 13258. Because of the pilot's short time duration and limited geographic coverage, we expect any costs or savings to be negligible (*i.e.*, less than $2.5 million).

Regulatory Flexibility Act

We certify that these proposed rules will not have a significant economic impact on a substantial number of small entities because they affect only individuals or States. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules contain reporting requirements as shown in the following table.

Section	Annual number of responses	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
404.617	13,910	1	5	1,159
416.327	14,080	1	5	1,173
Total	27,990			2,332

An Information Collection Request has been submitted to OMB for clearance. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments may be mailed or faxed to the Office of Management and Budget and the Social Security Administration at the following addresses/fax numbers:

Office of Management and Budget, Attn: OMB Desk Officer, Rm. 10235, New Executive Office Building, 725 17th St., NW., Washington, DC 20503, Fax No. 202–395–6974.

Social Security Administration, Attn: SSA Reports Clearance Officer, Rm. 1–A–20 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, Fax No. 410–965–6400.

Comments can be received between 30 and 60 days after publication of this notice and will be most useful if received by SSA within 30 days of publication.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Aged, Blind, Disability benefits, Old-age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: October 9, 2002.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend part 404, subpart G of chapter III, title 20 Code of Federal Regulations and part 416, subpart C of chapter III title 20 Code of Federal Regulations as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart G—[Amended]

1. The authority citation for subpart G of part 404 continues to read as follows:

Authority: Secs. 202(i), (j), (o), (p), and (r), 205(a), 216(i)(2), 223(b), 228(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 402(i), (j), (o), (p), and (r), 405(a), 416(i)(2), 423(b), 428(a), and 902(a)(5)).

2. Add new § 404.617 under the existing heading, APPLICATIONS, to read as follows:

§ 404.617 Pilot program for photographic identification of disability benefit applicants in designated geographic areas.

(a) To be eligible for Social Security disability insurance benefits in the designated pilot geographic areas during the time period of the pilot, you or a person acting on your behalf must give SSA permission to take your photograph and make this photograph a part of the claims folder. You must give us this permission when you apply for benefits and/or when we ask for it at a later time. Failure to cooperate will result in denial of benefits. We will permit an exception to the photograph requirement when an individual has a sincere religious objection. This pilot will be in effect for a six-month period after the final rules become effective.

(b) *Designated pilot geographic areas means:*

(1) All SSA field offices in the State of South Carolina.

(2) The Augusta, Georgia SSA field office.

(3) All SSA field offices in the State of Kansas.

(4) Selected SSA field offices located in New York City.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND AND DISABLED

Subpart C—[Amended]

3. The authority citation for subpart C of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1611, and 1631(a), (d), and (e) of the Social Security Act (42 U.S.C. 902(a)(5), 1382, and 1383(a), (d), and (e)).

4. Add new § 416.327 under the existing heading, APPLICATIONS, to read as follows:

§ 416.327 Pilot program for photographic identification of disability benefit applicants in designated geographic areas.

(a) To be eligible for SSI disability benefits in the designated pilot geographic areas during the time period of the pilot, you or a person acting on your behalf must give SSA permission to take your photograph and make this photograph a part of the claims folder. You must give us this permission when you apply for benefits and/or when we ask for it at a later time. Failure to cooperate will result in denial of benefits. We will permit an exception to the photograph requirement when an individual has a sincere religious objection. This pilot will be in effect for a six-month period after the final rules become effective.

(b) *Designated pilot geographic areas means:*

(1) All SSA field offices in the State of South Carolina.

(2) The Augusta, Georgia SSA field office.

(3) All SSA field offices in the State of Kansas.

(4) Selected SSA field offices located in New York City.

[FR Doc. 02–28957 Filed 11–14–02; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 416 and 422

RIN 0960–AE92

Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income; Collection of Overdue Program and Administrative Debts Using Administrative Wage Garnishment

AGENCY: Social Security Administration.

ACTION: Proposed rules.

SUMMARY: We propose to modify our regulations dealing with the collection of program overpayment debts that arise under titles II and XVI of the Social Security Act (the Act) and administrative debts owed to us. Specifically, we propose to make some changes and establish new regulations that will establish our rules on the use of administrative wage garnishment (AWG) to collect such debts when they are past due. AWG is a process whereby we order the debtor's employer to withhold and pay to us up to 15 percent of the debtor's disposable pay every payday until the debt is repaid. The employer is required by law to comply with our AWG order.

DATES: To be sure your comments are considered, we must receive them no later than January 14, 2003.

ADDRESSES: You may give us your comments by using: our Internet site facility (*i.e.*, Social Security Online) at *http://www.ssa.gov/regulations/,* e-mail to *regulations@ssa.gov,* by telefax to (410) 966–2830 or by letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Process and Innovation Management, Social Security Administration, 2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted to our Internet site for your review, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

Electronic version: The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.access.gpo.gov/su_docs/aces/aces140.html.* It is also available on the Internet site for SSA (*i.e.*, Social Security Online): *http://www.ssa.gov/regulations.*

FOR FURTHER INFORMATION CONTACT: Patricia Hora, Social Insurance Specialist, Office of Process and Innovation Management, Social Security Administration, 2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–7183 or TTY (410) 966–5609. For information on eligibility or filing for benefits: Call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778 or visit our Internet web site, Social Security Online, at *http://www.ssa.gov/.*

SUPPLEMENTARY INFORMATION: Section 31001(o)(1) of Public Law 104–134 amended Chapter 37, subchapter II, of title 31, United States Code, by adding section 3720D to permit Federal agencies to use AWG to recover past due debts. We propose to pursue AWG to collect past due program overpayment debts incurred under title II and title XVI of the Act and past due administrative debts (*see* 20 CFR 422.306(a) for examples of administrative debts). The proposed regulations discussed below would implement 31 U.S.C. 3720D under the guidance provided by the Department of the Treasury at 31 CFR 285.11.

Explanation of Changes to Regulations

We propose to create a new subpart E in part 422 of our regulations containing the rules we will use to collect both title II and title XVI program overpayments and administrative debts by AWG. Proposed subpart E would include sections that would explain the conditions for our use of AWG, the rights of the debtor and the responsibilities of the employer.

In proposed § 422.401, we describe the scope of this subpart—our use of AWG under 31 U.S.C. 3720D to recover past due debts that you owe.

Proposed § 422.402 contains definitions of several terms used in the new subpart, including:

- Paragraph (a), defining ''administrative wage garnishment'' as the process whereby we order your employer to withhold from your disposable pay and send the amount withheld to us;
- Paragraph (b), defining the term ''debt'' to mean any amount of money or property that we determine is owed to the United States government and that arises from a program that we administer or an activity that we perform;
- Paragraph (c), defining the term ''disposable pay'' to mean the amount equal to your total compensation from an employer (including, among other things, wages or salary, bonuses, commissions and vacation pay) after deduction of health insurance premiums and amounts withheld as required by law other than amounts withheld under court order.

Proposed § 422.403 would provide that, subject to certain exceptions and conditions, we would use AWG to collect any debt that is past due. We may use AWG concurrently with other practices, such as, tax refund offset and other administrative offset conducted by the Department of the Treasury and referral of information about the debt to consumer reporting agencies. *See* paragraph (a). We would not use AWG to collect a debt from salary or wages paid by the United States Government. If you have been separated involuntarily from employment, we will not use AWG against you until you have been re-employed continuously for at least 12 months. *See* paragraph (b).

In paragraphs (c) and (d) of proposed § 422.403, we describe the conditions under which we could apply AWG to recover title II and title XVI program overpayment debts, respectively. We could apply AWG if all of the following conditions are met.

- You are not receiving benefits under the program under which the overpayment occurred.
- For an overpayment under title XVI, we are not collecting the debt by reducing your title II benefits.
- We have completed our billing sequence (*i.e.*, we have sent an overpayment notice, reminder notice and past-due notice) or we have terminated or suspended collection activity.
- We have no installment payment arrangement with you, or you failed to make payment under such an arrangement for two consecutive months.
- You have not requested that we waive collection of the overpayment, or you requested waiver but we determined that we would not waive collection.
- You have not requested reconsideration of the initial overpayment determination, or you requested reconsideration but we affirmed the initial determination in whole or in part.
- We cannot recover the overpayment by adjustment of benefits payable to someone other than you.

According to 31 U.S.C. 3720D(b), we must send you written notice at least 30 days prior to taking AWG action. We propose to send the notice at least 60 days before we would take AWG action. Proposed § 422.405 describes the information we would include in that notice:

- The payment of your debt is past due;
- The nature and amount of your debt;
- Our intention to collect the debt by AWG;
- The amount that could be withheld from your disposable pay (the payment schedule) under AWG;
- You may inspect and copy our records about the debt;
- You may ask us to review the debt (*i.e.*, whether you owe the amount stated in the notice) or the payment schedule stated in the notice;
- You may request an installment payment plan.

The notice would also explain that at the expiration of 60 calendar days from the date of the notice we would order your employer to begin withholding from your disposable pay, unless within that 60-day period you pay us the full amount of the debt, request review of the debt or the payment schedule or request to establish a written agreement to pay us by installments. We would keep an electronic record of the notice, showing the date we mailed it and the amount of the debt.

Proposed § 422.410 explains the actions we would take after we send the notice. We would not send an AWG order to your employer before the expiration of 60 calendar days from the date of the notice. If within that 60-day period you would request that we review the debt (see proposed § 422.425) or the payment schedule (see proposed § 422.415) stated in the notice or request an installment payment arrangement, we would not take further action until we send you a written notice of our decision. If within that 60-day period you do not pay the full balance of the debt, request review, or request an installment payment arrangement, we may send the AWG order to your employer without further delay. If your request for review is late, we would still perform the review even though we would send the AWG order to your employer. However, if you had good cause for failing to request review of the debt or the payment schedule on time, we would treat your request as if we received it within the 60-day period and delay further action until we send you our decision. Paragraph (b) of proposed § 422.410 describes the circumstances that show good cause for your failure and gives examples. If we arrange an installment payment plan with you after we send you the AWG notice and you fail to make the installment payments for two consecutive months, we may send your employer an AWG order without further delay.

Under 31 U.S.C. 3720D(b)(3) and (5) and (c), we must give you the opportunity to inspect and copy our records relating to the debt and the opportunity for a hearing on the existence and amount of the debt and the terms of the repayment schedule. We address these requirements in proposed §§ 422.415, 422.420 and 422.425.

Proposed § 422.415 provides that, upon your request, we would review the amount that your employer would withhold from your disposable pay (the payment schedule) and, when we find that withholding a particular amount would cause financial hardship, we would reduce that amount. We would not reduce the amount to be withheld every payday below $ 10.00. We would find financial hardship when evidence submitted by you shows that withholding a particular amount from your disposable pay would deprive you of income necessary to meet ordinary and necessary living expenses. Such expenses would include, among other things, the cost of food, clothing, housing, medical care, insurance, and support of others for whom you are legally responsible. We would not reduce the amount the employer would withhold for financial hardship if the debt was caused by your intentional false statement or willful concealment of or failure to furnish material information.

Proposed § 422.420 explains that we would arrange to make our records relating to the debt available for your inspection and copying if you notify us of your intention to inspect and copy them.

Proposed § 422.425 describes the hearing process, the process by which we would review the debt at your request. Essentially, this would be the same process that we employ to review the debt upon your request before we would refer information to the Department of the Treasury for collection by administrative offset or refer information about the debt to consumer reporting agencies. See 20 CFR 422.317. To exercise your right to this review, you must request review and give us evidence that you do not owe all or part of the debt described in the notice or that we do not have the right to collect it. If you do not request review and give us the evidence before the expiration of 60 calendar days from the date of the notice, we may issue the AWG order without further delay. If you would request review and give us the evidence within that 60-day period, or if you had good cause for failing to request review and give us the evidence on time, we would not take further AWG action unless and until we consider all of the evidence (including our own records) and send you our written findings that all or part of the debt is past due and we have the right to collect it. Our findings would include supporting rationale and would be our final decision on your request. If we would find that you do not owe the debt, or the debt is not overdue, or we do not have the right to collect it, we would not send your employer an AWG order.

Proposed § 422.430 states that, if we would determine that you do not owe the debt or we do not have the right to collect it, we would cancel any AWG order that we issued and refund promptly any amount withheld from your pay under that order. Refunds will not bear interest unless Federal law or contract requires interest.

In proposed § 422.435, we describe the AWG order, the factors that

determine the amount your employer must withhold and the information that your employer must send us. Paragraph (a) describes the information that would appear in the AWG order (your name, address and social security number; the amount of the debt; information about the amount that the employer must withhold; and where to send the withheld amount). We would maintain an electronic record of the order showing the date that we mailed the order. See paragraph (b). We would require the employer to certify within 20 days of receipt of the AWG order your employment status and the amount of disposable pay available for withholding. See paragraph (c).

Paragraph (d) of proposed § 422.435 explains how the employer would calculate the actual amount to withhold from your disposable pay on each payday and remit to us. This section would implement 31 U.S.C. 3720D(b)(1) and 31 CFR 285.11(i). Usually, the amount to be withheld under the AWG order would be the lesser of the amount indicated in the order (up to 15% of disposable pay) or the amount by which disposable pay exceeds thirty times the minimum wage.

Paragraph (e) of proposed § 422.435 discusses our rules that would apply if your disposable pay is subject to more than one garnishment order. A withholding order for family support always would have priority over our AWG order. Our AWG order would have priority over other types of orders served after our AWG order unless Federal law provides otherwise. When your disposable pay is already subject to one or more withholding orders with higher or equal priority with our AWG order, the amount that your employer must withhold and remit to us would not be more than an amount calculated by subtracting the amount(s) withheld under the other withholding order(s) from 25% of your disposable pay. Under proposed paragraph (f), we would have your employer withhold more than the amount calculated under these rules if you would request in writing the higher rate of withholding. Moreover, as noted above, we would reduce the amount that your employer would withhold if we find under proposed § 422.415(b) that withholding at that amount would cause you financial hardship.

In paragraphs (a)–(e) of proposed § 422.440, we discuss the responsibilities of your employer under the AWG order. The proposed rules would require your employer to begin withholding the appropriate amount on the first payday following receipt of the AWG order, or on the first or second payday after such receipt if the employer received the AWG order within 10 days before the first payday. The proposed rules would require your employer to continue to withhold and promptly pay the withheld amount to us every payday until we have recovered the debt and any interest, penalties and administrative costs that we may charge you under applicable law. Your employer need not alter its normal pay and disbursement cycles. However, your employer cannot honor any allotment or assignment of pay by you (other than arrangements made to satisfy a family support judgement or order) to the extent that such assignment or allotment would interfere with or prevent withholding under the AWG order.

In paragraph (f) of proposed § 422.440, we explain that Federal law prohibits your employer from using an AWG order as the basis for firing, refusing to employ or disciplining you. You may file a civil action in Federal or State court against an employer who violates the prohibition. See 31 U.S.C. 3720D(e).

In proposed § 422.445, we explain that we may file a civil action in Federal court against the employer for any amounts that it fails to withhold in compliance with our AWG order issued under proposed § 422.435, and the employer may also be liable for our attorney fees and other associated costs and damages. *See* 31 U.S.C. 3720D(f). We would not bring a civil action against your employer until we terminate collection action against you in accordance with applicable Federal standards, unless earlier filing is necessary to avoid the expiration of any applicable statute of limitations. We would deem collection to be terminated if we receive no payment on the debt for one year.

Other Changes

We would amend 20 CFR 404.527 and 416.590 to mention that we may recover title II and title XVI overpayments, respectively, under the rules in subpart E of part 422.

We propose to add to 20 CFR 404.903 a new paragraph (v) to include in the list of administrative actions that are not initial determinations our determination to use AWG to collect an overpayment made under title II of the Act. We propose to add to 20 CFR 416.1403(a) a new paragraph (20) to include in the list of administrative actions that are not initial determinations our determination to use AWG to collect an overpayment made under title XVI of the Act. As a result of these two revisions, the administrative review procedures in 20 CFR part 404, subpart J, and part 416, subpart N, would not apply to the determination to use AWG. Moreover, that determination would not be subject to judicial review under 42 U.S.C. 405(g) or 1383(c)(3).

Clarity of This Regulation

Executive Order (E.O.) 12866, as amended by E.O. 13258, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand.

For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is unclear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order 12866

The Office of Management and Budget (OMB) has reviewed these proposed rules in accordance with E.O. 12866, as amended by Executive Order 13258.

Regulatory Flexibility Act

We certify that these proposed regulations would not have a significant impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis, as provided in the Regulatory Flexibility Act, as amended, is not required.

Some entities, as employers of some individuals who owe debts to us, would be subjected to these proposed regulations and to the certification requirement in proposed § 422.435(c). However, any particular small employer is not likely to receive wage garnishment orders from us concerning a significant number of employees. Under proposed § 422.435(c), employers of delinquent debtors must certify certain information about the debtor's status such as the debtor's employment status and earnings. This information is contained in the employer's payroll records. Therefore, it would not take a significant amount of time or result in a significant cost for an employer to complete the certification form. Even if an employer receives withholding orders from us on several employees

over the course of a year, the cost imposed on the employer to complete the certifications, withhold from disposable pay, and remit those amounts to us would not have a significant economic impact on that entity. Employers would not be required to vary their normal pay cycles to comply with a withholding order that would be issued under the proposed rules.

Federalism

We have reviewed these proposed rules under the threshold criteria of E.O. 13132, ''Federalism,'' and determined that they would not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Although States and local governments, as employers of some individuals who owe debts to us, would be subjected to these proposed regulations and to the certification requirement in § 422.435(c), there will be a relatively small number of debtors who would meet the criteria for selection who are employed by the States and local governments. Any particular State or local government is not likely to receive AWG orders from us concerning a significant number of employees. Under proposed § 422.435(c), States and local governments that employ delinquent debtors must certify certain information about the debtors' status such as the debtors' employment status and earnings. This information is contained in the States' or local governments' payroll records. Therefore, it would not take a significant amount of time or result in a significant cost for a State or local government to complete the certification form. Even if a State or local government receives AWG orders from us on several employees over the course of a year, the cost imposed on the State or local government to complete the certifications, withhold from disposable pay, and remit those amounts to us would not have a significant economic impact on that entity. States or local governments would not be required to vary their normal pay cycles to comply with AWG orders that would be issued under the proposed rules.

Paperwork Reduction Act

The proposed rules in new subpart E of part 422 contain information collection activities at §§ 422.415, 422.425 and 422.435. The activities are exempt as administrative actions under 44 U.S.C. 3518(c)(1)(B)(ii) from the clearance requirements of 44 U.S.C. 3507 as amended by section 2 of Public Law 104–13 (May 22, 1995), the Paperwork Reduction Act of 1995.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.003 Social Security—Special Benefits for Persons Aged 72 and Over; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Death benefits; Blind, Disability benefits; Old-Age, Survivors and Disability Insurance; Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits; Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

20 CFR Part 422

Administrative practice and procedure, Organization and functions (Government agencies), Social Security.

Dated: August 12, 2002.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend parts 404, 416 and 422 of Title 20 of the Code of Federal Regulations as follows:

PART 404—[AMENDED]

1. The authority citation for subpart F of part 404 continues to read as follows:

Authority: Secs. 204, 205(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 404, 405(a) and 902(a)); 31 U.S.C. 3720A.

2. Paragraph (a), introductory text, of § 404.527 is revised to read as follows:

§ 404.527 Additional methods for recovery of title II benefit overpayments.

(a) *General.* In addition to the methods specified in §§ 404.502 and 404.520, an overpayment under title II of the Act is also subject to recovery under the rules in subparts D and E of part 422 of this chapter. Subpart D of part 422 of this chapter applies only under the following conditions:

* * * * *

3. The authority citation for subpart J of part 404 is revised to read as follows:

Authority: Secs. 201(j), 204(f), 205(a), (b), (d)–(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a), (b), (d)–(h), and (j), 421, 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

4. Section 404.903 is amended by removing the word ''and'' at the end of paragraph (t), replacing the period at the end of paragraph (u) with ''; and'', and adding paragraph (v) to read as follows:

§ 404.903 Administrative actions that are not initial determinations.

* * * * *

(v) Determining whether we will order your employer to withhold from your disposable pay to collect an overpayment you received under title II of the Social Security Act (see part 422, subpart E, of this chapter).

PART 416—[AMENDED]

5. The authority citation for subpart E of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1601, 1602, 1611(c) and (e), and 1631(a)–(d) and (g) of the Social Security Act (42 U.S.C. 902(a)(5), 1381, 1381a, 1382(c) and (e), and 1383(a)–(d) and (g)); 31 U.S.C. 3720A.

6. Paragraph (a), introductory text, of § 416.590 is revised to read as follows:

§ 416.590 Are there additional methods for recovery of title XVI benefit overpayments?

(a) *General.* In addition to the methods specified in §§ 416.560, 416.570, 416.572 and 404.580, we may recover an overpayment under title XVI of the Act from you under the rules in subparts D and E of part 422 of this chapter. Subpart D of part 422 of this chapter applies only under the following conditions:

* * * * *

7. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

8. Section 416.1403 is amended by removing the word ''and'' at the end of paragraph (a)(18), replacing the period at the end of paragraph (a)(19) with ''; and'', and adding paragraph (a)(20) to read as follows:

§ 416.1403 Administrative actions that are not initial determinations.

(a) * * *

(20) Determining whether we will order your employer to withhold from your disposable pay to collect an overpayment you received under title XVI of the Social Security Act (see part 422, subpart E, of this chapter).

PART 422—[AMENDED]

9. Subpart E is added to read as follows:

Subpart E—Collection of Debts by Administrative Wage Garnishment

422.401 What is the scope of this subpart?
422.402 What special definitions apply to this subpart?
422.403 When may we use administrative wage garnishment?
422.405 What notice will we send you about administrative wage garnishment?
422.410 What actions will we take after we send you the notice?
422.415 Will we reduce the amount that your employer must withhold from your pay when withholding that amount causes financial hardship?
422.420 May you inspect and copy our records related to the debt?
422.425 How will we conduct our review of the debt?
422.430 When will we refund amounts of your pay withheld by administrative wage garnishment?
422.435 What happens when we decide to send an administrative wage garnishment order to your employer?
422.440 What are your employer's responsibilities under an administrative wage garnishment order?
422.445 May we bring a civil action against your employer for failure to comply with our administrative wage garnishment order?

Subpart E—Collection of Debts by Administrative Wage Garnishment

Authority: Secs. 205(a), 702(a)(5) and 1631(d)(1) of the Social Security Act (42 U.S.C. 405(a), 905(a)(5) and 1383(d)(1)) and 31 U.S.C. 3720D.

§ 422.401 What is the scope of this subpart?

This subpart describes the procedures relating to our use of administrative wage garnishment under 31 U.S.C. 3720D to recover past due debts that you owe.

§ 422.402 What special definitions apply to this subpart?

(a) *Administrative wage garnishment* is a process whereby we order your employer to withhold a certain amount from your disposable pay and send the withheld amount to us. The law requires your employer to comply with our garnishment order.

(b) *Debt* means any amount of money or property that we determine is owed to the United States and that arises from a program that we administer or an activity that we perform. These debts include program overpayments made under title II or title XVI of the Social Security Act and any other debt that meets the definition of ''claim'' or ''debt'' at 31 U.S.C. 3701(b).

(c) *Disposable pay* means that part of your total compensation (including, but not limited to, salary or wages, bonuses, commissions, and vacation pay) from your employer after deduction of health insurance premiums and amounts withheld as required by law. Amounts withheld as required by law include such things as Federal, State and local taxes but do not include amounts withheld under court order.

(d) *We, our,* or *us* means the Social Security Administration.

(e) *You* means an individual who owes a debt to the United States within the scope of this subpart.

§ 422.403 When may we use administrative wage garnishment?

(a) *General.* Subject to the exceptions described in paragraph (b) and the conditions described in paragraphs (c) and (d) of this section, we may use administrative wage garnishment to collect any debt that is past due. We may use administrative wage garnishment while we are taking other action regarding the debt, such as, using tax refund offset under § 404.520–404.526 and 416.580–416.586 of this chapter and taking action under subpart D of this part.

(b) *Exceptions.*

(1) We will not use this subpart to collect a debt from salary or wages paid by the United States Government.

(2) If you have been separated involuntarily from employment, we will not order your employer to withhold amounts from your disposable pay until you have been re-employed continuously for at least 12 months. You have the burden of informing us about an involuntary separation from employment.

(c) *Overpayments under title II of the Social Security Act.* This subpart applies to overpayments under title II of the Social Security Act if all of the following conditions are met:

(1) You are not receiving title II benefits.

(2) We have completed our billing system sequence (*i.e.*, we have sent you an initial notice of the overpayment, a reminder notice, and a past-due notice) or we have suspended or terminated collection activity in accordance with applicable rules, such as, the Federal Claims Collection Standards in 31 CFR 903.2 or 31 CFR 903.3.

(3) We have not made an installment payment arrangement with you or, if we have made such an arrangement, you have failed to make any payment for two consecutive months.

(4) You have not requested waiver pursuant to § 404.506 or § 404.522 of this chapter or, after a review conducted pursuant to those sections, we have determined that we will not waive collection of the overpayment.

(5) You have not requested reconsideration of the initial overpayment determination pursuant to §§ 404.907 and 404.909 of this chapter or, after a review conducted pursuant to § 404.913 of this chapter, we have affirmed, in whole or in part, the initial overpayment determination.

(6) The overpayment cannot be recovered pursuant to § 404.502 of this chapter by adjustment of benefits payable to any individual other than you. For purposes of this paragraph, an overpayment will be deemed to be unrecoverable from any individual who was living in a separate household from yours at the time of the overpayment and who did not receive the overpayment.

(d) *Overpayments under title XVI of the Social Security Act.* This subpart applies to overpayments under title XVI of the Social Security Act if all of the following conditions are met:

(1) You are not receiving benefits under title XVI of the Social Security Act.

(2) We are not collecting your title XVI overpayment by reducing title II benefits payable to you.

(3) We have completed our billing system sequence (*i.e.*, we have sent you an initial notice of the overpayment, a reminder notice, and a past-due notice) or we have suspended or terminated collection activity under applicable rules, such as, the Federal Claims Collection Standards in 31 CFR 903.2 or 31 CFR 903.3.

(4) We have not made an installment payment arrangement with you or, if we have made such an arrangement, you have failed to make any payment for two consecutive months.

(5) You have not requested waiver pursuant to § 416.550 or § 416.582 of this chapter or, after a review conducted pursuant to those sections, we have determined that we will not waive collection of the overpayment.

(6) You have not requested reconsideration of the initial overpayment determination pursuant to §§ 416.1407 and 416.1409 of this chapter or, after a review conducted pursuant to § 416.1413 of this chapter, we have affirmed all or part of the initial overpayment determination.

(7) We cannot recover your overpayment pursuant to § 416.570 of this chapter by adjustment of benefits payable to any individual other than you. For purposes of this paragraph, if you are a member of an eligible couple that is legally separated and/or living apart, we will deem unrecoverable from

the other person that part of your overpayment which he or she did not receive.

§ 422.405 What notice will we send you about administrative wage garnishment?

(a) *General.* Before we order your employer to collect a debt by deduction from your disposable pay, we will send you written notice of our intention to do so.

(b) *Contents of the notice.* The notice will contain the following information:

(1) we have determined that payment of the debt is past due;

(2) the nature and amount of the debt;

(3) information about the amount that your employer could withhold from your disposable pay each payday (the payment schedule);

(4) no sooner than 60 calendar days after the date of the notice, we will order your employer to withhold the debt from your disposable pay unless, within that 60-day period, you pay the full amount of the debt or take either of the actions described in paragraphs (b)(6) or (7) of this section;

(5) you may inspect and copy our records about the debt (*see* § 422.420);

(6) you may request a review of the debt (*see* § 422.425) or the payment schedule stated in the notice (*see* § 422.415); and

(7) you may request to pay the debt by monthly installment payments to us.

(c) *Mailing address.* We will send the notice to the most current mailing address that we have for you in our records.

(d) *Electronic record of the notice.* We will keep an electronic record of the notice that shows the date we mailed the notice to you and the amount of your debt.

§ 422.410 What actions will we take after we send you the notice?

(a) *General.*

(1) We will not send an administrative wage garnishment order to your employer before 60 calendar days elapse from the date of the notice described in § 422.405.

(2) If paragraph (b) of this section does not apply and you do not pay the debt in full or do not take either of the actions described in paragraphs (b)(6) or (7) of § 422.405 within 60 calendar days from the date of the notice described in § 422.405, we may order your employer to withhold and send us part of your disposable pay each payday until your debt is paid.

(3) If you request review of the debt or the payment schedule after the 60 calendar day period ends and paragraph (b) of this section does not apply, we will conduct the review. However, we may send the administrative wage garnishment order to your employer without further delay.

(4) We may send an administrative wage garnishment order to your employer without further delay if

(i) You request an installment payment plan after receiving the notice described in § 422.405, and

(ii) We arrange such a plan with you, and

(iii) You fail to make payments in accordance with that arrangement for two consecutive months.

(b) *Good cause for failing to request review on time.* If we decide that you had good cause for failing to request review within the 60-day period mentioned in paragraph (a)(2) of this section, we will treat your request for review as if we received it within that 60-day period.

(1) *Determining good cause.* In determining whether you had good cause, we will consider—

(i) Any circumstances that kept you from making the request on time;

(ii) Whether our action misled you;

(iii) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from making a request on time or from understanding the need to make a request on time.

(2) *Examples of good cause.* Examples of facts supporting good cause include, but are not limited to, the following.

(i) Your serious illness prevented you from contacting us yourself or through another person.

(ii) There was a death or serious illness in your family.

(iii) Fire or other accidental cause destroyed important records.

(iv) You did not receive the notice described in § 422.405.

(v) In good faith, you sent the request to another government agency within the 60-day period, and we received the request after the end of that period.

(3) *If we issued the administrative wage garnishment order.* If we determine that you had good cause under paragraph (b) of this section and we already had sent an administrative wage garnishment order to your employer, we will tell your employer to stop withholding from your disposable pay until we make our decision.

§ 422.415 Will we reduce the amount that your employer must withhold from your pay when withholding that amount causes financial hardship?

(a) *General.* Unless paragraph (d) of this section applies, we will reduce the amount that your employer must withhold from your pay when you request the reduction and we find financial hardship. In any event, we will not reduce the amount your employer must withhold each payday below $10. When we decide to reduce the amount that your employer withholds, we will give you and your employer written notice.

(1) You may ask us at any time to reduce the amount due to financial hardship.

(2) If you request review of the payment schedule stated in the notice described in § 422.405 within the 60-day period stated in the notice, we will not issue a garnishment order to your employer until we notify you of our decision.

(b) *Financial hardship.* We will find financial hardship when you show that withholding a particular amount from your pay would deprive you of income necessary to meet your ordinary and necessary living expenses. You must give us evidence of your financial resources and expenses.

(c) *Ordinary and necessary living expenses.* Ordinary and necessary living expenses include:

(1) Fixed expenses such as food, clothing, housing, utilities, maintenance, insurance, tax payments;

(2) Medical, hospitalization and similar expenses;

(3) Expenses for the support of others for whom you are legally responsible; and

(4) Other reasonable and necessary miscellaneous expenses which are part of your standard of living.

(d) *Fraud and willful concealment or failure to furnish information.* (1) We will not reduce the amount that your employer withholds from your disposable pay if your debt was caused by:

(i) Your intentional false statement, or

(ii) Your willful concealment of, or failure to furnish, material information.

(2) ''Willful concealment'' means an intentional, knowing and purposeful delay in providing, or failure to reveal, material information.

§ 422.420 May you inspect and copy our records related to the debt?

You may inspect and copy our records related to the debt. You must notify us of your intention to review our records. After you notify us, we will arrange with you the place and time the records will be available to you. At our discretion, we may send copies of the records to you.

§ 422.425 How will we conduct our review of the debt?

(a) *You must request review and present evidence.* If you receive a notice

described in § 422.405, you have the right to have us review the debt. To exercise this right, you must request review and give us evidence that you do not owe all or part of the debt or that we do not have the right to collect it. If you do not request review and give us this evidence within 60 calendar days from the date of our notice, we may issue the garnishment order to your employer without further delay. If you request review of the debt and present evidence within that 60 calendar-day period, we will not send a garnishment order to your employer unless and until we consider all of the evidence and send you our findings that all or part of the debt is overdue and we have the right to collect it.

(b) *Review of the evidence.* If you request review of the debt, we will review our records related to the debt and any evidence that you present.

(c) *Our findings.* Following our review of all of the evidence, we will send you written findings, including the supporting rationale for the findings. Issuance of these findings will be our final action on your request for review. If we find that you do not owe the debt, or the debt is not overdue, or we do not have the right to collect it, we will not send a garnishment order to your employer.

§ 422.430 When will we refund amounts of your pay withheld by administrative wage garnishment?

If we find that you do not owe the debt or that we have no right to collect it, we will promptly refund to you any amount withheld from your disposable pay under this subpart that we received and cancel any administrative wage garnishment order that we issued. Refunds under this section will not bear interest unless Federal law or contract requires interest.

§ 422.435 What happens when we decide to send an administrative wage garnishment order to your employer?

(a) *The wage garnishment order.* The wage garnishment order that we send to your employer will contain only the information necessary for the employer to comply with the order. This information includes:

(1) Your name, address, and social security number,

(2) The amount of the debt,

(3) Information about the amount to be withheld, and

(4) Information about where to send the withheld amount.

(b) *Electronic record of the garnishment order.* We will keep an electronic record of the garnishment order that shows the date we mailed the order to your employer.

(c) *Employer certification.* Along with the garnishment order, we will send your employer a certification form to complete about your employment status and the amount of your disposable pay available for withholding. Your employer must complete the certification and return it to SSA within 20 days of receipt.

(d) *Amounts to be withheld from your disposable pay.* After receipt of the garnishment order issued under this section, your employer must begin withholding from your disposable pay each payday the lesser of:

(1) The amount indicated on the order (up to 15% of your disposable pay); or

(2) The amount by which your disposable pay exceeds thirty times the minimum wage as provided in 15 U.S.C. 1673(a)(2).

(e) *Multiple withholding orders.* If your disposable pay is subject to more than one withholding order, we apply the following rules to determine the amount that your employer will withhold from your disposable pay:

(1) Unless otherwise provided by Federal law or paragraph (e)(2) of this section, a garnishment order issued under this section has priority over other withholding orders served later in time.

(2) Withholding orders for family support have priority over garnishment orders issued under this section.

(3) If at the time we issue a garnishment order to your employer amounts are already being withheld from your pay under another withholding order, or if a withholding order for family support is served on your employer at any time, the amounts to be withheld under this section will be the lesser of:

(i) The amount calculated under paragraph (d) of this section; or

(ii) The amount calculated by subtracting the amount(s) withheld under the withholding order(s) with priority from 25% of your disposable pay.

(4) If you owe more than one debt to us, we may issue multiple garnishment orders. If we issue more than one garnishment order, the total amount to be withheld from your disposable pay under such orders will not exceed the amount set forth in paragraph (d) or (e)(3) of this section, as appropriate.

(f) *You may request that your employer withhold more.* If you request in writing that your employer withhold more than the amount determined under paragraphs (d) or (e) of this section, we will order your employer to withhold the amount that you request.

§ 422.440 What are your employer's responsibilities under an administrative wage garnishment order?

(a) *When withholding must begin.* Your employer must withhold the appropriate amount from your disposable pay on each payday beginning on the first payday after receiving the garnishment order issued under this section. If the first payday is within 10 days after your employer receives the order, then your employer must begin withholding on the first or second payday after your employer receives the order. Withholding must continue until we notify your employer to stop withholding.

(b) *Payment of amounts withheld.* Your employer must promptly pay to the Social Security Administration all amounts withheld under this section.

(c) *Other assignments or allotments of pay.* Your employer cannot honor an assignment or allotment of your pay to the extent that it would interfere with or prevent withholding under this section, unless the assignment or allotment is made under a family support judgment or order.

(d) *Effect of withholding on employer pay and disbursement cycles.* Your employer will not be required to vary its normal pay and disbursement cycles in order to comply with the garnishment order.

(e) *When withholding ends.* When we have fully recovered the amounts you owe, including interest, penalties, and administrative costs that we charge you as allowed by law, we will tell your employer to stop withholding from your disposable pay. As an added precaution, we will review our debtors' accounts at least annually to ensure that withholding has been terminated for accounts paid in full.

(f) *Certain actions by an employer against you are prohibited.* Federal law prohibits an employer from using a garnishment order issued under this section as the basis for discharging you from employment, refusing to employ you, or taking disciplinary action against you. If your employer violates this prohibition, you may file a civil action against your employer in a Federal or State court of competent jurisdiction.

§ 422.445 May we bring a civil action against your employer for failure to comply with our administrative wage garnishment order?

(a) We may bring a civil action against your employer for any amount that the employer fails to withhold from your disposable pay in accordance with paragraphs (d), (e) and (f) of § 422.435. Your employer may also be liable for

attorney fees, costs of the lawsuit and (in the court's discretion) punitive damages.

(b) We will not file a civil action against your employer before we terminate collection action against you, unless earlier filing is necessary to avoid expiration of any applicable statute of limitations period. For purposes of this section, ''terminate collection action'' means that we have terminated collection action in accordance with the Federal Claims Collection Standards (31 CFR 903.3) or other applicable standards. In any event, we will consider that collection action has been terminated if we have not received any payments to satisfy the debt for a period of one year.

[FR Doc. 02–28856 Filed 11–14–02; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 94P–0036]

RIN 0910–AB66

Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening to December 16, 2002, the comment period for a proposed rule published in the **Federal Register** of November 17, 1999 (64 FR 62746), in which FDA proposed to amend its regulations on nutrition labeling to include the amount of *trans* fatty acids present in a food in the amount and percent Daily Value declared for saturated fatty acids. Since publication of the proposed rule, the National Academy of Sciences issued a report entitled ''Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein and Amino Acids'' that did not provide a dietary reference intake value for *trans* fat. In response to this report, FDA intends to take a more incremental approach and provide for mandatory declaration of *trans* fat content on a separate line within the Nutrition Facts panel. FDA is reopening the comment period to receive comment on a footnote statement that it is proposing be required on the label when *trans* fat is listed. Lastly, FDA is outlining conditions for when it would consider exercising enforcement discretion for manufacturers who wish to begin labeling the *trans* fat content of food products prior to publication of a final rule.

DATES: Submit written or electronic comments on the proposed footnote by December 16, 2002.

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

FOR FURTHER INFORMATION CONTACT: Joyce Saltsman, Center for Food Safety and Applied Nutrition (HFS–306), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1641.

SUPPLEMENTARY INFORMATION:

I. Reopening of Comment Period

In the **Federal Register** of November 17, 1999 (64 FR 62746) (the November 1999 proposal), FDA (we) proposed to amend our regulations on nutrition labeling to require that the amount of *trans* fatty acids (*trans* fats) present in a food, including dietary supplements, be included in the amount and percent of Daily Value (% DV) declared for saturated fatty acids. We also proposed that, wherever saturated fat limits are placed on nutrient content claims, health claims, or disclosure or disqualifying levels, the amount of *trans* fatty acids be limited as well. Finally, we proposed to define the nutrient content claim ''*trans* fat free.'' In that document, we requested comments on the proposal by February 15, 2000. In the **Federal Register** of February 16, 2000 (65 FR 7806), we reopened the comment period to April 17, 2000, in response to requests for more time to submit comments. In the **Federal Register** of December 5, 2000 (65 FR 75887), we again reopened the comment period to January 19, 2001, in response to comments regarding nutrient content claims.

Subsequent to FDA's November 1999 proposal, the Institute of Medicine of the National Academy of Sciences (IOM/NAS) issued a report entitled ''Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein and Amino Acids'' (the IOM/NAS macronutrient report) and found ''a positive linear trend'' between *trans* fatty acid intake and total and low density lipoprotein-cholesterol (LDL–C) concentration, and therefore increased risk of coronary heart disease (Ref. 1).

The report summarized that the scientific evidence would suggest a tolerable upper intake level (UL) of zero, but because *trans* fats are unavoidable in ordinary diets and achieving such a UL would require extraordinary changes in dietary intake patterns that might introduce other undesirable effects and unknown health risks, a UL was not proposed. Instead, the report recommended ''that *trans* fat consumption be as low as possible while consuming a nutritionally adequate diet.'' Likewise, the conclusions in the Dietary Guidelines for Americans, 2000 (Ref. 2) and recent guidelines from the National Cholesterol Education Program (NCEP) (Ref. 3) are similar with recommendations to limit *trans* fat intake in the diet.

The IOM/NAS report (Ref. 1) underscores the relationship between the intake of *trans* fat and the increased risk for heart disease and emphasizes that consumers need to limit *trans* fat in their diets. FDA recognizes that, to accomplish this, information on the *trans* fat content of foods needs to be available on food labels. But the IOM/NAS report did not provide a dietary reference intake (DRI) value for *trans* fat or information that the agency believes is sufficient to support its establishing a daily reference value (DRV) to assist the agency in providing other information on the label, such as a % DV for *trans* fat.

Comments to the November 1999 proposal stressed the importance of helping consumers understand the relevance of the quantitative amount of *trans* fat in relation to recommended dietary intake patterns. In addition, Section 2(b) of the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Public Law 101–535) states that the Secretary of Health and Human Services, and by delegation FDA, shall require the declaration of nutrients ''be conveyed to the public in a manner which enables the public to readily observe and comprehend such information and to understand its relative significance in the context of a total daily diet.'' The % DV has been added to nutrition labeling for most nutrients to achieve this purpose. However, we do not have a basis on which to establish a DV for *trans* fat at this time. Therefore, in light of the public health recommendations to reduce *trans* fat intake in the American diet, FDA is proposing to require an asterisk (or other symbol) in the % DV column for *trans* fat when it is listed, that is tied to a similar symbol at the bottom of the Nutrition Facts box and

that is followed by the statement ''Intake of *trans* fat should be as low as possible.'' In the absence of a % DV for *trans* fat, the footnote statement will provide guidance to consumers when using the quantitative information to help maintain healthy dietary practices. This statement is taken from the IOM/NAS macronutrient report and is consistent with the dietary guidance in the other recent scientific reports referenced in this document.

For interested parties who would like to submit comments on the proposed use of the footnote statement ''Intake of *trans* fat should be as low as possible,'' we are reopening the comment period of the November 1999 proposal for a period of 30 days. Comments submitted during this period are to be limited to those that directly address the proposed use of the footnote. We are not requesting comments on any other issue, and we do not intend to consider such comments if submitted.

Following receipt of comments on this document, FDA intends to publish in early 2003 a final rule requiring mandatory declaration of *trans* fat content within the Nutrition Facts panel under the declaration for saturated fat, similar to the declarations of mono- and polyunsaturated fats. In response to interest expressed by manufacturers and trade associations to begin labeling the *trans* fat content of food products prior to publication of the final rule, we will consider the exercise of our enforcement discretion for such labeling as long as the footnote statement is also included in the Nutrition Facts panel. The agency cautions manufacturers that a final rule on this issue may differ from this proposal and that manufacturers would then be required to change their labels to conform to the final rule.

II. How to Submit Comments

Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments. Two copies of any mailed comments are to be submitted, except that individuals may submit one copy. Submit electronic comments to http://www.fda.gov/dockets/ecomments. Identify all comments with the docket number found in brackets in the heading of this document. You may review received comments in the Dockets Management Branch office between 9 a.m. and 4 p.m., Monday through Friday.

III. References

The following references have been placed on display in the Dockets Management Branch (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. FDA has verified the following three Web site addresses, but is not responsible for subsequent changes to the Web sites after this document publishes in the **Federal Register**.

1. IOM/NAS, ''Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein and Amino Acids,'' chapter 8, National Academy Press, Washington, DC, pp. 335–432, 2002 (Internet address: http://www.nap.edu/books/0309085373/html/).

2. U.S. Department of Agriculture and U.S. Department of Health and Human Services, *Nutrition and Your Health: Dietary Guidelines for Americans*, 5th ed. Washington, DC; Home and Garden Bulletin No. 232, pp. 27–31, 2000 (Internet address: http://www.usda.gov/cnpp/Pubs/DG2000/Index.htm).

3. Expert Panel on Detection, Evaluation, and Treatment of High Blood Cholesterol in Adults, Third Report of the National Cholesterol Education Program (NCEP) Expert Panel on Detection, Evaluation, and Treatment of High Blood Cholesterol in Adults (Adult Treatment Panel III), Chapter II. ''Rationale for Intervention'' and Chapter V ''Adopting Healthful Lifestyle Habits to Lower LDL Cholesterol and Reduce CHD Risk,'' 2001 (Internet address: http://www.nhlbi.nih.gov/guidelines/cholesterol/index.htm).

Dated: November 8, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–29096 Filed 11–12–02; 3:33 pm]

BILLING CODE 4160–01–S

AMERICAN BATTLE MONUMENTS COMMISSION

36 CFR Part 404

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

AGENCY: American Battle Monuments Commission.

ACTION: Proposed rule.

SUMMARY: The American Battle Monuments Commission proposes to revise its regulations for responding to public requests for access to records or information under the Freedom of Information Act (FOIA). These regulations update and amplify the Commission's current regulations.

DATES: We will accept comments from all interested parties until January 14, 2003.

ADDRESSES: Submit your comments to Mr. Thomas R. Sole, FOIA Officer, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, VA 22201–3367; fax (703) 696–6666. All comments received will be available for public inspection at that address.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas R. Sole, Freedom of Information Officer, American Battle Monuments Commission or Ms. Martha Sell, Freedom of Information Act Representative, Courthouse Plaza II, Suite 500, 2300 Clarendon Blvd., Arlington, VA 22202 or by telephone at 703–696–6897.

SUPPLEMENTARY INFORMATION: This proposed rule replaces 36 CFR Parts 404 and 405. It updates Commission addresses, organizational information, and fee schedule and explicitly incorporates electronic format information as within the scope of covered information consistent with the Electronic Freedom of Information Act of 1996 (Pub. L. 104–231).

List of Subjects in 36 CFR Parts 404 and 405

Freedom of information.

For the reasons stated in the preamble, the American Battle Monuments Commission amends 36 CFR chapter IV as follows:

1. Revise part 404 to read as follows:

PART 404—PROCEDURES AND GUIDELINES FOR COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT

Sec.
404.1 General.
404.2 Authority and functions.
404.3 Organization.
404.4. Access to information.
404.5 Inspection and copying.
404.6 Definitions.
404.7 Fees to be charged—general.
404.8 Fees to be charged—categories of requesters.
404.9 Miscellaneous fee provisions.
404.10 Waiver or reduction of charges.

Authority: 5 U.S.C. 552.

§ 404.1 General.

This information is furnished for the guidance of the public and in compliance with the requirements of section 552 of Title 5, United States Code, as amended.

§ 404.2 Authority and functions.

The general functions of the American Battle Monuments Commission, as provided by statute, 36 U.S.C. 2101, *et seq.,* are to build and maintain suitable memorials commemorating the service of American Armed Forces and to maintain permanent American military cemeteries in foreign countries.

§ 404.3 Organization.

(a) The brief description of the central organization of the American Battle Monuments Commission follows:

(1) The Commission is composed of not more than eleven members appointed by the President.

(2) The day to day operation of the Commission is under the direction of a secretary appointed by the President.

(3) Principal Officials include the Executive Director, Director of Finance, Director of Procurement and Contracting, Director of Engineering, Maintenance, and Operations and Director of Personnel and Administration.

(4) The Commission also creates temporary offices when tasked with major additional responsibilities not of a permanent nature.

(b) *Locations.* (1) The principal offices of the American Battle Monuments Commission are located at Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, VA 22201. Persons desiring to visit offices or employees of the American Battle Monuments Commission should write or telephone ahead (703–696–6897 or 703–696–6895) to make an appointment.

(2) Field offices are located in Paris, France; Rome, Italy; Manila, Republic of the Philippines; the Republic of Panama; and Mexico City, Mexico.

§ 404.4 Access to information.

(a) The American Battle Monuments Commission makes available information pertaining to Commission matters within the scope of 5 U.S.C. 552(a)(2) by publishing them electronically at the ABMC home page at *www.abmc.gov.*

(b) The ABMC FOIA Officer is responsible for acting on all initial requests. Individuals wishing to file a request under the Freedom of Information Act (FOIA) should address their request in writing to the FOIA Officer, American Battle Monuments Commission, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, VA 22201 (telephone 703–696–6897 or 703–696–6895). Requests for information shall be as specific as possible.

(c) Upon receipt of any request for information or records, the FOIA Officer will determine within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such request whether it is appropriate to grant the request and will immediately provide written notification to the person making the request. If the request is denied, the written notification to the person making the request shall include the names of the individuals who participated in the determination, the reasons for the denial, and a notice that an appeal may be lodged within the American Battle Monuments Commission. (Receipt of a request as used herein means the date the request is received in the office of the FOIA Officer.)

(d) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) 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;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which effect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (d)(1)(ii) 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 or her sole occupation. A requester within the category (d)(1)(ii) of this section also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) Within ten days of its receipt of a request for expedited processing, ABMC will decide whether to grant it and will notify the requester of the decision. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

(e) Appeals shall be set forth in writing within 30 days of receipt of a denial and addressed to the FOIA Officer at the address specified in paragraph (b) of this section. The appeal shall include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the Executive Director, or his designee, within 20 days (excepting Saturdays, Sundays, and legal public holidays). If, on appeal, the denial is in whole or in part upheld, the written determination will also contain a notification of the provisions for judicial review and the names of the persons who participated in the determination.

(f) In unusual circumstances, the time limits prescribed in paragraphs (c) and (e) of this section may be extended for not more than 10 days (excepting Saturdays, Sundays, or legal public holidays). Extensions may be granted by the FOIA Officer. The extension period may be split between the initial request and the appeal but in no instance may the total period exceed 10 working days. Extensions will be by written notice to the persons making the request and will set forth the reasons for the extension and the date the determination is expected.

(g) With respect to a request for which a written notice under paragraph (f) of this section extends the time limits prescribed under paragraph (c) of this section, the agency shall notify the person making the request if the request cannot be processed within the time limit specified in paragraph (f) of this section and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of 5 U.S.C. 552(a)(6)(C). When ABMC reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, ABMC may aggregate those requests for purposes of this paragraph. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(h) As used herein, but only to the extent reasonably necessary to the proper processing of the particular request, the term unusual circumstances means:

(1) The need to search for and collect the requested records from establishments that are separated from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records

which are demanded in a single request; or

The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency which have a substantial subject matter interest therein.

§ 404.5 Inspection and copying.

When a request for information has been approved pursuant to § 404.4, the person making the request may make an appointment to inspect or copy the materials requested during regular business hours by writing or telephoning the FOIA Officer at the address or telephone number listed in § 404.4(b). Such materials may be copied and reasonable facilities will be made available for that purpose. Copies of individual pages of such materials will be made available at the price per page specified in § 404.7(d); however, the right is reserved to limit to a reasonable quantity the copies of such materials which may be made available in this manner when copies also are offered for sale by the Superintendent of Documents.

§ 404.6 Definitions.

For the purpose of the regulations in this part:

(a) All the terms defined in the Freedom of Information Act apply.

(b) A statute specifically providing for setting the level of fees for particular types of records (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services that are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information. Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

(c) The term direct costs means those expenditures that ABMC actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(d) The term search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. ABMC employees should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section).

(e) The term duplication means the making of a copy of a document, or of the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microform, audio-visual materials, or electronic records (*e.g.,* magnetic tape or disk), among others. The requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format.

(f) The term review refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (g) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, *e.g.,* doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(g) The term commercial use request refers to a request from or on behalf of one 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 properly belongs in this category, ABMC must determine the use to which a requester will put the documents requested. Moreover, where an ABMC employee has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the employee should seek additional clarification before assigning the request to a specific category.

(h) The term educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, that operates a program or programs of scholarly research.

(i) The term non-commercial scientific institution refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (g) of this section), 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.

The term representative of the news media refers to 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 would be of current interest to the public. Examples of news media entities include 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. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (*e.g.*, electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of freelance journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but ABMC may also look to the past publication

record of a requester in making this determination.

§ 404.7 Fees to be charged—general.

ABMC shall charge fees that recoup the full allowable direct costs it incurs. Moreover, it shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in §404.5(b)), such as the NTIS, ABMC should inform requesters of the steps necessary to obtain records from those sources.

(a) *Manual searches for records.* ABMC will charge at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search.

(b) *Computer searches for records.* ABMC will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search.

(c) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., the review undertaken the first time ABMC analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

(d) *Duplication of records.* Records will be duplicated at a rate of $.15 per page. For copies prepared by computer, such as tapes or printouts, ABMC shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, ABMC will charge the actual direct costs of producing the document(s). If ABMC estimates that duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(e) *Other charges.* ABMC will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail.

(3) Eight by ten inch black and white photographs—$3.75

(4) Eight by ten inch color photographs—$5.00

(5) $1.50 per publication

(6) Video Purchase: The Price of Freedom—$13.00

(f) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer, American Battle Monuments Commission, Courthouse Plaza II, Suite 500, 2300 Clarendon Blvd., Arlington, Virginia 22201.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

(h) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, ABMC will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, ABMC will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) The elements to be considered in determining the cost of collecting a fee are the administrative costs of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account.

(2) For purposes of these restrictions on assessment of fees, the word pages refers to paper copies of 8½ x 11 or 11 x 14. Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, does meet the terms of the restriction.

(3) Similarly, the term search time in this context has as its basis, manual search. To apply this term to searches made by computer, ABMC will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, *i.e.*, the operator, ABMC will begin assessing charges for computer search.

§ 404.8 Fees to be charged—categories of requesters.

There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The specific levels of fees for each of these categories:

(a) *Commercial use requesters.* When ABMC receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. ABMC may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 404.8(b)).

(b) *Educational and non-commercial scientific institution requesters.* ABMC shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

(c) *Requesters who are representatives of the news media.* ABMC shall provide documents to requesters in this category when serving the news dissemination function for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 404.4(j), and his or her request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters must reasonably describe the records sought.

(d) *All other requesters.* ABMC shall charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records

that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests for records about the requesters filed in ABMC's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

§ 404.9 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* ABMC may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. The fact that the fee has been received by ABMC within the thirty day grace period, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of Title 31 of the United States Code and will accrue from the date of the billing.

(b) *Charges for unsuccessful search.* ABMC may assess charges for time spent searching, even if it fails to locate the records or if records located are determined to be exempt from disclosure. If ABMC estimates that search charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When ABMC reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, ABMC may aggregate those requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(d) *Advance payments.* ABMC may not require a requester to make an advance payment, *i.e.*, payment before work is commenced or continued on a request, unless:

(1) ABMC estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250. Then, ABMC will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 days of the date of the billing). Then, ABMC may require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(3) When ABMC acts under paragraph (d)(1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (*i.e.*, 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits), will begin only after ABMC has received fee payments described in paragraphs (d)(1) and (2) of this section.

(e) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365).* ABMC should comply with provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

§ 404.10 Waiver or reduction of charges.

Fees otherwise chargeable in connection with a request for disclosure of a record shall be waived or reduced where it is determined that disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

PART 405—[REMOVED]

2. Remove part 405.

Dated: November 5, 2002.

Theodore Gloukhoff,

Director, Personnel and Administration.

[FR Doc. 02–28900 Filed 11–14–02; 8:45 am]

BILLING CODE 6120–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018—AH10

Endangered and Threatened Wildlife and Plants; Designations of Critical Habitat for Plant Species From the Island of Lanai, HI

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) announce the reopening of the public comment period for the proposed rule to designate critical habitat for 32 plants from the island of Lanai, Hawaii. We have received new information since the close of the comment period and the comment period is reopened to allow additional time for all interested parties to consider the information and submit written comments on the proposal. Comments already submitted on the proposed rule need not be resubmitted as they already have been incorporated into the public record and will be fully considered in the final determination.

DATES: The comment period for this proposal now closes on November 25, 2002. Any comments received by the closing date will be considered in the final decision on this proposal.

ADDRESSES: Written comments and information should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, HI 96850. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Paul Henson, at the above address (telephone 808/541–3441; facsimile 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

On March 4, 2002, we published a revised proposed critical habitat rule for 32 of the 37 plant species listed under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), known historically from the island of Lanai (67 FR 9806). The original comment period closed on May 3, 2002. The comment period was reopened on July 15, 2002 and closed on August 30, 2002. The current comment period closes on November 25, 2002.

A total of 37 species historically found on Lanai were listed as

endangered or threatened species under the Act between 1991 and 1999. Some of these species may also occur on other Hawaiian islands. Previously, we proposed that designation of critical habitat was prudent for 32 (*Abutilon eremitopetalum, Adenophorus periens, Bidens micrantha* ssp. *kalealaha, Bonamia menziesii, Brighamia rockii, Cenchrus agrimonioides, Centaurium sebaeoides, Clermontia oblongifolia* ssp. *mauiensis, Ctenitis squamigera, Cyanea grimesiana* ssp. *grimesiana, Cyanea lobata, Cyanea macrostegia* ssp. *gibsonii, Cyperus trachysanthos, Cyrtandra munroi, Diellia erecta, Diplazium molokaiense, Gahnia lanaiensis, Hedyotis mannii, Hesperomannia arborescens, Hibiscus brackenridgei, Isodendrion pyrifolium, Mariscus fauriei, Neraudia sericea, Portulaca sclerocarpa, Sesbania tomentosa, Silene lanceolata, Solanum incompletum, Spermolepis hawaiiensis, Tetramolopium remyi, Vigna o-wahuensis, Viola lanaiensis,* and *Zanthoxylum hawaiiense*) of the 37 species reported from the island of Lanai. No change is made to the 32 proposed prudency determinations in the March 4, 2002, revised proposed critical habitat rule for plants from Lanai. We previously proposed that designation of critical habitat was not prudent for *Phyllostegia glabra* var. *lanaiensis* because it had not been seen recently in the wild, and no viable genetic material of this species is known to exist (65 FR 82086). No change is made to this proposed prudency determination in the March 4, 2002, revised proposed critical habitat rule (67 FR 9806). In the March 4, 2002, revised proposed critical habitat rule, we proposed that designation of critical habitat is prudent for *Tetramolopium lepidotum* ssp. *lepidotum*, a species for which a prudency determination has not been made previously. We determined that designation of critical habitat was prudent for *Hedyotis schlechtendahliana* var. *remyi, Labordia tinifolia* var. *lanaiensis*, and *Melicope munroi* at the time of their listing in 1999.

We also proposed designation of critical habitat for 32 (*Abutilon eremitopetalum, Adenophorus periens, Bidens micrantha* ssp. *kalealaha, Bonamia menziesii, Brighamia rockii, Cenchrus agrimonioides, Centaurium sebaeoides, Clermontia oblongifolia* ssp. *mauiensis, Ctenitis squamigera, Cyanea grimesiana* ssp. *grimesiana, Cyanea lobata, Cyanea macrostegia* ssp. *gibsonii, Cyperus trachysanthos, Cyrtandra munroi, Diellia erecta, Diplazium molokaiense, Gahnia lanaiensis, Hedyotis mannii, Hedyotis schlechtendahliana* var. *remyi, Hesperomannia arborescens, Hibiscus brackenridgei, Isodendrion pyrifolium, Labordia tinifolia* var. *lanaiensis, Melicope munroi, Neraudia sericea, Portulaca sclerocarpa, Sesbania tomentosa, Solanum incompletum, Spermolepis hawaiiensis, Tetramolopium remyi, Vigna o-wahuensis,* and *Viola lanaiensis*) plant species. Critical habitat is not proposed for four (*Mariscus fauriei, Silene lanceolata, Tetramolopium lepidotum* ssp. *lepidotum,* and *Zanthoxylum hawaiiense*) of the 37 species which no longer occur on the island of Lanai, and for which we are unable to identify any habitat that is essential to their conservation on the island of Lanai. Critical habitat is not proposed for *Phyllostegia glabra* var. *lanaiensis* for the reasons given above. Eight critical habitat units, totaling approximately 7,853 hectares (19,405 acres), are proposed for designation on the island of Lanai. For locations of these proposed units, please consult the proposed rule (67 FR 9806).

Public Comments Solicited

Since the close of the comment period, we have received new information in the form of a draft conservation agreement (copy available upon request) from the owner of Unit D. The comment period is reopened to allow additional time for all interested parties to consider the information and submit written comments on the proposal. One possible outcome may be a decision to exclude this area from the final designation pursuant to section 4(b)(2) of the Act.

We will accept written comments and information during this reopened comment period. If you wish to comment, you may submit your comments and materials concerning this proposal by any of the following methods:

(1) You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001.

(2) You may hand-deliver comments to our Honolulu Fish and Wildlife Office at the address given above.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for inspection, by appointment, during normal business hours at the address under (1) above. Copies of the draft document are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at the address and phone number under (1 and 2) above.

Information regarding this proposal is available in alternative formats upon request.

Author

The primary author of this notice is Gina Shultz (see **ADDRESSES** section).

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: November 5, 2002.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02–29047 Filed 11–12–02; 3:04 pm]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018—AH01

Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Kauai Cave Wolf Spider and Kauai Cave Amphipod

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period and notice of availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft economic analysis for the proposed designations of critical habitat for the Kauai cave wolf spider and Kauai cave amphipod from the island of Kauai, Hawaii. We are now providing notice of extending the comment period to allow peer reviewers and all interested parties to comment simultaneously on the proposed rule and the associated draft economic analysis. The draft economic analysis shows a range likely costs from the proposed critical habitat designation of between $743 million to $1.955 billion over the 18 year period from 2003 to 2020. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this extended comment period and will be fully considered in preparation of the final rule.

DATES: We will accept public comments until December 16, 2002.

ADDRESSES: Written comments and information should be submitted to Field Supervisor, U.S. Fish and Wildlife

Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001. Copies of the draft economic analysis are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at the above address and 808/541–3441. For further instructions on commenting, refer to Public Comments Solicited section of this notice.

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, Pacific Islands Office, at the above address (telephone: 808/541–3441; facsimile: 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

On June 16, 1978, we published in the **Federal Register** a proposal to list the Kauai cave wolf spider (*Adelocosa anops*) as an endangered species and the Kauai cave amphipod (*Spelaeorchestia koloana*) as threatened (43 FR 26084). That proposal was withdrawn on September 2, 1980 (45 FR 58171) as a result of a provision in the 1978 Amendments to the Endangered Species Act of 1973 that required withdrawal of all pending proposals that were not made final within 2 years of the proposal or within one year after passage of the Amendments, which ever period was longer. An initial comprehensive Notice of Review for invertebrate animals was published on May 22, 1984 (49 FR 21664), in which the Kauai cave wolf spider and Kauai cave amphipod were treated as category 2 candidates for Federal listing. Category 2 taxa were those for which conclusive data on biological vulnerability and threats were not currently available to support proposed rules.

We published an updated Notice of Review for animals on January 6, 1989 (54 FR 554). In this notice, the Kauai cave wolf spider and Kauai cave amphipod were treated as category 1 candidates for Federal listing. Category 1 taxa were those for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. However, in the Notice of Review for all animal taxa published on November 21, 1991 (56 FR 58804), the two Kauai cave arthropods were listed as category 2 candidates. In the November 15, 1994, Notice of Review for all animal taxa (59 FR 58982), the two Kauai cave arthropods were again elevated to category 1 candidates. Upon publication of the February 28, 1996, Notice of Review (61 FR 7596), we ceased using candidate category designations and included the two cave arthropods as candidate species. Candidate species are those for which we have on file sufficient information on biological vulnerability and threats to support proposals to list the species as threatened or endangered. The two cave arthropods were included as candidate species in the September 19, 1997 (62 FR 49398), Notice of Review.

A proposed rule to list these two species as endangered was published on December 5, 1997 (62 FR 64340), and the final rule to list them was published on January 14, 2000 (65 FR 2348). In the proposed listing rule, we indicated that designation of critical habitat for the Kauai cave wolf spider and Kauai cave amphipod was not prudent. Our concern was that publication of precise maps and descriptions of critical habitat in the **Federal Register** could increase human visitation to these highly sensitive cave habitats, which could lead to incidents of vandalism, destruction of habitat, and unintentional cases of take. Also, we believed that critical habitat designation would not provide any additional benefit to these species beyond that provided through listing as endangered.

However, in the final rule, we determined that critical habitat designation was prudent as at the time we did not find specific evidence of taking, vandalism, collection, or trade of these species or any other similarly situated species. Also, we did find that there may also be some educational or informational benefit to designating critical habitat. Therefore, we found that the benefits of designating critical habitat for these two species outweighed the benefits of not designating critical habitat. In that final rule, we determined that critical habitat designation would be prudent, and we also indicated that we were not able to develop a proposed critical habitat designation for both species at that time due to budgetary and workload constraints.

On June 2, 2000, we were ordered by the U.S. District Court for the District of Hawaii (in *Center for Biological Diversity* v. *Babbitt and Clark,* Civ. No. 99–00603 (D. Haw.) to publish the final critical habitat designation for both cave animals by February 1, 2002. The plaintiffs and the Service entered into a consent decree in a separate action agreeing to jointly seek an extension of this deadline (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–2063 D.D.C. October 2, 2001).

On January 30, 2002, the U.S. District Court in Hawaii approved a joint stipulation to modify the terms of the June 2 order to extend the deadline to August 10, 2002. Subsequently, the Service determined that an additional extension of time was needed to complete this designation making process. On August 21, 2002, the U.S. District Court in Hawaii approved another joint stipulation extending the date for the final rule designating critical habitat for this species to March 31, 2003.

We proposed critical habitat designations for the Kauai cave wolf spider and the Kauai cave amphipod on March 27, 2002, totaling approximately 1,697 hectares (ha) (4,193 acres (ac)) on the island of Kauai, Hawaii (67 FR 14671).

Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act (16 U.S.C. 1531 *et seq.*) with regard to actions carried out, funded, or authorized by a Federal agency. Section 4(b)(2) of the Act requires that the Secretary shall designate or revise critical habitat based upon the best scientific and commercial data available, and after taking into consideration the economic impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed critical habitat designation. The draft economic analysis is available on the Internet and from the mailing address in the Public Comments Solicited section below.

The public comment period for the March 27, 2002, proposal originally closed on May 28, 2002. We are now announcing the availability of the draft economic analysis and the extension of the comment period for the Kauai cave wolf spider and Kauai cave amphipod. We will accept public comments on the proposal and the associated draft economic analysis for the Kauai cave wolf spider and Kauai cave amphipod until the close of this comment period (see **DATES**). The extension of the comment period gives all interested parties the opportunity to comment on the proposal and the associated draft economic analysis for the Kauai cave wolf spider and Kauai cave amphipod. Comments already submitted on the proposed designation of critical habitat for the Kauai cave wolf spider and Kauai cave amphipod need not be resubmitted as they will be fully considered in the final determinations.

Public Comments Solicited

We will accept written comments and information during this re-opened comment period. If you wish to comment, you may submit your comments and materials concerning this proposal by any of several methods:

(1) You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001. Or by facsimile at 808/541–3470.

(2) You may hand-deliver comments to our Honolulu Fish and Wildlife Office at the address given above.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for inspection, by appointment, during normal business hours at the address under (1) above. Copies of the draft economic analysis are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at the address and phone number under (1 and 2) above.

Author(s)

The primary author of this notice is Lorena Wada (*see* **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: November 5, 2002.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02–29048 Filed 11–12–02; 3:04 pm]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH94

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Blackburn's Sphinx Moth

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft economic analysis for the proposed designations of critical habitat for the Blackburn's sphinx moth (*Manduca blackburni*) on the islands of Maui, Hawaii, Molokai, and Kahoolawe, Hawaii. The comment period to allow peer reviewers and all interested parties to comment simultaneously on the proposed rule (67 FR 54763) and the associated draft economic analysis currently ends on December 30, 2002. Over a 10-year period, the draft economic analysis shows a range of direct costs from $1.2 to 1.9 million, and the possibility of indirect costs approaching $500 million. However, many of the indirect costs shown in the analysis result from uncertain and possibly unlikely future private and governmental actions, and we expressly request comments as to the likelihood of these actions occurring and of the indicated costs from these possible actions being incurred. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this extended comment period and will be fully considered in preparation of the final rule.

DATES: We will accept public comments until December 30, 2002. Any comments received by the closing date will be considered in the final decision on this proposal.

ADDRESSES: Written comments and information should be submitted to Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001. Copies of the draft economic analysis are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at above address and 808/541–3441. For further instructions on commenting, refer to Public Comments Solicited section of this notice.

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, Pacific Islands Office, at the above address (telephone: 808/541–3441; facsimile: 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

An initial comprehensive Notice of Review for Invertebrate Animals was published in the **Federal Register** on May 22, 1984 (49 FR 21664). In that notice, we identified Blackburn's sphinx moth as a category 3A taxon. Category 3A taxa were those for which we had persuasive evidence of extinction. We published an updated Notice of Review for animals on January 6, 1989 (54 FR 554). Although Blackburn's sphinx moth had been rediscovered by 1985, in the 1989 Notice of Review this taxon was again identified as category 3A. In the next Notice of Review on November 15, 1994 (59 FR 58982), this species was reclassified as a category 1 candidate for listing. Category 1 candidates were those taxa for which we had on file sufficient information on biological vulnerability and threats to support preparation of listing proposals. Beginning with our February 28, 1996, Notice of Review (61 FR 7596), we discontinued the designation of multiple categories of candidates, and only those taxa meeting the definition of former category 1 candidates are now considered candidates for listing purposes. In the February 28, 1996, Notice of Review, we identified Blackburn's sphinx moth as a candidate species (61 FR 7596). A proposed rule to list Blackburn's sphinx moth as endangered was published on April 2, 1997 (62 FR 15640). In the September 19, 1997, Notice of Review (62 FR 49398), this species was included as proposed for endangered status.

A final listing rule, listing the Blackburn's sphinx moth as endangered, was published in the **Federal Register** on February 1, 2000 (65 FR 4770). In that final rule, we determined that critical habitat designation for the moth would be prudent, and we also indicated that we were not able to develop a proposed critical habitat designation for the species at that time due to budgetary and workload constraints.

On June 2, 2000, we were ordered by the U.S. District Court for the District of Hawaii (in *Center for Biological Diversity* v. *Babbitt,* Civil No. 99–00603) to publish the final critical habitat designation for Blackburn's sphinx moth by February 1, 2002. The plaintiffs and the Service have entered into a consent decree agreeing to extend the deadline to May 30, 2003. *Center for Biological Diversity, et al.* v. *Norton,* Civ. No. 99–00603 (Aug. 22, 2002).

In response to the court order, on June 13, 2002, we published a proposed critical habitat rule for the Blackburn's sphinx moth. The species is known historically from the islands of Hawaii, Kauai, Maui, Molokai, and Oahu, and known currently from the islands of Hawaii, Kahoolawe, and Maui (67 FR 40633). We proposed a total of approximately 40,240 hectares (99,433 acres) on the islands of Maui, Hawaii, Molokai, and Kahoolawe.

Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act (16 U.S.C. 1531 *et seq.*) with regard to actions carried out, funded, or authorized by a Federal agency. Section 4(b)(2) of the Act requires that the Secretary designate critical habitat based upon the best scientific and commercial data available, and after taking into consideration the economic impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed critical habitat designation. The draft economic analysis is available on the Internet and from the mailing address in

the Public Comments Solicited section below.

The public comment period for the June 13, 2002, proposal originally closed on August 12, 2002. On August 26, 2002, we published a **Federal Register** notice (67 FR 54763) extending the comment period for the proposed designation of critical habitat for Blackburn's sphinx moth. We are now announcing the availability of the draft economic analysis. We will accept public comments on the proposal and the associated draft economic analysis for the Blackburn's sphinx moth until December 30, 2002. Comments already submitted on the proposed designation of critical habitat for the Blackburn's sphinx moth do not need to be resubmitted as they will be fully considered in the final determinations. Written comments should be submitted to us (*see* **ADDRESSES**).

Public Comments Solicited

We will accept written comments and information on the proposed critical habitat designation and draft economic analysis for Blackburn's sphinx moth. If you wish to comment, you may submit your comments and materials concerning the proposal and draft economic analysis by the following methods:

(1) You may submit written comments and information to the Field Supervisor by mail, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001, or by facsimile, (808) 541–3470.

(2) You may hand-deliver comments to our Honolulu Fish and Wildlife Office at the address given above.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for inspection, by appointment, during normal business hours at the address under (1) above. Copies of the draft economic analysis are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at the address and phone number under (1) above.

Author(s)

The primary author of this notice is Mike Richardson (*see* **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: November 5, 2002.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02–29049 Filed 11–12–02; 3:04 pm]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 103102B]

Atlantic Highly Migratory Species; Environmental Impact Statement (EIS) for Amendment 1 to the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks; Shark Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent (NOI) to prepare an EIS; request for comments.

SUMMARY: NMFS announces its intent to prepare an EIS under the National Environmental Policy Act to assess the potential effects on the human environment of its proposed action to initiate Amendment 1 to the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks based on the results of the 2002 stock assessments of large coastal sharks (LCS) and small coastal sharks (SCS). The amendment will examine management alternatives available to rebuild or prevent overfishing of Atlantic sharks, consistent with the LCS and SCS stock assessments, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other relevant Federal laws. NMFS is requesting comments on a wide range of commercial and recreational management measures including, but not limited to, quotas, minimum sizes, and prohibited species.

DATES: Comments on this action must be received no later than 5 p.m., local time, on March 17, 2003.

ADDRESSES: Written comments on this action should be mailed to Christopher Rogers, Chief, NMFS Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910; or faxed to (301) 713–1917. Comments will not be accepted if submitted via email or Internet. For a copy of the 2002 stock assessments, contact Kimberly Marshall, Heather Stirratt, or Karyl Brewster-Geisz at (301) 713–2347.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz,Kimberly Marshall, or Heather Stirratt at (301) 713–2347.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Act. The Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) is implemented by regulations at 50 CFR part 635.

Background

LCS

The LCS complex is composed of several species including, but not limited to, sandbar, blacktip, spinner, bull, and tiger sharks. Since the 1993 Shark FMP, LCS have been considered overfished. The latest stock assessment of LCS in the U.S. Atlantic and Gulf of Mexico, completed in September 2002, provides an update on the status of LCS stocks and projects their future abundance under a variety of catch levels in waters off the U.S. Atlantic and Gulf of Mexico coasts. The 2002 assessment includes catch estimates, new biological data, and a number of fishery-independent catch rate series, as well as extended fishery-dependent catch rate series.

The results for the LCS complex indicate that overfishing could still be occurring and the resource may be overfished. However, for sandbar sharks, the stock assessment indicates that, while overfishing could be occurring, current biomass could be near, or somewhat above, maximum sustainable yield (MSY). Additionally, the stock assessment indicates that no reduction in catch for blacktip sharks is needed to maintain the stock at current levels and that some increase may be sustainable in the long term. This stock assessment is currently under peer review.

SCS

The SCS complex is comprised of four species including Atlantic sharpnose, blacknose, bonnethead, and finetooth. The 1992 stock assessment classified SCS as being fully utilized. The 2002 stock assessment of SCS in the U.S. and Gulf of Mexico indicates that the current level of removals is sustainable for the SCS aggregate. Aggregate biomass levels for the SCS aggregate are estimated at or above those which could produce MSY, and are not considered to be overfished. However, recent fishing mortality of finetooth sharks exceeds the fishing mortality at MSY, indicating overfishing is occurring for this species.

Copies of the assessments are available for review (see **ADDRESSES**).

Management Options

NMFS requests comments on management options for this action. Specifically, NMFS requests comments on commercial management options including quota levels, regional and seasonal quotas, trip limits, minimum sizes, applying dead discards and state landings after a Federal closure to the quota, counting quota over- and underages, and fishery closure and opening notices. Additionally, NMFS request comments on recreational management options including retention limits, minimum sizes, authorized gear, and landing requirements. NMFS also seeks comment regarding deep water and prohibited shark species, display quotas, time/area closures and the organization of species groupings. Comments received on this action will assist NMFS in determining the options for rulemaking to conserve and manage shark resources and shark fisheries.

NMFS intends to publish an Issues and Options paper summarizing the different options under consideration and will announce the availability of this document at a later date. Within the comment period established in this action, NMFS will hold at least one scoping meeting to gather public comment on the implementation of new management measures for Atlantic sharks (time and location details of which will be announced in a subsequent **Federal Register** notification).

Based on the 2002 stock assessments, NMFS believes the implementation of new management measures via an amendment to the HMS FMP is necessary to rebuild or prevent overfishing of Atlantic sharks. NMFS anticipates completing this amendment and any related documents by January 1, 2004. NMFS is currently in the process of developing new interim management measures via a proposed and final rule. These interim management measures would address quotas and other management measures currently in place and would remain in effect until the amendment is finalized.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 12, 2002.

John H. Dunnigan,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–29086 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021101264–2264–01; I.D. 101802D]

RIN 0648–AQ33

Fisheries of the Northeastern United States; Atlantic Herring Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed 2003 specifications for the Atlantic herring fishery; request for comments.

SUMMARY: NMFS proposes specifications for the 2003 Atlantic herring fishery. The regulations for the Atlantic herring fishery require NMFS to publish specifications for the upcoming year and to provide an opportunity for public comment. The intent of the specifications is to conserve and manage the Atlantic herring resource and provide for a sustainable fishery.

DATES: Comments must be received no later than 5 p.m., Eastern Standard Time, on December 16, 2002.

ADDRESSES: Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), Essential Fish Habitat Assessment, and the Stock Assessment and Fishery Evaluation (SAFE) Report for the 2001 Atlantic Herring Fishing Year are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR/IRFA is accessible via the Internet at *http://www.nero.nmfs.gov/ro/doc/nero.html*.

Written comments on the proposed specifications should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930. Mark on the outside of the envelope: ''Comments--2003 Herring Specifications.'' Comments may also be sent via facsimile (fax) to (978) 281–9371. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Paul H. Jones, Fishery Policy Analyst, (978) 281–9273, e-mail at *paul.h.jones@noaa.gov*, fax at (978) 281–9135.

SUPPLEMENTARY INFORMATION: Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for consideration by the Council's Atlantic Herring Oversight Committee: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and subarea identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. Recommended specifications are presented to the Council for adoption and recommendation to NMFS.

Proposed 2003 Specifications

At its August 2002 meeting, the Council recommended specifications for the 2003 Atlantic herring fishery. Based on the Council's recommendations, NMFS proposes the specifications and Area TACs contained in the following table.

SPECIFICATIONS AND AREA TACS FOR THE 2003 ATLANTIC HERRING FISHERY

Specification	Proposed Allocation (mt)
ABC	300,000
OY	250,000
DAH	250,000
DAP	226,000
JVPt	20,000
JVP	10,000 (Area 2 and 3 only)
IWP	10,000
USAP	20,000 (Area 2 and 3 only)
BT	4,000
TALFF	0
Reserve	0

SPECIFICATIONS AND AREA TACS FOR THE 2003 ATLANTIC HERRING FISHERY—Continued

Specification	Proposed Allocation (mt)
TAC–Area 1A	60,000
TAC–Area 1B	10,000
TAC–Area 2	50,000 (TAC reserve: 70,000)
TAC–Area 3	60,000

There are two proposed changes from the specifications approved by NMFS for the 2002 fishery: A transfer of 10,000 mt from the Area 2 TAC reserve to the Area 3, TAC resulting in an Area 3 TAC of 60,000 mt and an Area 2 TAC reserve of 70,000 mt; and a restriction on USAP vessels to receive fish from Areas 2 and 3 only. A discussion of impacts of these proposed changes follows.

Increase to the Area 3 TAC

The proposed increase in the Area 3 TAC from 50,000 to 60,000 mt, and concomitant decrease in the Area 2 TAC reserve from 80,000 to 70,000 mt will have no significant impact on the Atlantic herring stock or the Southern New England/Georges Bank Atlantic herring spawning component. Landings from Area 3 totaled 34,510 mt in 2001, a large increase over the 12,884 mt landed from Area 3 in 2000. This would suggest that the Area 3 TAC could be fully harvested in the future, especially if shoreside processors are able to expand markets and processing capacity. Harvest from Area 2 totaled 15,388 mt in 2001, well below the 50,000–mt TAC and 80,000–mt TAC reserve for that area. Therefore, the proposed TAC-reserve reduction to 70,000 mt in Area 2 is not expected to have any impact on the fishery.

USAP

No biological impacts on the stock of Atlantic herring are anticipated as a result of restricting USAP vessels to receiving fish from Areas 2 and 3 only. No vessel has fished under the USAP category since the FMP was implemented. However, if a USAP vessel has the opportunity to operate in or near Area 1 at a lower cost (for fuel, maintenance, or other operational expenses) than it would incur from fishing in Areas 2 or 3, and it is restricted from fishing in Area 1, the profitability of the USAP vessel could be compromised. However, the prohibition on harvesting Area 1 fish for delivery to USAP vessels would leave more fish available to shoreside processors and bait dealers operating on the coasts of Maine, New Hampshire, and Massachusetts, the three states that border Area 1A (the inshore portion of Area 1). The quota for Area 1A was taken prior to the end of both the 2000 and 2001 fishing years.

Classification

This proposed rule has been determined to be not significant under Executive Order 12866.

The Council and NOAA Fisheries prepared an initial regulatory flexibility analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A summary of the analysis follows:

A description of the reasons why this action is being considered, and the objectives of this proposed rule can be found in the preamble to this proposed rule and are not repeated here. This action does not contain any collection-of-information, reporting, or recordkeeping requirements. It would not duplicate, overlap, or conflict with any other Federal rules.

All of the affected businesses (fishing vessels and dealers) are considered small entities under the standards described in NOAA Fisheries guidelines because they have annual returns (revenues) that do not exceed $3.5 million annually. The last full year of data available for the Atlantic herring fishery is for 2001. There were 146 vessels, 6 processors, and 190 dealers participating in the fishery in 2001. Given that vessels caught less than half the OY in 2001, the proposed status quo OY should not impact harvest levels in 2003.

The Council, in proposing an increase in the Area 3 TAC from 50,000 to 60,000 mt, and concomitant decrease in the Area 2 TAC reserve from 80,000 to 70,000 mt, considered only a zero-sum transfer that would not alter the proposed OY of 250,000 mt. Landings from Area 3 increased from 12,884 mt in 2000 to 34,150 mt in 2001. The Council sought to provide additional opportunity for the industry to increase its activity in Area 3. The Council did not consider transferring any TAC from Area 1 because that is the area in which the fishery has historically concentrated its activity. In fact in 2001, landings from Area 1A and Area 1B totaled 68,130 mt, nearly attaining the combined TAC for both areas of 70,000 mt. Landings from Area 2 in 2001 were 15,388 mt out of a combined Area 2 TAC and Area 2 TAC Reserve of 130,000 mt. Thus the Council concluded that the transfer of 10,000 mt from the Reserve would still leave a substantial amount of TAC for the fishery to expand its activity in Area 2. If the transfer is fully utilized, an additional 10,000 mt would produce additional revenues of 1.2M (assuming $120/mt) to vessels and a proportionate increase in profits to processors.

As noted above, landings from Area 1 in 2001 neared the total TAC for the area. The Council was concerned that future USAP activity, if allowed in Area 1, would have negative impact on firms that have historically harvested Area 1 fish for sale to shoreside processors. If the Area 1 TACs were attained, harvesting vessels that sell their catch to shoreside processors would have to fish further offshore, increasing their operating costs and potentially reducing their profitability. The economic impact on USAP vessels from prohibition on receiving fish harvested in Areas 1A and 1B cannot be directly measured since there is no history of over-the-side purchases upon which to base economic impacts.

The Council considered a Committee recommendation to reduce USAP by 5,000 mt, but rejected it based on comments that a vessel may operate under this specification in 2003 and be able to utilize 20,000 mt. The specification of 15,000 mt would reduce potential profits of USAP operations when compared to the status quo specification of 20,000 mt, although as yet, no part of USAP has been utilized. The Council did not consider a recommendation to increase USAP by 5,000 mt, because no vessel has fished under the USAP category since the FMP was implemented.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 12, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 02–29181 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 67, No. 221

Friday, November 15, 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

Agricultural Marketing Service

[Doc. No. FV–02–338]

United States Standards for Grades of Grapefruit Juice

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; withdrawal.

SUMMARY: The Agricultural Marketing Service (AMS) is withdrawing a notice soliciting public comments on a petition to change the United States Standards for Grades of Grapefruit Juice. This notice is in response to a letter from a petitioner requesting that their petition be withdrawn.

EFFECTIVE DATE: November 15, 2002.

FOR FURTHER INFORMATION CONTACT: Karen L. Kaufman at (202) 720–5021 or e-mail at *karen.kaufman@usda.gov.*

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** (67 FR 39671; June 10, 2002) requesting comments on a petition to change the United States Standards for Grades of Grapefruit Juice. The petitioner, Indian River Citrus League, requested the replacement of the current requirements for U.S. Grade A with the requirements of the Florida Department of Citrus ''Gold Standard''. Prior to undertaking research and other work associated with revising the grade standards, AMS decided to seek public comments on the petition.

In response to our request for comments, AMS received six comments from trade associations and various other interested parties. Four of the six comments opposed the proposed new standard.

In a letter dated August 20, 2002, the Indian River Citrus League requested that their petition to change the standards be withdrawn.

The Department is therefore withdrawing the notice published on June 10, 2002, seeking public comments based on the letter from the petitioner withdrawing their request to change the United States Standard for Grade of Grapefruit Juice.

Dated: November 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–29033 Filed 11–14–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 02–037N]

Codex Alimentarius Commission: Eighteenth Session of the Codex Committee on Fats and Oils

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, of the U.S. Department of Agriculture and the Food and Drug Administration, of the Department of Health and Human Services, are sponsoring a public meeting on January 7, 2003, to review the technical contents of the agenda item documents and to receive comments on all issues coming before the Eighteenth Session of the Codex Committee on Fats and Oils, which will be held in London, United Kingdom, February 3–7, 2003.

DATES: The public meeting is scheduled for Tuesday, January 7, 2003 from 10 a.m. to 12 noon.

ADDRESSES: The public meeting will be held in the Harvey Wiley Federal Building, 5100 Paint Branch Parkway, College Park, Maryland 20740, in Conference Room 1B–042. To receive copies of the documents relevant to this notice, contact the Food Safety and Inspection Service (FSIS) Docket Room, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 102, Cotton Annex, 300 12th Street, SW., Washington, DC 20250–3700. The documents will also be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net.*

Send comments (an original and two copies) to the FSIS Docket Room and reference Docket # 02–037N. All comments submitted in response to this notice will be available for public inspection in the FSIS Docket Room between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Syed Amjad Ali, International Issues Analyst, U.S. Codex Office, FSIS, Room 4861, South Agriculture Building, 1400 Independence Avenue SW., Washington, DC 20250–3700, telephone (202) 205–7760; Fax (202) 720–3157. Persons requiring a sign language interpreter or other special accommodations should notify Mr. Charles W. Cooper, Director, International Activities Staff, FDA, at telephone (301) 436–1714; Fax (301) 436–2618.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission (Codex) was established in 1962 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Codex is the major international organization for encouraging fair international trade in food and protecting the health and economic interests of consumers. Through adoption of food standards, codes of practice and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to ensure that the world's food supply is sound, wholesome, free from adulteration, and correctly labeled. The Codex Committee on Fats and Oils (CCFO) was established to elaborate worldwide standards for fats and oils and their products. The Government of United Kingdom hosts this committee and will chair the Committee meeting.

Issues To Be Discussed at the Public Meeting

The following specific issues will be discussed during the public meeting:

1. Matters referred by the Codex Alimentarius Commission and other Codex Committees.
2. Proposed Draft Amendments to the Standard for Named Vegetable Oils(including provisions for Mid-Oleic Acid Sunflower Oil and Super Palm Olein.
3. Proposed Draft Amendment to the Code of Practice for the Storage and Transport of Edible Fats and Oils in Bulk: Lists of Acceptable Previous Cargoes and Lists of Banned Immediate Previous Cargoes.

4. Proposed Draft Standard for Fat Spreads and Blended Spreads.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and make copies of this **Federal Register** publication available through the FSIS Constituent Update. FSIS provides a weekly Constituent Update, which is communicated via Listserv, a free e-mail subscription service. In addition, the update is available on-line through the FSIS web page located at *http://www.fsis.usda.gov.* The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent Listserv consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through the Listserv and web page, FSIS is able to provide information to a much broader, more diverse audience.

For more information contact the Congressional and Public Affairs Office, at (202) 720–9113. To be added to the free e-mail subscription service (Listserv) go to the ''Constituent Update'' page on the FSIS web site at *http://www.fsis.usda.gov/oa/update/update.htm.* Click on the ''Subscribe to the Constituent Update Listserv'' link, then fill out and submit the form.

Done at Washington, DC on November 8, 2002.

F. Edward Scarbrough,

U.S. Manager for Codex Alimentarius.

[FR Doc. 02–29029 Filed 11–14–02; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest, South Dakota, Elk Bugs and Fuel Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: In accordance with the National Environmental Policy Act, notice is hereby given that the Forest Service, Black Hills National Forest will prepare a Draft Environmental Impact Statement to disclose the environmental consequences of the proposed Elk Bugs and Fuel Project which encompasses approximately 45,498 acres of National Forest System Land (NFS) and 15,068 acres of interspersed private and state lands. Mountain pine beetles are at epidemic levels in portions of the project area and have caused significant mortality of ponderosa pine. Proposed treatments will focus on reducing hazardous fuel concentrations and stand susceptibility to beetle infestation. Priority will be given to treatments on NFS land near private land and those that would contribute to firefighter safety.

In order to move towards the desired future condition as described in the Black Hills National Forest Land and Resource Management Plan as well as meet the purpose and need of the project proposal, proposed activities include: (1) Commercial hardwood restoration; (2) non-commercial hardwood restoration; (3) commercial thinning; (4) non-commercial thinning; (5) commercial thinning and bait and sanitation cutting; (6) prescribed burning; (7) bait and sanitation cutting; (8) shaded fuel breaks; and (9) transportation activities consisting of road construction, reconstruction, and eliminating unnecessary roads.

In accordance with the National Environmental Policy Act and the National Forest Management Act, the Black Hills National Forest will also evaluate the environmental consequences of four nonsignificant Forest Plan Amendments in the Elk Bugs and Fuel environmental impact statement. The amendments, if approved, would apply only to the Elk Bugs and Fuel project.

The treatments authorized by Pub. L. 107–206 are not subject to the decision that will be made by the Elk Bugs and Fuel Record of Decision. However, section 706 of Pub. L. 107–206 requires that the effects of section 706 actions be disclosed in the Elk Bugs and Fuel cumulative effects analysis for past, present, and reasonable foreseeable future actions. This project proposal does not include any proposed treatments in the Greater Beaver Park Lawsuit Settlement Area, including the Beaver Park roadless area.

DATES: Comments concerning the scope of the analysis must be received by December 16, 2002. The draft environmental impact statement is expected to be available for public review in April 2003 and the final environmental impact statement is expected to be available in July 2003.

ADDRESSES: Submit written, oral, or e-mail comments by: (1) Mail—Elk Bugs and Fuel Project; Carl Leland, U.S. Post Office, Room 201, 18 South Mill Ave, Ridgway, PA 15853; (2) phone—(814) 772–2028; (3) e-mail—c*leland@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Carl Leland at (814) 772–2028

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose and need for action of the Elk Bugs and Fuel Project is to reduce mountain pine beetle populations in pine stands, decrease the risk and hazard of wildfire in the proximity of private lands and homes, and to reduce the susceptibility of vegetation to catastrophic fire and further mountain pine beetle attacks.

Proposed Action

The proposed actions to meet the purpose and need include: (1) 409 acres of commercial hardwood restoration; (2) 144 acres of non-commercial hardwood restoration; (3) 10,348 acres of commercial thinning; (4) 3,282 acres of non-commercial thinning; (5) 434 acres of commercial thinning followed by pheromone baiting and sanitation cutting; (6) 562 acres of prescribed burning; (7) 126 acres of pheromone baiting and sanitation cutting; (8) 2,745 acres of shaded fuel breaks; and (9) transportation activities consisting of 42.9 miles of new road construction, 33.9 miles of reconstruction, and 63.5 miles of road decommissioning.

The Black Hills National Forest also proposes to disclose the effects of four nonsignificant Forest Plan Amendments that are needed because of changed conditions brought about by mountain pine beetle infestations and the associated potential for catastrophic wildfire events. The proposed amendments to the Forest Plan, if approved, would apply only to the Elk Bugs and Fuel Project.

Forest Standard 3202, General Wildlife and Fish Direction, provides for big game screening along 20 percent of the edges of arterial and collector roads. Providing shaded fuel breaks along roads in order to protect resources from potential wildfires will require that this standard be reduced to approximately 14 percent for the project area. Management Area (MA) 5.4, Big Game Winter Range Emphasis, Objective 5.4–205 provides for thermal cover for elk, deer and winter turkey habitat on at least 20 percent of the forested portions of the management area. Standard 5.4–2101 states that thermal cover should not be harvested if the planning unit does not meet Objective 5.4–205. In order to maintain the health of many of the insect infested

stands, it is necessary to reduce the basal area so that the remaining healthy trees are less stressed and therefore more capable of withstanding insect attacks. Reducing the basal area of some of these stands will decrease their effectiveness in providing thermal cover. It is therefore necessary to temporarily lower the 20 percent standard to approximately 14 percent within the project area until the stands are treated, recover, and grow to a density that will provide thermal cover in the future.

Management Area 5.4, Big Game Winter Range Emphasis. Standard 5.4–3203 states that deer and elk habitat effectiveness should at least meet the following values: Elk Summer = 54 percent; Elk Winter = 47 percent; Deer Summer = 45 percent; and Deer Winter = 46 percent. In order to meet the purpose and need of this project proposal, it will be necessary to amend the Forest Plan, Standard 5.4–3203 to the following approximate values: Elk Summer = 47 percent; Elk Winter = 42 percent; Deer Summer = 44 percent; and Deer Winter = 40 percent.

Management Area 3.31, Backcountry Motorized recreation Emphasis. Standard 3.31–3202 states that deer and elk habitat effectiveness should at least meet the following values: Elk Summer = 40 percent; Elk Winter = 35 percent; Deer Summer = 37 percent; and Deer Winter = 33 percent. In order to meet the purpose and need of this project proposal, it will be necessary to amend the Forest Plan, Standard 3.31–3202 to the following approximate values: Elk Summer = 32 percent; Elk Winter = 28 percent; Deer Summer = 28 percent; and Deer Winter = 25 percent.

Responsible Official

The responsible official for the Elk Bugs and Fuel Project is John C. Twiss, Forest Supervisor, Black Hills National Forest.

Nature of Decision To Be Made

The Elk Bugs and Fuel environmental impact statement will evaluate site specific management proposals, consider alternatives, and analyze the effects of the activities proposed in these alternatives. It will form the basis for the Responsible Official to determine: (1) Whether or not the proposed activities and alternatives are responsive to the issues, are consistent with Forest Plan direction, meet the purpose and need, and are consistent with other related laws and regulations directing National Forest Management Activities; (2) which actions, if any, to approve; (3) whether or not the information in the analysis is sufficient to implement proposed activities; and (4) whether or not to amend the Black Hills National Forest Management Plan, as previously described.

Scoping Process

Comments will be accepted during the 30-day scoping period as described in this notice of intent. Comments will be reviewed and issues identified. Issues that cannot be resolved by mitigation or minor changes to the proposed action may generate alternatives to the proposed action. This process is driven by comments received from the public, other agencies, and internal Forest Service concerns. To assist in commenting, a scoping letter providing more detailed information on the project proposal has been prepared and is available to interested parties. Contact Carl Leland, Interdisciplinary Team Leader, at the address listed in this notice of intent if you would like to receive a copy.

Preliminary Issues

Preliminary Issues were developed based on past projects in the area (environmental analysis), issues developed for similar projects, and Forest Service concerns and opportunities identified in the Project Area. These issues are listed below:

1. *Road management*—The Forest Service will complete a Roads Analysis, which includes evaluating all roads in the Project Area for effects to the ecosystem. The proposed action requires examining the road system to determine if the existing road system is adequate (or if improvements are needed), and if any roads need to be closed for resource protection or other reasons (*e.g.*, water quality, wildlife, or recreation opportunities).

2. *Mountain pine beetle and forest health*—The spread of mountain pine beetle attacks has caused a concern that there could be large-scale mortality if these areas are not treated.

3. *Prescribed burns, fuels, and wildland-urban interface*—There is a concern for an increased potential for wildfires where there are large areas of unmanaged forest, or where mortality from mountain pine beetle infestations has increased fuels.

4. *Wildlife habitat*—As evidenced by the proposed Forest Plan Amendments, wildlife habitat will fall below present Forest Plan Standards in several areas. The Proposed Action was developed by weighing the potential effects of the proposed treatments to wildlife habitat against the on-going loss of wildlife habitat through mountain pine beetle attacks plus the potential effects of the increased risk of catastrophic wildfire events. This issue will be fully explored in the environmental impact statement. These issues may be modified as additional issues are identified during scoping. A range of alternatives will be considered after public comments are received and analyzed.

Comment Requested

This notice of intent initiates the scoping process that guides the development of the environmental impact statement. Comments that are site-specific in nature are most helpful to resource professionals when trying to narrow and address the public's issues and concerns.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, 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 environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement 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 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement.

Comments may also address the adequacy of the draft environmental impact statement 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.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: November 7, 2002.

William G. Schleining,

Acting Forest Supervisor.

[FR Doc. 02–28876 Filed 11–14–02; 8:45 am]

BILLING CODE 3410–11–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

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

ACTION: Proposed additions to Procurement List.

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

Comments must be received on or before: December 15, 2002.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

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

2. If approved, the action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Janitorial and Mailroom Operations, Environmental Protection Agency, Environmental Science Center, Fort Meade, Maryland.
NPA: Goodwill Industries of the Chesapeake, Inc., Baltimore, Maryland.
Contract Activity: Environmental Protection Agency, Philadelphia, Pennsylvania.

Service Type/Location: Janitorial/Custodial, U.S. Army Reserve Center, Pewaukee, Wisconsin.
NPA: Milwaukee Center for Independence, Inc., Milwaukee, Wisconsin.
Contract Activity: HQ, 88th Regional Support Command, Fort Snelling, Minnesota.

Sheryl D. Kennerly,

Director, Information Management.

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Modification concerning affiliated party sales in the comparison market.

SUMMARY: The Department of Commerce is modifying its methodology in antidumping proceedings concerning the determination of whether sales to affiliated parties in the comparison market are made in the ordinary course of trade and thus may be considered for use in calculating normal value. The schedule for implementing this change is set forth in the ''Timetable'' section, below.

FOR FURTHER INFORMATION CONTACT: Kris Campbell (202) 482–1032, Office of Policy, Import Administration, International Trade Administration.

SUPPLEMENTARY INFORMATION:

Background

This change in methodology concerns the test used in antidumping proceedings to determine whether comparison market sales between affiliated parties are made at arm's length and thus may be considered to be within the ''ordinary course of trade.''

Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the ''AD Agreement'') requires that investigating authorities exclude sales not made in the ''ordinary course of trade'' from calculations of normal value.[1] Section 773(a)(1) of the Tariff Act of 1930, as amended (''the Act''), implements this provision by restricting comparison market sales used to determine normal value to those made in the ordinary course of trade. Under current Department practice, comparison market sales by an exporter or producer to an affiliated customer are treated as having been made at arm's length, and may be considered to be within the ordinary course of trade,[2] if prices to that affiliated customer are, on average, at least 99.5 percent of the prices charged by that exporter or producer to unaffiliated comparison market customers.

Under this 99.5 percent test, the Department determines the weighted-average comparison market selling price for each product for sales by the exporter or producer to each affiliated party. The Department also determines the weighted-average selling price for each product to the group of unaffiliated comparison market customers. For each affiliated customer, the Department compares the weighted-average price to that affiliate for each product to the weighted-average price of the same product to all unaffiliated customers.

[1] Article 2.1 states: ''For the purpose of this Agreement, a product is to be considered as being dumped, *i.e.,* introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting county.''

[2] Such sales may be outside the ordinary course of trade for other reasons, *e.g.,* if they are below cost.

The Department then weight averages the ratios found for all products sold to the affiliated customer. If the result shows sales prices to an individual affiliated party are, on average, at least 99.5 percent of the sales prices to all unaffiliated comparison market customers (*i.e.*, the overall ratio is at least 99.5 percent), all of the sales to that affiliated party may be treated as being made in the ordinary course of trade and may be used in calculating normal value. Otherwise, if the prices to the affiliate are, on average, less than 99.5 percent of prices to non-affiliates, it is the Department's practice to disregard them. Additionally, for affiliates that pass this test (*i.e.*, those whose weighted-average prices are above 99.5 percent), the exporter or producer may request the exclusion of individual sales to such an affiliate upon a showing that such sales are for other reasons outside the ordinary course of trade, *e.g.*, the prices are ''aberrationally'' or ''artificially'' high.

In July 2001, the WTO Appellate Body issued a report in a dispute involving U.S. antidumping measures on certain hot-rolled steel products from Japan (''Japan Hot-Rolled''),[3] concerning, among other things, the Department's determination of whether sales made to affiliated parties in the comparison market were made in the ordinary course of trade and thus may be considered for use in calculating normal value. In its report in Japan Hot-Rolled, the Appellate Body found that the Department's application of its 99.5 percent arm's-length test in the underlying proceeding was inconsistent with the obligations of the United States under Article 2.1 of the AD Agreement. In the view of the Appellate Body, ''[i]f a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be ''in the ordinary course of trade'.''[4] Furthermore, ''the duties of investigating authorities, under Article 2.1 of the Anti-Dumping Agreement, are precisely the same, whether the sales price is higher or lower than the 'ordinary course' price, and irrespective of the reason why the transaction is not in the ordinary course of trade. Investigating authorities must exclude, from the calculation of normal value, all sales which are not made in the ordinary course of trade.''[5] However, investigating authorities do not need to utilize identical rules to scrutinize each category of sales that is potentially not in the ordinary course of trade.[6] WTO Members are afforded discretion in this determination, but such discretion must be exercised in an ''even-handed'' manner.[7]

The United States and Japan entered into arbitration over the period of time in which to implement the Appellate Body's findings in the Japan Hot-Rolled dispute. The arbitrator found that the United States has until November 23, 2002, for implementation.

On August 15, 2002, we solicited public comment on our proposed modification to practice with respect to treatment of affiliated party sales in the comparison market.[8] We received numerous comments and rebuttal comments submitted pursuant to this notice, as discussed below.

Final Modification to Arm's-Length Methodology

The final modification to the Department's arm's-length test is the same as the proposed modification, with the exception of comparing prices of ''similar'' products where an identical comparison product was not sold to unaffiliated parties, as described below. The new test will provide that, for sales by the exporter or producer to an affiliate to be included in the normal value calculation, those sales prices must fall, on average, within a defined range, or band, around sales prices of the same or comparable merchandise sold by that exporter or producer to all unaffiliated customers. The band applied for this purpose will provide that the overall ratio calculated for an affiliate be between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers in order for sales to that affiliate to be considered ''in the ordinary course of trade'' and used in the normal value calculation. This new test is consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, ''even-handedly,'' that ''both high and low-priced sales between affiliates might not be ''in the ordinary course of trade'.''

The single change from the proposed arm's-length methodology involves comparing prices of products sold to affiliates with prices of non-identical products sold to unaffiliated customers, with an adjustment for physical differences in the products, where there is no identical product sold to non-affiliates. This methodology corresponds to that used in comparing prices of products sold in the U.S. and comparison markets in the dumping analysis. In comparing prices across markets, the Department first seeks to match U.S. sales with comparison market sales of identical merchandise. If there are no appropriate sales of identical merchandise in the comparison market, the Department seeks the most comparable merchandise based on the relevant product matching characteristics. When comparing non-identical merchandise, the Department makes an adjustment, where appropriate, to normal value for differences in physical characteristics.[9] This adjustment normally is based on differences in the variable costs of manufacturing attributable to the physical differences between the products.[10] While product characteristics differ from case to case, the Department generally does not compare a comparison market product to a given product sold in the United States if the difference in variable manufacturing costs of the two products is greater than 20 percent.

We plan to employ a corresponding methodology, including adjustments for differences in variable costs and application of the 20 percent ''difmer cap,'' in analyzing non-identical product matches between sales to affiliated and unaffiliated customers for purposes of the arm's-length test. In many cases the information needed, including matching criteria and variable and total cost information, will be on the record pursuant to our standard information requests.[11] Where we lack the necessary information we will limit our analysis to identical merchandise, consistent with our current methodology. That is, we will determine

[3] Dispute Settlement Panel Report on Japan complaint concerning U.S. Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R (Feb. 28, 2001) (''Panel Report.'' Appellate Body Report on Japan Complaint Concerning U.S. Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2002) (''AB Report'').

[4] AB *Report,* paragraph 148.

[5] *Id.,* paragraph 145.

[6] *Id.,* paragraph 146.

[7] *Id.,* paragraph 148.

[8] ''Request for public comment pursuant to section 129(g)(1)(C) of the Uruguay round Agreements Act,'' 67 FR 53339 (August 15, 2002) (''Proposed Modification'').

[9] See section 773(a)(6)(C)(ii) of the Act.

[10] See 19 CFR 351.411.

[11] In determining product matches across markets, the 20 percent difmer cap is calculated by dividing the difference in variable manufacturing costs between the two porducts by the total manufacturing costs of the U.S. product. For the arm's-length test, we will divide the difference invariable manufacturing costs between the two products by the total manufacturing costs of the product sold to the affiliated party. Variable manufacturing costs for home market sales normally are requested in all cases, while total manufacturing costs for home market sales currently are requested incases involving below-cost inquiries.

the overall ratio for a given affiliate only on the basis of sales of those products that were also sold to non-affiliates.

The inclusion of comparisons of non-identical matches will enhance the reliability of the arm's-length test by increasing the pool of sales used to calculate the affiliate-specific ratios that are assessed against the 98–102 percent band. While some of the public comments submitted expressed concern that comparing non-identical merchandise will add unnecessarily to the complexity of the arm's-length test, or will otherwise increase the chance of error resulting from data not fully analyzed at the time the arm's-length test is conducted, we believe the benefits of bringing these matches within the ambit of the test outweigh these concerns.[12]

Finally, as noted in the Proposed Modification and as further discussed in the ''Comments'' section below, we will continue our present practices with regard to the use of so-called ''downstream'' sales (sales made by an affiliated buyer to that buyer's subsequent customer). Specifically:

1. If sales to all affiliates account for less than five percent of all comparison market sales, we normally will disregard downstream sales.

2. If sales to an affiliate fail the arm's-length test, and (1) does not apply, we normally will request the affiliate's downstream sales and use those instead of the sales which failed that test.

3. If a respondent has cooperated to the best of its ability and is unable to obtain downstream sales, we will not use adverse facts available for those sales.

Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the Proposed Modification. We have carefully considered each of the comments submitted. While we have not adopted suggested alternatives to the proposed 98–102 percent band test, the comments were useful in helping to clarify the concepts underlying the ''ordinary course of trade'' analysis and in refining the test by allowing for comparisons of non-identical products. As such, we are grateful to those who took the time to comment on this aspect of the Department's antidumping methodology. Specific proposals are summarized below, along with our response to each. For more detail on the comments submitted, see the Department's web site at http://ia.ita.doc.gov, where all comments received have been posted in their entirety.

1. Proposals for Automatically Disregarding Comparison Market Sales Between Affiliates and Requesting Downstream Sales

A number of commenters proposed that the Department should presume that comparison market sales between affiliates are always made outside the ordinary course of trade, and should automatically request downstream sales (sales from the affiliated purchaser to unaffiliated customers). These commenters maintain that such a methodology would be consistent with the Appellate Body report in Japan Hot-Rolled, which explicitly allowed for the use of downstream sales in determining normal value, and would also bring the normal value analysis into alignment with the analysis for U.S. sales, in which sales between affiliates are automatically disregarded. In the view of these commenters, such a methodology would reflect the fact that affiliated party sales are inherently suspect and subject to manipulation. They also suggest that the Act explicitly allows for use of comparison market downstream sales while it does not require the use of prices between affiliates. However, one commenter who recommends this approach acknowledges that it would require a change in the Department's regulations, in particular 19 CFR 351.403(c)–(d). This commenter recommends that the change in practice be accompanied by an announcement that the Department intends to change the regulations to conform to the new practice.

Several commenters objected to this proposal. Some asserted that it is contrary to U.S. law, claiming that the Department must examine all sales in the ordinary course of trade, and citing section 773(f)(2) of the Act in support of the general proposition that the Department must make an affirmative finding that transactions between affiliates do not fairly reflect market value before disregarding them. Others claimed that it is contrary to U.S. regulations, and also is likely to give rise to problems of WTO consistency with respect to the obligation to make fair comparisons.

Department's Position: While we disagree with the comment that U.S. law prohibits requesting downstream sales in lieu of upstream sales to affiliated parties,[13] we are not adopting the proposal to automatically disregard sales to affiliates. As we stated in the Proposed Modification and as acknowledged by at least one proponent of automatically excluding sales to affiliates, this proposal conflicts with the assumptions underlying the Department's regulations on affiliated party sales (19 CFR 351.403(c)–(d)) that such sales normally will be used in the dumping analysis if shown to be in the ordinary course of trade.

We do not believe it necessary or appropriate to change these provisions, as suggested by one commenter. The current regulations were developed after extensive comment, including comment on the issue of whether to require in all cases that respondents report downstream sales. In our view, the regulatory scheme for reporting and analyzing affiliated party sales established by 19 CFR 351.403(c) and (d) strikes the appropriate balance between seeking to use first-level sales from the respondent where such sales can be demonstrated to be within the ordinary course of trade, and requiring downstream sales where sales to affiliates do not meet this standard. While this approach does not look to downstream sales automatically, it places an affirmative obligation on respondents to report such sales where sales to an affiliate cannot be shown to be at arm's length. As noted in the preamble to the regulations, the Department ''will require a respondent to demonstrate in each segment of an AD proceeding that the reporting of downstream sales is not necessary.''[14] This is accomplished in practice by maintaining a requirement that respondents report downstream sales for all affiliated party sales that do not pass the arm's-length test.

2. Proposals for Using Statistical Testing Methods Instead of a Percentage Band Approach

Several commenters suggested that the Department incorrectly rejected statistically valid testing (*e.g.*, standard deviation, difference in means, non-parametric tests) in the Proposed Modification in favor of the 98–102 percentage band approach. One commenter took issue with the reasons given in the Proposed Modification for not relying on statistical testing in determining whether sales are made in the ordinary course of trade, in particular the statement that ''[s]uch tests, properly applied, would allow

[12] See also ''Analysis of Public Comments,'' comment 5, below.

[13] Discretion to request downstream sales is explicit in section 773(a)(5) of the Act (''If the foreign like product is sold, or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party may be used in determining normal value.'').

[14] Preamble to Dep't of Commerce Regulations, 62 FR 27296, 27356 (May 19, 1997) (''Preamble'').

certain affiliated party sales to be deemed in the ordinary course of trade, including sales with prices below unaffiliated sales prices, that we believe would distort dumping calculations.''[15] This statement, according to the commenter, is results-oriented reasoning because the Department is focusing on low-priced sales to affiliates and expressly rejecting statistical tests on the basis that, when properly applied, these tests would not exclude affiliated party transactions that the Department believes would result in the calculation of ''distorted'' margins. This commenter suggests that the concern over distorted margins is inappropriate in this context, since statistical approaches, if properly structured, by definition are intended to operate in a mathematically neutral manner.

Another commenter proposed standard deviation testing as an example of a statistically valid methodology more suitable to identifying outlier transactions than the percentage band approach. Citing a proposal for such testing by one of the Japanese respondents in the investigation underlying the Japan Hot-Rolled report, this commenter suggests that, in general, respondents should be allowed on a case-by-case basis to propose alternative testing methods that are reasonable and easy to administer.

Department's Position: While we appreciate the desire for a statistical-testing approach to the arm's-length test, as we indicated in the Proposed Modification, we have been unable to identify an alternative test that adequately serves the purposes of a dumping analysis and can be readily applied in the context of the variety of situations we encounter, including situations that involve multiple products sold to an affiliate. The comment that the Department's reasoning is ''results oriented'' implies that the Department should be unconcerned that parties might manipulate pricing to affiliates for purposes of a dumping case. We disagree. We do not believe that the purpose of the types of statistical tests considered is applicable in this context. Moreover, the only specific proposal offered for a statistical test would apply the test on a CONNUM-specific basis, which is inconsistent with the purpose of evaluating the overall pricing relationship between the affiliates. (*See* comment 6 below.) Therefore, we are not persuaded that a statistical test is appropriate in this context.

[15] Proposed Methodology at 53340–53341.

3. Proposals Regarding Appropriate Size of the Band

A number of commenters proposed that, if the Department decides to use a ''band'' approach in determining whether comparison market sales to affiliates were made at arm's-length, it should alter the band size from the 98–102 percent range set forth in the Proposed Modification. Three types of proposals were made in this regard: (1) A wider band (*e.g.*, 90–110); (2) a narrower band (*e.g.*, 99.5–100.5); and an ''asymmetrical'' band (*e.g.*, 99.5–125).

Those favoring a wider band argue that a 98–102 percent range does not sufficiently recognize natural variability within a respondent's pricing data, both between customers and over time. This range, therefore, will produce results that fail to reflect commercial reality, leading to the inappropriate rejection of *bona fide* arm's-length sales.

These commenters suggest that pricing differences of up to ten percent can occur in the normal course of business for reasons unconnected with affiliation, such as differences in quantities and relative differences in bargaining power. One commenter suggested in addition that some variability in POI-average prices to affiliates and non-affiliates can result from selling in different quantities over time to the two groups, *e.g.,* a higher quantity to affiliated customers early in the POI and a higher quantity to unaffiliated customers later in the POI. Under this scenario, even where there is no variation in pricing to affiliates and non-affiliates at any single point in time, the affiliate-specific ratios calculated by the Department will show variance from average prices to non-affiliates.

These commenters also contend that a restrictive band for determining whether sales to affiliates are within the ordinary course of trade is counter to the general preference in both the AD Agreement and U.S. law for establishing normal value based on comparison market sales. Further, in the event that the Department seeks to replace sales that fail the new arm's-length test with downstream sales (as indicated in the Proposed Modification), a narrow test may impose overly burdensome reporting requirements, in which case it may not be considered sufficiently ''even-handed'' as the term is used in the Japan Hot-Rolled report.

Finally, certain commenters favoring a broader band suggest that, to the extent there is concern over manipulation of pricing (via clustering of sales to affiliates at the low end of the band), the Department could test for such pricing patterns upon receipt of a respondent's sales databases, and could address such problems on a case-by-case basis, through the fictitious markets provision[16] as well as the ordinary course of trade provision.

Commenters arguing for a narrower band (99.5–100.5) stress that the change in practice under the proposed 98–102 percent band would go beyond the requirements of the Appellate Body report in Japan Hot-Rolled and would enhance respondents' ability to manipulate home market sales to mask dumping. One commenter provides a hypothetical example of this potential for manipulation, highlighting perceived weaknesses both in the range of acceptable prices in the new standard and the fact that, as with the old standard, it would be applied on an affiliate-specific, and not product-specific, basis.[17] This combination, according to the commenter, would allow respondents to make sales to an affiliate of products matching to U.S. products at prices significantly below the 98 percent threshold (*e.g.,* at 80 percent of prices to non-affiliates) while still passing the test by selling non-matched products to the same affiliate at prices above the threshold (*e.g.,* 120 percent). This commenter maintains that, while such manipulation is possible under the current test, it would be ''dramatically easier'' under the proposed 98–102 standard.

Another commenter suggests that, if the Department retains the 98–102 standard for investigations, it should at a minimum use a 99.5–100.5 standard for administrative reviews. This approach would place the arm's-length test on a consistent footing with the two percent and 0.5 percent *de minimis* dumping standards used in investigations and reviews, respectively.

Linking the standards used in the arm's-length test with those used in determining *de minimis* dumping would, according to this commenter, reduce any perceived arbitrariness over the range selected, thereby lowering its susceptibility to further WTO challenges. It would also reflect the greater potential for manipulation of pricing that can occur after imposition of an order than during the initial period of investigation.

Commenters in favor of an ''asymmetrical'' test base their arguments on language from a footnote in the Japan Hot-Rolled report providing that, ''in finding that the application of the 99.5 percent test was not sufficiently even-handed, we do not suggest that the

[16] Section 773(a)(2) of the Act.

[17] See also comment 6, below, regarding the affiliate-specific nature of the test.

methods for verifying whether high and low-priced sales to affiliates are 'in the ordinary course of trade' must necessarily be identical.''[18] Accordingly, these commenters suggest, the Department retains the discretion to tailor an arm's-length test for comparison market sales between affiliates geared toward the primary concern in a dumping context: namely, low-priced sales designed to reduce normal value. These commenters maintain that an asymmetrical test is consistent with the WTO report since it imposes a ''bright line'' standard for high-priced sales, and is otherwise appropriate because it would retain a broader base of profitable sales made in the normal course of business than the proposed 98–102 percent test. It would also reflect the fact that a different set of circumstances exists for high-priced sales between affiliates, which are priced as such for internal company-specific reasons unrelated to the dumping analysis.

Department's Position: We have carefully considered each of the ranges proposed as alternatives to the 98–102 percent test. While some of these ranges (*e.g.*, 99.5–100.5) were previously examined in the course of arriving at the Proposed Modification,[19] we have reconsidered all options regarding upper and lower limits of the band in light of the arguments and hypothetical situations provided in the comments received.

As indicated in the Proposed Modification, the range adopted must account for concerns that the band be neither overly narrow, which would reduce the utility of the test as few affiliates would pass, nor overly broad, which could increase the potential for manipulating normal value through clustering of sales prices to affiliates at the lower end of the band.[20] Having considered the alternative suggestions regarding the appropriate band size, we continue to believe that the 98–102 range strikes the best balance in providing a reasonable and predictable means of assessing whether affiliated party sales were made at arm's-length prices. First, contrary to the argument of advocates for the 99.5–100.5 band, we do not believe that extending the lower end of the acceptable range from 99.5 percent to 98 percent provides a significant opportunity for manipulation of normal value, either in investigations or administrative reviews. The range established retains a standard that reasonably ensures that we only use sales between affiliates that are appropriate for use in the dumping analysis, in light of the fact that such sales are inherently suspect unless demonstrated to be in accord with prices negotiated by independent parties. While a particular concern arises regarding low-priced sales between affiliates in an antidumping context, the requirement that such sales, on average, fall within two percent of average prices to non-affiliates will provide a reasonable means of continuing to ensure against such manipulation.

As noted, several commenters suggest that the proposed 98–102 standard will have largely the same effect as a 99.5–100.5 band, arguing that sales prices routinely diverge by more than this range in the normal course of business, and that the ratio can be affected by other factors such as the timing of sales to affiliates and non-affiliates within the period of investigation. In response, we note first that the test recognizes that pricing of individual transactions may vary by more than two percent in the normal course of business. Such sales may still be found to be at arm's length and included in the dumping analysis as long as sales to the affiliate are, on average, within the band. The test in this respect is appropriately geared toward a recognition that, while individual sales transactions may be expected to vary in the normal course of business, systematic underpricing or overpricing between affiliates over the period examined in the dumping analysis is indicative of sales not made at arm's length.

Second, as discussed in more detail in comment 4, below, in comparing prices under the arm's-length test we routinely adjust for many of the factors that give rise to differences in pricing, and allow for additional adjustments, *e.g.*, for differences in quantities, where warranted.

Third, we disagree with suggestions for a broader band (*e.g.*, 90–110) coupled with the proviso that, if the Department finds upon further analysis that sales to affiliates are clustered at the low end of the band, it may then consider, on a case-by-case basis, whether to disregard them under either the fictitious market provision or the ordinary course of trade provision. The fictitious market provision is inappropriate for this analysis; whether or not a fictitious market exists, prices between affiliates may not reflect arm's-length transactions. Applying the fictitious market standard would not adequately serve the purpose of identifying systematic underpricing or overpricing between affiliates. Furthermore, as we have stated in past cases, it is to be used in exceptional circumstances and not employed as a routine part of the Department's analysis.[21] Such inquiries typically require an allegation from an interested party and call for analyses based on information that is quantitatively and/or qualitatively different from the information normally gathered by the Department as part of its standard antidumping analysis.[22] In addition, the suggested approach is not sufficiently in accord with the concept that sales between affiliates are inherently suspect until demonstrated to be in the ordinary course of trade. In effect, it would reverse this concept for certain sales that in our view are suspect, requiring an additional finding, on a case-by-case basis, that other factors render such sales not at arm's length. Finally, there are serious concerns that any such approach would not be reasonably administrable within the time limits of an antidumping proceeding, particularly given the requirement in most instances for downstream sales once a determination is made that sales between affiliates are not at arm's length.

In light of these concerns, we believe the more appropriate finding is that sales below the 98 percent threshold, but within the proposed broader band, are outside the ordinary course of trade. However, as discussed in comment 4, below, we will consider arguments on a case-by-case basis that such pricing patterns were determined entirely by market factors not captured by the arm's-length test, such as the timing of sales made to affiliated and unaffiliated parties during the period of investigation.

Finally, we disagree with suggestions that an ''asymmetrical'' test would be consistent with the WTO report in Japan Hot-Rolled or is otherwise appropriate as a test for sales not made at arm's length. While the Appellate Body provided in a footnote that the tests for whether low-priced and high-priced sales to affiliates are in the ordinary course of trade did not necessarily have to be ''identical,'' this was made in the context of statements that the current test was not sufficiently ''evenhanded'' to the extent that it ''operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of high-

[18] AB Report, footnote 113.

[19] Proposed Modification at 53340. See also Premable at 27356.

[20] Proposed Modification at 53340.

[21] Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 64 FR 12951, 12956 (March 16, 1999).

[22] Preamble at 27357.

priced sales, except those proved, upon request, to be aberrationally high priced.'' The Appellate Body's finding that the application of the 99.5 percent test in the Japan Hot-Rolled case violates Article 2.1 of the AD Agreement was based on its assessment that the test ''focuses predominantly'' on the distortion that results from low-priced sales and does not ''take equal account of the possibility that prices 'above the (99.5 percent) threshold' can also 'distort' normal value.'' [23] We believe that automatically disregarding sales to affiliates at prices below the 99.5 percent threshold while automatically including sales at prices up to a 125 percent threshold would be inconsistent with this reasoning.

4. Proposals To Take Into Account Relevant Commercial Circumstances

Numerous commenters proposed that, in assessing whether affiliated party sales were made in the ordinary course of trade, the arm's-length test should not focus exclusively on price, but should take into account all relevant commercial circumstances. Referencing a statement in the Appellate Body report that ''price is merely one of the terms and conditions of a transaction,'' [24] these commenters suggest that, to the extent the arm's-length test ignores the commercial circumstances pertaining to affiliated and unaffiliated party sales, the new methodology will produce distorted results. Suggestions for factors to examine include level of trade, customer categories, quantities sold, product mix, and any other terms of sale relevant to the transactions under examination.

The suggestions vary with respect to the relationship between these factors and the arm's-length test as described in the Proposed Modification. One proposal is that affiliated party sales should be found within the ordinary course of trade wherever their terms of sale are the same as sales made at the same time to unaffiliated parties. Other commenters suggest that, if a price analysis is conducted, it needs to ensure that any differences in commercial terms and conditions between affiliated and unaffiliated party sales that could impact price are taken into account. A third proposal is that the price analysis should merely establish a rebuttable presumption that sales to an affiliated party are outside the ordinary course of trade, which could be countered by other information demonstrating that such sales were in fact made under the conditions and practices that are normal in the comparison market and, thus, are in the ordinary course of trade.

Department's Position: As with the current test, the new methodology takes account of many of the factors suggested by commenters as relevant to the ordinary course of trade analysis. We take this opportunity to clarify those aspects of the methodology used to establish the affiliate-specific price ratios that relate to this issue.

First, price comparisons between affiliated and unaffiliated party sales that are factored into the affiliate-specific price ratios (which are then applied against the 98–102 percent range) are made at the same level of trade, where appropriate. That is, the arm's-length test generally does not compare prices of sales made at different levels of trade. Any sales to affiliates for which there are no comparable sales to unaffiliated parties at the same level of trade are not used in determining the affiliate-specific price ratios. This does not mean that such sales are automatically disregarded from use in determining normal value, but simply that such sales are not used in determining whether, overall, sales to a given affiliate are made at arm's length. If, based on the sales that are used in the analysis, it is determined that sales to an affiliate were made at arm's length, all sales to the affiliate, including sales without comparable unaffiliated sales at the same level of trade, are included in the comparison market database used to establish normal value.[25]

In addition to comparing sales at the same level of trade, the test adjusts affiliated and unaffiliated party prices for numerous differences relating to the sales. The adjustments account for, among other things, differences in packing expenses, movement expenses from the original place of shipment, discounts and rebates, and selling expenses that relate directly to the sale at issue. While the Department's questionnaire specifically requests information pertaining to a number of adjustments, it also allows for responding companies to claim additional adjustments for other expenses relating to the sales at issue. Thus, provided that a respondent has accurately reported its claimed differences in circumstances of sale, along with other expenses and price adjustments relating to the reported sales, the arm's-length test will account for such differences between sales to affiliates and non-affiliates.

With respect to the request by numerous commenters that the test also take into account the price effect of any difference between sales to affiliates and non-affiliates in quantities sold, we note that adjustments for differences in quantity are addressed at § 351.409 of the Department's regulations. We do not automatically adjust for differences in quantities, but will do so under the conditions specified in this regulation. Moreover, the fact that the arm's-length test makes comparisons only at the same level of trade should reduce the number of instances in which sales of significantly different quantities are compared. As stated in the preamble to the Department's regulations, based on our experience we believe that differences in quantity are more likely to occur at different levels of trade.[26]

Considering these aspects of the arm's-length test in light of the proposals made, we believe the test adequately accounts for the factors alleged by the commenters to affect price comparisons between sales to affiliated and unaffiliated parties. Beyond this, we are not in a position to speculate on any case-specific circumstances that might warrant additional consideration. Accordingly, we have not changed the test in response to these comments. However, as with other aspects of the Department's dumping analysis, parties have a right to submit comments on the record of a proceeding regarding the adjustments that must be made under the statute in order to ensure a fair comparison. We will consider any comments submitted regarding case-specific adjustments made in the arm's-length analysis in that light. While this does not constitute what one commenter referred to as a rebuttable presumption with respect to the results of the 98–102 percent test, and is not a change in our practice of generally limiting the analysis to pricing as adjusted, as upheld by the Court of International Trade,[27] it does provide a fair opportunity to ensure that all appropriate adjustments are made in deriving the affiliate-specific ratios to which the band applies.

Finally, we have not adopted the proposal that equivalent terms of sale for affiliates and non-affiliates should conclusively establish that affiliated

[23] AB Report, paragraph 157.

[24] AB Report, paragraph 142.

[25] Under the current test, the same holds true regarding affiliated party sales that have no identical matching unaffiliated party sales. *See* comment 5 regarding the change in methodology allowing for non-identical comparisons. In both situations, where there are no sales to an affiliate that can be compared with unaffiliated party sales, sales to this affiliate would not be used in the dumping analysis.

[26] *Preamble* at 27368.

[27] *NTN Bearing Corp.* v. *United States,* 905 F. Supp1083, 1099–1100 (October 2, 1995).

party sales are in the ordinary course of trade. This proposal, like others offered, appears to be based on a sale-by-sale analysis.[28] As we discuss further below, we do not believe this approach appropriately addresses the question of the nature of the relationship between the affiliates.

5. Treatment of Sales to Affiliated Parties of Products Not Sold to Unaffiliated Parties

Certain commenters suggested that the Department alter the manner in which it treats sales to affiliated parties of products not sold to unaffiliated parties. Currently, as with affiliated party sales that cannot be compared to unaffiliated party sales at the same level of trade (*see* comment 4, above), sales to affiliates with no identical match to an unaffiliated party sale are not used in determining the affiliate-specific ratios that are compared against the 99.5 percent threshold.

However, such sales are not automatically disregarded for determining normal value; they are retained in the comparison market database if the affiliate passes the arm's-length test based on sales that could be compared with unaffiliated party sales.[29]

One commenter suggested that the new test should seek to compare affiliated party sales with sales of non-identical merchandise sold to unaffiliated parties, where there are no comparable sales of identical merchandise. This revision would, according to this commenter, expand the pool of sales used to determine whether pricing to an affiliate was made at arm's-length, and would also be in accord with the Department's regulations on affiliated party sales. These regulations provide that ''the Secretary may calculate normal value based on [affiliated party sales] only if satisfied the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller.''[30] The use of the term ''foreign like product'' in this context, according to this commenter, indicates that the determination of whether affiliated party sales are made at arm's length is to be established with reference to the price of identical and similar merchandise sold to unaffiliated parties.

Another commenter suggests an alternative means of including sales to affiliates of products lacking an identical match in the arm's-length analysis; namely, that the Department should assume that such sales were made at 100 percent of the price to non-affiliates, and factor this into the affiliate-specific ratio.

Department's Position: As noted in the ''Final Modification to Arm's-Length Methodology'' section, above, we intend to match non-identical merchandise where there are no comparable sales of identical merchandise. The reference in the governing regulation to comparing prices of affiliated party sales with sales to non-affiliates of the ''foreign like product'' makes clear that the price of non-identical merchandise is appropriate for use in determining whether sales were made at arm's length. We expect to be able to make such comparisons where the respondent has provided both total and variable home market costs, typically in cases involving sales-below-cost inquiries. While we will not require total home market costs in non-cost cases solely for purposes of making comparisons in the arm's-length test, we will accept the reporting of such costs on a voluntary basis in such cases. While some commenters maintain that expanding the arm's-length test in this manner will add unnecessarily to the complexity of the analysis, we believe that comparisons to non-identical merchandise can be accommodated within the existing framework for the conduct of antidumping proceedings.

We can see no reason to adopt the alternative proposal for assuming sales with no identical match were made at 100 percent of the price to unaffiliated parties. There is no claim that such an assumption is grounded in fact, and could lead, in effect, to an assumption that affiliated party sales were made at arm's length.

6. Comments Regarding Appropriate Level for Determining Whether Sales are at Arm's Length: by Individual Sale; by Product; by Affiliate

As described in the Background section, above, the Department currently assesses whether sales were made at arm's length at the level of the individual affiliate. Both the methodology used in the 99.5 percent test and the Proposed Modification weight average the product-specific price ratios for all products sold to an affiliated customer to arrive at an affiliate-specific price ratio. If the result shows sales prices to an individual affiliated party are, on average, at least 99.5 percent of the sales prices to all unaffiliated comparison market customers (under the 99.5 percent test) or between 98–102 percent, inclusive, of unaffiliated prices (under the 98–102 percent test), then all sales to that affiliated party may be treated as being made in the ordinary course of trade and may be used in calculating normal value, including any sales made at prices below the threshold. Otherwise, if the affiliate-specific price ratios do not meet these criteria, all sales to the affiliate are generally considered outside the ordinary course of trade, including sales at prices above the 98–102 band.

A variety of proposals were submitted that would allow the arm's-length determination to be made on the basis of individual sale prices or weighted-average prices by product, as opposed to the affiliate-wide determination described above. One commenter suggests that the determination should be done on a sale-by-sale basis. Under this proposal, any individual sale to an affiliated party would be considered as made at arm's-length as long as it is priced at a level equivalent to any comparable sale to an unaffiliated party. According to this commenter, there is no basis to disregard such sales to affiliates where the comparable sale to the unaffiliated party is determined to be in the ordinary course of trade. Another commenter takes the opposite approach, recommending that all individual sales to an affiliate must be found to be priced at levels establishing the arm's-length nature of the transaction in order for any sales to the affiliate to be used.

Another commenter proposes a product-specific approach for each customer, whereby the product-specific average price, as sold to an individual affiliate, must be within the band established for arm's-length sales in order for such sales to be used in determining normal value. According to this commenter, a product-specific approach to determining sales in the ordinary course of trade is more in line with the rest of the statutory framework for determining normal value, which is centered on the price of the foreign like product, *i.e.*, a model-specific hierarchy of merchandise for comparison. Yet another commenter views ''foreign like

[28] Comment 6, below, addresses a similar proposal to retain all individual affiliated party sales that are priced at the level of any unaffiliated party sale considered to be in the ordinary course of trade.

[29] A number of comments received on this issue assume that such sales are automatically considered to have ''failed'' the arm's-length test and, as such, are disregarded in determining normal value. One commenter suggests that, in a variant of the test, the Department makes an adverse assumption and assigns all affiliated party sales of products with no match to unaffiliated party sales a CONNUM-specific ratio of 0 percent. While the commenter does not cite specific cases employing different methodologies, we will ensure that future cases are consistent in their treatment of affiliated party sales with no match to unaffiliated sales.

[30] 19 CFR 351.403(c) (emphasis added).

product'' broadly (akin to class or kind) and contends that the arm's-length analysis should focus on this broad basis, since a corporation's pricing decisions are rarely, if ever, made on a CONNUM-specific basis.

Department's Position: While we have carefully considered each of these alternative proposals for the appropriate level at which to determine whether affiliated party sales are made within the ordinary course of trade, we have decided to retain our normal practice of making this determination on an affiliate-wide basis. While certain individual sales and products that would pass the test on their own may be excluded under this approach, and vice-versa, an affiliate-wide analysis does not systematically bias the arm's-length determination in one direction or another. Our reasons for preferring that the determination of whether sales are made at arm's-length be conducted at the level of the individual affiliate were set forth in the investigation underlying the AB Report in Japan Hot-Rolled:

> With respect to NKK's concern of applying the arm's-length test on a customer basis, we note that the question underlying the arm's-length test is whether affiliation between the seller and the customer has (in general) affected pricing. Because affiliation is the result of relationships between firms, the focus of the arm's-length test is the customer, not a particular product. For this reason, the Department makes one up-or-down call on pricing to an affiliated customer: Either there is arm's-length pricing or there is not. However, under NKK's [product-specific] approach, affiliation could be found to matter for some connums, but not for others, even though the customer in both cases is the same.[31]

This aspect of the Department's methodology was not at issue before either the WTO Panel or the Appellate Body in Japan Hot-Rolled, and we do not find sufficient reason to depart from the current approach in adopting the new methodology. Moreover, abandoning the focus on the pricing relationship with the affiliate would fundamentally alter the nature of the test and introduce many complicated questions about other aspects of the test as well as use of downstream sales.

While the explanation cited above pertains to requests for a product-specific approach, its rationale applies as well to requests for a sale-specific approach. In particular, the proposal to retain an individual affiliated party sale if priced at a level equivalent to a comparable sale to an unaffiliated party would require that we ignore the potential for manipulation that results from the affiliation. Under this approach, affiliated party sales could be priced on average far below market price and still be retained for determining normal value as long as they are made at the price of the lowest individual sale price to an unaffiliated customer. The adoption of this method for determining arm's-length sales would, therefore, not establish that affiliated party sales are appropriate for use in the dumping analysis.

7. Proposals for Treatment of Merchandise ''Consumed'' by Affiliates, as Distinguished from Merchandise Resold

Certain commenters submitted proposals for differentiating between sales of the foreign like product ''consumed'' (not resold as subject merchandise) by an affiliate and sales to an affiliate that are resold as subject merchandise.[32]

One commenter suggested that, when sales to affiliated parties are not resold but are instead ''consumed,'' the standard used in the arm's-length test should be different. In particular, this commenter suggests dropping the requirement that sales, on average, be within the band and allowing any individual sales within the band to pass the arm's-length test. This commenter suggests that the broader requirement that pricing overall to the affiliate be within the band is less relevant where an affiliate consumes the merchandise by producing and selling a product that is outside the scope of the order.

Another commenter, while proposing that the Department automatically request downstream sales in the case of resales (*see* comment 1, above), suggested applying an arm's-length test in the limited instance of sales of merchandise ''consumed'' by an affiliate. Alternatively, a third commenter, while agreeing that the Department should automatically request downstream resales, suggested eliminating sales of merchandise consumed by an affiliate from the analysis. This commenter suggests that the Department's concern over a methodology that leads to fewer comparisons based on the preferred methodology (home market sales) is overstated, given the U.S. Court of Appeals ruling in *Cemex S.A.* v. *United States* with respect to matching to similar merchandise[33]. Further, according to this commenter, disregarding all sales to affiliated consumers would not be contrary to the Department's regulations or Congressional intent, since the former must be read in light of the general suspicion of affiliated party sales encompassed in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), and the latter anticipates that Commerce, ''in general,'' will not rely on sales to affiliates in determining normal value.[34]

Department's Position: Consistent with our current practice and with § 351.403(c) of the Department's regulations, we intend to continue using sales to affiliates, whether of merchandise consumed or resold, to determine normal value where such sales are shown to be at arm's length. The comments submitted proposing different treatment of sales of merchandise consumed by affiliates do not provide sufficient reasons to depart from this practice.

With respect to the proposal that individual sales of merchandise consumed by affiliates should be found to have passed the arm's-length test whenever such sales prices are within the established price band, no underlying rationale was provided for this difference in treatment other than to claim that the affiliate-wide pricing requirement ''makes no sense'' as applied to affiliated consumers. We do not believe that there is sufficient reason to apply a different standard with respect to such sales. Whether the affiliate consumes or resells the subject merchandise, the question posed is the same and the test applied should be the same.

With respect to the suggestions that we should automatically disregard sales to affiliated consumers, or that we should apply an arm's-length test only to such sales while automatically disregarding sales to affiliated resellers, our response to comment 1, above, which provides our reasons for applying an arm's-length test to upstream sales to resellers (as opposed to automatically disregarding such sales), applies as well to applying an arm's-length test to sales to affiliated consumers and using such sales to establish normal value when

[31] Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329, 24342 (May 6, 1999).

[32] Sales by an affiliate of subject merchandise are referred to in the Preamble to the Department's regulations, and in this notice, as ''downstream sales.'' Preamble at 27356. Sales from the respondent company to the affiliated reseller are described in this notice as ''upstream sales.''

[33] 133 F.3d 897 (Fed. Cir. 1998) (citing also DOC Policy Bulletin 98.1, which specifies that, henceforth, when all sales of a particular home market model are below cost, instead of automatically resorting to constructed value to determine normal value, the Department will first attempt to use prices of a non-identical model that remains above cost.).

[34] Citing H.R. Rep. No. 103–826, at 82 (1994).

they are demonstrated to be at arm's length. There is insufficient reason to apply different methodologies to these two groups of sales to affiliated parties. We also note that, to the extent there is ambiguity regarding reporting requirements for these two types of affiliated party sales, we intend in the future to make clear that sales to affiliates, whether consumers or resellers, will be used in the dumping analysis where shown to be at arm's length based on the 98–102 price band methodology.

8. Other Methodological Proposals for Determining Sales at Arm's Length

Other proposals made regarding the arm's-length test include:

• A proposal by the commenter who recommended a sale-by-sale approach to use, as an alternative in the event the sale-by-sale approach is not adopted, the quantity-based test described as an alternate option in the Proposed Methodology. Under this option, affiliated party sales would be found within the ordinary course of trade as long as a sufficient quantity of comparable sales to non-affiliates were priced above and below the affiliated price. This commenter believes the Department's concerns over this option, centering on complexity, implementation, and uncertainty over the appropriate level of quantities needed to pass the test, are overstated, and provides examples of how it could be implemented without undue difficulty.

• A suggestion to apply the arm's-length test only when common ownership between affiliates reaches a level of 50 percent or more. This approach, the commenter suggests, will more accurately reflect those situations where actual control exists sufficient to give rise to concerns over manipulation of pricing.

• A request for clarification of the methodology with respect to a single affiliate with multiple customer codes in the reported home market database, due to, for instance multiple billing addresses. This commenter requests that Commerce adopt in all cases the methodology used in Certain Cold-Rolled Carbon Steel Flat Products from France,[35] where it ''collapsed'' multiple customer codes and performed the arm's-length test on an aggregate basis.

• A request that the Department explain how a band approach, containing an upper-level ceiling on affiliated party prices, is consistent with the test applied for valuing inputs sold between affiliates, as prescribed at sections 773(f)(2) and (3) of the Act. The commenter believes any differences could be interpreted as reflecting inconsistent definitions of the term ''foreign like product,'' one relating to price-based normal value (arm's-length test) and one relating to constructed value (the provisions of the Act cited above). This commenter requests that this explanation be made with reference to a recent remand by the Court of International Trade (as directed by the Court of Appeals for the Federal Circuit), in which the Department was asked to clarify why it uses different definitions of the term ''foreign like product'' for price-based and cost-based calculations.[36] The commenter also references the recent determination in Certain Cold-Rolled Carbon Steel Flat Products from France,[37] where, the commenter maintains, the arm's-length and cost valuation issues were joined, since a transaction that failed the current arm's-length test could be evaluated under the major input rule for use in determining input costs.

• A request for clarification that, when the Department finds an insufficient volume of sales to unaffiliated purchasers, it will continue its practice, as noted in the preamble to the Department's regulations,[38] of disregarding affiliated party sales.

• A request that the Department explicitly place on respondents the burden of proof for establishing that affiliated party sales are in the ordinary course of trade, and clarify that all such sales will be disregarded until this burden of proof is met.

• A request for clarification regarding whether all affiliated party sales that fail the arm's-length test will continue to be excluded from the CEP profit calculation. This commenter notes that the current practice is centered on low-priced sales falling below the 99.5 percent threshold,[39] and asks whether high-priced sales above the 98–102 band would also be excluded. This commenter suggests that ''capping'' the CEP profit calculation by excluding high-priced sales that fail the arm's-length test would conflict with the preamble to the Department's regulations and with its statutory obligations.[40]

Department's Position: We respond to each item, in turn. With respect to the suggestion favoring the use of a quantity-based test, our concerns with this test, as set forth in the Proposed Modification, remain despite the suggestions by the commenter. These include, in addition to the general complexity and implementation concerns cited by the commenter, concerns over whether to apply the test by affiliate or for all affiliates combined by product, and questions as whether this might not be an overly narrow definition of the ''normal'' price range of sales to affiliated parties. We continue to believe the 98–102 percent band provides a more reasonable, predictable, and administrable test.

With respect to the suggestion that we only apply the arm's-length test in situations involving 50 percent or greater cross-ownership between affiliates, as we stated in the preamble to the Department's regulations, we believe an arm's-length analysis is appropriate ''whenever there are transactions between parties within the meaning of section 771(33) of the Act. Therefore, if two parties are affiliated, any transactions between them are subject to paragraphs (c) and (d) of 19 CFR 351.403, allowing use of transactions between affiliated party sales only if found to be made at arm's length.''[41] We have not changed our view in this regard.

With respect to the issue of multiple customer codes for a single affiliate, we confirm that we intend to aggregate sales to a single affiliate for purposes of the arm's-length test.

With respect to the comment regarding a perceived inconsistency between the arm's-length standard as set forth in the Proposed Modification and the statutory requirements for valuing affiliated party inputs (sections 773(f)(2) and (3)), we disagree that the arm's-length test must apply the standard or test used for valuing affiliated party inputs. These tests are employed for different purposes in analytically distinct areas of the dumping analysis. As for the CIT remand cited by the commenter, we note that this remand concerned a separate issue relating to the statutory definition of ''foreign like product'' as the term is used in various parts of the antidumping statute. The commenter did not explain the relevance of this court decision, nor do we believe that the modification of the arm's-length test depends on or implies any application of different definitions of the term ''foreign like product.''

[35] 67 FR 31204 (May 9, 2002).

[36] *FAG Italia* v. *United States*, 291 F.3d 806 (CIT 2002).

[37] 67 FR 31204 (May 9, 2002).

[38] Preamble at 27355.

[39] Citing Import Administration Policy Bulletin 97.1: Calculation of Profit for Constructed Export Price Transactions, at pages 3–5 (September 4, 1997).

[40] Citing Preamble at 27354 (''the statute does not authorize a cap on the amount of profit deducted from CEP'').

[41] Preamble at 27356.

With respect to the request for clarification on our intended practice regarding insufficient unaffiliated party sales, we confirm that, consistent with the preamble to our regulations, affiliated party sales will not be used where there are insufficient unaffiliated party sales for use in the arm's-length test.

With respect to the comment on burden of proof, we believe the Department's regulations speak for themselves, namely that affiliated party sales will be used only where the Department is satisfied that the price to an affiliate is comparable to unaffiliated prices.[42]

With respect to the request for clarification regarding affiliated party sales used in determining CEP profit, the Department's current practice is to exclude non-arm's-length sales and include downstream sales of the same merchandise where such sales are reported. We have not changed that policy.

9. Treatment of Downstream Sales

Aside from the methodology used to determine whether sales to affiliates are made in the ordinary course of trade, numerous commenters submitted proposals regarding the use of downstream sales by affiliated parties where upstream sales fail the arm's-length test.[43]

Several commenters maintain that the 98–102 percent test, if adopted, will increase reliance on downstream sales and will, as a result, create greater potential for facts available given the frequent reluctance on the part of affiliated resellers to provide information regarding downstream sales. One commenter suggests that, in order to balance this likely effect, the current ''five percent'' exemption for reporting downstream sales[44] should be broadened to a ''20 percent'' exemption, analogous to the rule for determining whether ''substantial quantities'' of sales were made below cost. Under this approach, the Department would not request downstream sales for any respondent whose comparison market sales to affiliates comprise less than 20 percent of the value (or quantity) of all comparison market sales of the foreign like product. Alternatively, this commenter suggests applying the five percent test on a different basis than that currently used. Specifically, instead of determining whether sales to all affiliates are less than 5 percent of total sales of the foreign like product, the Department would under this proposal determine whether only those sales of merchandise to affiliates that (1) failed the arm's-length test and (2) are resold (not consumed) are less than five percent of all sales of the foreign like product, and would not request any downstream sales if this standard was met.

Another commenter suggests that the Department should not request downstream sales under the following circumstances: (1) Where sales to an individual affiliate constitute less than one percent of all comparison market sales of the foreign like product, regardless of whether the five percent exemption is met in the aggregate; (2) where respondents demonstrate that downstream sales prices are lower than upstream sales prices, provided they agree that upstream prices would be used in determining normal value; and (3) where resales are made in small quantities or at different levels of trade than the other comparison market and U.S. sales.

Other commenters propose stricter reporting requirements and expanded coverage of downstream sales. One suggestion is to eliminate or lower (to 0.5 percent) the five percent exemption for reporting downstream sales in order to counteract what is likely to be a larger amount of sales disregarded—particularly high-priced sales—under the revised test compared with the 99.5 percent test.

Another commenter recommends a different standard be applied in investigations and reviews regarding the respondent's obligations to report downstream sales. This proposal would allow for downstream sales to be disregarded in investigations when a respondent demonstrates to the Department that it cannot obtain such sales, but would require respondents to include, as a condition of sale to affiliates, a requirement that such affiliates provide information on their sales in antidumping reviews. This proposal would have the Department issue a statement of practice pertaining to administrative reviews providing, among other things, that ''[i]f a respondent claims that it is otherwise unable to submit the downstream sales data of an affiliated seller, the Department will apply adverse facts available.''

Finally, another commenter asks that the Department make clear that it will apply an arm's-length test to downstream sales, where such sales are sold to a second-level affiliate.

Department's Position: We have not changed our requirements regarding downstream sales based on these suggestions. With respect to the five-percent threshold for reporting downstream sales by affiliates set forth at § 351.403(d) of the Department's regulations, the proposals to raise or to lower this standard do not address the proposed change in the arm's-length test itself. In any event, we do not believe that a change in the regulations is warranted by these suggestions.

The adoption of the five-percent threshold was based on the premise ''that imposing the burden of reporting small numbers of downstream sales often is not warranted, and that the accuracy of determinations generally is not compromised by the absence of such sales.''[45] We continue to believe that a five-percent standard normally balances these considerations appropriately. The proposed 20 percent standard is too high to warrant confidence that exceptions to reporting downstream sales based on this threshold would not compromise the accuracy of our determinations. On the other hand, the proposed 0.5 percent threshold is based on a misplaced analogy to the *de minimis* dumping standard in administrative reviews. We do not believe that exempting downstream reporting where a respondent sells less than five percent of the foreign like product to affiliates, and basing normal value on other sales or on constructed value, gives rise to concerns about the accuracy of our determinations.

With respect to the proposal that the sales of the foreign like product used to determine whether the five-percent threshold is met should be narrowed to only those that fail the arm's-length test and are not consumed by the reseller, we continue to believe that the five-percent standard, as stated in the regulation, is appropriate. The assessment by the Department, in the preamble to the regulations, that excusing reporting of downstream sales would not compromise the accuracy of its determinations was predicated on a finding that the respondent's total sales of the foreign like product to affiliates were less than five percent of all sales of the foreign like product. While we may determine in certain cases that it is appropriate to excuse downstream reporting along the lines suggested by this commenter, we do not believe the

[42] 19 CFR 351.403(c).

[43] See page 7, above, and Proposed Modification, 67 FR at 53340, for a summary of the Department's practice concerning downstream sales.

[44] *See* § 351.403(d) of the Department's regulations, specifying that the Department generally will not calculate normal value based on downstream sales where sales of the foreign like product to affiliated parties constitute less than five percent of the total value (or quantity) of the respondent's sales of the foreign like product in the market in question.

[45] *Preamble* at 27356.

proposal could be applied generally without compromising accuracy. For similar reasons, we also disagree with the proposal to exempt individual affiliates from reporting downstream sales based on the proposed ''one-percent'' standard, though we may exempt reporting of such sales in individual cases. In our view, the five-percent standard, based on a company's aggregate sales to all affiliates, provides a reasonable test for whether to exempt a respondent from downstream reporting.

Regarding the proposal that we exempt respondents from downstream sales reporting where they can show such sales were made at prices below the relevant upstream sale and agree to use the upstream sale in its place, we do not believe it would be appropriate to address such hypothetical situations. We will do so if and when such issues are raised in a case.

Regarding the proposal that we exempt downstream sales made at different levels of trade than other comparison market sales or U.S. sales, such an exemption could conflict with our practice of matching U.S. and comparison market sales at different levels of trade in the absence of comparable sales at the same level of trade. As such, it could inappropriately reduce the number of price-based comparisons in the dumping analysis. However, as stated in the Preamble to the Department's regulations, the Department does not believe it necessary or appropriate to require the reporting of downstream sales in all instances, though the Department will require a respondent to demonstrate in each segment of a proceeding that the reporting of downstream sales is not necessary.

Regarding the proposal that we exempt downstream sales made in small quantities, as noted above, we believe that, as a general matter, the correct level at which to determine whether sales are so small as to warrant not reporting is at the level of the upstream sale between affiliates. This is the level at which the five-percent threshold is applied. Any other requests for exemptions from reporting based on a small quantity of sales would need to be considered on a case-by-case basis.

Regarding the proposal that we apply different standards in investigations and administrative reviews regarding a respondent's claim that it cannot submit downstream sales data, we disagree with the suggestion that we automatically resort to adverse facts available in administrative reviews. We will continue to determine, based on the facts of each case, the extent to which an individual respondent has failed to cooperate by not providing requested information. This approach is consistent with our statutory and WTO obligations regarding the use of adverse facts available. While we do not disagree in principle with the suggestion that a respondent who has participated in an initial investigation may be expected in subsequent administrative reviews to have gone to greater lengths to secure such data, any finding of uncooperativeness must be made with reference to the particular facts of each segment of the proceeding.

Finally, we intend to continue our practice of applying the arm's-length test to any sales made to affiliated parties, including downstream sales to second-level affiliates.

10. Proceedings/Entries Governed by Revised Arm's-Length Test

One commenter argued that the Department's proposed timetable for applying the new methodology with respect to other proceedings and segments of the Japan hot-rolled proceeding other than the investigation (*i.e.,* reviews initiated on the basis of requests received on or after the first day of the month following the date of publication of the Department's final notice of that new methodology) would contravene section 129(c) of the URAA (19 U.S.C. 3538(c)). That section, the commenter claimed, requires that such changes be implemented only with respect to entries made, not proceedings requested or initiated, on or after the implementation date.

Department's Position: The Department's timetable for applying its new methodology beyond the Japan hot-rolled investigation is legally permissible and appropriate. Specifically, contrary to the commenter's assertions, section 129 of the URAA applies only to changes implemented with respect to the segment of the proceeding that gave rise to the WTO challenge. That is, section 129 of the URAA applies only to changes made as a result of ''an action by the administering authority in a proceeding under title VII * * * [that] is not in conformity with the obligations of the United States under the Antidumping Agreement * * *.'' Section 129(b)(1) (emphasis added). Therefore, the timing provisions of section 129(c) (which deal with implementation under section 129) also apply only to changes to measures ''as implemented'' with respect to the segment of the proceeding which served as the basis for the WTO challenge.

In contrast, changes in agency practice (such as this change with respect to the arm's-length test) made in connection with an adverse WTO panel or Appellate Body are governed by a different provision of the URAA. See section 123(g) of the URAA. Section 123 has its own ''effective date of modification'' provision (section 123(g)(2)). This provides for a single limitation on the effective date: ''the final rule or other modification may not go into effect before the end of the 60-day period beginning on the date on which consultations [with the appropriate congressional committees on the proposed content of the modification] begin [unless the President determines that an earlier effective date is in the national interest].'' Because this new methodology will ''go into effect,'' for other proceedings and other segments of the Japan hot-rolled proceeding, after the 60-day period will have ended, the timetable for implementation is lawful. Thus, Commerce's decision to apply its new methodology prospectively, beginning with segments of proceedings initiated on or after November 23, 2002,[46] is proper.

The fact that, under the proposed implementation timetable, the new arm's-length methodology ''would affect'' margins on imports which entered prior to the implementation date, but for which the margins would be calculated in a review initiated after the implementation date, does not compel the result urged by the commenter. The commenter's broad reading of the legislative history of section 129 does not provide authority for extending the effective date provision of that section to areas covered instead by section 123, especially given that section 123 has its own, different, provision that controls such a new methodology.

It is significant that section 123 uses the term ''go into effect'' (which refers to the beginning of *use* of a methodology), rather than language of section 129, which refers to which entries will be affected. There is no legislative inconsistency with the use of a new methodology ''affecting'' entries made prior to the date on which the methodology changed. Indeed, except where otherwise specified (as in section 129 with respect to the actions of the Department in the contested segment of the proceeding), the Department's practice has normally been to begin application of a new methodology with respect to segments of proceedings requested or initiated after a given date, rather than applying different methodologies within the same segment

[46] See ''Timetable'' section, below.

of the proceeding. See, *e.g.*, section 291(a)(2) of the URAA (the URAA amendments shall ''take effect'' on the date the WTO Agreements enter into force and ''shall apply with respect to'' reviews initiated pursuant to a request filed after such date); 19 CFR 351.701 (regulations implementing the changes made by the URAA ''apply to all administrative reviews initiated on the basis of requests made after June 18, 1997'' (the ''effective date'' provided in the notice of final rule published in the **Federal Register** on May 19, 1997).

11. Applicability of Administrative Procedures Act To Revised Arm's-Length Test

One commenter contended that the change to the arm's-length test is tantamount to creating a rule as set forth in 5 U.S.C. 553 of the Administrative Procedures Act (APA). More specifically, citing *Carlisle Tire & Rubber Co.* v. *United States,* 10 C.I.T. 301, 305–06 (1986) (*Carlisle*), the commenter suggests that the Department's notice and comment procedures should comply with those set forth under APA. In this commenter's view, the 15 day notice and comment period provided by the Department falls short of the 60 day period required under the APA.

Department's Position: As discussed above, the revised arm's-length methodology has been developed taking into account the finding in the AB Report that the application of the 99.5 percent arm's-length test in the underlying investigation was inconsistent with the obligations of the United States under Article 2.1 of the AD Agreement. As a result, the revised arm's-length test represents a methodology consistent with section 2.1 of the AD Agreement in accordance with the AB Report. Unlike the methodologies contested in *Carlisle,* our arm's-length methodology does not create an inflexible rule. In short, the Department's arm's-length methodology is not subject to the APA because, unlike the methodology underlying *Carlisle,* it only interprets the law.

The Department also notes that section 123(g) does not provide for application of the APA within the context of the remediation of the Department's practice. Section 123(g) only requires, in relevant part, that the Department provide the public with the proposed change, an explanation of how that change would implement the panel or Appellate Body report, and an opportunity for comment. Consequently, under a plain language reading of section 123(g), the Department's announced change in practice would not be subject to the notice and comment procedures of the APA.

Timetable

This methodology will be used in implementing the Japan Hot-Rolled findings pursuant to section 129 of the URAA. In accordance with section 129(c)(1) of the URAA, the section 129 determination in Japan Hot-Rolled will establish new cash deposit rates for all producers for whom the investigation rates are still applicable and will apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which the United States Trade Representative directs the Department to implement that determination. With respect to other proceedings and other segments of the Japan hot-rolled proceeding, the new methodology will be applied in all investigations and reviews initiated on or after November 23, 2002.[47]

Dated: November 8, 2002.

Faryar Shirzad.

Assistant Secretary for Import Administration.

[FR Doc. 02–29065 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–DS–P

[47] This is a slight modification of the Timetable as set forth in the Proposed Modification. Previously, the Timetable anticipated that the implementation of this practice would go into effect with respect to investigations initiated on the basis of requests received after the publication date of this notice, and for reviews initiated on the basis of requests received in the month following publication of this notice. Upon further consideration, we have determined that it is appropriate to employ this methodology in all investigations and reviews initiated on or after November 23, 2002.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 021028257–2257–01]

RIN 0648–ZB32

NOAA Ocean Exploration Initiative, Fiscal Year 2003

AGENCY: Office of Ocean Exploration, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: NOAA's Office of Ocean Exploration (OE) is seeking pre-proposals and full proposals for grants and cooperative agreements and other financial collaborations in support of OE's mission to expand our knowledge base of the ocean's physical, chemical and biological characteristics, processes, and resources and to learn more about our maritime cultural heritage by means of experiments and expeditions to unknown, or poorly known oceanic and Great Lakes regions. With an emphasis on stimulating integrated, interdisciplinary efforts and institutional collaborations, the goal is to foster a program in ocean exploration in which discovery and the spirit of challenge are the cornerstones.

DATES: Pre-proposals are required and must be received in the NOAA Office of Ocean Exploration by close of business (U.S. Eastern Time Zone), December 16, 2002, and full proposals by close of business, January 29, 2003. In the event these dates fall on a weekend or holiday, the application deadline shall be the first working day after the date specified. E-mail submissions of the pre-proposals and proposals are strongly encouraged. Facsimile pre-proposals and/or facsimile proposals will not be accepted.

ADDRESSES: Send proposals to NOAA, Office of Ocean Exploration, ATTN: OE Science Program Coordinator, Bldg. SSMC3, Rm. 10221, 1315 East West Highway, Silver Spring, MD 20910 or via e-mail to: *oar.oe.submissions@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Margot Bohan, OE Science Program Coordinator, or Randi Neff, OE Program Grants Coordinator, NOAA Office of Ocean Exploration, 301–713–9444, facsimile 301–713–4252 or submit inquiries via e-mail to the Frequently Asked Questions address: *oar.oe.FAQ@noaa.gov.* A copy of this notice, as well as ancillary information, will be posted on the Ocean Explorer Website which can be found at: *http://www.explore.noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Program Authority

Authority: 33 U.S.C. 883d. *Catalog of Federal Domestic Assistance Number:* 11.460.

II. Program Description

A. Background

In June 2000, the Secretary of Commerce was given a Presidential directive to convene a panel of leading ocean explorers, scientists, and educators to develop a national strategy for exploring the oceans. Upon completion of its undertaking, the Presidential Panel presented its recommendations in the report entitled, *Discovering Earth's Final Frontier: A U.S. Strategy for Ocean Exploration (Presidential Panel Report)* (*http://*

oceanpanel.nos.noaa.gov). Among them was a recommendation to designate a lead Federal agency to guide a national program in ocean exploration. NOAA was selected and established the Office of Ocean Exploration in 2001.

Through implementation of the vision of the Presidential Panel, OE seeks to challenge our Nation's scientists to explore the frontiers of ocean science and technology for the purpose of discovery and the advancement of knowledge of the oceans and their resources.

B. Program Mission

The mission of OE is to expand our knowledge base of the ocean's physical, chemical and biological characteristics, processes and resources and to learn more about our maritime cultural heritage by means of experiments and expeditions to unknown, or poorly known oceanic and Great Lakes regions.

III. Program Notice

A. Notice Objectives

The purpose of this announcement is to invite the submission of pre-proposals and full proposals for grants and cooperative agreements and other financial collaborations whose objectives are to explore the ocean and map its resources, to gain new insights about its physical and chemical processes and its living and non-living resources, including maritime cultural heritage, and to contribute to the advancement and utilization of ocean technology.

B. General Guidance

Themes. In 2002, OE conducted eight U.S. regional workshops to engage a broad and diverse representation of ocean scientists, explorers, and educators from public, private and commercial organizations to help define and prioritize ocean exploration objectives for the coming years. A number of exploration themes, which refine and complement those of the Presidential Panel Report, emerged as a result. Persons submitting proposals may elect to address these preferred themes, which are listed below (in no order of priority).

- Mapping ocean characteristics and bathymetry;
- Marine life inventories: vertebrate, invertebrate, macro-organisms and micro-organisms
- Marine archaeology characterization of benthic and pelagic habitats and ecosystems
- Locating and mapping corals (including deep corals)
- New ocean resources
- Passive ocean acoustics
- Technology: innovative applications and leveraged development

Geographic Areas of Interest. OE is especially interested in, but will not limit its consideration to, proposals for exploration within the U.S. EEZ and other areas of U.S. jurisdiction, including the Great Lakes. Additional areas of geographic interest include the Polar Regions and the following regions where OE anticipates being able to provide the noted resources:

- Gulf of Mexico/Caribbean/ Southwest North Atlantic [Class I ship w/ sub or ROV, 30 days]
- Gulf of Mexico/U.S. East Coast/ Caribbean [Class II ship with sub or ROV, 40 days]
- U.S. East Coast, [Class I ship with ROV, 60 days]
- U.S. East Coast, [Class III ship, 30 days]
- Northwestern Hawaiian Islands [Class II ship with sub or ROV, 60 days]

Investigators with non-OE-funded shiptime, projects, or other resources may wish to propose supplementing them by the addition of tasks or objectives that are consistent with (and are, therefore, eligible for funding by) the OE program.

Establishment and support of facilities and infrastructure are not OE priorities. Proposals focused solely on ocean-climate issues are also not an OE priority.

C. Proposal Requirements

Outreach & Education. A key recommendation of the Presidential Panel Report is ''reaching out in new ways to stakeholders, to improve to the literacy of learners of all ages with respect to ocean issues.''

All funded Principal Investigators (PIs) and collaborators will be required to cooperate with OE in facilitating education and outreach activities. This may entail development of lesson plans, professional development for teachers, accommodation of a teacher/educator-at-sea, and at-sea media participation.

Data Management. In accepting full or partial OE sponsorship, each PI is obligated to meet certain data management requirements including:

1. PIs will provide metadata, e.g., number and type of data, and description of the data collected immediately upon completion of a project cruise. Other data or data products may also be required at the discretion of the OE Director.

2. PIs will provide OE and the public access to the acquired data sets collected as soon as practical and, in no case, later than one year following the data of collection, unless an extension is specially granted by OE.

Proposals should include a description and justification of data funding needs and explain how data will be made accessible or available to the public.

3. NOAA's ocean Explorer Web site (*http://oceanexplorer. noaa.gov*) is the principal vehicle for chronicling and documenting all missions supported by OE. PIs and mission participants will be required to provide material (i.e., throughout the mission) for this site such as cruise tracks, preliminary bathymetry, characterization of data collected, photographic or other images from the mission, and participants interviews, essays, or written materials. Funded PI's will be required to cooperate with the NOAA Ocean Explorer website team which may include accommodation of a NOAA web team member. (See Ancillary Information at: *http://explore.noaa.gov*).

IV. Funding Availability

FY2003 funding for this program has not yet been appropriated. Proposals are encouraged for collaborations and explorations ranging from the tens of thousands of dollars to funds appropriate for up to two months of expeditionary exploration work. Multi-year proposals will be accepted, although the principal focus in the first several years of the OE program will be on one-year projects and expeditions. Out-year funding will be contingent upon factors including successful accomplishment of prior-year objectives as well as availability of program funding and other relevant resources.

The funding instrument of extramural awards may be a grant or cooperative agreement. A cooperative agreement is appropriate when substantial NOAA involvement is anticipated. This means that the recipient can expect substantial agency collaboration, participation, or intervention in project performance. Substantial involvement exists when: responsibility for the management, control, direction or performance of the project is shared by the assisting agency and the recipient; or the assisting agency has the right to intervene (including interruption or modification) in the conduct or performance of project activities. NOAA will make decisions regarding the use of cooperative agreements on a case-by-case basis. NOAA encourages the participation of NOAA scientists in collaborative efforts. Applications determined to be for the acquisition of property or services for the direct benefit or use of the U.S. government will evaluated for funding

under agency contract procurements outside of this announcement.

There is no guarantee that sufficient funds will be available to make awards for all qualified projects. Publication of this Notice does not obligate NOAA to award any specific project or to obligate all or any part of the available funds.

V. Eligibility

Eligible applicants are institutions of higher education, other nonprofits, commercial organizations, international organizations, state, local and Indian tribal governments. Applications from non-Federal and Federal applicants will be competed against each other. (**Note:** NOAA/OE spent approximately 70 percent of Fiscal Year 2002 funds outside the agency.) Proposals selected for funding from non-Federal applicants will be funded through a project grant or cooperative agreement under the terms of this notice. Proposals selected for funding from NOAA scientists shall be affected by an intra-agency fund transfer. Proposals selected for funding from a non-NOAA Federal agency will be funded through an inter-agency transfer. **Please Note:** Before non-NOAA Federal applicants may be funded, they must demonstrate that they have legal authority to receive funds from another Federal agency in excess of their appropriation. Because this announcement is not proposing to procure goods or services from applicants, the Economy Act (31 U.S.C. 1535) is not an appropriate legal basis.

VI. Project Funding Considerations

Ideally, proposals should be interdisciplinary, involve legitimate collaborations with other institutions or agencies, and have contributory funding. An interdisciplinary approach will likely to result in a greater breadth of science product. Collaborations will enhance the proposal through the contribution of scientific or technical expertise, funds, personal, shiptime, and/or equipment. Although cost sharing is not required, it is encouraged. Contributory funding will leverage OE funds.

The geographic area of interest of a proposal will also be a project funding consideration.

Communication of research through outreach and education is a critical element of the programs, projects and activities that OE supports. Proposals should reflect a willingness to facilitate and participate in such activities.

OE may share proposals with other funding entities, such as the agencies of the National Ocean Partnership Program, and other NOAA funding sources, to ensure the most appropriate funding (see Section VIII.B.).

VII. Guidelines for Submission

There will be a two-stage competition with pre-proposals utilized for an initial selection process. Full proposals will be solicited from investigators who submit successful pre-proposals. An approved pre-proposal is a requisite for submission of a full proposal. All pre-proposals and proposals must conform with the requirements published in this notice. Pre-proposals will be judged in terms of their consistency with the Presidential Panel Report and the Ocean Exploration program's themes (see Section III.B.). The cost of the proposed activities relative to available program funds will also be taken into consideration.

A. Preliminary Proposals

A pre-proposal should include a summary of the proposed research, project priorities, a statement of objectives, and a description of how the proposed project is in keeping with the OE mission described in this notice. The area of proposed operations must be clearly defined (e.g., including latitude, longitude, and depth). Required platforms or other critical assets should be identified. The pre-proposal should make clear any time or other operational constraints, especially with regard to field operations. Any auxiliary funding sources for the proposed project should be identified. Pre-proposals should also identify all collaborators and include a summary budget. Pre-proposals may not exceed two typewritten single-sided pages, using 10-point font or larger. All pre-proposals must also include a completed pre-proposal cover page (available electronically at *http://explore.noaa.gov)* (see **FOR FURTHER INFORMATION CONTACT** to request a hard copy version). Electronic submission of pre-proposals to *oar.oe.submissions@noaa.gov* is strongly encouraged. See **ADDRESSES** to submit a hard copy submission.

B. Proposals

All proposals must include the following, packaged in the order listed here: (a) A completed proposal cover page (available electronically at *http://explore.noaa.gov*); (b) a maximum half-page executive summary; (c) a maximum 15-page description of the entire project (including work plan, schedule, and collaborations); (d) a summary of relevant current funding support; (e) brief resumes for each investigator, including recent relevant publication references, (f) a detailed budget (including any ship and equipment costs) and budget narrative (including justification for non-standard items) and (g) all government forms required for submission (see Section VII.C.). All pages should be single-sided, single—or double-spaced, typewritten margin in a minimum 10-point font on a 8½″ x 11″ page. Tables and visual materials, including charts, graphs, maps, photographs, and other pictorial presentations are to be including in the 15-page limit. The signature page, executive summary, references/literature cited, budgets and budget notes, current and pending support sections and resumes need not be counted against the 15-page limit. All information needed for review of the proposal should be included in the main text, e.g., not submitted as appendices.

The proposal must clearly explain each participant's efforts and their respective requests for OE funds, as well as any cost-sharing. Separate budgets within the single proposal must be provided if more than one funding action is anticipated (e.g., if funds are to be allocated to more than one institution or agency).

Forms must be submitted in triplicate, each with original signatures, along with any electronic submissions, by the closing timed identified in this announcement. All required forms (see Section VII.C.) must be mailed to OE. With the exception of these forms, electronic submission of proposals to *oar.oe.submissions@noaa.gov* is strongly encouraged and will have a positive influence on the processing time for such proposals. Investigators who elect to submit hard copies of their proposal are required to submit 3 copies but are encouraged to submit 15 copies, particularly if they wish reviewers to receive included color graphics, glossy photographs, or other unusual materials. For further information, see *Announcement of Opportunity: Application Kit* at *http://www.explore.noaa.gov/* or see **ADDRESSES** and/or **FOR FURTHER INFORMATION.**

Proposals and required forms received after the deadline, or proposals that deviate from the format described in this Notice will not be accepted.

C. Forms

Standard Forms 424, Application for Federal Assistance, 424A, Budget Information-Non-Construction Programs, 424B, Assurances-Non-Construction Programs, SF–LLL, Disclosure of Lobbying Activities (Rev. 7–97) (if applicable); DOC forms, CD–346, Applicant for Funding Assistance, CD–511, Certifications Regarding

Debarment, Suspension and Other Responsibility Matters: Drug-Free Workplace Requirements and Lobbying, CD–512, Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying shall be used in applying for financial assistance, and, if applicable, please submit your most current negotiated indirect cost rate agreement. All necessary forms may be obtained via the OE Internet site (see: OE Application Kit) at *http://explore.noaa.gov.* For hard copies, see **ADDRESSES** and/or **FOR FURTHER INFORMATION.**

VIII. Pre-Proposal and Proposal Selection Process

A. Pre-Proposals

The OE Director will make the decisions regarding pre-proposal acceptance or rejection. These decisions will be based on the following factors: (1) Is the proposal consistent with the Presidential Panel Report and OE mission?, (2) Does it touch on the OE themes and project funding considerations?, (3) Are the costs of the proposed activities relative to available program funds?

B. Proposals

Proposals will be evaluated and rated individually by (a) ad hoc independent peer review and/or by (b) independent peer panel review using the following equally weighted criteria. In general, the pool of reviewers will be composed of scientists, engineers, social scientists, economists, outreach specialists, and resource managers as appropriate to the scope of proposals received in response to this announcement.

Scientific and Technical merit: The scientific and/or technical value of the work proposed, its probability of success, and the applicant's scientific and/or technical capabilities to undertake the proposed work.

Program Relevance: The degree to which the proposal addresses and supports Ocean Exploration's mission and notice objectives (see Section II and Section III.A.).

Usability of results: The anticipated scientific and/or technical impact of project results on the advancement of knowledge within the field(s) of endeavor.

All proposals submitted for funding via a grant or cooperative agreement (or intra/interagency transfer) will be rated by the independent peer reviewers according to an adjectival scale ranging in order of decreasing merit, as follows:

Excellent: Comprehensive, thorough and of exceptional merit, one or more major strengths, no major weaknesses, and any minor weaknesses easily correctable.

Very Good: Competent, one or more major strengths, strengths outweigh weaknesses, and major weaknesses correctable.

Good: Reasonable, may be strengths and/or weaknesses, weaknesses do not significantly detract from the proposal's viability, any major weaknesses are correctable.

Fair: One or more major weaknesses, weaknesses outweigh strengths, major weaknesses may possibly be corrected or minimized.

Poor: One or more major weaknesses which will be difficult to correct or may not be correctable.

Following the peer review, the OE Chief Scientist will compile the individual ratings and make recommendations for funding based on OE's mission, notice objectives and the project funding considerations.

The OE Director will have the final authority and responsibility for decisions regarding proposal selection. The Director shall have discretion in making final decisions and will consider: (1) Peer reviews; (2) the Chief Scientist's recommendations; (3) the avoidance of duplication with other projects funded by NOAA or other Federal Agencies or the proprietary of other funding sources; (4) the extent to which the proposal is in the best interest of OE's mission and the notice objectives (see Section II and III), (5) the extent to which it addresses funding considerations identified in this announcement (see Section VI), (6) the availability of program funding, and (7) the proposal's geographic location. High proposal peer review ratings may not result in funding for a given proposal. Investigators may be asked to modify objectives, work plans, or budgets prior to approval of the award. Subsequent administrative processing will be in accordance with current NOAA financial administrative procedures.

Other NOAA agencies and programs also have mission objectives which involve ocean research and technology development. Examples include the National Undersea Research Program, the National Sea Grant College Program, the Arctic Research Office, NOAA Fisheries and the National Ocean Service. OE anticipates and encourages collaborative proposals involving these agencies and programs. Investigators who wish to work with OE through any of these other entities should contact them directly. Prospective collaborative projects facilitated by these other programs will be subject to the OE's proposal review and decision-making process. For additional details about these other programs, *see: http://oceanexplorer.noaa.gov.*

C. Disposition of Unsuccessful Applications

Those proposals that are not ultimately selected for OE funding will be destroyed.

IX. Federal Policies and Procedures Applicable to OE

A. Environmental Impact

Applicants whose proposed projects may have an environmental impact should furnish sufficient information to assist proposal reviewers in assessing the potential environmental consequences of supporting the project.

B. Permits and Authorizations

Proposers are responsible for obtaining relevant permits and authorizations required under the laws of the jurisdiction in which the work is to be performed and under U.S. law.

For further information about permits, authorizations or viewing marine mammals and other protected species in the wild please visit the following NOAA Fisheries Web site: *http://www.nmfs.noaa.gov/prot_res/overview/permits.html* and *http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html.*

X. Other Requirements

The Department of Commerce Pre-award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** Notice (66 FR 49917) published on October 1, 2001, are applicable to this solicitation.

Intergovernmental Review. Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Classification

Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act (5 U.S.C. 553(a)(2)) or any other law for this notice concerning grants, benefits, and contracts.

Therefore, a regulatory flexibility analysis is not required for purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This action has been determined to be not significant for purposes of Executive Order 12866.

This notice contains collection-of-information requirements which are subject to the Paperwork Reduction Act. The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective

control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the Paperwork Reduction Act, unless than collection of information displays a currently valid OMB control number.

Louisa Koch,

Acting Assistant Administrator, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 02–29120 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–KD–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110502D]

Marine Mammals; File No. 774–1649–01

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit amendment.

SUMMARY: Notice is hereby given that Permit No. 774–1649–00 issued to the Southwest Fisheries Science Center, National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, California 92038 (Principle Investigator: Rennie Holt, Ph.D.) has been amended.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits and Documentation 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;

FOR FURTHER INFORMATION CONTACT: Ruth Johnson or Amy Sloan (301)713–2289.

SUPPLEMENTARY INFORMATION: On October 2, 2002, notice was published in the **Federal Register** (67 FR 61850) that an amendment of Permit No. 774–1649, issued November 14, 2001 (66 FR 58445), had been requested by the above-named organization. The requested amendment has been granted under authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The Amended Permit authorizes the Holder to capture, weigh, measure, tag and release southern elephant seal pups.

Dated: Novemver 7, 2002.

Eugene T. Nitta,

Acting Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–29085 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 010222048–2243–05]

The Housing Foreclosure, Repossession, and Default Notices Exception to the Electronic Signatures in Global and National Commerce Act

AGENCY: National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce

ACTION: Notice, Request For Comments

SUMMARY: Section 101 of the Electronic Signatures in Global and National Commerce Act, Pub. L. 106–229, *codified at* 15 U.S.C. 7001 *et seq.* (''ESIGN'' or ''the Act''), preserves the legal effect, validity, and enforceability of signatures and contracts relating to electronic transactions and electronic signatures used in the formation of electronic contracts. 15 U.S.C. 7001(a). Section 103 (a) and (b) of the Act, however, provides that the provisions of section 101 do not apply to contracts and records governed by statutes and regulations regarding probate and domestic law matters; state commercial law; consumer law covering utility services, residential property foreclosures and defaults, and insurance benefits; product recall notices; and hazardous materials papers. 15 U.S.C. 7003(a),(b). Section 103 of the Act also requires the Secretary of Commerce, through the Assistant Secretary for Communications and Information, to review the operation of these exceptions to evaluate whether they continue to be necessary for consumer protection, and to make recommendations to Congress based on this evaluation. 15 U.S.C. 7003(c)(1). This Notice is intended to solicit comments from interested parties to provide information for this evaluation, specifically on the ESIGN exception for notices that communicate information regarding the primary residence of an individual concerning default, acceleration, repossession, foreclosure, eviction, and the right to cure (hereinafter referred to as ''residential default, foreclosure, and eviction notices''). *See* 15 U.S.C. 7003(b)(2)(B).

DATES: Written comments and papers are requested to be submitted on or before [sixty (60) days after publication in the **Federal Register**].

ADDRESSES: Written comments should be submitted to Josephine Scarlett, Senior Attorney, National Telecommunications and Information Administration, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Paper submissions should include a 3 and one-half inch computer diskette in HTML, ASCII, Word, or WordPerfect format (please specify version). Diskettes should be labeled with the name and organizational affiliation of the filer, and the name of the word processing program used to create the document. In the alternative, comments may be submitted electronically to the following electronic mail address: esignstudy__default@ntia.doc.gov. Comments submitted via electronic mail also should be submitted in one or more of the formats specified above.

FOR FURTHER INFORMATION CONTACT: For questions about this request for comment, contact: Josephine Scarlett, Attorney, Office of the Chief Counsel, NTIA, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–1816 or electronic mail: jscarlett@ntia.doc.gov. Media inquiries should be directed to the Office of Public Affairs, National Telecommunications and Information Administration, at (202) 482–7002.

SUPPLEMENTARY INFORMATION:

Background: Electronic Signatures in Global and National Commerce Act

Congress enacted the Electronic Signatures in Global and National Commerce Act, Pub. L. 106–229, 114 Stat. 464 (2000), to facilitate the use of electronic records and signatures in interstate and foreign commerce and to remove uncertainty about the validity of contracts entered into electronically. Section 101 requires, among other things, that electronic signatures, contracts, and records be given legal effect, validity, and enforceability. Sections 103(a) and (b) of the Act provides that the requirements of section 101 shall not apply to contracts and records governed by statutes and regulations regarding: probate and domestic law matters; state commercial law; consumer law covering utility services, residential property default, foreclosure, and eviction notices, and insurance benefits; product recall notices; and hazardous materials papers.

The statutory language providing for an exception to section 101 of ESIGN for notices of default, acceleration, repossession, foreclosure or eviction for a primary residence of an individual is found in section 103(b)(2)(B) of the Act:

Sec. 103. [15 U.S.C. 7003] Specific Exceptions.

(b) Additional Exceptions.—The provisions of section 101 shall not apply to

* * * *

(2) any notice of—

* * * *

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

* * * *

The statutory language requiring the Assistant Secretary for Communications and Information to submit a report to Congress on the results of the evaluation of the section 103 exceptions to the ESIGN Act is found in section 103(c)(1) of the Act as set forth below.

(c) Review of Exceptions.—

(1) Evaluation required.— The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall review the operation of the exceptions in subsections (a) and (b) to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers. Within 3 years after the date of enactment of this Act, the Assistant Secretary shall submit a report to Congress on the results of such evaluation.

Housing Default, Acceleration, Repossession, Foreclosure, Eviction and Right to Cure Regulations

The ESIGN exception for residential default, foreclosure, and eviction notices prohibits creditors from sending electronic documents or information to consumers as notice of an impending foreclosure or eviction. Residential default, foreclosure, and eviction notices forwarded to consumers in electronic format are *not* required to be accorded legal validity and effect. Federal and state regulations governing foreclosures and evictions require that the creditors or landlords give consumer mortgagors and tenants written notice of default, foreclosure and eviction and that the notice be sent by certified or registered mail prior to action by the mortgagee or landlord to recover possession of the property. The regulations discussed herein are representative of the types of residential, default, foreclosure, and eviction notice requirements that are covered by the ESIGN exception and are not intended to provide an exhaustive list of the existing statutory requirements governing housing default, foreclosure, and eviction notice under federal and state law.

The Department of Agriculture (USDA), the Federal Reserve Board (Board), the Department of Housing and Urban Development (HUD), the Department of Treasury (DOT), and the Department of Veteran's Affairs (VA) have federal regulatory oversight over the housing and mortgage industry and, more specifically, over single family mortgage loans and programs that guarantee or secure funding for housing. These regulations and laws govern the type of notice and the manner of service that mortgage companies, banks, and other lenders are required to provide consumers prior to taking action to foreclose on residential properties or to evict a tenant. The states have concurrent jurisdiction in these areas and, thus, also have laws that govern residential foreclosure proceedings and tenant eviction processes. Section 104 of ESIGN allows federal and state regulatory agencies that are responsible for rulemaking under any other statute to interpret the consumer provisions of ESIGN through interpretive rules, orders, and regulations. *See* 15 U.S.C.7004(b)(1).

The Farm Credit Administration (FCA) of the USDA has created new rules and amended others to remove regulatory barriers to electronic commerce for Farm Credit System institutions and their customers. 67 *FR* 16627, 16628 (2002); *see also* 12 CFR 609.910. FCA recognized the ESIGN exception for residential default, foreclosure, and eviction notices and concluded that some of its system institutions cannot use electronic notification to deliver some of the notices required under part 614 of the rules. *See id.* at 16632. These rules provide that a lender ''shall provide written notice to the borrower that the loan may be suitable for restructuring'' not later than 45 days before the lender begins foreclosure proceedings. *See* 12 CFR 614.4516, 614.4519.

Similarly, the notice rules of the Office of Thrift Supervision require a creditor to provide written notice by registered or certified mail with return receipt requested no later than 30 days before the creditor acts to foreclose or accelerate payments on a federally related loan or mortgage. *See* 12 CFR 590.4(h). The foreclosure rules of the Department of Veteran's Affairs require the Department to provide borrowers with certain written information regarding the alternatives to foreclosure after receiving notice of default from the holder of a note on a loan guaranteed by the Department. *See* 38 U.S.C. 3732.

The Federal Reserve Board (Board) and Department of Treasury (DOT) have revised their regulations to authorize the electronic delivery of disclosures regarding certain home mortgages consistent with the ESIGN Act. In March, 2001, the Federal Reserve amended Regulation Z, 12 CFR part 226, in response to the ESIGN Act. *See* 66 *FR* 17329 (2001). Regulation Z implements the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.*, and requires that creditors make certain written disclosures to consumers about the terms and cost of credit before the transaction is consummated. The Board interpreted ESIGN as containing special rules for use of electronic disclosures that may be provided only if the consumer affirmatively consents after receiving certain information. *Id.* at 17330. The amendment to Regulation Z allows depository institutions, creditors, lessors and others to provide information to consumers regarding financial transactions if the disclosures are clear and conspicuous and the creditor complies with the consumer consent provisions of section 101(c) of ESIGN. *Id.* at 17334. Specifically regarding notices relating to the primary residence of an individual, the Board amended its rules to permit a creditor to provide a single rescission notice by electronic communication to each consumer with an ownership interest in a dwelling who has affirmatively assented to electronic delivery of the notice. *Id.* at 17332, 17333; *see also*, 12 U.S.C. 226.15(b)(1) and 226.23.

The Board also amended Regulation B, to allow for electronic disclosure of information required by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. section 1691 *et seq. See* 66 *FR* 17779 (2001). ECOA prohibits discrimination by a creditor in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age, receipt of public assistance, or good faith reliance on provisions of the Consumer Credit Protection Act. 12 CFR part 202. Regulation B provides guidance on the timing and delivery of written disclosures required by ECOA. The Board's amendment of Regulation B requires that creditors comply with the consumer consent provisions of section 101(c) of ESIGN when making disclosures electronically by e-mail or through website postings. *See* 12 CFR 202.17(b). Recently, the Department of the Treasury's Office of the Comptroller of the Currency (OCC) also amended its

regulations, adding Subpart E, to facilitate the ability of national banks to conduct business using electronic technologies. *See* 67 FR 34992 (May 17, 2002); 12 CFR 7.5000 *et seq.*

The regulations of the Department of Housing and Urban Development (HUD) contain several requirements for residential default, foreclosure, and eviction notices to be provided to consumers of multifamily and single family housing.[1] HUD insures mortgages secured by multifamily housing projects under the National Housing Act. Mortgagees are required to notify HUD of a default on a HUD-insured loan within 30 days of the date of the initial event of default. *See* HUD Handbook 4350.4, Table 2, Default Dates and Deadlines. The procedures for nonjudicial foreclosure of multifamily properties are set forth in the Multifamily Mortgage Foreclosure Act of 1981. *See* 12 U.S.C. 3701 *et seq.* For these mortgages, HUD's foreclosure commissioner must serve notice of default and foreclosure by certified or registered mail, postage prepaid and return receipt requested to the owners, mortgagors, dwelling units, and other lienholders not less than 21 days prior to the foreclosure sale. *See* 12 U.S.C. 3708; *see also*, 24 CFR 27.15(a). Notice must be served by mail, publication, or posting on the secured property. *Id.* Notices under this section are deemed duly given upon mailing, regardless of whether the addressee actually receives the letter. *Id.* HUD's regulations do allow, under limited circumstances, the electronic transmission of information for some mortgage defaults and foreclosures. The lenders or mortgagees that hold multifamily housing mortgages insured or coinsured by HUD are allowed to fulfill reporting requirements for mortgage defaults and delinquencies by electronically submitting the information to HUD. 24 CFR 200.120.

HUD's Office of the Assistant Secretary for Housing also oversees the requirements for and the manner of eviction notices given to tenants of subsidized housing and HUD-owned projects. The regulations provide that a landlord's determination to terminate a tenancy must be in writing and served on the tenant by first class mail or hand-delivery to an adult person at the residence no earlier than 30 days prior to the termination of the tenancy. *See* HUD Handbook 4350.3, Chapter 4, No. 4–21; 24 CFR 247.4.

HUD provides rental assistance for low income families under the public housing program, various Section 8 project-based assistance programs, and the section 8 tenant-based voucher program. Federal statutes and regulations set the tenancy requirements, however, the tenancies are governed by State law and procedure in all other respects. In all of the programs, tenants may be evicted for violations of the lease or other good cause. Under HUD's regulations, the landlord, owner, or public housing agency must give written notice of the grounds for eviction, and this notice may be combined with a notice to vacate issued under State law. *See* 24 CFR 880.607(c), 882.511(d), 966.4(l)(3), and 982.310(e).

The Single Family Mortgage Foreclosure Act of 1994, Pub. L. 103–227, requires several written notices and communications for single family mortgages during the pre-foreclosure, foreclosure sale, and mortgage collection processes. The regulations require that the mortgagees or lenders give the mortgagors in default on loans insured by HUD a written notice of delinquency. *See* 24 CFR 203.602. In addition, the regulations require that the foreclosure commissioner must serve notice of default and foreclosure sale by certified or registered mail, postage prepaid and return receipt requested on the current owner, occupants, mortgagors and lienholders not less than 21 days before the foreclosure sale. *See* 12 U.S.C. 3758; *see also* 24 CFR 27.103 and 27.105. For notices of default and acceleration, the lender or mortgagee must provide the borrower with written notice, by certified mail, that the loan is in default. 24 CFR 201.50. The lender, or mortgagee, is required to notify the mortgagor, or borrower, and each head of household who is actually occupying a unit of the property of its potential acquisition by HUD at least 60 days before the date on which the mortgagee reasonably expects to acquire title to the property. *See* 24 CFR 203.675.

We note that the states also have jurisdiction over the residential default, foreclosure, and processes as applied to the real estate located within state borders. In addition, the laws regarding default and eviction notices for most rental property are within the primary jurisdiction of the states. For example, Colorado provides that with respect to a default on any consumer loan secured by a deed of trust or mortgage, recorded after January 1, 2002, which encumbers a dwelling, the owner of the evidence of indebtedness shall, not more than 45 days after initial default and at least 20 days prior to the recording of a notice of election and demand, or the initiation of a suit for foreclosure, provide written notice of such default and the opportunity to cure, to all persons liable on the debt at the address of the residence of each such person. Colorado Revised Statutes § 38–38–102.5(c)(2). Similarly, Georgia's rules regarding foreclosure provide that notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 15 days before the date of the proposed foreclosure. Georgia Code Ann. § 44–14–162.2(a). The Georgia rules require that the notice shall be in writing and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor, and shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. *Id.*

Just as the state requirements vary regarding the manner of notice provided to home owners and renters upon default, the state electronic transactions laws are also different. Approximately 39 states have enacted their own electronic transactions laws and ESIGN no longer applies to these states. Several of the states that have enacted electronic transactions laws have retained an exception for housing foreclosure and rental default notices. *See e.g.*, Ala. Code § 8–1A–3(c)(2)(b)(2001); 5 Ill.Comp.Stat. 175/5–106 (2001). The ESIGN Act continues to apply to the remaining states and, therefore, housing foreclosure and rental default notices that are transmitted or executed in an electronic format or using an electronic signature are *not* legally valid in those states without UETA laws. The various state and federal laws that require written notice control the manner in which housing consumers receive notice of the delinquencies that threatened ownership and tenancy rights. The removal of the foreclosure and rental default notices exception to the ESIGN Act would give mortgagees and landlords an additional method of communicating this information to consumers via any electronic format available to them, including but not limited to facsimile, electronic mail, and digital or wireless devices. Information

[1] This notice is not an interpretive statement of the applicability of ESIGN's provisions to HUD's multifamily and single family housing regulations, but is designed to provide information regarding the type of residential default, foreclosure, and eviction notices that may be issued to consumers pursuant to HUD's rules and regulations. As noted above regarding the Fedral Reserve Board and the Farm Credit Administration's regulations, federal agencies may issue regulations and rulings to interpret the application of ESIGN's provisions on the specific statutes under their purview.

regarding the potential impact on state and federal laws, and on consumers of the removal of the foreclosure and rental default notices exception from the ESIGN Act would assist in this evaluation.

The ESIGN Section 103 Evaluation

The ESIGN Act directs the Assistant Secretary of Communications and Information to conduct an evaluation of the exceptions set out in section 103 of the Act to determine whether the exceptions continue to be necessary for the protection of consumers, and to submit a report to Congress on the results of the evaluation no later than June 30, 2003. The Assistant Secretary for Communications and Information is the chief administrator of NTIA. As the President's principal advisor on telecommunications policies pertaining to the Nation's economic and technological advancement, NTIA is the executive branch agency responsible for developing and articulating domestic and international telecommunications policy.

The ESIGN section 103 evaluation is intended to examine the current status of federal and state regulations that govern, and industry practices among companies that issue notices for residential default, foreclosure, and eviction in preparation for a report to Congress on whether this exception remains necessary to protect consumers. This evaluation is not a review or analysis of federal and state regulations and rules relating to residential default, foreclosure, or eviction notices for the purpose of recommending changes to those regulations but to advise Congress of the current state of law, practice, and procedure regarding this issue. Comments filed in response to this Notice should not be considered to have a connection with or impact on ongoing specific federal and state procedures or rulemaking proceedings concerning residential default, foreclosure, and eviction notices.

Invitation to Comment

NTIA requests that all interested parties submit written comments on any issue of fact, law, or policy that may assist in the evaluation required by section 103(c). We invite comments on ESIGN generally that assists in evaluating the narrower issues associated with residential default, foreclosure, and eviction notices as governed by the substantive law in these areas. The following questions are intended to provide guidance as to the specific subject areas to be examined as a part of the evaluation. Commenters are invited to discuss any relevant issue, regardless of whether it is identified below.

1. Provide information regarding federal, state, and municipal regulations, laws, and ordinances that require written notice to consumers for residential defaults, foreclosures, and evictions.

2. Provide state Uniform Electronic Transactions Act (UETA) provisions that require written notice to consumers by excluding housing foreclosure, repossession, and default notices from the provisions of the statute.

3. Describe state or federal regulations, other than UETA or ESIGN laws, that require residential default, foreclosure, and eviction notices to be provided in written form or to be excluded from the operation of ESIGN or the applicable state UETA.

4. Provide information regarding federal, state, and municipal laws or regulations that allow notice to consumers regarding residential defaults, foreclosures, and evictions in an electronic format.

5. Discuss the impact that the removal of the residential default, foreclosure, and eviction notices exception from ESIGN, to allow mortgage or rental companies to send notices by electronic methods mail, may have on consumers and on federal or state consumer protection policies.

6. If it is necessary to retain the residential default, foreclosure, or eviction notices exception to the ESIGN requirements, discuss the interest that this exception continues to serve or protect.

7. Discuss the methods that are available for consumer protection, if the residential default, foreclosure, and eviction notices exception to ESIGN is eliminated from the statute. Describe the methods that may be used to verify:

a. the notice was sent and/or received;

b. the security of the transmission; and

c. the recipient has the capability of receiving and reading the notice.

8. What effect, if any, would the elimination of the residential default, foreclosure, and eviction notices exception to ESIGN have on the mission of federal and state agencies and organizations that have regulatory authority over the process and service of notice of default, eviction and foreclosure?

Please provide copies of studies, reports, opinions, research or other empirical data referenced in the responses.

Dated: November 12, 2002.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 02–29025 Filed 11–14–02; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Joint Military Intelligence College Board of Visitors Closed Meeting

AGENCY: Joint Military Intelligence College, Defense Intelligence Agency, DoD.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the provisions of subsection (d) of section 10 of Public Law 92–463, as amended by section 5 of Public Law 94–409, notice is hereby given that a closed meeting of the Defense Intelligence Agency Joint Military Intelligence College Board of Visitors has been scheduled as follows:

DATES: Tuesday, January 7, 2003, 0800 to 1700; and Wednesday, January 8, 2003, 0800 to 1200.

ADDRESSES: Joint Military Intelligence College, Washington, DC 20340–5100.

FOR FURTHER INFORMATION CONTACT: Mr. A. Denis Clift, President, Defense Intelligence Agency Joint Military Intelligence College, Washington, DC 20340–5100, telephone: 202–231–3344.

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), title 5 of the United States Code and therefore will be closed. The Board will discuss several current critical intelligence issues and advise the Director, Defense Intelligence Agency, as to the successful accomplishment of the mission assigned to the Joint Military Intelligence College.

Dated: November 4, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–28960 Filed 11–14–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Change in Meeting Date of the DOD Advisory Group on Electron Devices

AGENCY: Advisory Group on Electron Devices, Department of Defense.

ACTION: Notice.

SUMMARY: Working Group B (Microelectronics) of the DoD Advisory Group on Electron Devices (AGED) announces a change to a closed session meeting.

DATES: The meeting will be held at 1400, Friday, November 22, 2002.

ADDRESSES: The meeting will be held the Seaside Room, Hyatt Monterey, 1 Old Golf Course Drive, Monterey, CA 93940.

FOR FURTHER INFORMATION CONTACT: Elise Rabin, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition and Technology, to the Director Defense Research and Engineering (DDR&E), and through the DDR&E, to the Director Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective research and development program in the field of electron devices.

The Working Group B meeting will be limited to review of research and development programs which the military proposes to initiate with industry, universities or in their laboratories. The microelectronics area includes such programs on semiconductor materials, integrated circuits, charge coupled devices and memories. The review will include classified program details throughout.

In accordance with section 10(d) of Public Law 92–463, as amended, (5 U.S.C. App. sec 10(d)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that accordingly, this meeting will be closed to the public.

Dated: November 4, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–28959 Filed 11–14–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to transfer and delete systems of records.

SUMMARY: The Defense Security Service (DSS) is transferring two systems of records to the Defense Human Resources Activity, Office of the Secretary of Defense (OSD). The systems of records are identified as V5–05, entitled 'Security Research Center Espionage Database'', and V5–07, entitled 'Security Research Center Export Violations Database'.

The systems of records will be known as DHRA 01, entitled 'PERSEREC Espionage Database', and DHRA 03, 'PERSEREC Export Violations Database', respectively. Before being transferred, administrative changes have been made to the notices.

DATES: The changes will be effective on December 16, 2002, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mr. David Bosworth at (703) 601–4728.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the records system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: November 4, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Deletions

SYSTEM NAME:

V5–05; Security Research Center Espionage Database (June 1, 1999, 64 FR 29281).

Reason: The responsibility for this system of records is being transferred to the Defense Human Resources Activity (DHRA), Office of the Secretary of Defense. The system of records will be known as DHRA 01, entitled 'PERSEREC Espionage Database'.

SYSTEM NAME:

V5–07; Security Research Center Export Violations Database (June 1, 1999, 64 FR 29281).

Reason: The responsibility for this system of records is being transferred to the Defense Human Resources Activity (DHRA), Office of the Secretary of Defense. The system of records will be known as DHRA 03, entitled 'PERSEREC Export Violations Database'.

* * * * *

SYSTEM NAME:

DHRA 01; PERSEREC Espionage Database.

SYSTEM LOCATION:

Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have been arrested and convicted of espionage or related offense; those who have been prosecuted for espionage who committed suicide before trial or sentencing; and those arrested or under warrant for arrest for espionage who were not prosecuted because of death, suicide, or defection.

CATEGORIES OF RECORDS IN THE SYSTEM:

Background information including individual's name, Social Security Number, date of birth, city/state/country of birth, education, marital status, gender, race, civilian or military member, rank (if military), security clearance (if applicable), years of federal service (if applicable), occupational category, job organization and location, age began espionage, first espionage contact, whether volunteered or recruited, receiving country, payment (if any), foreign relatives (if any), motivation-related, substance abuse (if applicable), date of arrest, arresting agency, date of sentence, sentence, and duration of espionage. Sources for records are newspaper and magazine articles, the biographies of spies, and similar open source works are included in paper files. Some of the missing variables have been filled in using information supplied by the agencies that investigated the case.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; DoD Directive 5210.79, and ASD(C3I) October 31, 1991 memo, Subject: Request for Exemption from DoD Directive 5200.27; and E.O. 9397 (SSN);

PURPOSE(S):

To analyze factors which may contribute to acts of espionage and assemble a body of knowledge useful to improved personnel security procedures. This information will permit examination of espionage trends

and will help identify personal and situational variables of interest to policy-makers and others concerned with personnel security issues.

Aggregate statistics will be reported to DoD and other Government agencies in a technical report prepared from open-sources and containing some illustrative material mentioning some of the more famous cases by name.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices apply to this system.

Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in the System:

STORAGE:

Maintained on paper, computer and computer output products, and in microform.

RETRIEVABILITY:

Records may be retrieved by name and Social Security Number.

SAFEGUARDS:

Records are stored under lock and key in secure containers, and in a computer system with intrusion safeguards.

RETENTION AND DISPOSAL:

Records are treated as permanent pending a determination by the NARA of authority for disposition of the records.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

The inquiry should include full name and Social Security Number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address a written request to Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

The inquiry should include full name and Social Security Number.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from newspaper and magazine articles and similar open source documents. Some of the missing variables were filled in using information supplied by the agencies that investigated the case.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

SYSTEM NAME:

DHRA 03; PERSEREC Export Violations Database.

SYSTEM LOCATION:

Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have been convicted of violating U.S. export control laws.

CATEGORIES OF RECORDS IN THE SYSTEM:

Extracts of reports, court records, newspaper, magazine, and other open source materials.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; and ASD(C3I) July 20, 1993 memo, Subject: Exemption from DoD Directive 5200.27.

PURPOSE(S):

To analyze factors which may contribute to acts of illegal technology transfer in violation of U.S. export controls and to assemble a body of knowledge useful for improving security procedures. This information will permit examination of trends in illegal technology transfer since 1981 and help identify personal and situational variables of interest to policy makers and others concerned with counteracting export control violations. Aggregate statistics will be reported in a technical report. The report will include some vignettes of the more famous cases, using the individual's name, based on material found in open sources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices apply to this system.

Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in the System:

STORAGE:

Maintained on paper, computer and computer output products, and in microform.

RETRIEVABILITY:

Records are retrieved by individual's name.

SAFEGUARDS:

Records are stored under lock and key in secure containers, and in a computer system with intrusion safeguards.

RETENTION AND DISPOSAL:

Records are treated as permanent pending a determination by the NARA of authority for disposition of the records.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

The inquiry should include the individual's full name.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address a written request to Director, Defense Personnel Security Research and Education Center, 99 Pacific Street, Building 455E, Monterey, CA 93940–2481.

The inquiry should include the individual's full name.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Justice Department Export Control Cases listing, newspaper and magazine articles and other open source documents.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 02–28958 Filed 11–14–02; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF EDUCATION

[CFDA NO. 84.031H]

Office of Postsecondary Education; Strengthening Institutions (SIP), American Indian Tribally Controlled Colleges and Universities (TCCU), Alaska Native and Native Hawaiian-Serving Institutions (ANNH) and Hispanic-Serving Institutions (HSI) Programs; Notice of Reopening the Processes for Designation as an Eligible Institution for Fiscal Year (FY) 2001 and FY 2002 for a Limited Purpose

Summary: An institution of higher education (IHE) that is designated an eligible institution under the SIP, TCCU, ANNH and HSI Programs may receive a waiver of certain non-Federal share requirements under the Federal Work Study (FWS) and Federal Supplemental Educational Opportunity Grant (FSEOG) Programs. The SIP, TCCU, and ANNH Programs are authorized under Title III, Part A of the Higher Education Act of 1965, as amended (HEA). The HSI Program is authorized under Title V of the HEA. The FWS and FSEOG Programs are authorized under Title IV of the HEA.

On November 16, 2000 and December 26, 2001, we published **Federal Register** notices (65 FR 69291–69293 and 66 FR 66407–66409) that announced the processes for IHEs to apply for eligibility designation for FY 2001 and FY 2002 for the SIP, TCCU, ANNH and the HSI Programs. Some IHEs did not meet the established deadlines for submitting the applications, and therefore were not designated eligible to receive waivers of certain cost-sharing requirements under the FWS and FSEOG Programs. We are reopening the FY 2001 and FY 2002 eligibility processes to allow IHEs to apply for designation as eligible institutions under the SIP, TCCU, ANNH and HSI Programs for the limited purpose of receiving waivers of certain non-Federal share requirements of the FWS and FSEOG Programs for FY 2001 and FY 2002.

Deadline for Transmittal of Applications: January 31, 2003.

Applications Available: November 15, 2002.

For Applications and Further Information Contact: Thomas M. Keyes, Margaret A. Wheeler or Ellen Sealey, Institutional Development and Undergraduate Education Service, U. S. Department of Education, 1990 K Street, Room 6048, Request for FY 2001 and FY 2002 Eligibility Designation, Washington, DC 20202–8513. Mr. Keyes's telephone number is (202) 502–7577. Ms. Wheeler's telephone number is (202) 502–7583. Ms. Sealey's telephone number is (202) 502–7580. They may be reached via Internet:

Thomas.Keyes@ed.gov
Margaret.Wheeler@ed.gov
Ellen.Sealey@ed.gov

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audio tape, or computer diskette) on request to the contact persons listed under *For Applications and Further Information Contact.*

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting those persons. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

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: *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 the 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*

Program Authority: 20 U.S.C. 1057–1059d, 1101–1103g.

Dated: November 12, 2002.

Sally L. Stroup,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 02–29036 Filed 11–14–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.250D]

Vocational Rehabilitation Service Projects for American Indians With Disabilities; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

Purpose of Program: To provide vocational rehabilitation services to American Indians with disabilities who reside on or near Federal or State reservations, consistent with their individual strengths, resources, priorities, concerns, abilities, capabilities, and informed choices, so that they may prepare for and engage in gainful employment, including self-employment, telecommuting, or business ownership.

Eligible Applicants: Applications may be submitted only by the governing bodies of Indian tribes (and consortia of those governing bodies) located on Federal or State reservations.

Applications Available: November 18, 2002.

Deadline for Transmittal of Applications: March 31, 2003.

Estimated Available Funds: $7,659,000.

The Administration has requested $26,804,000 for this program for FY 2003, of which $7,659,000 is expected to be used for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process, if Congress appropriates funds for this program.

Estimated Range of Awards: $300,000–$400,000.

Estimated Average Size of Awards: $350,000.

Estimated Number of Awards: 21.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Applicable regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 80, 81, and 82; and (b) The regulations for this program in 34 CFR part 371.

Priority: Under section 121(b)(4) of the Rehabilitation Act of 1973, as

amended (29 U.S.C. 741), we give preference to applications that meet the following competitive priority (see 34 CFR 75.105(b)(2)(iv)). Under 34 CFR 75.105(c)(2)(i) we award 10 points to an application that meets this competitive priority. These points are in addition to any points the application earns under the selection criteria:

Competitive Preference Priority—Continuation of Previously Funded Tribal Programs

In making new awards under this program, we give priority consideration to applications for the continuation of tribal programs that have been funded under this program.

Selection Criteria: In evaluating an application for a new grant under this competition, we use selection criteria chosen from the general selection criteria in 34 CFR 75.210 of EDGAR. The selection criteria to be used for this competition will be provided in the application package for this competition.

For Applications Contact: Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html.* Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.250D.

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 3317, Switzer Building, Washington, DC 20202–2550. Telephone: (202) 205–8207. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

For Further Information Contact: Pamela Martin or Suzanne Tillman, U.S. Department of Education, 400 Maryland Avenue, SW., room 3314, Switzer Building, Washington, DC 20202–2650. Telephone: for Pamela Martin (202) 205–8494; for Suzanne Tillman (202) 205–8303. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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Program Authority: 29 U.S.C. 773(b).

Dated: November 12, 2002.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 02–29035 Filed 11–14–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice 03–05: Genomes to Life

AGENCY: Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Biological and Environmental Research (OBER) and the Office of Advanced Scientific Computing Research (ASCR) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announce their interest in receiving applications for research in the following areas that support the Genomes to Life research program (*http://www.doegenomestolife.org/*):

(1) Technologies and strategies to image individual proteins and multi-protein complexes in microbes and to image complex microbial communities;

(2) Technologies for the high-throughput synthesis of proteins and their biological characterization;

(3) Molecular tags to identify individual proteins and to characterize multi-protein complexes in microbial cells;

(4) High resolution, quantitative microbial biochemistry;

(5) New genomic strategies and technologies for studying complex microbial communities;

(6) Pathway inference in prokaryotes;

(7) Implications for society, the law, education, and technology transfer; and

(8) Other novel and innovative technologies and research strategies to address the core goals of the Genomes to Life research program.

DATES: Statements of intent to apply, including information on collaborators, areas of proposed research and technology development, and a short (one page) summary of the proposed research should be submitted by Tuesday, January 7, 2003.

Formal research applications are due by 4:30 PM E.D.T., Tuesday, April 22, 2003.

ADDRESSES: Statements of intent to apply should be sent to Ms. Joanne Corcoran by e-mail at: *joanne.corcoran@science.doe.gov* with copies to Dr. David Thomassen at: *david.thomassen@science.doe.gov* and Dr. Gary Johnson at: *gary.johnson@science.doe.gov*.

Formal applications in response to this solicitation are to be electronically submitted by an authorized institutional business official through DOE's Industry Interactive Procurement System (IIPS) at: *http://e-center.doe.gov/*. IIPS provides for the posting of solicitations and receipt of applications in a paperless environment via the Internet. In order to submit applications through IIPS your business official will need to register at the IIPS website. The Office of Science will include attachments as part of this notice that provide the appropriate forms in PDF fillable format that are to be submitted through IIPS. Color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific application as Color image 1, Color image 2, etc. Questions regarding the operation of IIPS may be e-mailed to the IIPS Help Desk at: *HelpDesk@e-center.doe.gov* or you may call the help desk at: (800) 683–0751. Further information on the use of IIPS by the Office of Science is available at: *http://www.science.doe.gov/production/grants/grants.html*.

If you are unable to submit an application through IIPS please contact

the Grants and Contracts Division, Office of Science at: (301) 903–5212 in order to gain assistance for submission through IIPS or to receive special approval and instructions on how to submit printed applications.

FOR FURTHER INFORMATION CONTACT: Dr. David Thomassen, telephone: (301) 903–9817, e-mail: *david.thomassen@science.doe.gov*, Office of Biological and Environmental Research, SC–72/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290.

A complementary request for proposals from DOE national laboratories has been issued, Program Solicitation LAB 03–05.

SUPPLEMENTARY INFORMATION: Biology has entered a new era—the era of systems biology—in which we will understand entire living organisms and their interactions with the environment. While scientists have long tried to understand the workings of individual genes or small groups of genes this new era in biology will focus research on entire networks of genes and even entire biological systems—small, single celled organisms at first and later more complex creatures ultimately including humans.

This dramatic advance is possible, in large part, because of the scientific and technical successes of the Human Genome Project. The information and technology now available to all scientists on the human genome and on a rapidly growing list of the genomes of other organisms from microbes to plants to worms to mice not only gives us new perspectives on the inner workings of biological systems but provides new opportunities to use this knowledge to solve problems in energy.

The Genomes to Life program is a systems biology research program that offers the possibility of biotechnology solutions that can give us abundant sources of clean energy yet control greenhouse gases like carbon dioxide, a key factor in global climate change, and that can help us clean up past contamination of the environment.

The overall goals of the Genomes to Life program include understanding:

1. Natural, multi-protein molecular machines of complex living systems.
2. Complex networks that control the assembly and operation of these machines.
3. The organization and biochemical capabilities of complex microbial communities.

These three goals will only be achieved if we develop:

4. A computational infrastructure for systems biology that enables the development of computational models for complex biological systems that can predict the behavior of these complex systems and their responses to the environment.

The Genomes to Life program supports a combination of large, well integrated, multidisciplinary research teams and smaller, focused research projects. This solicitation will support smaller, focused research projects to develop new technologies, research strategies, or research resources needed by the Genomes to Life program. Future solicitations will likely request applications for both large, well integrated, multidisciplinary research teams and smaller, focused research projects.

Information on the research projects currently funded by the Genomes to Life program and a description of project goals and overall program organization can be found at: *http://www.doegenomestolife.org/.*

Other useful Web sites include:

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

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

Microbes of Interest to DOE. The initial focus of Genomes to Life is on microbes (including fungi) directly relevant to DOE mission needs in energy (cleaner energy, biomass conversion, carbon sequestration) or the environment (cleanup of metals and radionuclides at DOE sites). Research in Goals 1 and 2 takes advantage of and focuses on microbes whose complete DNA sequence is already known. Research in Goal 3 focuses on microbes or microbial communities of interest to, directly relevant to, or that will contribute substantially to an ability to address DOE mission needs. Selected, well-justified research using yeast is appropriate as a means of quickly generating data that addresses the needs of the Genomes to Life Program. However, the use of yeast as a long-term research focus will not be encouraged.

Data and Other Results. Any data and results generated through the investigations into Goals 1 through 4 that are appropriate to share with the broader community should be provided in timely, open, and machine-readable format where possible or appropriate. Microbial DNA sequence data will be publicly released according to the ''Data Release Requirements: Microbial Genome Sequencing Projects'' (*http://www.sc.doe.gov/production/ober/EPR/data.html*).

Software Development and Distribution. Software developed by research teams that is appropriate for distribution beyond the research team shall be made available to the biological and computational community. It is our intent that this software be accessible, useful, affordable, and interoperable with other software and with data. Applications should include plans for assuring availability, stating whether: the software will be available as binary or source code, a fee will be charged for the use of the software, some users (*e.g.*, commercial) will be charged while others not, in what way derivative products will be treated, etc. Statements such as that by the International Society for Computational Biology on Bioinformatics Software Availability, *http://www.iscb.org/pr.shtml,* may be used for reference.

Research Focus

(1) Technologies and Strategies to Image Individual Proteins and Multi Protein Complexes in Microbes and to Image Complex Microbial Communities

This solicitation will promote the development of imaging technology (probes, instrumentation and computational methodology) needed to accomplish the Genomes to Life program goals. Applications or development of imaging technology should be directed to or easily adapted to the study of microbes. Development of probes and instrumentation should be complementary to and facilitate completion of Genomes to Life program goals, including currently funded projects (see currently funded projects at: *http://www.doegenomestolife.org/*).

Additional information on the projected imaging needs of the Genomes to Life program can be found at: *http://www.doegenomestolife.org/technology/imaging/GTLimaging2002.pdf.*

Specific research needs include:

• *Development of novel probes* (fluorescent, electron dense, vibrational tags, etc.) with optimum physico-chemical properties that enable:

—Visualization, tracking, assembly and disassembly of multi-protein molecular machines and their individual components. Multifunctional probes that measure structure, including post-translational modification and function in real time, are needed.

—Rapid visualization and quantitation of intracellular processes with high spatial resolution.

—Visualization and quantitation of microbial populations and communities with respect to their structure, functions, stability and response to environmental stress.

Probes should be developed to determine the spatial and temporal concentration of nutrients, metabolites, signaling molecules, elements, extra cellular matrices and other biomolecules critical to maintaining microbial community structure and function. This should also include dynamic measuring of oxidative states and energy transfer kinetics.

Probes should be selective, non-perturbative, and resistant to degradation and should have unique spectroscopic signatures. Unambiguous experimental systems to validate probe performance should be presented.

• *Development of new high-throughput tagging methods* for chromophores, electron dense and other probes. Methods should be capable of being transported to the broader scientific community.

• *Development of innovative optical and non-optical instrumentation* that will visualize and quantitate dynamic aspects of molecular machines over a wide range of dimensions and time scales; enable simultaneous co-localization of different intra-cellular processes with high spatial resolution; and/or permit visualization of bacterial community composition and functions in the field as well as in the laboratory.

• *Development of computational methods* for rapid processing, storing, reconstructing, and three dimensional modeling of large image data sets, *e.g.*, from cryoelectron microscopy. Computational methods are needed that can predict capabilities and limitations of various probes and instruments over a wide range of size and time scales. Novel computational tools are needed to integrate cellular image data sets derived from different instruments and technologies. Models of bacterial community structure, growth, functions and adaptive responses should be constructed based on experimental data and should facilitate development of alternative experimental approaches.

(2) Technologies for the High-Throughput Synthesis of Proteins and Their Biophysical Characterization

This solicitation seeks to promote the development of techniques and protocols for high-throughput, low-cost synthesis of full-length proteins directly from coding sequence and for their subsequent biophysical characterization. Availability of proteins will enable the production and confirmation of selective, non-perterbutive probes and molecular tags needed to address the broad goals of the Genomes to Life program.

An essential early requirement for turning genome information into biological understanding is having access to purified samples of at least the majority of the proteins encoded in the genomes of interest. Even within the microbial-focus of Genomes to Life, this requirement is daunting. It must encompass, within the next decade, hundreds of different microbes and therefore many tens of thousands of proteins. Both the production and characterization goals are significantly broader than those of structural genomics programs. In those programs the goals are limited to the structural characterization of a relatively small fraction of proteins, and often protein fragments, that represent structurally novel motifs.

It is recognized that no satisfactory general approach currently exists and that not all proteins will likely yield to the same techniques. It is expected that a variety of both cell-free and cell-based systems will be required, as well as multiple characterization methods. Production and characterization technologies should be scalable, economic, and sufficiently robust to meet the production goal of milligram quantities of approximately 10,000 proteins per year.

An essential early need is the development of improved techniques for predicting from sequence what production and purification approaches are most likely to succeed with each protein. Thus, informatics is an integral component. Algorithms based on data from successful and failed protein expressions are expected to substantially inform and improve future protein production efficiency.

Informatics coupled with biophysical characterizations are expected to provide functional insights that may also explain why such a large number of biologically important, full-length proteins either can not be expressed in soluble form, or have whose structures that cannot be determined once expressed. These proteins may include substantial disordered regions that adopt structures only after interaction with appropriate protein binding partners. Reliable predictive algorithms based on expression and characterization databases are therefore needed to predict disorder and binding partners.

Areas in which improvements are sought include:

• Optimization of cloning and clone validation techniques to support the protein production process.

• Optimization of cell-free and cellular expression methods.

• Optimization of protein purification protocols.

• Improved strategies for increasing the fraction of proteins that can be synthesized by automated methods. This may include sequence-based predictions of methods most likely to succeed and insights for optimization of expression protocols.

High-throughput, economical approaches for characterizing synthesized protein to assess product quality and to predict protein function are also solicited. A goal is to provide multiple benchmark biophysical characterizations for each protein under several conditions. These approaches are expected to include:

• Biophysical techniques, e.g., mass spectrometry circular dichroism, calorimetry, partial proteolysis, deuterium exchange, surface plasmon resonance, neutron scattering, nuclear magnetic resonance.

• Improved techniques for predicting, from protein sequence, ordered and dis-ordered domains and for predicting solubility properties of proteins and protein domains.

• Integrated data acquisition and management tools for tracking all steps of the production and characterization process and for supporting detailed QC/QA procedures.

• Improved high-throughput methods to predict, then rapidly test, and finally to confirm binding partners for proteins so that the nearly infinite number of potential interactions is reduced to experimentally testable subset.

(3) Molecular Tags To Identify Individual Proteins and To Characterize Multi-Protein Complexes in Microbial Cells

This solicitation seeks advances in technology needed to mass-produce molecular tags for proteins and protein complexes, as tools to be used for determining function. As a top priority, technologies are sought for mass-producing specific protein recognition tags capable of functioning as:

• Capture reagents in affinity extraction and purification protocols, and as.

• Labeling reagents for intracellular and 'in situ' localization and mapping studies.

These technologies must be scalable to permit tens of thousands of successful tags to be produced and characterized per year at affordable costs. It is recognized that none of the many approaches under development to address this problem have yet demonstrated compelling promise—even as generally effective laboratory-scale methods. Yet for the purposes of

Genomes to Life and for modern biology altogether, very high-throughput, industrially robust methods to address this problem are required.

For the purposes of this solicitation, it is assumed that purified protein 'targets' will be provided to the researchers in micro-gram to milli-gram quantities so that tags can be optimized and characterized. Tags that interfere with function as well as those that do not interfere with protein function are both needed to help better define the biological roles of proteins. Areas in which technological improvements are sought include:

- Scalable methods for producing 'epitope-directed' affinity reagents of high specificity and affinity for proteins capable of functioning either as affinity extraction and capture reagents or as intra-cellular labeling reagents. High success ratios (fraction of protein epitopes yielding useful reagents) are essential.
- Improvements in protein-directed affinity tag design to improve tag utility, *e.g.,* to facilitate subsequent purification and or/imaging, to facilitate release of the tagged protein, to image with and without disrupting activity, etc.
- Improved methods for developing tags directed specifically to protein complexes as distinct from their component proteins. Labeling complexes with and without disrupting interactions amongst protein components will provide important functional insights.
- Improved strategies for predicting, from sequence data, what potential protein epitopes are likely to be successful targets for tagging with and without interfering with function, and for predicting what tag development methods are likely to work for a particular protein/epitope.
- Imaging and labeling methods for multiplex mapping of proteins within cells. Simultaneously monitoring multiple labeled proteins will provide more comprehensive views of multi-protein complexes and their activities.
- Informatics tools both for managing tag production processes and for managing the data resulting from their use.

(4) High Resolution, Quantitative Microbial Biochemistry

As noted above, the initial focus of Genomes to Life is on microbes (including fungi) directly relevant to DOE mission needs in energy (cleaner energy, biomass conversion, carbon sequestration) or the environment (cleanup of metals and radionuclides at DOE sites). To this end, development of novel technologies are encouraged to support the characterization of the internal environment and organization of prokaryotic microbes relevant to DOE missions and the Genomes to Life program and to explore how the characteristics of a microbe's internal environment affect its metabolism and physiology.

Very little is known of the internal ''milieu'' of any cell. A microbial cell is not likely to be a ''bag of dilute salt water'' within which metabolites and gene products freely diffuse. There is internal organization due to structural cytoskeletal components, partitioning of gene products in different parts of the cell so that they can efficiently mediate their appropriate pathways, concentration gradients of proteins and small molecules across the volume of the cell, and physical effects caused by the cell membrane and intracellular constituents including the viscosity of a cell's cytoplasm.

A protein's localization within a cell, its relationships with other proteins, concentrations, and subcellular dynamics are critically important parameters in determining its function, for identifying functional networks of proteins in a morphological context, and for expanding our understanding of whole-cell function. Thus, studies on the topological, physical, and chemical properties of cellular cytoplasm, their effects on protein dynamics, on flux rates of metabolites, on protein-protein and protein-ligand interactions, and ultimately, on protein function are needed.

Research is needed that furnishes information on the dynamic behavior of these various molecules as the ''molecular machines'' perform their functions and on the distribution, localization, movement, and temporal variations of the molecules and complexes inside individual microbes as they carry out reactions of relevance to DOE missions and the Genomes to Life Program. Research is also needed to characterize topological, physical, and chemical characteristics underlying cellular responses to external stimuli, *e.g.,* nutrients, toxins, or changes in environmental conditions. Similarly, computational algorithms designed to recognize regulatory networks or patterns of gene expression under different circumstances are needed that can provide insights into co-regulated genes.

New methods that accomplish any of several aims are solicited:

- Techniques to map the spatial distribution and concentrations of proteins and metabolites within prokaryotes.
- Techniques to assess fluxes and changes in concentrations of metabolites as a function of intracellular parameters and spatial location.
- Techniques to effectively map the immediate environment surrounding specific proteins, protein complexes, or other structural components within prokaryotes.
- Techniques to measure changes in enzyme-catalyzed reaction rates (catabolic and anabolic) and fluxes, as a function of the internal cell milieu, *e.g.,* distance from the inner membrane surface, proton concentration, temperature, etc.
- Techniques to quantitate intracellular protein-protein association/dissociation rates as a function of ion concentrations, dielectric constants, protein concentrations, small molecule (metabolite, cofactor, ligand, etc.) concentrations, or temperature.
- Techniques to link data from experiments addressing the above aims to the broader goals of the Genomes to Life Program.
- Techniques to exploit computational methods to interrogate resulting datasets in order to suggest experimental priorities and derive insights into the underlying biology.

(5) New Genomic Strategies and Technologies for Studying Complex Microbial Communities

Microorganisms are the largest reservoir of genetic and biochemical diversity on earth. New methods for examining microbial communities have revealed that uncultured microbes make up more than 99% of many natural microbial communities. DNA isolated directly from environmental samples is a tremendous resource for examining the structure and function of microbial communities. The science of microbial ecology will be advanced by understanding the distribution, diversity, relative abundance, and interactions of the microorganisms in these communities.

A goal of the Genomes to Life Program (Goal 3) is to dramatically extend current scientific and technical understanding of the genetic diversity and metabolic capabilities of microbial communities in the environment, especially those related to remediation, biogeochemical cycles, climate changes, energy production, and biotechnology. A challenge to achieving this objective, however, is the difficulty in characterizing the complexity of microbial communities in nature. For example, it has been estimated that there may be thousands of different species in surface soils. Thus, new

strategies and technologies are needed to help define and assess the repertoire of metabolic capabilities as embodied in the collective community's genomic sequence.

We need new technologies that enable us to:

• Determine whole-genome sequences of dominant uncultured microorganisms to estimate their genetic diversity and interrelationships. Novel technologies and strategies are needed to use the genome sequence to identify the genes, metabolic pathways, regulatory network and proteins needed for survival, growth and adaptation to the environment.

• Identify the extent, patterns and spatial distribution of genetic diversity in microbial communities of interest to the DOE mission areas. In particular, we need to understand how microbial diversity supports community structure and function, and the relationship of genetic diversity to key environmental parameters. For example, one strategy for understanding the extent and pattern of genetic diversity in microbial communities is to sequence bacterial artificial chromosome (BAC) clones from individual microbial communities by the shotgun approach. Comparing BAC clone sequences should lead to insights into community genetic diversity and metabolic capacity.

• Understand the ecological functions of the uncultured microorganisms. We need to identify the metabolic functions that these genomes encode and to understand how those functions contribute to the community's ecological role in the environment. Of particular interest is the unique role of novel uncultured microorganisms in ecosystems relevant to DOE's missions in bioremediation, carbon sequestration, global climate change, energy production, and biotechnology.

• Determine cellular and biochemical functions of genes discovered in uncultured community members. This includes determining the protein complexes unique to uncultured microorganisms in ecosystems of DOE relevance, and whether their unique characteristics can be used for protein engineering.

• Understand the genetic basis of microbial community functional stability and adaptation in environments important to DOE missions. We need to understand the relationship between genetic diversity and microbial community stability. For example, the genetic basis and factors controlling microbial community stability and adaptation is of great importance in managing microbial communities to bioremediate contaminated sites, sequester carbon from the atmosphere, and contribute to sustainable energy production.

Key technologies needed to achieve these goals include, but are not limited to:

• New approaches for recovering RNA and high-molecular-weight DNA from environmental samples.

• New approaches for isolating single cells of uncultured microorganisms.

• New parallel comparative approaches that allow unique microbial community DNA fragments to be identified and the community to be characterized in automated high-throughput ways.

• Novel technologies and approaches for defining the patterns of expression and functions of genes from microbial communities with large numbers of uncultured microorganisms, under different environmental conditions.

• Advanced methods for community genome sequence assembly, genome comparison, microarray data analysis, and data management.

In addition, there are many computational challenges to characterizing the composition and functional capabilities of microbial communities. New algorithms for DNA sequence assembly and annotation will be required to analyze the multiorganism sequence data, and new modeling methods will be required to predict the behavior of microbial communities. Computational methods needed include the ability to deconvolute mixtures of partial genomes sampled in the environment and to identify individual organisms; to facilitate multiple-organism shotgun-sequence assembly; to improve comparative approaches to microbial sequence annotation and gene finding; to reconstruct pathways from sequenced or partially sequenced genomes; and to evaluate the combined metabolic capabilities of heterogeneous microbial populations. Importantly, computational methods are needed to correlate genomic, physiological, and biogeochemical site parameters, as well as their spatial and temporal distribution. Finally, methods to integrate regulatory-network, pathway, and expression data into integrated models of microbial community function are needed.

(6) Pathway Inference in Prokaryotes

Many of the future solutions to the problems of supplying energy without net greenhouse gas emissions, managing the atmosphere's carbon budget, and remediating environmental contamination from metals, radionuclides, and toxic chemicals, will be based on biotechnology. Most of the new biotechnologies will almost certainly arise from fundamental advances in our understanding the ''microbial world''. This is primarily due to two facts. First, the metabolism of naturally occurring microorganisms plays a major role, often a dominant one, in many of the key chemical and energy fluxes of the planet. Second, virtually all of the biochemical transformations needed for safe energy production, carbon management, and environmental cleanup are part of the natural repertoire of one or more microorganisms. The challenge therefore is to explore and understand the immense chemical processing power that the microbial world possesses and uses. Achieving the needed understanding will require a nearly complete predictive mastery of the microbial cell from a 'systems' point of view—including their metabolic and signaling pathways, their regulatory networks, their material and energy flow constraints, etc. Data sets of considerable size and complexity must be obtained, managed, and mined. In addition, entirely new realms of modeling and simulation must be mastered.

The research requested in this section builds on advances in both computation and data base management as well as the extraordinary increase in the speed and capacity—and a corresponding reduction in the cost—of genome sequencing. Most fundamentally, it builds on the new and massive investment in the systems-level genomic-style study of microbial cells and microbial communities being undertaken as part of the Genomes to Life initiative.

The research requested in this section will facilitate the use of data obtained from the genomic and 'systems-level' experimental study of microbes (primarily prokaryotes) and microbial communities. It will in particular assist in using these data to predict the role played by each of the proteins encoded in the microbe's genome, the microbe's signaling and metabolic pathways, its regulatory mechanisms, and its biochemical capacities. This research will help enable the re-annotation of incorrectly annotated genomes, the prediction of functions for unknown genes, and discovery of known functions for which no genes have been identified. Biochemical capacities with direct relevance to DOE missions, such as energy production, carbon fixation, bioremediation, etc. are of particular interest.

Pathway Inference: Information on regulatory, metabolic, and signaling

pathways in prokaryotes is growing rapidly. Just as the use of similarity searches, such as Basic Local Alignment Search Tool, across genomes of multiple organisms has provided extraordinarily useful information regarding the imputed function of the target gene sequences, the research requested in this section is intended to facilitate similar inferences through probes of pathways in other organisms, primarily microbes. Although, some new knowledge may be required experimentally, the emphasis is on providing a computational infrastructure for this homology searching. Investigators may propose the construction of specific databases, research on knowledge representation, and/or tools to measure similarity or provide inference. Any proposed databases should contain references to the source of the data, including measures of presumed accuracy, based partly on whether annotations were derived from experimental results or computational analogy. Research may be proposed on data structures and data access tools for the integrative storage of pathway, signaling, and regulation information needed to support 'knowledge' extraction and in particular the computation of inferences about pathway structure and function. This goal presents questions concerning the types of data that should be stored and how they are to be interrelated, queried, presented, etc. Research also may be proposed to develop tools and resources that will support computational methods for inferring the existence and function of signaling, regulatory, and metabolic pathways. The research in this element initially may be conducted on organisms chosen for their utility to the research rather than for their importance to DOE, but the proposed research should show that it will be transferable to prokaryotes and pathways of DOE interest.

(7) Implications for Society, the Law, Education, and Technology Transfer

Scientific research takes place in a context of ongoing societal concerns and expectations. Headlines about DNA, genes, and the new powers of science to analyze and manipulate fundamental elements of life vie for our attention daily. The dazzling diversity of applications of DNA science to fields ranging from medicine and agriculture to forensics and environmental restoration are having and will continue to have profound impacts on society and the lives of our citizenry. Many recent discoveries stem from data and tools generated by the Human Genome Project, whose goal is to describe in intricate detail the DNA from humans and other selected organisms by 2003. DNA is the information molecule that carries instructions for creating and maintaining all life. Resources and analytical technologies generated by the Human Genome Project and other genetic research can be applied to the DNA of all other organisms including those that are currently centerpieces of Genomes to Life research. Thus, it is important for the Genomes to Life program to address some of the ethical, legal, and social issues that may arise from the project.

The Genomes to Life program initially focuses on nonpathogenic microbes of environmental importance and those that have potential to address DOE missions such as bioremediation, energy production, global climate change processes and biotechnology. To this end, research is solicited into the Implications for Society, the Law, Education, and Technology Transfer from the research being conducted under the Genomes to Life program. Investigations are encouraged that focus on:

- Defining the range, nature and scope of issues raised by Genomes to Life research or the applications of that research;
- Exploring legal issues such as intellectual property protection and commercialization practices that may be relevant to advances in the Genomes to Life program;
- Exploring potential economic sequelae to the introduction of Genomes to Life scientific developments into the marketplace, *e.g.*, impacts on the biotechnology sector and other industries;
- Educational challenges from the Genomes to Life mediated ''paradigm shift'' from reductionist science to a more ''reconstructionist'' science, *e.g.*, the need to present science as more of a synthetic activity requiring insights from different scientific disciplines.

The scope of research on the Implications for Society, the Law, Economics and Education is a work in progress and emphases will evolve as opportunities are identified to explore the consequences of Genomes to Life science for society.

(8) Other Novel and Innovative Technologies and Research Strategies To Address the Core Goals of the Genomes to Life Research Program

Many different technologies, research strategies, and data resources will be required to successfully address the core goals of the Genomes to Life program. Applications will be accepted that propose to develop additional tools, research strategies, or resources that will help speed success in reaching the core goals of the Genomes to Life program. In most cases, these new technologies and research strategies should be scalable and automatable for genome-scale analyses. A strategy for or demonstration of scalability and automatability should be described. The relevance to Genomes to Life goals should be clearly described.

Program Funding

Up to $10 million is available in Fiscal Year 2003, contingent upon availability of appropriated funds. It is anticipated that individual research grants will be funded at a level of $250,000 to $1,000,000 per year.

Merit and Relevance Review

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

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

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

Applications

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

The application must contain an abstract or project summary, letters of intent from collaborators, and short curriculum vitas consistent with NIH guidelines for all Principal and co-Principal Investigators.

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

As noted above, color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific application as Color image 1, Color image 2, *etc.*

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

- Face page (DOE F 4650.2 (10–91))
- Project abstract (no more than one page) including the name of the applicant, mailing address, phone, Fax, and e-mail
- Budgets for each year and a summary budget page for the entire project period (using DOE F 4620.1)
- Budget explanation
- Budgets and budget explanation for each collaborative subproject, if any
- Project description (includes goals, background, research plan, preliminary studies and progress, and research design and methodologies) not to exceed 20 pages.

—Goals
—Background
—Research plan
—Preliminary studies and progress (if applicable)
—Research design and methodologies

- Literature cited.
- Collaborative arrangements (if applicable).
- Biographical sketches (limit 2 pages per senior investigator).
- Description of facilities and resources.
- Current and pending support for each senior investigator.

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

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

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

Issued in Washington, DC, on November 7, 2002.

Ralph H. De Lorenzo,

Acting Associate Director of Science for Resource Management.

[FR Doc. 02–29022 Filed 11–14–02; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science

Biological and Environmental Research Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Biological and Environmental Research Advisory Committee. Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, December 3, 2002, 8:30 a.m. to 5 p.m.; and Wednesday, December 4, 2002, 8:30 a.m. to 12 p.m.

ADDRESSES: American Geophysical Union, 2000 Florida Avenue, NW., Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: Dr. David Thomassen (301–903–9817; *david.thomassen@science.doe.gov*), or Ms. Shirley Derflinger (301–903–0044; *shirley.derflinger@science.doe.gov*), Designated Federal Officers, Biological and Environmental Research Advisory Committee, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–70/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290. The most current information concerning this meeting can be found on the Web site: *http://www.science.doe.gov/ober/berac/announce.html.*

SUPPLEMENTARY INFORMATION: *Purpose of the Meeting:* To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda

Tuesday, December 3, and Wednesday, December 4, 2002

- Minisymposium on proposed facilities for the Genomes to Life program
- Review of Free Air Carbon Dioxide Enrichment facilities
- Science talk on nuclear medicine by Dr. Steve Larson, Memorial Sloan-Kettering Cancer Center, New York
- Comments from Dr. Ray Orbach, Director, Office of Science
- Presentation by Dr. Margaret Wright, Chair, Office of Advanced Scientific Computing Research Advisory Committee
- Report by Dr. Ari Patrinos, Associate Director of Science for Biological and Environmental Research
- Report of the Natural and Accelerated Bioremediation Research BERAC Subcommittee
- New Business
- Public Comment (10 minute rule)

Public Participation: The day and a half meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact David Thomassen or Shirley Derflinger at the address or telephone numbers listed above. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and

copying within 30 days at the Freedom of Information Public Reading Room, IE–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC on November 12, 2002.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 02–29021 Filed 11–14–02; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6635–1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 12, 2002 (67 FR 17992).

Draft EISs

ERP No. D–COE–E35086–FL Rating EC2, Fort Pierce Shore Protection Project, Future Dredging of Capron Shoal, Implementation, St. Lucie County, FL.

Summary: EPA has environmental concerns regarding the direct and indirect consequences of this proposal which will require additional information to determine if the unavoidable losses will be appropriately mitigated.

ERP No. D–DOE–L08063–WA Rating EC2, Plymouth Generating Facility, Construction and Operation of a 307-megawatt (MW) Natural Gas-Fired Combined Cycle Power Generation Facility on a 44.5 Acre Site, Conditional Use/Special Use Permit Issuance, Benton County, WA.

Summary: EPA identified environmental concerns with the proposed project based on its contribution to significant cumulative visibility degradation in the Columbia River Gorge National Scenic Area and at Mount Hood. EPA recommended that the EIS be revised to include a more comprehensive air quality analysis.

ERP No. D–NOA–E91011–00 Rating LO, Northeast Skate Complex Fishery Management Plan, Implementation of Management Measures, Magnuson-Stevens Fishery Conservation and Management Act, New England Fishery Management Council.

Summary: EPA has no objection to the proposal, but made suggestions on enhancing the efficacy of the study fleet and on multi-species zone closures.

ERP No. D–NOA–E91012–00 Rating LO, Atlantic Surfclam and Ocean Quahog Fishery Management Plan Amendment 13, Implementation, US Exclusive Economic Zone along the Atlantic Seaboard from Maine through North Carolina.

Summary: EPA expressed no objection to Amendment 13, but made suggestions for periodic stock assessment monitoring; for reducing clam dredge bycatch; and, for determining gear effects on fauna.

ERP No. DS–COE–H32002–00 Rating LO, Missouri River Fish and Wildlife Mitigation Project to Restore Fish and Wildlife Habitat Losses Resulting from Construction, Operation and Maintenance of the Missouri River Bank Stabilization and Navigation Project (BSNP), Missouri River, Sioux City, Iowa to the Mouth near St. Louis, NB, KS and MO.

Summary The Draft Supplemental EIS for this project was adequate and considered all appropriate environmental impacts. Comments made on the DSEIS consisted of suggestions to improve the presentation or organization of data to ease the reader's understanding.

ERP No. DS–UAF–K11076–00 Rating LO, Airborne Laser (ABL) Program to Conduct Test Activities at Kirtland Air Force Base (AFB) and White Sands Missile Range/Holloman AFB, New Mexico and Edwards AFB and Vandenberg AFB CA.

Summary: EPA expressed a lack of objection on the proposed action but requested clarification on the applicability of this project to the Emergency Planning and Community Right-to-Know Act, the Pollution Prevention Act and Executive Order 13148 for ammonia, chlorine and sulfuric acid.

Final EISs

ERP No. F–BIA–K39071–00 Truckee River Water Quality Settlement Agreement-Federal Water Right Acquisition, Implementation, Truckee River, Placer County, CA and Washoe, Storey and Lyon Counties, NV.

Summary: EPA commended the Truckee River Water Quality Settlement Agreement signatories' work to permanently improve Truckee River water quality and reduce violations of water quality standards. EPA encouraged them to continue to work with EPA in achieving full compliance with water quality standards. The FEIS adequately addresses our concerns.

ERP No. F–DOE–G06012–00, Technical Area 18 (TA–18) Relocation of Capabilities and Materials at the Los Almos National Laboratory (LANL), Operational Activities involve Research in and the Design, Development, Construction, and Application of Experiments on Nuclear Criticality, NM, NV and ID.

Summary: EPA has no objections to the selection of the preferred alternative since EPA comments on the draft document have been adequately responded to.

ERP No. F–FHW–E40786–FL, I–4 Corridor Improvements, Upgrading the Safety and Mobility of the existing I–4 from west of FL–528 (Bee Line Expressway) Interchange in Orange County to east of FL–472 Interchange in Volusia County, Funding, U.S. Army COE Section 10 and 404 and NPDES Permits Issuance, Orange, Seminole, and Volusia Counties, FL.

Summary: EPA continues to have environmental concerns about the extent and mitigation of related socio-economic impacts. EPA suggests that a schedule for construction and operation of all project components be documented in the Record of Decision to ensure that alternative project considerations are consistent with comprehensive review procedures under NEPA.

ERP No. F–FRC–E03009–00, Patriot Project, Construction and Operation of Mainline Expansion and Patriot Extension in order to Transport 510.000 dekatherms per day (dth/day) of Natural Gas, TN, VA and NC.

Summary: EPA has environmental concerns regarding the need for better documentation regarding cumulative and secondary impacts, environmental justice issues, sampling and analysis of potentially contaminated sediments at Mud Creek, and pipeline safety.

ERP No. FS–COE–E34030–FL, Central and Southern Florida Project, Indian River Lagoon-South Feasibility Study, Additional Information concerning Selection of Plan, Alternative 6, Restoration of the Southern Indian River Lagoon and the St. Lucie Estuary Ecosystem, Martin, St. Lucie and Okeechobee Counties, FL.

Summary: EPA supports the positive water quality and habitat benefits which should result from the proposed IRLS plan.

Dated: November 12, 2002.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 02–29052 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6634–9]

Environmental Impact Statements; Notice of Availability

RESPONSIBLE AGENCY: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements

Filed November 4, 2002, through November 8, 2002,

Pursuant to 40 CFR 1506.9.

EIS No. 020457, Draft EIS, AFS, UT, Fox and Cresent Reservoirs Maintenance Project, to operate and maintain the dam structures, special use permit, High Uintas Wilderness, Ashley National Forest, Uinta Basin, Duchesne County, UT, Due: December 30, 2002, Contact: Clark Tucker (435) 781–5203.

EIS No. 020458, Draft EIS, AFS, ID, Salmon-Challis National Forest Noxious Weed Management Program, to implement an integrated series of weed treatment and non-treatment practices, Custer, Lemhi, Butte and Blaine Counties, ID, Due: January 14, 2003, Contact: William Diage (208) 756–5100.

EIS No. 020459, Final EIS, MMS, AL, LA, MS, TX, Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sales: 2003–2007, starting in 2002 the proposed central planning area sales 185, 190, 194, 198, and 201 and western planning area sales 187, 192, 196, and 200, offshore marine environment, coastal counties and parishes of TX, LA, AL and MS, Due: December 16, 2002, Contact: Archie Melancon (703) 787–1547.

EIS No. 020460, Final EIS, AFS, MT, Cave Gulch post-fire salvage sale, harvesting dead or dying trees, implementation, Helena National Forest, Big Belts Mountain, Lewis and Clark Counties, MT, Due: December 16, 2002, Contact: Jerry Meyer (406) 449–5201.

EIS No. 020461, Draft EIS, EPA, CA, Lower Owens River Project, to implement a large-scale habitat restoration project, funding, NPDES permit and COE section 404 permit, Owens Valley, Inyo County, CA, Due: January 14, 2003, Contact: Gail Louis (414) 972–3467. This document is available on the Internet at: *http://lorpeir.com*

EIS No. 020462, Draft EIS, DOE, CA, Sacramento Area Voltage Support Project, to improve system reliability and provide voltage support, Sierra Nevada Region, Alamenda, Contra Costa, Placer, Sacramento, San Joaquin and Sutter Counties, CA, Due: December 30, 2002, Contact: Loreen McMahon (916) 353–4460. This document is available on the Internet at: *http://www.wapa.gov.*

EIS No. 020463, Draft EIS, SFW, CA, Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), implementation, issuing incidental take permits, Riverside and Orange County, CA, Due: January 15, 2003, Contact: Jim Bartel (760) 431–9440.

EIS No. 020464, Draft EIS, APH, importation of solid wood packing material, to exclude, eradicate and/or control invasive alien agricultural pest, implementation, United States, Due: December 30, 2002, Contact: Ray Nosbaum (301) 734–6280. This document is available on the Internet at: *http://www.aphis.usda.gov/ppd/es/ppq/swpmdeis.pdf.*

EIS No. 020465, Draft EIS, COE, LA, Bayou Sorrel Lock Replacement (formerly IWW Locks) feasibility study, to relieve navigation delays and/or provide adequate flood protection, Atchafalaya Basin Floodway, Iberville Parish, LA, Due: December 30, 2002, Contact: Richard Boe (504) 862–1505.

EIS No. 020467, Draft EIS, FHW, IL, Milan Beltway Extension (FAU 5822) Airport Road to Blackhawk Road/John Deere Expressway, to provide a connections between the developing areas, Black Hawk State historic site, Rock Island County, IL, Due: January 13, 2003, Contact: Roger E. Rocke (815) 284–2271.

EIS No. 020468, Final EIS, COE, TX, Texas City's Proposed Shoal Point Container Terminal Project, containerized cargo gateway development, U.S. Army COE section 404 and 10 permits issuance, material placement area (DMPA), City of Texas, Galveston County, TX, Due: December 16, 2002, Contact: Sharon Manzaella-Tirpak (409) 766–3136.

EIS No. 020469, Draft Supplement, FTA, FL, Miami-Miami Beach (Bay Link) Transportation Corridor Study, transportation improvements connecting government center and downtown Miami Beach Convention Center, Dade County, FL, Due: December 30, 2002, Contact: Elizabeth B. Martin (404) 562–3509.

EIS No. 020470, Final EIS, FTA, AZ, Central Phoenix/East Valley Light Rail Transit Corridor, construction, operation and maintenance, funding, Cities of Phoenix, Tempe and Mesa, Maricopa County, AZ, Due: December 16, 2002, Contact: Hymie Luden (415) 744–3115.

EIS No. 020471, Draft EIS, SFW, FL, proposed rulemaking for: the incidental take of small numbers of Florida manatees (*Trichechus manatus latirostris*) resulting from government programs related to watercraft access and watercraft operation in the State of Florida, Due: January 10, 2003, Contact: Pete Benjamin (904) 232–2580.

Amended Notices

EIS No. 020418, Draft EIS, USN, CA, Advanced Amphibious Assault Vehicle (AAAV) development, replacement and establishment, implementation, Del Mar Basin Area of Marine Base Corps (MCB) Camp Pendelton, San Diego County, CA, *Due:* December 03, 2002, Contact: Lisa Seneca (619) 532–4744. Revision of **Federal Register** notice published on 10/11/2002: CEQ comment period ending 11/25/2002 has been extended to 12/3/2002.

EIS No. 020452, Final Supplement, AFS, GA, AL, FL, SC, LA, NC, MS, TX, vegetation management in the Coastal Plain/ Piedmont, proposal to clarify direction for conducting project-level inventories for biological evaluations (BEs), US Forest Service Southern Region, Al, GA, FL, SC, NC, LA, MS and TX, Due: December 9, 2002, Contact: Robert Wilhelm (404) 347–7076. Revision of **Federal Register** notice published on 11–8–2002: correction to website address on the Internet at: *http://www.southregion.fs.fed.us/planning/vmeis/index.htm.*

EIS No. 020453, Final Supplement, AFS, AL, GA, KY, NC, SC, TN, VA, WV, vegetation management in the Appalachian Mountains, proposal to clarify direction for conducting project-level inventories for biological evaluations (BEs), AL, GA, KY, NC, SC, TN, VA and WV, Due: December 9, 2002, Contact: Robert Wilhelm (404) 347–7076. Revision of **Federal Register** notice published 11–08–02 correction to website address. This document is available on the Internet at: *http://www.southregion.fs.fed.us/planning/vmeis/index.htm.*

Dated: November 12, 2002.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 02–29053 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7408–8]

Notice of Meeting of the EPA's Children's Health Protection Advisory Committee (CHPAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the next meeting of the Children's Health Protection Advisory Committee (CHPAC) will be held December 2–4, 2002 at the Hotel Washington, Washington, DC. The CHPAC was created to advise the Environmental Protection Agency on science, regulations, and other issues relating to children's environmental health.

DATES: Monday, December 2, the Science/Regulatory Work Group and the Smart Growth Work Group will meet; plenary sessions will take place Tuesday, December 3, and Wednesday, December 4.

ADDRESSES: Hotel Washington, 515 15th Street, NW, Washington, DC.

Agenda Items: The meetings of the CHPAC are open to the public. The Science/Regulatory Work Group will meet December 2, from 9 a.m. to 5 p.m. The Smart Growth Workgroup will meet on December 2, from 1 p.m. to 5 p.m. The plenary CHPAC will meet on Tuesday, December 3, from 9 a.m. to 5:30 p.m., with a public comment period at 5:15 p.m., and on Wednesday, December 4, from 8:30 a.m. to 12 p.m.

The plenary session will open with introductions and a review of the agenda and objectives for the meeting. Agenda items include highlights of the Office of Children's Health Protection (OCHP) activities and reports from the Smart Growth Workgroup and the Science and Regulatory Work Group. Other potential agenda items include an EPA Briefing on the Draft Cancer Guidelines and Interim Policy Statement and an informational panel on the National Children's Study.

FOR FURTHER INFORMATION CONTACT: Contact Joanne Rodman, Office of Children's Health Protection, USEPA, MC 1107A, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, (202) 564–2188, rodman.joanne@epa.gov.

Dated: November 8, 2002.

Joanne K. Rodman,

Designated Federal Official.

[FR Doc. 02–29055 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2002–0284; FRL–7280–1]

Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2002–0284, must be received on or before December 16, 2002.

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

FOR FURTHER INFORMATION CONTACT: Bipin Gandhi, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8380; e-mail address: gandhi.bipin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, pesticide manufacturer, or antimicrobial pesticide manufacturer. Potentially affected entities may include, but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry	111	Crop Production
	112	Animal Production
	311	Food manufacturing
	32532	Pesticide Manufacturing
	32561	Antimicrobial Pesticide

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2002–0284. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall# 2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in

the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restriced by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

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

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

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at http://www.epa.gov/edocket, and follow the online instructions for submitting comments. Once in the system, select'' search,'' and then key in docket ID number OPP–2002–0284. The system is an'' anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2002–0284. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

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

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2002–0284.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall# 2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2002–0284. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

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

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 6, 2002.

Debra Edwards,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Rhodia, Inc.,

PP 2E6515

EPA has received a pesticide petition (2E6515) from Rhodia, Inc., CN 7500, Prospect Plains Rd., Cranbury, NJ 08512-7500, proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzenedicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzenedicarboxylate and 1,2 ethanediol (CAS Reg. No. 212842–88–1) when used as an inert ingredient in pesticide formulations under 40 CFR 180.960 (polymers). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

Rhodia, Inc. is petitioning that 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzenedicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol be exempt from the requirement of a tolerance based upon the definition of a low risk polymer under 40 CFR 723.250(e). Consequently, the analytical method to determine residues, the residues present in plant material, and the magnitude of 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzenedicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol residues in raw agricultural commodities is not relevant.

B. Toxicological Profile

Where it can be determined that an inert ingredient meets the definition of a low risk polymer (40 CFR 723.250), then the production of data is generally not required by EPA to establish a tolerance or the exemption from a tolerance. Rhodia, Inc. asserts that the data and information provided below is sufficient to establish the activity and toxicity associated with 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, with polymer with 1,3-benzenedicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol as an inert ingredient when applied to growing crops or raw agricultural commodities.

Further, in the case of chemical substances described as polymers, EPA has established criteria, which when they are met or exceeded, are considered low risk. These criteria are described in 40 CFR 723.250, and identify the polymers that are relatively unreactive, stable, and typically are not absorbed when compared to other chemical substances including some polymers. Rhodia, Inc. has previously submitted information regarding 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, with polymer 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol to the Environmental Protection Agency in a Pre Manufacturing Notice for consideration under the polymer exemption rule (PMN Number P96–818).

The criteria described in 40 CFR 723.250, and addressed below, will generally exclude polymer chemicals that are not well known and understood, and present great risk of adverse effects. Therefore, the polymers that meet or exceed these criteria can be considered of minimal or no risk.

1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol conforms to the definition of a low risk polymer as described in 40 CFR 723.250 as described below:

a. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol is not a cationic polymer, nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

b. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol contains as the integral part of its composition the atomic elements hydrogen, oxygen, carbon, and sulfur.

c.1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and

1,2 ethanediol does not contain as an integral part of its composition, except as impurities, any elements other than those listed in 40 CFR 723.250(d)(2)(ii).

d.1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol is not designed nor reasonably anticipated to substantially depolymerize, degrade, or decompose.

e. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol is manufactured from monomers that are listed in the Toxic Substance Control Act (TSCA) Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

f. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol is not a water-absorbing polymer.

g. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol does not contain any reactive functional groups.

h. The minimum number-average molecular weight of 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol is 2,580 Daltons. Substances with molecular weights greater than 400 Daltons are generally not absorbed through the intact skin, and substances with molecular weights greater than 1,000 generally are not absorbed through the intact gastrointestinal (GI) tract. Chemicals not absorbed through the skin or GI tract are incapable of eliciting a toxic response via these routes of exposure.

i. 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol has a number average molecular weight of approximately 2,580 Daltons and contains less than 4.3% oligomeric material below molecular weight of 500 Daltons and less than 7.0% oligomeric material below 1,000 molecular weight.

C. Aggregate Exposure

1. *Dietary exposure*. The physical-chemical characteristics of 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol lead to the conclusion that there is a reasonable certainty of no harm from exposure to the polymer from food or drinking water nor from an aggregate exposure.

2. *Non-dietary exposure*. The physical-chemical characteristics of 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol lead to the conclusion that there is a reasonable certainty of no harm from exposure to the polymer from non-dietary means.

D. Cumulative Effects

At this time there is no information to indicate that any toxic effects produced by 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol would be cumulative with those of any other chemical. Given the compound's categorization as a low risk polymer, and its proposed use in pesticide formulations, there is no expectation of increased risk due to cumulative exposure.

E. Safety Determination

1. *U.S. population*. Based on the polymer's physical-chemical properties, and that it meets or exceeds the polymer exemption criteria at 40 CFR 723.250 for low-risk polymers, adverse effects are not expected.

2. *Infants and children*. Based on the polymer's physical-chemical properties, and that it meets or exceeds the polymer exemption criteria at 40 CFR 723.250 for low-risk polymers, adverse effects are not expected.

F. International Tolerances

There are no CODEX maximum residue limits established for 1,3-Benzene dicarboxylic acid, 5-sulfo-, 1,3-dimethyl ester, Sodium salt, polymer with 1,3-benzene dicarboxylic acid, 1,4-benzene dicarboxylic acid, dimethyl 1,4-benzene dicarboxylate and 1,2 ethanediol in or on crops or commodities at this time.

[FR Doc. 02–29056 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7408–4]

Notice of Availability of Annual Reports as Required by the Energy Policy Act of 1992 (EPAct)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of annual reports as required by the EPAct of 1992.

SUMMARY: The Environmental Protection Agency announces the availability of reports summarizing compliance with alternative fueled vehicle acquisition requiremetns of the Energy Policy Act of 1992 (EPAct). These reports are available at the following Web site: *http://www.epa.gov/greeningepa/greenfleet/index.htm.* or by request to the Environmental Protection Agency (EPA) Transportation Management Office. These reports have been prepared and are being made publicly available as mandated by EPAct, which was designed to increase United States energy security in cost-effective and environmentally beneficial ways, in part through increased use of alternative fuels by vehicles owned and operated by the Federal governmnet.

DATES: These reports will be available starting December 1, 2002.

FOR FURTHER INFORMATION CONTACT: Melvin Joppy, EPA Transportation Management Office at (202) 564–6232 or by e-mail at *Joppy.Melvin@epa.gov.*

David R. Lloyd,

Acting Director, Facilities Management and Services Division.

[FR Doc. 02–29057 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7408–7]

Proposed Prospective Purchaser Agreement Under CERCLA for the Pruitt & Grace Superfund Site

AGENCY: Environmental Protection Agency (''EPA'').

ACTION: Notice; proposal of CERCLA Prospective Purchaser Agreement for the Pruitt & Grace Superfund site.

SUMMARY: EPA is proposing to execute a Prospective Purchaser Agreement (''PPA'') under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA''), 42 U.S.C. 9601 *et seq.*, as amended, and under the

inherent authority of the Attorney General of the United States to compromise and settle claims of the United States, for the transfer of title to property at the Pruitt & Grace Superfund site to Patrick Electric Company, Inc., and Mr. Robert Patrick II. The company and Mr. Patrick are both settling respondents under the PPA. In return for a covenant not to sue and contribution protection from EPA, the settling respondents will pay $2,000 to EPA, and will redevelop and operate the site. Settling respondents further agree to: Provide EPA and the Ohio Environmental Protection Agency (''OEPA'') with continued access to the site if necessary; exercise due care with respect to any existing contamination; cooperate with EPA and OEPA; and comply with all environmental laws and regulations. Patrick Electric further covenants not to sue the United States.

The proposed PPA has been executed by the settling respondents, and has been submitted to the Attorney General for approval. EPA today is proposing to execute the PPA because it achieves a benefit for the community where the site is located by encouraging the reuse or redevelopment of property at which fear of Superfund liability may have been a barrier, thereby fulfilling EPA's Brownfields policies and goals. The site is not on the National Priorities List. No further response activities by EPA are anticipated at the site at this time.

DATES: Comments on this proposed PPA must be received by December 16, 2002.

ADDRESSES: A copy of the proposed PPA is available for review at EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. Please contact Kevin C. Chow at (312) 353–6181, prior to visiting the Region 5 office. Comments on the proposed PPA should be addressed to Kevin C. Chow, Office of Regional Counsel (C–14J), EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Kevin C. Chow, Office of Regional Counsel, at (312) 353–6181.

SUPPLEMENTARY INFORMATION: The site is located at 1228 West 15th Street, Lorain, Lorain County, Ohio. It is approximately one acre in size and is bounded to the north by railroad tracks, to the south by West 15th Street and private residences, and to the east by Oberlin Avenue and small businesses. The facility was operated by Pruitt & Grace Prime Line, Inc. and Pruitt & Grace Development Corporation (collectively, ''Pruitt & Grace''). Pruitt & Grace ceased operating in the mid-1980s. As a result, Pruitt & Grace left behind approximately 325 55-gallon drums and a number of 5-gallon cans. Access to the site was unrestricted. The drums were left outdoors and were rusty, bulging, leaking, open, or in various stages of deterioration, which prompted neighborhood complaints about odor and other problems. The drums contained abandoned or waste paints, lacquers, solvents (including tetrachloroethylene), and other substances. Several drums were labeled inflammable. EPA sampled open containers and found organic vapors with concentrations as high as 200 parts per million (''ppm''). Based on these results, EPA performed field hazard characterization tests for ignitability on several drums and confirmed that ignitable and/or inflammable materials existed at the site.

EPA determined that, among other things, the site posed a threat of fire or explosion and that an imminent and substantial endangerment to human health or the environment existed. EPA took an emergency removal action as authorized by section 104 of CERCLA, 42 U.S.C. 9604, to mitigate the threat of fire or explosion. Actions taken by EPA included: Installation of a fence along the northern boundary of the site; inventorying and sampling of drum contents; pumping and off-site disposal of liquid fractions from all drums; consolidation of partially full drums; over-packing of full drums; crushing and off-site disposal of empty drums; and off-site disposal of all hazardous wastes, including one 55-gallon drum of waste oil. EPA completed the clean-up on January 17, 1992. Total costs incurred by EPA amounted to at least $144,358.73.

Under the proposed PPA, the settling respondents will redevelop the site and move their electrical services contracting business there, thus returning an abandoned Superfund site to productive use and preserving or creating jobs. The settling respondents will also pay $2,000 to EPA; provide future access to the site if necessary to EPA and the Ohio Environmental Protection Agency (''OEPA''); exercise due care with respect to any existing contamination; cooperate with EPA and OEPA; and comply with all environmental laws and regulations. They further covenant not to sue the United States. In return, EPA covenants not to sue and provides contribution protection to the settling respondents, subject to certain reservations of rights. A 30-day period, beginning on the date of publication of this notice, is open for comments on the proposed Prospective Purchaser Agreement.

Dated: October 15, 2002.

William E. Muno,

Director, Superfund Division, Region 5.

[FR Doc. 02–29058 Filed 11–14–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–02–47–B (Auction No. 47); DA 02–2797]

Revised Inventory and Auction Start Date for Closed Auction of Licenses for Cellular Unserved Service Areas; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document revises the starting date for Auction No. 47, revises the auction inventory to include three additional licenses, and seeks comment on procedural issues related to the auction of these additional licenses. This document revises the auction start date to provide additional time for bidder preparation and planning.

DATES: Comments are due on or before November 1, 2002, and reply comments are due on or before November 8, 2002.

ADDRESSES: All comments and reply comments must be filed electronically to the following address: *auction47@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: *For legal questions:* Kenneth Burnley (202) 418–0660. *For general auction questions:* Jeff Crooks (202) 418–0660 or Lisa Stover (717) 338–2888. *For service rule questions:* Amal Abdallah, Jay O'Connor or Mike Kleeb at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice* released October 25, 2002. The complete text of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice*, including the attachment, 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–B402, Washington, DC 20554. The *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice* 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 to *qualexint@aol.com.*

I. Background

1. In the *Auction No. 47 Comment Public Notice*, the Wireless Telecommunications Bureau (''Bureau'') announced the auction of four licenses to provide cellular service in four unserved areas (''Auction No. 47'') scheduled to commence on December 4, 2002.[1] By the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice* the Bureau revises the starting date for Auction No. 47 to February 12, 2003 and revises the auction inventory to include three additional licenses in the Cellular Radiotelephone Service. The additional spectrum to be auctioned is the subject of pending mutually exclusive long-form applications for three additional unserved area licenses. One additional license will be auctioned for each of the three additional mutually exclusive applicant groups (''MX Groups''). The three additional licenses that will be offered in Auction No. 47 and three additional MX Groups are identified in Attachment A of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice*. The *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice* seeks comment on procedural issues related to the auction of these licenses. The auction start date has been revised to provide additional time for bidder preparation and planning.

II. Auction Structure

A. Single-Round Sealed-Bid Auction Design

2. In the *Auction No. 47 Comment Public Notice*, the Bureau proposed to award licenses included in Auction No. 47 in a single-round sealed-bid auction. This methodology offers every license for bid at the same time with bidders placing one bid per license. For the same reasons the Bureau proposed to use the single-round sealed-bid format in the *Auction No. 47 Comment Public Notice*, it proposes to use this format for the additional licenses. The Bureau seeks comment on this proposal. It will consider comments received in response to the *Auction No. 47 Comment Public Notice* as well as comments filed in response to the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice* in considering whether to use a single-round sealed-bid auction design as proposed.

[1] In addition, procedures were proposed in the *Auction No. 47 Comment Public Notice* with actual notice and an opportunity to comment provided to all of the parties in this closed auction.

III. Reserve Price or Minimum Opening Bid

3. For the additional licenses offered in Auction No. 47, the Bureau proposes to utilize the same minimum opening bid of $500 per license as proposed in the *Auction No. 47 Comment Public Notice*. A complete list of all licenses to be offered in Auction No. 47 and their proposed minimum opening bids is provided in Attachment A of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice*. Comment is sought on this proposal. Alternatively, comment is sought on whether, consistent with the Balanced Budget Act of 1997, the public interest would be served by having no minimum opening bid or reserve price.

IV. Upfront Payments and Initial Maximum Eligibility for Each Bidder

4. For the additional licenses in Auction No. 47, the Bureau proposes to use the same upfront payment of $500 per license as previously proposed for the cellular unserved service area licenses in the *Auction No. 47 Comment Public Notice*. A complete list of all licenses to be offered in Auction No. 47, including their related geographic service areas and upfront payments, is included in Attachment A of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice*. The Bureau seeks comment on this proposal.

5. The Bureau further proposes that the amount of the upfront payment submitted by a bidder will determine the number of bidding units on which a bidder may place bids. This limit is a bidder's ''maximum eligibility.'' This number does not reflect the maximum bid that can be placed on each license. Rather, a bidder may place bids on any number of licenses as long as the sum of the bidding units associated with those licenses does not exceed its maximum eligibility. Thus, in calculating the upfront payment amount, an applicant must determine the maximum number of bidding units it may wish to bid on, and submit an upfront payment covering that number of bidding units. The Bureau seeks comment on this proposal.

V. Other Auction Procedural Issues

6. In the *Auction No. 47 Comment Public Notice*, the Bureau also set forth and sought comment on the following proposals relating to auction structure and bidding procedures: (i) Information relating to auction delay, suspension or cancellation; (ii) round structure; (iii) minimum acceptable bids; (iv) winning bids and tied bids; and (v) information regarding bid withdrawal and bid removal. For the additional licenses in Auction No. 47, the Bureau proposes to utilize the same auction structure and bidding procedures proposed in the *Auction No. 47 Comment Public Notice*. The Bureau seeks comment on these proposals as they relate to the three additional licenses included in Attachment A of the *Auction No. 47 Revised License Inventory and Auction Start Date Public Notice*.

VI. Conclusion

7. Comments are due on or before November 1, 2002, and reply comments are due on or before November 8, 2002. The Bureau requires that all comments and reply comments be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: *auction47@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 47 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. In addition, the Bureau requests that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338–2850.

8. This proceeding has been designated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written ex parte presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Margaret Wiener,

Chief, Auctions and Industry Analysis Division, WTB.

[FR Doc. 02–28943 Filed 11–14–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 29, 2002.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. Robert Lee Riley, Holliday, Missouri; to acquire voting shares of Paris Bancshares, Inc., Paris, Missouri, and thereby indirectly acquire voting shares of The Paris National Bank, Paris, Missouri.

Board of Governors of the Federal Reserve System, November 8, 2002.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 02–28946 Filed 11–14–02; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 9, 2002.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. M&T Bank Corporation, Buffalo, New York; to merge with Allfirst Financial Inc., Baltimore, Maryland, and thereby indirectly acquire voting shares of Allfirst Financial Center National Association, Millsboro, Delaware, and Allfirst Bank, Baltimore, Maryland.

In connection with this application, Applicant also has applied to acquire Allfirst Leasing Corporation, Baltimore, Maryland; Allfirst Mortgage Corporation, Baltimore, Maryland; Allfirst Life Insurance Corporation, Phoenix, Arizona; Williams, Daniels & Associates, Inc., Baltimore, Maryland; Zirkin-Cutler Investments, Inc., Bethesda, Maryland, and Loans USA, Inc., Pasadena, Maryland, and thereby engage in certain nonbanking activities including insurance, leasing insurance, financial and investment advisement, data processing and the extension of credit, pursuant to §§ 225.28(b)(1), (b)(3), (b)(6), (b)(11), and (b)(14) of Regulation Y.

2. Allied Irish Banks, P.L.C., Dublin, Ireland; to acquire up to 25 percent of the voting shares of M&T Bank Corporation, Buffalo, New York, and thereby will control indirectly shares of Manufacturers and Traders Trust Company, Buffalo, New York.

In connection with this application, Applicant also has applied to acquire Keystone Financial Life Insurance Company, Phoenix, Arizona, and thereby indirectly acquire Martindale Andres & Company, LLC, West Conshohocken, Pennsylvania, and engage in certain nonbanking activities including insurance, and investment services, pursuant to §§ 225.28(b)(6) and (b)(11) of Regulation Y.

Applicant currently owns Allfirst Financial Inc., with has applied to merge with M&T Bank Corporation. After the merger, Applicant also indirectly would own an interest in all of Allfirst's current subsidiaries including, Allfirst Financial Center, N.A., Mislsboro, Delawre.

B. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Synovus Financial Corp., Columbus, Georgia; to merge with FNB Newton Bankshares, Inc., Covington, Georgia, and thereby indirectly acquire voting shares of First Nation Bank, Covington, Georgia.

Board of Governors of the Federal Reserve System, November 8, 2002.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 02–28945 Filed 11–14–02; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the State Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2003 Through September 30, 2004

AGENCY: Office of the Secretary, DHHS.

ACTION: Notice.

SUMMARY: The Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages for Fiscal Year 2004 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2003 through September 30, 2004. This notice announces the calculated ''Federal Medical Assistance Percentages'' and ''Enhanced Federal Medical Assistance Percentages'' that we will use in determining the amount of Federal matching for State medical assistance (Medicaid) and State Children's Health Insurance Program (SCHIP) expenditures, and Temporary Assistance for Needy Families (TANF) Contingency Funds, the federal share of Child Support Enforcement collections, Child Care Mandatory and Matching Funds for the Child Care and Development Fund, Foster Care Title IV–E Maintenance payments, and Adoption Assistance payments. The table give figures for each of the 50 States, the District of Columbia, Puerto

Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Programs under title XIX of the Act exist in each jurisdiction; programs under titles I, X, and XIV operate only in Guam and the Virgin Islands; while a program under title XVI (Aid to the Aged, Blind, or Disabled) operates only in Puerto Rico. Programs under title XXI began functioning in fiscal year 1998. The percentages in this notice apply to State expenditures for most medical services and medical insurance services, and assistance payments for certain social services. The statute provides separately for Federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Act require the Secretary of Health and Human Services to publish the Federal Medical Assistance Percentages each year. The Secretary is to figure the percentages, by formulas in sections 1905(b) and 1101(a)(8)(B), from a Department of Commerce's statistics of average income per person in each State and in the Nation as a whole. The percentages are within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentage for the 50 states.

The ''Federal Medical Assistance Percentages'' are for Medicaid. Section 1905(b) of the Act specifies the formula for calculating Federal Medical Assistance Percentages as follows:

> ''Federal medical assistance percentage'' for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, (2) the Federal medical assistance for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum.

A provision in the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 modified the formula to calculate the percentages to be applied to Alaska for fiscal years 2001 through 2005. For Alaska only, the formula requires dividing the state's three-year average per capita income by 10.5 instead of 1.0. Section 2105(b) of the Act specifies the formula for calculating the Enhanced Federal Medical Assistance Percentages as follows:

> The ''enhanced FMAP'', for a State for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the State increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the State, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a State exceed 85 percent.

The ''Enhanced Federal Medical Assistance Percentages'' are for use in the State Children's Health Insurance Program under Title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1095(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the Enhanced Federal Medical Assistance Percentages. We include them in this notice for the convenience of the States.

EFFECTIVE DATES: The percentages listed will be effective for each of the 4 quarter-year periods in the period beginning October 1, 2003 and ending September 30, 2004.

FOR FURTHER INFORMATION CONTACT: Adelle Simmons or Robert Stewart, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 442E—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93–596: Child Care Mandatory and Matching Funds for the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.778: Medical Assistance Program; 93.767: State Children's Health Insurance Program)

Dated: October 30, 2002.

Tommy G. Thompson,

Secretary of Health and Human Services.

FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES

[Effective October 1, 2003–September 30, 2004 (Fiscal Year 2004)

State	Federal medical assistance percentages	Enhanced Federal medical assistance percentages
Alabama	70.75	79.53
Alaska**	58.39	70.87
American Samoa*	50.00	65.00
Arizona	67.26	77.08
Arkansas	74.67	82.27
California	50.00	65.00
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	50.00	65.00
District of Columbia**	70.00	79.00
Florida	58.93	71.25
Georgia	59.58	71.71
Guam*	50.00	65.00
Hawaii	58.90	71.23
Idaho	70.46	79.32
Illinois	50.00	65.00
Indiana	62.32	73.62
Iowa	63.93	74.75
Kansas	60.82	72.57
Kentucky	70.09	79.06
Louisiana	71.63	80.14
Maine	66.01	76.21
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	55.89	69.12
Minnesota	50.00	65.00
Mississippi	77.08	83.96
Missouri	61.47	73.03
Montana	72.85	81.00
Nebraska	59.89	71.92
Nevada	54.93	68.45
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	74.85	82.40
New York	50.00	65.00
North Carolina	62.85	74.00
North Dakota	68.31	77.82
Northern Mariana Islands*	50.00	65.00
Ohio	59.23	71.46
Oklahoma	70.24	79.17
Oregon	60.81	72.57
Pennsylvania	54.76	68.33
Puerto Rico*	50.00	65.00
Rhode Island	56.03	69.22
South Carolina	69.86	78.90
South Dakota	65.67	75.97
Tennessee	64.40	75.08
Texas	60.22	72.15
Utah	71.72	80.20
Vermont	61.34	72.94
Virgin Islands*	50.00	65.00
Virginia	50.00	65.00
Washington	50.00	65.00
West Virginia	75.19	82.63
Wisconsin	58.41	70.89
Wyoming	59.77	71.84

*For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

**The values for Alaska and the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, including programs remaining in Title IV of the Act, the percentage for D.C. is 50.00.

[FR Doc. 02–28985 Filed 11–14–02; 8:45 am]

BILLING CODE 4154–05–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–04–03]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Project: Impact of Community Coordinated Response for the Prevention of Intimate Partner Violence: A Random Digital Dial Survey—NEW—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

A random digit dial survey will be conducted with 12,000 male and female adults in the communities of ten experimental sites and ten control sites (600 per site). The survey will determine whether adding resources to a community to develop a coordinated community response to intimate partner violence (IPV), leads to increased knowledge about IPV such as where to go for help and how to assist a victim, child witness and/or perpetrator of IPV. A base survey instrument will be administered along with an addendum from the sites that wish to address other research needs in their experiment and control communities.

While previous surveys such as the National Violence Against Women Survey (1996) have collected information on intimate partner violence, no previous survey has explored the effects of a coordinated community response, enhanced services, and public awareness campaigns between experimental and control sites.

Interviews will be conducted with persons at residential phone numbers selected using random digit dialing. No more than one respondent per household will be selected, and each sample member will complete just one interview. Non-residential numbers are ineligible for the sample and will not be interviewed. Female interviewers will be used and bi-lingual Spanish interviewers will conduct interviews in Spanish to reduce language barriers to participation. The estimated annualized burden is 3813 hours.

Respondents	Number of respondents	Number of responses/ respondent	Avg. burden/ response (in hours)
Pretest	50	1	15/60
Contacted but not eligible or refused	15,000	1	2/60
Core questionnaire (7 sites and comparison communities)*	8,400	1	15/60
Core questionnaire plus addendums*	3,600	1	20/60

Dated: November 6, 2002.

Nancy E. Cheal,

Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 02–29000 Filed 11–14–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Contaminants and Natural Toxicants Subcommittee of the Food Advisory Committee; 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: Contaminants and Natural Toxicants Subcommittee of the Food Advisory Committee.

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 December 4 and 5, 2002, from 8:30 a.m. to 6 p.m.

Location: The Inn and Conference Center, University of Maryland University College, 3501 University Boulevard East, Adelphi, MD 20783, 301–985–7300.

Contact Person: Henry Kim, Center for Food Safety and Applied Nutrition (HFS–306), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2023, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 10564. Please call the Information Line for up-to-date information on this meeting.

Agenda: The subcommittee will discuss FDA's action plan for addressing the issue of acrylamide in food. An agenda for the meeting will be available on the Internet at http://www.cfsan.fda.gov/list.html and at the meeting location on the day of the meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by November 20, 2002. Oral presentations from the public will be scheduled between approximately 4:30 p.m. and 6 p.m. on December 4, 2002, on issues related to acrylamide in food. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before November 20, 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 Henry Kim 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: November 7, 2002.

Linda Arey Skladany,

Senior Associate Commissioner for External Relations.

[FR Doc. 02–28941 Filed 11–14–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Vaccines and Related Biological Products Advisory Committee; 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: Vaccines and Related Biological Products Advisory Committee.

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 December 17, 2002, from 8:30 a.m. to 5 p.m.

Location: Bethesda Marriott Hotel, 5151 Pooks Hill Rd., Bethesda, MD.

Contact Person: Jody G. Sachs or Denise H. Royster, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12391. Please call the Information Line for up-to-date information on this meeting.

Agenda: The committee will review and discuss safety and efficacy and proposed indications for the product, FluMist, a cold-adapted, live attenuated, trivalent influenza vaccine for the prevention of influenza sponsored by MedImmune Vaccines, Inc.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by December 1, 2002. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 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 Jody G. Sachs or Denise H. Royster 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: November 7, 2002.

Linda Arey Skladany,

Senior Associate Commissioner for External Relations.

[FR Doc. 02–28940 Filed 11–14–02; 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, United States Code, 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 OMB 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 through the use of automated collection techniques or other forms of information technology.

Proposed Project: Voluntary Partner Surveys To Implement Executive Order 12862 in the Health Resources and Services Administration—(OMB No. 0915–0212)—Extension

In response to Executive Order 12862, the Health Resources and Services Administration (HRSA) is proposing to conduct voluntary customer surveys of its ''partners'' to assess strengths and weaknesses in program services. A generic approval is being requested from OMB to conduct the partner surveys. HRSA partners are typically State or local governments, health care facilities, health care consortia, health care providers, and researchers.

Partner surveys to be conducted by HRSA might include, for example, mail or telephone surveys of grantees to determine satisfaction with a technical assistance contractor, or in-class evaluation forms completed by providers who receive training from HRSA grantees, to measure satisfaction with the training experience. Results of these surveys will be used to plan and redirect resources and efforts as needed to improve service. Focus groups may also be used to gain partner input into the design of mail and telephone surveys. Focus groups in-class evaluation forms, mail surveys, and telephone surveys are expected to be the preferred methodologies.

A generic approval will permit HRSA to conduct a limited number of partner surveys without a full-scale OMB review of each survey. If generic approval is granted, information on each individual partner survey will not be published in the **Federal Register**.

The estimated response burden is as follows:

Type of survey	Number of respondents	Responses per response	Hours per response	Total hour burden
In-class evaluations	40,000	1	.05	2,000
Mail/Telephone surveys	12,000	1	.25	3,000

Type of survey	Number of respondents	Responses per response	Hours per response	Total hour burden
Focus groups	50	1	1.5	75
Total	52,050	1	.10	5,075

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: November 7, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–28939 Filed 11–14–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee E—Cancer Epidemiology, Prevention & Control.

Date: December 11–12, 2002.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mary C. Fletcher, PhD, Scientific Review Administrator, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Rm 8115, Bethesda, MD 20892, 301/496–7413.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institute of Health, HHS)

Dated: November 6, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29013 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee D—Clinical Studies.

Date: December 11–12, 2002.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: William D. Merritt, PhD, Scientific Review Administrator, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, Bethesda, MD 20892–8328, 301–496–9767.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 6, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29014 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–01–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, SEP for NIMH PA R13: Support of Scientific Meetings.

Date: November 22, 2002.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of health, 6001 Executive of Blvd., Bethesda, MD 20892, (Telephone Conference Cal).

Contact Person: Benjamin Xu, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Boulevard, Room 6143, MSC 9608, Bethesda, MD 20892–9608, 301–443–1178, *benxu1@mail.nih.gov.*

This notice is being published less than 15 days prior to the meting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research

Service Awards for Research Training, National Institutes of Health, HHS)

Dated: November 5, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29016 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, ZAAA1BB (02) R01 and R21 Application Review Meeting.

Date: November 19, 2002.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Willco Building, Suite 409, 6000 Executive Boulevard, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Elsie D. Taylor, Scientific Review Administrator, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Suite 409, 6000 Executive Blvd., Bethesda, MD 20892–7003, 301–443–9787, *etaylor@niaaa.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: November 5, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29017 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the PubMed Central National Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: PubMed Central National Advisory Committee.

Date: January 16, 2003.

Time: 9 a.m. to 5 p.m.

Agenda: Program documents.

Place: Library of Medicine, Board Room, Room 2E17, Bldg. 38, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: David J. Lipman, MD, Director, Natl Ctr For Biotechnology Information, National Library of Medicine Department of Health and Human Services, Bethesda, MD 20894.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign-in at the security desk upon entering the building.

Information is also available on the Institute's/Center's home page: www.pubmedcentral.nih.gov/about/nac/html, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: November 5, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29015 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the f0llowing meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 BBCA (40) Chemistry/Biophysics Program Project Panel.

Date: November 13–15, 2002.

Time: 6 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: The Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Nancy Lamontagne, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1726, *lamontan@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Immunology Gene Therapy.

Date: November 18, 2002.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Stephen M. Nigida, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7812, Bethesda, MD 20892, (301) 435–3565.

This notice is being published less than 15 days prior to the meeting due to the timing

limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Ethics of Health Research.

Date: November 19, 2002.

Time: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mary Ann Guadagno, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1104, MSC 7770, Bethesda, MD 20892, (301) 451–8011.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, SNEM–5 (03) M Member Conflict: Behavioral Genetics and Mental Health.

Date: November 22, 2002.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ann Hardy, DRPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, (301) 435–0695, *hardyan@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, TNF–Family and Autoimmunity.

Date: November 25, 2002.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: George W. Chacko, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room: 4202, MSC: 7812, Bethesda, MD 20892, (301) 435–1220, *chackoge@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Family, Developmental Pathways, and Risk for Substance Use.

Date: November 25, 2002.

Time: 12:30 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mariela Shirley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7848, Bethesda, MD 20892, (301) 435–3554, *shirleym@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Renin-Ang II in Cardiovascular Remodeling.

Date: December 3. 2002.

Time: 10:30 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Anshumali Chaudhari, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cancer Stem Cells.

Date: December 5, 2002.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Gerhard Ehrenspeck, PhD, Scientific Review Administrator, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 5138, MSC 7840, Bethesda, MD 20892, (301) 435–1022. *ehrnespeckg@nih.csr.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 5, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29018 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Governors of the Warren Grant Magnuson Clinical Center.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Board of Governors of the Warren Grant Magnuson Clinical Center, Executive Committee.

Date: November 22, 2002.

Time: 9 a.m. to 12 p.m.

Agenda: Review of Clinical Center strategic planning, budgetary and operational issues.

Place: National Institutes of Health, Building 10, 10 Center Drive, Medical Board Room 2C116, Bethesda, MD 20892.

Contact Person: Maureen E Gormley, Executive Secretary, Warren Grant Magnuson Clinical Center, National Institutes of Health, Building 10, Room 2C146, Bethesda, MD 20892, (301) 496–2897.

This notice is being published less than 15 days prior to the meeting due to administrative error. Information is also available on the Institute's/Center's home page: *www.cc.nih.gov/,* where an agenda and any additional information for the meeting will be posted when available.

Dated: November 5, 2002.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 02–29019 Filed 11–14–02; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

The President's New Freedom Commission on Mental Health; Notice of Meeting

Pursuant to Executive Order 13263, notice is hereby given of a meeting of the President's New Freedom Commission on Mental Health in December 2002.

The meeting will be open and will consider how to accomplish the Commission's mandate to conduct a comprehensive study of the United States mental health service delivery system and to make recommendations on improving the delivery of public and private mental health services for adults and children. The Commission meeting will receive reports from several of its subcommittees, including Suicide Prevention, Criminal Justice, Co-Occurring Disorders and Evidence-Based Practices. There will also be panel presentations on several related topics.

Attendance by the public will be limited to space available. Public comments are welcome. Please communicate with the individual listed as contact below to make arrangements to comment or to request special accommodations for persons with disabilities.

Additional information and a roster of Commission members may be obtained either by accessing the Commission website, *http://www.mentalhealthcommission.gov*, or

by communicating with the contact whose name and telephone number is listed below.

Committee Name: The President's New Freedom Commission on Mental Health.

Meeting Date/Time:

Open: December 4, 2002, 3:30 p.m. to 6 p.m.

Open: December 5, 2002, 8:30 a.m. to 10 a.m.

Open: December 5, 2002, 3:15 p.m. to 5:15 p.m.

Open: December 6, 2002, 8:30 a.m. to 12:30 p.m.

Place: Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, Virginia.

Contact: Claire Heffernan, Executive Secretary, 5600 Fishers Lane, Parklawn Building, Room 13C–26, Rockville, MD 20857, Telephone: (301) 443–1545; Fax: (301) 480–1554 and e-mail: *Cheffern@samhsa.gov*; website: *http://www.mentalhealthcommission.gov.*

Dated: November 7, 2002.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 02–28938 Filed 11–14–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4739–N–46]

Notice of Proposed Information Collection: Comment Request; Request for Termination of Multifamily Mortgage Insurance

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: January 14, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8003, Washington, DC 20410 or *Wayne_Eddins@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development 451 7th Street, SW., Washington, DC 20410, telephone (202) 7008–3730 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Request for Termination of Multifamily Mortgage Insurance.

OMB Control Number, if applicable: 2502–0416.

Description of the need for the information and proposed use: The information collection is used to notify HUD that the mortgagor and mortgagee mutually agree to terminate the HUD multifamily mortgage insurance.

Agency form numbers, if applicable: HUD–9807.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The total number of respondents is estimated to be 1,400 generating approximately 1,400 annual responses, the estimated time needed to prepare the response is .125 hours, and the total annual burden requested is 175 hours.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: November 1, 2002.

Sean G. Cassidy,

General Deputy Assistant Secretary for Housing, Deputy Federal Housing Commissioner.

[FR Doc. 02–28961 Filed 11–14–02; 8:45 am]

BILLING CODE 4210–27–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4730–N–46]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: Mark Johnston, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or

(3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Brian Rooney, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Army:* Ms. Julie Jones-Conte, Headquarters, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, Attn: DAIM–MD, Room 1E677, 600 Army Pentagon, Washington, DC 20310–0600; (703) 692–9223; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; *Navy:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington, Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: November 6, 2002.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

Suitable/Available Properties

Buildings (by State)

New Jersey

Chapel Hill Front Range Light
N. Lenard Ave.
Middletown Co: Monmouth NJ
Landholding Agency: GSA
Property Number: 54200240011
Status: Excess
Comment: steel tower on 0.40 acres, possible flood hazard, wetlands & possible endangered species
GSA Number: 1–U–NJ–0627

Puerto Rico

7.5 Naval Reservation
Munoz Rivera Ave.
San Juan Co: PR
Landholding Agency: GSA
Property Number: 54200240012
Status: Excess
Comment: multi-use structures including admin. and residential, presence of asbestos/lead paint, exhibits historical and archeological significance
GSA Number: 1–N–PR–497

Land (by State)

Montana

Canyon Ferry Reservoir Portion
Tracts FS–1, FS–2, FS–3, FS–4
Lewis & Clark Co: MT 59602–
Landholding Agency: GSA
Property Number: 54200240010
Status: Surplus
Comment: 8.47 acres, subject to existing easements, buffer zone
GSA Number: 7–I–MT–0409

Unsuitable Properties

Buildings (by State)

Alabama

Bldg. 01306
Fort Rucker
Ft. Rucker Co: AL 36362–
Landholding Agency: Army
Property Number: 21200240001
Status: Unutilized
Reason: Extensive deterioration

Bldg. 01314
Fort Rucker
Ft. Rucker Co: AL 36362–
Landholding Agency: Army
Property Number: 21200240002
Status: Unutilized
Reason: Extensive deterioration

Bldg. 01316
Fort Rucker
Ft. Rucker Co: AL 36362–
Landholding Agency: Army
Property Number: 21200240003
Status: Unutilized
Reason: Extensive deterioration

Bldg. 01318
Fort Rucker
Ft. Rucker Co: AL 36362–
Landholding Agency: Army
Property Number: 21200240004
Status: Unutilized
Reason: Extensive deterioration

Bldg. 9001
Fort Rucker
Ft. Rucker Co: AL 36362–
Landholding Agency: Army
Property Number: 21200240005
Status: Unutilized
Reason: Extensive deterioration

Bldg. 112
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240006
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 01200
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240007
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 1400A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240008
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 1407A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240009
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 1413A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240010
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

8 Bldgs.

Redstone Arsenal
1417A thru 1424A
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240011
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

5 Bldgs.
Redstone Arsenal
1426A thru 1430A
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240012
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

5 Bldgs.
Redstone Arsenal
1433A thru 1437A
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240013
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 03140
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240014
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldgs. 03436, 03462
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240015
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 03524
Redstone Arsenal
Redstone Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240016
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 515–5107
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240017
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 7309A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240018
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldgs. 7360B, 7368A, 7382A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240019
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 07587
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240020
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldgs. 7632A, 7660A
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landhonding Agency: Army
Property Number: 21200240021
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 07716
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240022
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 08027
Redstone Arsenal
Redstone Arsenal Co: Madison AL 35898–
Landholding Agency: Army
Property Number: 21200240023
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Arizona

Bldg. 15348
Fort Huachuca
Ft. Huachuca Co: Cochise AZ 85613–6000
Landholding Agency: Army
Property Number: 21200240024
Status: Excess
Reason: Extensive deterioration

California

3 Bldgs.
DDJC Sharpe
S00004, 00006, 00012
Lathrop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240025
Status: Unutilized
Reason: Secured Area

Bldg. S00108
DDJC Sharpe
Lathrop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240026
Status: Unutilized
Reason: Secured Area

Bldgs. S00161, 00162
DDJC Sharpe
Lathrop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240027
Status: Unutilized
Reason: Secured Area

Bldg. S00221
DDJC Sharpe
Lathrop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240028
Status: Unutilized
Reason: Secured Area

4 Bldgs.
DDJC Sharpe
S00482, 00483, 00484, 00485
Lathop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240029
Status: Unutilized
Reason: Secured Area

Bldg. S00660
DDJC Sharpe
Lathrop Co: San Joaquin CA 95231–
Landholding Agency: Army
Property Number: 21200240030
Status: Unutilized
Reason; Secured Area

Bldg. 00352
Fort Irwin
Ft. Irwin Co: San Bernardino CA 92310–
Landholding Agency: Army
Property Number: 21200240031
Status: Excess
Reason: Extensive deterioration

Bldg2. 00516, 00520, 00547
Fort Irwin
Ft. Irwin Co: San Bernardino CA 92310–
Landholding Agency: Army
Property Number: 21200240032
Status: Excess
Reason: Extensive deterioration

Bldg. 00818
Fort Irwin
Ft. Irwin Co: San Bernardino CA 92310–
Landholding Agency: Army
Property Number: 21200240033
Status: Excess
Reason: Extensive deterioration

Hawaii

Bldgs. 01507, 01522, 06023
Fort Shafter
Honolulu Co: HI 96819–
Landholding Agency: Army
Property Number: 21200240034
Status: Unutilized
Reason: Extensive deterioration

Kentucky

5 Bldgs.
Fort Knox
Ft. Knox Co: Ky 40121–
Location: 04804, 04814, 04818, 04955, 04985
Landholding Agency: Army
Property Number: 21200240035
Status: Unutilized
Reason: Extensive deterioration

48 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 363 sq. ft.—housing
Landholding AGency: Army
Property Number: 21200240036
Status: Unutilized
Reason: Extensive deterioration

40 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 5,680 sq. ft.—housing
Landholding Agency: Army
Property Number: 21200240037
Status: Unutilized
Reason: Extensive deterioration

19 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 04809, 04812, 04832, 04843, 04849, 04852, 04869, 04873, 04890, 04919, 04920, 04935, 04941, 04962, 04968, 04975, 04978, 04980, 04988

Landholding Agency: Army
Property Number: 21200240038
Status: Unutilized
Reason: Extensive deterioration

13 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 04810, 04842, 04868, 04884, 04891, 04899, 04904, 04940, 04947, 04961, 04974, 04979, 04987
Landholding Agency: Army
Property Number: 21200240039
Status: Unutilized
Reason: Extensive deterioration

17 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 04829, 04833, 04838, 04844, 04850, 04870, 04875, 04908, 04918, 04921, 04926, 04936, 04942, 04951, 04957, 04963, 04969
Landholding Agency: Army
Property Number: 21200240040
Status: Unutilized
Reason: Extensive deterioration

5 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 04851, 04911, 04912, 04915, 04916
Landholding Agency: Army
Property Number: 21200240041
Status: Unutilized
Reason: Extensive deterioration

16 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 04857, 04858, 04885, 04886, 04892, 04893, 04895, 04896, 04905, 04906, 04932, 04933, 04948, 04949, 04982, 04983
Landholding Agency: Army
Property Number: 21200240042
Status: Unutilized
Reason: Extensive deterioration

Bldg. 04914
Fort Knox
Ft. Knox Co: KY 40121–
Landholding Agency: Army
Property Number: 21200240043
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 4955, 4985
Fort Knox
Ft. Knox Co: KY 40121–
Landholding Agency: Army
Property Number: 21200240044
Status: Unutilized
Reason: Extensive deterioration

12 Bldgs.
Fort Knox
Ft. Knox Co: KY 40121–
Location: 06818, 06824, 06853, 06857, 06869, 06872, 06887, 06891, 07023, 07027, 07053, 07089
Landholding Agency: Army
Property Number: 21200240045
Status: Unutilized
Reason: Extensive deterioration

Maine

Bldg. M–4
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240012
Status: Excess
Reason: Secured Area

Bldg. M–6
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240013
Status: Excess
Reason: Secured Area

Bldg. M–9
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240014
Status: Excess
Reason: Secured Area

Bldg. M–10
Portsmouth Naval Shipyard
Kittery Co: York Me 03904–
Landholding Agency: Navy
Property Number: 77200240015
Status: Excess
Reason: Secured Area

Bldg. M–11
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240016
Status: Excess
Reason: Secured Area

Bldg. M–18
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240017
Status: Excess
Reason: Secured Area

Bldg. H–29
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240018
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material; Secured Area

Bldg. 33
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240019
Status: Excess
Reason: Secured Area

Bldg. 34
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240020
Status: Excess
Reason: Secured Area

Bldg. 41
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240021
Status: Excess
Reason: Secured Area

Bldg. 55
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240022
Status: Excess
Reason: Secured Area

Bldg. 62/62A
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240023
Status: Excess
Reason: Secured Area

Bldg. 63
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240024
Status: Excess
Reason: Secured Area

Bldg. 65
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240025
Status: Excess
Reason: Secured Area

Bldg. 158
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240026
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldg. 188
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240027
Status: Excess
Reason: Secured Area

Bldg. 189
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240028
Status: Excess
Reason: Secured Area

Bldg. 237
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240029
Status: Excess
Reason: Secured Area

Bldg. 322
Portsmouth Naval Shipyard
Kittery Co: York ME 03904–
Landholding Agency: Navy
Property Number: 77200240030
Status: Excess
Reason: Secured Area

Maryland

12 Bldgs.
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Location: 1600, 1604, 1609, 1614, 1617, 1620, 1622, 1625, 1820, 1823, 1826, 1829
Landholding Agency: Army
Property Number: 21200240046
Status: Unutilized
Reason: Extensive deterioration

6 Bldgs.
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Location: 1603, 1606, 1607, 1610, 1613, 1618
Landholding Agency: Army
Property Number: 21200240047
Status: Unutilized
Reason: Extensive deterioration

12 Bldgs.
Fort George G. Meade

Ft. Meade Co: Anne Arundel MD 20755–5115
Location: 1601, 1602, 1605, 1608, 1611, 1612, 1615, 1616, 1619, 1621, 1623, 1624
Landholding Agency: Army
Property Number: 21200240048
Status: Unutilized
Reason: Extensive deterioration

7 Bldgs.
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Location: 1646, 1647, 1728, 1729, 1730, 1731, 1879
Landholding Agency: Army
Property Number: 21200240049
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 1700–1723
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Landholding Agency: Army
Property Number: 21200240050
Status: Unutilized
Reason: Extensive deterioration

9 Bldgs.
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Location: 1819, 1821, 1822, 1824, 1825, 1827, 1828, 1830, 1831
Landholding Agency: Army
Property Number: 21200240051
Status: Unutilized
Reason: Extensive deterioration

Bldg. 2221
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Landholding Agency: Army
Property Number: 21200240052
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 2247, 2249A
Fort George G. Meade
Ft. Meade Co: Anne Arundel MD 20755–5115
Landholding Agency: Army
Property Number: 21200240053
Status: Unutilized
Reason: Extensive deterioration

Massachusetts

Wayland Army Natl Guard Fac.
Oxbow Road
Wayland Co: MA 01778–
Landholding Agency: GSA
Property Number: 54200240007
Status: Excess
Reason: Extensive deterioration
GSA Number: 1–D–MA–0725

Missouri

Bldg. 218A
U.S. Army Reserve Center
St. Louis Co: St. Charles MO 63120–1794
Landholding Agency: Army
Property Number: 21200240054
Status: Unutilized
Reason: Extensive deterioration

Bldg. P4122
U.S. Army Reserve Center
St. Louis Co: St. Charles MO 63120–1794
Landholding Agency: Army
Property Number: 21200240055
Status: Unutilized
Reason: Extensive deterioration

Bldg. 6140
Fort Leonard Wood
Ft. Leonard Wood Co: Pulaski MO 65743–8944
Landholding Agency: Army
Property Number: 21200240056
Status: Unutilized
Reason: Extensive deterioration

New Hampshire

Bldg. 40
Portsmouth Naval Shipyard
Portsmouth Co: NH 03804–5000
Landholding Agency: Navy
Property Number: 77200240031
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

New Mexico

Bldgs. 20854, 21694
White Sands Missile Range
Dona Ana Co: NM 88002–
Landholding Agency: Army
Property Number: 21200240057
Status: Excess
Reason: Extensive deterioration

Ohio

Bldg. 12
Defense Supply Center
Columbus Co: Franklin OH 43216–5000
Landholding Agency: Army
Property Number: 21200240058
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldgs. 32, 33, 34, 35
Defense Supply Center
Columbus Co: Franklin OH 43216–5000
Landholding Agency: Army
Property Number: 21200240059
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldgs. 36, 38, 39, 40
Defense Supply Center
Columbus Co: Franklin OH 43216–5000
Landholding Agency: Army
Property Number: 21200240060
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

4 Bldgs.
Ravenna Army Amo Plant
Ravenna Co: Portage OH 44266–9297
Location: WS001, WS01A, WS002, WS02A
Landholding Agency: Army
Property Number: 21200240061
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Within airport runway clear zone; Secured Area; Extensive deterioration

27 Bldgs.
Ravenna Army Amo Plant
Ravenna Co: Portage OH 44266–9297
Location: 002F1–02F36, 00651, 1101; Load Line 6
Landholding Agency: Army
Property Number: 21200240062
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Within airport runway clear zone; Secured Area; Extensive deterioration

40 Bldgs.
Ravenna Army Amo Plant
Ravenna Co: Portage OH 44266–9297
Location: DT001–DT031, DT033–DT035, DT052, DT054–DT056, 09051; Load—Line 9
Landholding Agency: Army
Property Number: 21200240063
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Within airport runway clear zone; Secured Area; Extensive deterioration

32 Bldgs.
Ravenna Army Amo Plant
Ravenna Co: Portage, OH 44266–9297
Location: PE001–PE031; Load—Line 10
Landholding Agency: Army
Property Number : 21200240064
Status: Excess
Reasons: in 2000 ft. of flammable or explosive material; Within airport runway clear zone; Secured Area; Extensive deterioration

Tennessee

Bldg. 2438
Fort Campbell
Ft. Campbell Co: Montgomery TN 42223–
Landholding Agency: Army
Property Number: 21200240065
Status: Unutilized
Reason: Extensive deterioration

Bldg. 103
Holston Army Amo Plant
Kingsport Co: Sullivan TN 37660–
Landholding Agency: Army
Property Number: 21200240066
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Virginia

Bldgs. F0050, F0051
Fort A.P. Hill
Bowling Green Co: Caroline VA 22427–
Landholding Agency: Army
Property Number: 21200240067
Status: Unutilized
Reason: Extensive deterioration

Bldg. T0130
Fort A.P. Hill
Bowling Green Co: Caroline VA 22427–
Landholding Agency: Army
Property Number: 21200240068
Status: Unutilized
Reason: Extensive deterioration

Bldgs. T0131, T0132, T0133
Fort A.P. Hill
Bowling Green Co: Caroline VA 22427–
Landholding Agency: Army
Property Number: 21200240069
Status: Unutilized
Reason: Extensive deterioration

Bldg. 11503
Fort Lee
Ft. Lee Co: Prince George VA 23801–
Landholding Agency: Army
Property Number: 21200240070
Status: Unutilized
Reason: Extensive deterioration

Bldg. 00200
Radford Army Amo Plant
Radford Co: VA 24143–0100
Landholding Agency: Army
Property Number: 21200240071
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldg. T4022
Radford Army Amo Plant
Radford Co: VA 24143–0100
Landholding Agency: Army
Property Number: 21200240072
Status: Unutilized
Reasons: Within 2000ft. of flammable or explosive material; Secured Area; Extensive deterioration

Washington

Bldg. 66
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240032
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 67
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240033
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 180
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240034
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 182
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240035
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 214
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240036
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 273
Naval Magazine
Indian Island
Port Hadlock Co: Jefferson WA 98339–9723
Landholding Agency: Navy
Property Number: 77200240037
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Bldg. 937
Naval Undersea Warfare
Keyport Co: Kitsap WA 98345–7610
Landholding Agency: Navy
Property Number: 77200240038
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldg. 2801A
Naval Undersea Warfare
Keyport Co: Kitsap WA 98345–7610
Landholding Agency: Navy
Property Number: 77200240039
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldg. 7634
Naval Undersea Warfare
Keyport Co: Kitsap WA 98345–7610
Landholding Agency: Navy
Property Number: 77200240040
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Wisconsin

Bldg. 1366
Fort McCoy
Ft. McCoy Co: Monroe WI 54656–5136
Landholding Agency: Army
Property Number: 21200240073
Status: Unutilized
Reason: Extensive deterioration

Bldg. 420–8
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240074
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 750, 751, 753
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240075
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 754–1 thru 754–6
Badger Army Amo Plant
Baraboo Co: Sauk WI 53919–
Landholding Agency: Army
Property Number: 21200240076
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 763, 765, 768
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240077
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 770–1 thru 770–3
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240078
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 771, 00778
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240079
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Bldgs. 791, 793
Badger Army Amo Plant
Baraboo Co: Sauk WI 53913–
Landholding Agency: Army
Property Number: 21200240080
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

Land (by State)

Michigan

20.3 acres
Moon Island
Munuscong Lake Co: Chippewa MI
Landholding Agency: GSA
Property Number: 54200240008
Status: Excess
Reason; Not accessible by road
GSA Number: 1–U–MI–803

5.43 acres
Drummond Island
Drummond Tnshp Co: Cheppawa MI
Landholding Agency; GSA
Property Number: 54200240009
Status: Excess
Reason: Not accessible by road
GSA Number: 1–U–MI–449A

[FR Doc. 02–28962 Filed 11–14–02; 8:45 am]
BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Office of the Secretary, *Exxon Valdez* Oil Spill Trustee Council; Notice of Meeting

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice of meeting.

SUMMARY: The Department of the Interior, Office of the Secretary is announcing a public meeting of the *Exxon Valdez* Oil Spill Public Advisory Committee.

DATES: December 3–4, 2002, at 8:30 a.m.

ADDRESSES: Fifth floor conference room, 441 West 5th Avenue, Anchorage, Alaska.

FOR FURTHER INFORMATION CONTACT: Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 ''C'' Street, Suite 119, Anchorage, Alaska, (907) 271–5011.

SUPPLEMENTARY INFORMATION: The Public Advisory Committee was created by Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991, and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska,* Civil Action No. A91–081 CV. The meeting agenda will feature a

comprehensive briefing for new Public Advisory Committee members, discussions about the status of the Gulf of Alaska Ecosystem Monitoring and Research program, an update on lingering oil injury, and a review of the habitat protection program.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 02–29080 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–RG–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary, *Exxon Valdez* Oil Spill Trustee Council; Invitation for Comment

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice.

SUMMARY: The *Exxon Valdez* Oil Spill Trustee Council is asking the public, private organizations, and government agencies to submit comments on the Draft Work Plan for Federal Fiscal Year 2003: Phase II, which implements the Gulf Ecosystem Monitoring and Research Program. The Draft Work Plan is available on the Internet site listed below. Paper copies of the Draft Work Plan are available upon request.

DATES: Comments are due November 25, 2002.

ADDRESSES: Submit comments to *Exxon Valdez* Oil Spill Trustee Council, 441 West 5th Avenue, Suite 500, Anchorage, Alaska 99501–2340. See **SUPPLEMENTARY INFORMATION** for additional instructions about submitting comments.

FOR FURTHER INFORMATION CONTACT: The Trustee Council Office, (907) 278–8012 or toll free at (800) 478–7745 (in Alaska) or (800) 283–7745 (outside Alaska) or via Internet at *www.oilspill.state.ak.us.*

SUPPLEMENTARY INFORMATION: Following the *Exxon Valdez* oil spill in March 1989, a Trustee Council of three state and three federal trustees, including the Secretary of the Interior, was formed. The Trustee Council prepared a restoration plan for the injured resources and services within the oil spill area. The restoration plan called for annual work plans identifying projects to accomplish restoration. An extension of the Restoration Plan, the Gulf Ecosystem Monitoring and Research Program, also requires implementation through annual work plans. Each year proposals for restoration, monitoring, and research projects are solicited from a variety of organizations, including the public. Comments may be mailed to the above address, telephoned to the above telephone numbers (collect calls will be accepted from fishers and boaters who call through the marine operator), faxed to (907) 276–7178, or e-mailed to *paula_banks@oilspill.state.ak.us.* Public comment will also be accepted at the Trustee Council meeting, at 10:30 a.m. on Monday, November 25, 2002.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 02–29079 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–RG–P

DEPARTMENT OF THE INTERIOR

Performance Review Board Appointments

AGENCY: Department of the Interior.

ACTION: Notice of Performance Review Board Appointments.

SUMMARY: This notice provides the names of individuals who have been appointed to serve as members of the Department of the Interior Performance Review Board.

DATES: These appointments are effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Carolyn Cohen, Director of Personnel Policy, Office of the Secretary, Department of the Interior, 1849 C Street, NW., Washington, DC 20240, Telephone Number: (202) 208–6761.

2002 SES Performance Review Board

The following individuals have been appointed to serve on the Department of Interior 2002 Performance Review Board.

Mary K. Adler—Deputy Inspector General
Edith R. Blackwell—Deputy Assoc Solicitor—Indian Affairs
Brian P. Burns—Chief Information Officer
Terry R. Carlstrom—Field Director, National Capital Field Area
Horace J. Clark—Southeast Regional Solicitor (Atlanta)
Robert D. Comer—Associate Solicitor (Land and Water Resources)
Walter D. Cruickshank—Deputy Director, Minerals Management Service
Sharon Eller—Assistant Inspector General for Management and Policy
Pamela K. Haze—Deputy Director, Office of Budget
Paul W. Henne—Assistant Director—Business Management and Operations
James M. Hughes—Assistant Director for Policy & External Affairs
Donald Murphy—Deputy Director
Jonathan B. Jarvis—Field Director, Pacific West Area
Arthur D. Jones—Deputy Director, Internal Management
Daniel H. Jorjani—Special Assistant and Counselor to the Asst Secretary
Roger LaRouche—Assistant Inspector General for Audits
Phillip P. Leahy—Associate Director for Geology
Aurene Martin—Deputy Assistant Secretary—Indian Affairs
David A. Montoya—Assistant Inspector General for Investigations
Michael D. Nedd—State Director, Eastern State Office
Glenda Owens—Deputy Director
Mamie Parker—Regional Director—Hadley
Clinton M. Riley—Special Assistant
William Rinne—Director, Operations
Michael Rolutti—Director, Technical Service Center
David P. Russ—Regional Geologist, Eastern Region
Carol L. Sampson—Deputy Director for Finance and Administration
Christine M. Schabacker—Counselor to the Assistant Secretary
Denise E. Sheehan—Asst Director—Budget, Planning and Human Resources
Margaret Sibley—Director, Office of Policy
George T.C. Skibine—Director, Office of Indian Gaming Management
Michael R. Smith—Director, Office of Tribal Services
Paul Smyth—Deputy Assoc Solicitor—Land and Water
Willie R. Taylor—Director, Office of Environmental Policy Compliance
Robyn Thorson—Assistant Director—External Affairs
Michael Tollefson—Park Manager, Great Smokey Mountains National Park
Michael J. Trujillo—Dep Asst Secretary for Human Resources & Workforce Diversity
Sarah E. Wisely—State Director, Utah
Robert W. Wolf—Director, Program, Budget and Liaison
Elaine Y. Zielinski—State Director, Arizona

Dated: November 8, 2002.

Carolyn Cohen,

Director of Personnel Policy.

[FR Doc. 02–29051 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of a Draft Environmental Impact Statement/ Environmental Impact Report and Receipt of an Application for an Incidental Take Permit for the Western Riverside County Multiple Species Habitat Conservation Plan

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of Availability; Receipt of Application.

SUMMARY: The County of Riverside (County), Riverside County Flood Control and Water Conservation District, Riverside County Transportation Commission, Riverside

County Parks and Open Space District, Riverside County Waste Department, California Department of Transportation, California Department of Parks and Recreation, and 14 western Riverside County cities (Applicants) have applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Service is requesting public comment on the Draft Multiple Species Habitat Conservation Plan (MSHCP) and draft Implementing Agreement. The Applicants seek a permit to authorize incidental take of 146 species, including unlisted species that may become listed during the term of the permit. An incidental take permit is required to authorize take of listed species during urban and rural development in the approximately 1.26 million-acre (1,967 square-mile) Plan Area in western Riverside County. The proposed term of the permit is 75 years.

A Draft Environmental Impact Statement, which is the Federal portion of the Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR), has been prepared jointly by the Service and the County of Riverside to analyze the impacts of the MSHCP and is also available for public review. The analyses provided in the Draft EIS/EIR are intended to inform the public of our proposed action, alternatives, and associated impacts; address public comments received during the scoping period for the Draft EIS/EIR; disclose the direct, indirect, and cumulative environmental effects of the proposed action and each of the alternatives; and indicate any irreversible commitment of resources that would result from implementation of the proposed action.

DATES: Written comments should be received on or before January 14, 2003.

ADDRESSES: Send comments to Mr. Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008. You also may submit comments by facsimile to (760) 431–9618. Information, comments and/or questions related to the EIR and the California Environmental Quality Act should be submitted to Ms. Kristi Lovelady, Riverside County Transportation Land Management Agency, PO Box 1605, 4080 Lemon Street—7th Floor, Riverside CA 92502; facsimile (909) 955–6879.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Evans, Assistant Field Supervisor, at the Carlsbad Fish and Wildlife Office above; telephone (760) 431–9440.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Documents available for public review, includes the applications, the Public Review Draft MSHCP Volumes I (the proposed plan and mitigation) and II (the MSHCP reference document), and the accompanying Implementing Agreement, and the Draft EIS/EIR.

Individuals wishing copies of the documents should contact the Service by telephone at (760) 431–9440 or by letter to the Carlsbad Fish and Wildlife Office. Copies of the MSHCP, Draft EIS/EIR, and Draft Implementing Agreement also are available for public inspection, by appointment, during regular business hours, at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**). Copies are also available for viewing at the Riverside County Administrative Center, 4080 Lemon Street, 7th Floor, Riverside, California; at public libraries in each of the applicant cities; and on the World Wide Web in the library section at *http://www.rcip.org.*

Background Information

Section 9 of the Act and Federal regulation prohibit the ''take'' of fish and wildlife species federally listed as endangered or threatened. Take of federally listed fish or wildlife is defined under the Act to include kill, harm, or harass. Harm includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering (50 CFR 17.3(c)). Under limited circumstances, the Service may issue permits to authorize incidental take; *i.e.*, take that is incidental to, and not the purpose of, otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22, respectively.

The Applicants seek a permit to cover a total of 146 species, including 64 plant species (8 endangered, 3 threatened, and 53 unlisted); 3 crustacean species (1 endangered, 1 threatened and 1 unlisted); 2 insect species (both endangered); 2 fish species (1 threatened and 1 unlisted); 5 amphibian species (2 endangered, 1 threatened, and 2 unlisted); 12 reptile species (all unlisted); 45 bird species (2 endangered, 2 threatened, 1 proposed threatened, 1 candidate and 39 unlisted); and 14 mammal species (2 endangered and 12 unlisted). Collectively the 146 listed and unlisted species are referred to as ''Covered Species'' by the MSHCP. The permit would provide take authorization for covered animal species identified by the MSHCP as ''Covered Species Adequately Conserved.'' Currently, the Draft MSHCP identifies 128 species as ''Covered Species Adequately Conserved.'' The remaining species would be included as ''Covered Species Adequately Conserved'' upon completion of the conservation measures identified in the Draft MSHCP.

The MSHCP is intended to protect and sustain viable populations of native plant and animal species and their habitats in perpetuity through the creation of a preserve system, while accommodating continued economic development and quality of life for residents of western Riverside County. In the year 2020, the Southern California Association of Governments estimates that Riverside County will be home to approximately 2.8 million people, who will occupy approximately 918,000 dwelling units. This represents a doubling of the County's present population and housing stock. Another study by the California Department of Finance estimates that the County will continue to grow to 3.5 million people by 2030 and 4.5 million people by 2040. These residents will be located within 14 incorporated cities, as well as within numerous unincorporated areas.

The MSHCP is one part of the Riverside County Integrated Project (RCIP) intended to integrate and provide for future land use, transportation and conservation needs in Riverside County. The MSHCP plan area encompasses 1.2 million acres in western Riverside County and includes the following fourteen incorporated cities: Banning, Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore, Moreno Valley, Murietta, Norco, Perris, Riverside, San Jacinto, and Temecula. It is one of two large, multiple-jurisdictional habitat planning efforts in Riverside County, each of which constitutes a ''subregional'' plan under the State of California's Natural Community Conservation Planning (NCCP) Act of 1991.

As described in Volumes I and II of the Public Review Draft MSHCP and the Draft EIS/EIR, the proposed MSHCP would provide for the creation of a preserve system that protects and manages 153,000 acres of habitat for the Covered Species, consisting of 97,000 acres conserved as the local mitigation component, 6,000 acres conserved as mitigation for State Permittee Projects (California Department of Transportation and California Department of Parks and Recreation) and it is anticipated that the State and Federal Wildlife Agencies would provide an additional 50,000 acres to

help achieve conservation identified in the MSHCP. The financing plan for the local portion of the reserve assembly of 97,000 acres includes a mitigation fee, tipping fee for use of waste management facilities, and other funding sources to conserve 56,000 acres. Conservation of the remaining 41,000 acres would accrue through the implementation of developer incentives and on-site set asides accomplished through the development review process. The proposed 153,000 acre reserve area is not specifically identified in the MSHCP. The conservation of 153,000 acres is anticipated to occur over the first 25 years of the program and when completed, must be in a configuration to, and include the vegetation communities that, provide for the conservation of covered species. To accomplish this, the proposed reserve will be assembled pursuant to written criteria that describe a possible design for the 153,000 acre reserve to be established within an approximately 300,000-acre area termed the ''Criteria Area.''

Covered Activities would include, but are not limited to: public and private development within the plan area that requires a discretionary action by a permittee subject to consistency with MSHCP policies, two internal regional transportation facilities, maintenance of and safety improvements on existing roads, the Circulation Elements of the permittees, maintenance and construction of flood control facilities, single family homes on existing legal parcels within the Criteria Area, up to 10,000 new acres of agricultural activity within the Criteria Area, and compatible uses in the reserve. The MSHCP makes a provision for the inclusion of special districts and other non-permittee entities in the permit with a certificate of inclusion.

The EIS/EIR considers analyzes four other alternatives in addition to the proposed MSHCP Project Alternative described above including: A listed, proposed and strong candidate species alternative; A listed and proposed species alternative; an existing reserves alternative; and a no project alternative.

The listed, proposed and strong candidate species alternative focuses on the conservation of 29 State and/or federally listed species and 7 unlisted species. This alternative would conserve approximately 119,300 acres.

The listed and proposed species alternative focuses on the conservation of 29 State and/or federally listed or proposed species. This alternative is approximately 93,800 acres.

The existing reserves alternative does not provide any new land acquisition for conservation purposes, but instead focuses on conservation for six State and/or federally listed or candidate species and some unlisted species present in existing reserves. Species coverage would be dependent upon additional management regimes in the existing reserves.

Public Comments

The Service invites the public to comment on the Draft MSHCP, Draft Implementing Agreement, and Draft EIS/EIR during a 60-day public comment period beginning the date of this notice. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public. This notice is provided pursuant to section 10(a) of the Endangered Species Act and Service regulations for implementing the National Environmental Policy Act of 1969 (40 CFR 1506.6). The Service will evaluate the application, associated documents, and comments submitted thereon to prepare a Final Environmental Impact Statement. A permit decision will be made no sooner than 30 days after the publication of the Final Environmental Impact Statement and completion of the Record of Decision.

Dated: November 7, 2002.

Miel R. Corbett,

Acting Deputy Manager, Region 1, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 02–28875 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Proposed Agency Information Collection; Comment Request

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that we are seeking comments from interested parties to renew the clearance for Application for Job Placement and Training Program, OMB No. 1076–0062.

DATES: Written comments must be received by January 14, 2003.

ADDRESSES: Written comments should be sent to: Lynn Forcia, Office of Economic Development, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 4640–MIB, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: For more information or copies of the forms, call Lynn Forcia at 202–219–5270 (This is not a toll-free number). You may send requests by facsimile to 202–208–3664.

SUPPLEMENTARY INFORMATION: Public Law 84–959 and Public Law 88–230 authorize the Department of the Interior, Bureau of Indian Affairs (BIA) to help adult Indians who reside on or near Indian reservations to obtain reasonable and satisfactory employment. The information collection documents provide information necessary to administer the program for Job Placement and Training Program. The Department is authorized to undertake a program of vocational training and direct employment that provides vocational counseling, guidance, and training in any recognized vocation, apprenticeship, trade, or on-the-job training. The program is available to Indians who are primarily not less than 18 years old and not more than 35 years old who reside on or near an Indian reservation. The acts authorize the BIA to enter into contracts or agreements with Federal, State, local government agencies or associations with apprenticeship programs or on-the-job training that leads to skilled employment. The same application form is used for both 25 CFR parts 26 and 27. We are also proposing to combine 25 CFR parts 26 and 27 into one comprehensive Federal regulation combining vocational training and direct employment services. Information of a confidential nature is protected by the Privacy Act.

You are asked to comment on the necessity of the information collection to fulfill the functions of the bureau; whether the burden estimate is accurate and the methodology and assumptions are valid; the utility, quality, and clarity of information requested; and ways that the burden might be minimized for respondents. All comments are subject to review by the public during regular business hours (9 a.m. to 3 p.m.). If you wish your name or address withheld, you must state this prominently at the beginning of your comments. We will honor your request to the extent allowed by the law. Individuals who represent businesses, or companies will have comments available for review by the public. In some cases we may decide to withhold comments from review for good reason.

Please note that an agency may not sponsor or conduct, and a person need not respond to, an information collection unless a currently valid OMB Control Number is displayed.

Title: Application for Job Placement and Training, 25 CFR 26 and 27 (Proposed 25 CFR 26 combining both regulations.

OMB Control Number: 1076–0062.

Description of Respondents: Individual Indians living on or near a reservation who seek training or employment provide the information in order to receive a benefit.

Respondents: 4900.

Burden: 30 minutes to complete, total: 2450 hours.

Dated: November 6, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

[FR Doc. 02–29082 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Mooretown Rancheria Alcoholic Beverage Control Law Amendment

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Mooretown Rancheria Alcoholic Beverage Control Law Amendment as set forth by Resolution 98–16. The Mooretown Rancheria Alcoholic Beverage Control Law was originally published in the **Federal Register** of February 11, 2000. This amendment increases the tax on sales of alcoholic beverages from 1 percent of the amount actually collected, including payments by major credit cards, to an amount equal to the current sales tax rate of the State of California. Further, the amendment exempts a tribal enterprise, the Feather Falls Mini Mart, from application of the sales tax. This is in conformity with the laws of the State of California, where applicable and necessary. Although the amendment was adopted on January 3, 2002, it does not become effective until published in the **Federal Register**, because the failure to comply with the ordinance may result in criminal charges.

EFFECTIVE DATE: This amendment is effective on November 15, 2002.

FOR FURTHER INFORMATION CONTACT: Kaye Armstrong, Office of Tribal Services, 1849 C Street, NW., MS 4631–MIB, Washington, DC 20240–4001; telephone (202) 208–4400.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Pub. L. 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Mooretown Rancheria Alcoholic Beverage Control Law Amendment, Resolution No. 98–16, was duly adopted by the Tribal Council of the Mooretown Rancheria on January 3, 2002. The Mooretown Rancheria, in furtherance of its economic and social goals, has taken positive steps to regulate retail sales of alcohol and use revenues to combat alcohol abuse and its debilitating effects among individuals and family members within the Mooretown Rancheria.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1.

I certify that by Resolution 98–16, the Mooretown Rancheria Alcoholic Beverage Control Law Amendment was duly adopted by the Mooretown Rancheria Tribal Council on January 3, 2002.

Dated: October 9, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

The Mooretown Rancheria Alcoholic Beverage Control Law Amendment, Resolution No. 98–16, reads as follows:

Chapter VII—Taxes

Section 701. Sales Tax. There is hereby levied and shall be collected a tax on each sales of alcoholic beverages on the Rancheria in the amount equal to the current sales tax rate of the State of California. The tax imposed by this section shall apply to all retail sales of liquor on the Rancheria (except at Feather Falls Mini Mart) and shall preempt any tax imposed on such liquor sales by the State of California.

[FR Doc. 02–29083 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

National Park Service

Fire Management Plan, Environmental Impact Statement, Carlsbad Caverns National Park, New Mexico

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of intent to prepare an environmental impact statement for the Fire Management Plan for Carlsbad Caverns National Park.

SUMMARY: Under the provisions of the National Environmental Policy Act of 1969, the National Park Service is preparing an environmental impact statement for the Fire Management Plan for Carlsbad Caverns National Park. This effort will result in a new wildland fire management plan that meets current policies, provides a framework for making fire-related decisions, and serves as an operational manual. Development of a new fire plan is compatible with the broader goals and objectives derived from the park purpose that governs resources management. Alternatives to be considered include: (1) No-action, (2) a fully integrated fire management plan with all strategies available for use, and (3) a plan allowing limited prescribed burning and not allowing lightning-started fires (wildland fire use). The no-action alternative maintains the current 1995 fire management plan strategy of suppression, wildland fire use, and prescribed burning. The proposed fully integrated plan alternative defines a relatively small fire management unit (FMU) surrounding the visitor center area, facilities, residences, and the area of the park adjacent to Whites City. This FMU applies full suppression and prescribed burning. The rest of the park comprises the second FMU, in which wildland fire use, prescribed fire, and suppression are management options. This second FMU specifies protection measures for special features, such as habitat of threatened and endangered species and sensitive cultural resources. The limited prescribed burning alternative does not allow wildland fire use. Conservative use of prescribed fire for fuels management or research is an option.

Major issues are environmental effects of the FMP that are potential problems. These include: protection of cultural resources, protection of plant and wildlife habitats, effects on non-native species, habitat protection for threatened and endangered species, protection of park neighbors' property, reducing impacts to park visitors, protection of life and property, effects on tourism, and changes in landscape-scale vegetation patterns.

A scoping brochure has been prepared describing the issues identified to date. Copies of the brochure may be obtained from Superintendent, Carlsbad Caverns National Park, 3225 National Parks Hwy., Carlsbad, New Mexico 88220.

DATES: The scoping period will be 30 days from the date this notice is published in the **Federal Register**.

ADDRESSES: Information will be available for public review and comment in the office of the Superintendent, Mary Gibson Scott,

3225 National Parks Highway, Carlsbad, NM 88220, (505) 785–2232 ext. 320.

FOR FURTHER INFORMATION CONTACT: Contact Superintendent, Carlsbad Caverns National Park, (505) 785–2232 x320.

SUPPLEMENTARY INFORMATION: If you wish to comment on the scoping brochure or on any other issues associated with the plan, you may submit your comments by any one of several methods. You may mail comments to Superintendent, Carlsbad Caverns National Park, 3225 National Parks Hwy., Carlsbad, New Mexico 88220. You may also comment via the Internet to *CAVE_superintendent@nps.gov*. Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: Carlsbad Fire Management Plan'' and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at Resources Stewardship and Science at (505) 785–2232 x380. Finally, you may hand-deliver comments to the above address or at public meetings that will be held in Carlsbad and Queen, New Mexico. The schedule for these public meetings is included in the scoping brochure.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: September 23, 2002.

Michael Snyder,

Director, Intermountain Region, National Park Service.

[FR Doc. 02–29026 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Negotiations

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of proposed contractual actions that are new modified, discontinued, or completed since the last publication of this notice on August 5, 2002. The January 31, 2002, notice should be used as a reference point to identify changes. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities. Additional Bureau of Reclamation (Reclamation) announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the supplementary information.

FOR FURTHER INFORMATION CONTACT: Sandra L. Simons, Manager, Water Contracts and Repayment Office, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225–0007; telephone (303) 445–2902.

SUPPLEMENTARY INFORMATION: Consistent with section 226 of the Reclamation Reform Act of 1982 (96 Stat. 1273) and 43 CFR 426.20 of the rules and regulations published in 52 FR 11954, April 13, 1987, Reclamation will publish notice of the proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Pursuant to the ''Final Revised Public Participation Procedures'' for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. Each proposed action is, or is expected to be, in some stage of the contract negotiation process in 2002. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act (80 Stat. 383), as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the

notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to: (i) The significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. As a minimum, the regional director shall furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Acronym Definitions Used Herein

BON Basis of Negotiation
BCP Boulder Canyon Project
Reclamation Bureau of Reclamation
CAP Central Arizona Project
CUP Central Utah Project
CVP Central Valley Project
CRSP Colorado River Storage Project
D&MC Drainage and Minor Construction
FR Federal Register
IDD Irrigation and Drainage District
ID Irrigation District
M&I Municipal and Industrial
NEPA National Environmental Policy Act
O&M Operation and Maintenance
P–SMBP Pick-Sloan Missouri Basin Program
PPR Present Perfected Right
RRA Reclamation Reform Act
R&B Rehabilitation and Betterment
SOD Safety of Dams
SRPA Small Reclamation Projects Act
WCUA Water Conservation and Utilization Act
WD Water District

Pacific Northwest Region: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706–1234, telephone (208) 378–5223.

Modified Contract Action

4. Pioneer Ditch Company, Boise Project, Idaho; Clark and Edwards Canal and Irrigation Company, Enterprise Canal Company, Ltd., Lenroot Canal Company, Liberty Park Canal Company, Poplar ID, all in the Minidoka Project, Idaho; and Juniper Flat District Improvement Company, Wapinitia Project, Oregon: Amendatory repayment and water service contracts; purpose is to conform to the RRA (Pub. L. 97–293).

Completed Contract Action

4. Pioneer Ditch Company, Boise Project, Idaho; Clark and Edwards Canal and Irrigation Company, Enterprise Canal Company, Ltd., Fremont-Madison ID, Lenroot Canal Company, Liberty Park Canal Company, Poplar ID, all in the Minidoka Project, Idaho; and Juniper Flat District Improvement Company, Wapinitia Project, Oregon: Amendatory repayment and water service contracts; purpose is to conform to the RRA (Pub. L. 97–293). Contract with Fremont-Madison ID was executed on September 16, 2002.

Mid-Pacific Region: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5250.

New Contract Action

41. *San Joaquin Valley National Cemetery, U.S. Department of Veteran Affairs, Delta Division, CVP, California:* Renewal of the long-term water service contract for up to 850 acre-feet with conveyance through the California State Aqueduct pursuant to the CVP–SWP wheeling agreement.

Modified Contract Actions

35. *Sacramento Suburban WD (formerly Northridge WD), CVP, California:* Execution of long-term Warren Act contract for conveyance of nonproject water. This contract will allow CVP facilities to be used to deliver nonproject water to the Sacramento Suburban WD for use within their service area.

38. *Cachuma Operation and Maintenance Board, Cachuma Project, California:* Long-term contract to transfer responsibility for O&M and O&M funding of certain Cachuma Project facilities to the member units.

Completed Contract Actions

7. *Cachuma Operation and Maintenance Board, Cachuma Project, California:* Repayment contract for SOD work on Bradbury Dam. Contract was executed July 1, 2002.

12. *Cachuma Operations and Maintenance Board, Cachuma Project, California:* Temporary interim contract (not to exceed 1 year) to transfer responsibility of certain Cachuma Project facilities to member units. Temporary interim contract executed on January 1, 2002, and expired on October 31, 2002.

15. *Placer County Water Agency, CVP, California:* Amendment of existing water service contract to allow for additional points of diversion and adjustment to Project water quantities. The amended contract will conform to current Reclamation law. Amendatory contract executed August 27, 2002.

Lower Colorado Region: Bureau of Reclamation, PO Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8536.

New Contract Actions

49. *All-American Canal, BCP, California:* Agreement among Reclamation, Imperial ID, and Metropolitan WD to provide for the construction of lining for 23 miles of the All-American Canal, funded by the State of California.

50. *All-American Canal, BCP, California:* Agreement among Reclamation, Imperial ID, Metropolitan WD, and Coachella Valley WD for the Federally funded construction of a reservoir(s) and associated facilities that will improve Reclamation's ability to regulate and manage Colorado River water.

51. *Pasquinelli, Gary J. and Barbara J., BCP, Arizona:* Contract for the delivery of 486 acre-feet of Colorado River water for agricultural purposes.

52. *Sun City West Company, CAP, Arizona:* Assignment of M&I subcontract rights and responsibilities to Arizona American Water Company.

53. *Sun City Company, CAP, Arizona:* Assignment of M&I subcontract rights and responsibilities to Arizona American Water Company.

54. *Citizens Communications Company, Agua Fria Division, CAP, Arizona:* Assignment of M&I subcontract rights and responsibilities to Arizona American Water Company.

Modified Contract Action

24. *ASARCO Inc., CAP, Arizona:* Amendment of subcontract to extend the deadline until December 31, 2003, for giving notice of termination on exchange.

Completed Contract Action

13. *City of Needles, Lower Colorado Water Supply Project, California:* Amend contract No. 2–07–30–W0280 to extend the City's water service subcontracting authority to the Counties of Imperial and Riverside.

Upper Colorado Region: Bureau of Reclamation, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1102, telephone 801–524–4419.

New Contract Actions

22. *City of Page, Arizona, Glen Canyon Unit, CRSP, Arizona:* Long-term contract for 1,000 acre-feet of water for municipal purposes.

23. *Castle Valley Special Service District, City of Huntington, Emery County Project:* Assignment of contract for 189 acre-feet of water for municipal purposes.

Discontinued Contract Action

19. *Ute Mountain Ute Tribe, Dolores Project, Colorado:* Short-term (5-year) carriage contract with the Ute Mountain Ute Tribe to carry up to 3,500 acre-feet of nonproject water in project facilities under the authority of the Warren Act of 1911.

Completed Contract Action

15. *Mancos Water Conservancy District, Mancos Project, Colorado:* Various carriage contracts with individual irrigators and the District to allow the carriage of up to 1,000 acre-feet of nonproject irrigation water in project facilities under the authority of Pub. L. 106–549 for the Mancos Project. Contracts executed June 10, 2002.

Great Plains Region: Bureau of Reclamation, PO Box 36900, Federal Building, 316 North 26th Street, Billings, Montana 59107–6900, telephone 406–247–7730.

New Contract Action

43. *Chippewa Cree Tribe, Rocky Boy's Indian Reservation, Montana:* Pursuant to Title II, section 201(a)(2), of the Rocky Boy's Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999 (Pub. L. 106–163), Reclamation is negotiating to allocate 10,000 acre-feet per year of stored water in Lake Elwell.

Modified Contract Actions

8. *Angostura ID, Angostura Unit, P–SMBP, South Dakota:* An interim 3-year contract was executed on June 9, 2000, to provide for a continuing water supply and allow adequate time for completion of the Environmental Impact Statement for long-term contract renewal. A BON for a long-term contract renewal has been approved by the Commissioner's Office. Contract negotiations for a long-term contract are expected to be completed by the end of the calendar year.

31. *Lower Marias Unit, P–SMBP, Montana:* Town of Chester water service contract expires December of 2002. Initiating negotiation for renewal of a long-term water service contract for an annual supply of raw water for domestic use from Tiber Reservoir not to exceed 500 acre-feet. An interim contract may be issued to continue delivery of water until the necessary actions can be completed to renew the long-term contract.

32. *City of Dickinson, P–SMBP, Dickinson Unit, North Dakota:* A temporary contract has been negotiated with the Park Board for minor amounts of water from Dickinson Dam. Negotiate a long-term water service contract with the City of Dickinson or Park Board, for minor amounts of water from Dickinson Dam.

35. *Pueblo Board of Water Works, Fryingpan-Arkansas Project, Colorado:* Water conveyance contract expires in October of 2002. On September 25, 2002, an amendment was executed to extend the contract term by 1 year, thereby extending the expiration date to October 1, 2003. Initiating negotiations for renewal of a water conveyance contract for annual conveyance of up to 750 acre-feet of nonproject water through the Nast and Boustead Tunnel System.

Completed Contract Action

39. *La Feria ID, Lower Rio Grande Rehabilitation Project, La Feria Division, Texas:* The District has repaid the repayment obligation and title to all project works, lands, or interests in lands originally conveyed by the District to the United States shall now be transferred back to the District in accordance with the authorizing legislation, Pub. L. 86–357 dated September 22, 1959, and the contract shall be terminated. Title to the project has been transferred to the District effective September 3, 2002.

Dated: October 16, 2002.

Elizabeth Cordova-Harrison,

Deputy Director, Office of Policy.

[FR Doc. 02–28996 Filed 11–14–02; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Office of Community Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: new collection; Making Officer Redeployment Effective (MORE) Closeout Report.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the pubic and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 67, Number 163, page 54462 on August 22, 2002, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 16, 2002. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Making Officer Redeployment Effective (MORE) Closeout Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* COPS Form Number: N/A. Office of Community Oriented Policing Services, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: MORE award recipients. Other: None. Abstract: The information collected will be used by the COPS Office to determine that MORE award recipients have completed the grant programmatic requirements.

(5) *As estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 1,856 respondents responding to the survey. The estimated amount of time required for the average respondent to respond is 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are approximately

3,712 annual burden hours associated with this collection.

If additional information is required contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: November 7, 2002.

Brenda E. Dyer,

Department Deputy Clearance Officer, Department of Justice.

[FR Doc. 02–28984 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–AT–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to CERCLA

Notice is hereby given that on November 4, 2002, the United States lodged a proposed Consent Decree between the United States, the State of Arkansas and Oakley-Keesee Ford, Inc. (''Oakley-Keesee'') with the United States District Court for the Eastern District of Arkansas in *United States et al.* v. *Oakley-Keesee Ford,* Nos. 3:98CV00362, 3:98CV00363, consolidated with *Signature Comb, Inc. et al.* v. *Oakley-Keesee Ford,* No. 3:02CV00125 (SMR).

The proposed Consent Decree resolves the claims of the United States and the State of Arkansas against Oakley-Keesee under sections 106(b) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, (''CERCLA''), 42 U.S.C. 9606, 9607, regarding the Gurley Pit and South 8th Street Superfund Sites located in Crittenden County, Arkansas. Under the proposed decree, Oakley-Keesee has agreed to pay the plaintiffs $310,000 within 30 days of the effective date of the Consent Decree as follows: (1) $200,000 will be paid to the Superfund in partial reimbursement of the United States' past and future response costs at the Sites; (2) $100,000 will be paid to the Superfund in penalties for the defendant's failure to comply with the Unilateral Administrative Order to perform the remedial action at the South 8th Street Site; and (3) $10,000 will be paid to the State in partial reimbursement of State's past and future response costs at the Sites.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044–7611, and should refer to *United States et al.* v. *Oakley-Keesee Ford,* DJ No. 90–11–2–196/2.

The proposed Consent Decree may be examined at the Office of the United States Attorney for the Eastern District of Arkansas, 425 West Capital, Suite 500, Little Rock, Arkansas 72201; and at the Region VI Office of the United States Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202. A copy of the proposed Consent Decree may be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044–7611. In requesting a copy, please enclose a check for reproduction costs (at 25 cents per page) in the amount of $7.50, payable to the U.S. Treasury.

Thomas A. Mariani, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 02–28951 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on October 28, 2002, two proposed consent decrees in *United States* v. *Ponderosa Fibres of America, Inc., et al.,* Civil Action No. 99–CV–1305 (FJS/RWS), were lodged with the United States District Court for the Northern District of New York.

The United States' Amended Complaint in this action alleges that Ponderosa Fibres of America, Inc. (''PFC''), Martin Bernstein and Jerome Goodman are jointly and severally liable for past and future response costs, currently totaling over $1.3 million, incurred by the United States in connection with the U.S. Environmental Protection Agency's removal of hazardous substances from the St. Lawrence Pulp and Paper Superfund Site in Ogdensburg, St. Lawrence County, New York (''Site''), pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607(a). The Complaint also alleges that certain transfers of funds from PFA to six current and former PFA officers and shareholders, Martin Bernstein, Jeffrey Feil, the Estate of Louis Feil, Nathan Bernstein, Robert L. Pitman and Roland O.A. Fjallstrom, violated the fraudulent transfer provisions of the Federal Debt Collection Procedures Act (''FDCPA''), 28 U.S.C. 3304, 3306, and the Federal Priority Statute (''FPS''), 31 U.S.C. 3713(b). After the United States initiated its recovery action against PFA, the company brought a third-party contribution action against six entities, including The Bank of New York (''BNY'') and Sonoco Products Company (''Sonoco''), pursuant to section 113(f) of CERCLA, 42 U.S.C. 9613(f). In April 2002, the Court entered a Consent Decree under which BNY paid $71,250 in partial reimbursement of the United States' response costs.

The first of the two proposed Consent Decrees lodged on October 28 resolves cost recovery and contribution claims against Third-Party Defendant Sonoco Products Company for $110,000. The second proposed Decree resolves FDCPA, FPS and potential cost recovery and contribution claims against Defendants Jeffrey Feil and Estate of Louis Feil for $75,000.

For a period of thirty (30) days from the date of this publication, the Department of Justice will accept comments relating to the proposed Sonoco and Feils Consent Decrees. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, U.S. Department of Justice, c/o David L. Weigert, Esq., Environmental Enforcement Section, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044–7611, and should refer to *United States* v. *Ponderosa Fibres of America, Inc., et al.,* Civil Action No. 99–CV–1305 (FJS/RWS), DJ # 90–11–2–1223/1.

The proposed Consent Decrees may be examined at the Office of the United Statesss Attorney, Northern District of New York, 231 Foley U.S. Courthouse, 445 Broadway, Albany, New York and at U.S. Environmental Protection Agency Region II, 290 Broadway, New York, New York. Copies of the proposed Consent Decrees may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing a request to Tonia Fleetwood at (202) 514–0097, phone confirmation number (202) 514–1547. If requesting copies of one or both the proposed Consent Decrees, please specify the requested Decree(s) and enclose a check in the amount of $4.75

per Decree (25 cents per reproduced page), payable to the U.S. Treasury.

Ronald G. Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice.

[FR Doc. 02–28953 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on October 11, 2002, a proposed consent decree in *Reinhold Industries, Inc.* v. *The National Park Service,* 01 Civ. 1806 (MBM), was lodged with the United States District Court for the Southern District of New York.

In this action, Reinhold Industries, Inc. (''Reinhold'') seeks a declaratory judgment that any claims asserted by the United States for recovery of costs incurred, or to be incurred, for response actions taken at or in connection with the release or threatened release of hazardous substances at the Valley Forge National Historic Park in Montgomery, Pennsylvania (''Valley Forge'') were discharged in bankruptcy. The United States, on behalf of the Secretary of the United States Department of Interior's (''DOI'') National Park Service, filed a counterclaim pursuant to section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9607, against Reinhold seeking reimbursement of response costs incurred in connection with Valley Forge.

Pursuant to the proposed consent decree, Reinhold shall make a payment in the amount of $500,000.00 to the DOI in reimbursement of response costs.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and transmitted by one of the following methods: (1) Via U.S. Mail to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611; (2) by facsimile to (202) 353–0296; and/or (3) by overnight delivery, other than through the U.S. Postal Service, c/o Chief, Environmental Enforcement Section, 1425 New York Avenue, NW., 13th Floor, Washington, DC 20005. Each communication should reference *Reinhold Industries, Inc.* v. *The National Park Service,* DOJ # 90–11–2–06991.

The proposed consent decree may be examined at the United States Attorney's Office, 33 Whitehall Street, New York, New York—contact AUSA Silvia L. Serpe at (718) 422–5686. A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. When requesting a copy, please enclose a check in the amount of $8.50 (25 cents per page reproduction cost) payable to the U.S. Treasury. Exhibits to the consent decree may be obtained for an additional charge.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Department of Justice.

[FR Doc. 02–28948 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Janice D. Todd,* Civil Action No. 2:01–2179–11 (D.S.C.), was lodged with the United States District Court for the District South Carolina on November 6, 2002. This proposed Consent Decree concerns a complaint filed by the United States of America against Janice D. Todd, pursuant to section 301 of the Clean Water Act, 33 U.S.C. 1311(a), to obtain injunctive relief from and impose civil penalties against the Defendant for constructing a logging road in wetlands adjacent to the Little Salkehatchie River in Colleton County, South Carolina.

The proposed Consent Decree prohibits Janice D. Todd from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the Clean Water Act and its implementing regulations, and requires the payment of a civil penalty.

The Department of Justice will accept written comments relating to this proposed consent Decree for thirty (30) days from the date of publication of this notice. Please address comments to Joseph P. Griffith, Jr., Assistant U.S. Attorney, 151 Meeting Street, Suite 200, P.O. Box 978, Charleston, South Carolina and refer to DJ # 90–5–1–1–16818 and civil action number 2:01–2179–11.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District South Carolina, Hollings, Judicial Center, Meeting Street at Broad Street, Charleston, South Carolina 29401. In addition, the proposed Consent Decree may be viewed on the World Wide Web at *http://www.usdoj.gov/enrd/enrd-home.html.*

Joseph P. Griffith, Jr.,

Assistant United States Attorney, United States Attorney's Office.

[FR Doc. 02–28952 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Financial Services Technology Consortium, Inc.

Notice is hereby given that, on September 30, 2002, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Financial Technology Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Zions Bancorporation, Salt Lake City, UT; Verifia, Mountain View, CA; Harex InfoTech (ZOOP), San Jose, CA; eOne Global, Napa, CA; Top Layer Networks, Westboro, MA; Cape Clear Softwear, Waltham, MA; Gotham Group, New York, NY; and InterComputer Corp., Fullerton, CA have been added as parties to this venture.

Also, Fleet Bank, Dorchester, MA; Authentor Systems, Englewood, CA; Bank of Montreal, Toronto, Ontario, Canada; Telcordia, Morristown, NJ; Visa, Foster City, CA; Online Resources, McLean, VA; Business Logic Corp., Chicago, IL; BAI, Chicago, IL; and CrossCheck, Rohnert Park, CA have been dropped as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Financial Technology Consortium, Inc., intends to file additional written notification disclosing all changes in membership.

On October 21, 1993, Financial Technology Consortium, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 14, 1993 (58 FR 65399).

The last notification was filed with the Department on June 28, 2002. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 6, 2002 (67 FR 50898).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 02–28950 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Multiservice Switching Forum

Notice is hereby given that, on October 9, 2002, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Multiservice Switching Forum (''MSF'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Bay Packets, Fremont, CA; Catena Networks, Morrisville, NC; Convedia Corporation, Vancouver, British Columbia, Canada; Empirix, Wilmington, MA; Italtel, Milan, Italy; KT Corporation, Seoul, South Korea; Leapstone Systems, Somerset, NJ; MetaSwitch, Alameda, CA; National Communications System, Arlington, VA; NetTest, Markham, Ontario, Canada; Spirent Communications, Sunnyvale, CA; and ZTE Corporation, Shenzhen, Guangdong, China have been added as parties to this venture. ipVerse has changed its name to NexVerse, San Jose, CA; and LM Ericsson has changed its name to Ericsson, Stockholm, Sweden. Also, Armillaire Technologies, Bethesda, MD; CPlane, Menlo Park, CA; Data Connection, Enfield, United Kingdom; France Telecom, Lannion, Cedex. France; General Bandwidth, Austin, TX; Intel, Santa Clara, CA; KPN Telecom, The Hague, The Netherlands; Mahi Networks, Petaluma, CA; Mercury Communications, Middletown, NJ; Nokia, Helsinki, Finland; OKI Electric Industry, Chiba, Japan; SBC, Austin, TX; Swisscom AG, Berne, Switzerland; Tachion Networks, Eatontown, NJ; Telcordia Technologies, Morristown, NJ; Telecom Italia, Rome Italy; Turin Networks, Petaluma, CA; Voxpath Networks, Austin, TX; and Westwave Communications, Santa Rosa, CA have been dropped as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MSF intends to file additional written notifications disclosing all changes in membership.

On January 22, 1999, MSF filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 26, 1999 (64 FR 28519).

The last notification was filed with the Department on April 4, 2001. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on May 23, 2001 (66 FR 28546).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 02–28949 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: new collection; NTTAC user Feedback Form.

The Department of Justice (DOJ), Office of Justice Programs has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 67, Number 161, page 53967 on August 20, 2002, allowing for a 60 day comment period. The purpose of this notice is to allow for an additional 30 days for public comment until December 16, 2002. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* NTTAC user Feedback Form.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State, Local or Tribal Government; Individuals or households; Not-for-profit institutions; Businesses or other for-profit. The NTTAC User Feedback Form is designed to collect the data necessary to continuously improve customer service intended to meet the needs of the juvenile justice field at-large and the OJJDP-funded TA provider network. Within 15 days of satisfying a request for technical assistance (TA), NTTAC staff will send this Form to TA requester to capture important feedback on the TA requester's satisfaction with the quality,

efficiency, referrals, and resources of the NTTAC.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 290 responses, one for each respondent. The estimated amount of time required for the average respondent to respond is 8 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 2,320 burden hours annually associated with this information collection.

If additional information is required contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, U.S. Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: November 8, 2002.

Brenda E. Dyer,

Department Deputy Clearance Officer, Department of Justice.

[FR Doc. 02–28983 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

[OJP(OJJDP)–1358]

Program Announcement for the Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Justice.

ACTION: Notice of solicitation.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is requesting applications for the Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative, a 2-year initiative that will replicate and evaluate the effectiveness of two school-based substance abuse prevention programs: Project ALERT and Project SUCCESS. Through this research initiative, OJJDP seeks to determine whether positive program outcomes can be replicated in different communities and sustained over time. The evaluator will select two replication sites (one for each program model), oversee program implementation in those sites, and work with program developers to assess and promote program fidelity at each site. The evaluator will conduct an outcome evaluation of the programs' effectiveness in preventing, reducing, and/or eliminating substance abuse by youth. Findings will enhance knowledge about effective strategies for prevention of substance abuse by youth and help communities decide how to spend the limited resources that are available for prevention activities.

DATES: Applications must be received by December 30, 2002.

ADDRESSES: Interested applicants can obtain the *OJJDP Application Kit* by calling the Juvenile Justice Clearinghouse at 800–638–8736, by sending an e-mail request to *puborder@ncjrs.org,* or through fax-on-demand. (For fax-on-demand, call 800–638–8736, select option 1, then select option 2 and enter the following four-digit numbers: 9119, 9120, 9121, and 9122. Application kits will be faxed in four sections because of the number of pages.) The *Application Kit* is also available online at *http://www.ncjrs.org/pdffiles1/ojjdp/sl000480.pdf.*

All applicants must submit the original application (signed in blue ink) and five copies. Applications should be unbound and fastened by a binder clip in the top left-hand corner. OJJDP strongly recommends that applicants number each page of the application. To ensure that applications are received by the due date, applicants should use a mail service that documents the date of receipt. Because OJJDP anticipates sending applicants written notification of application receipt approximately 4 weeks after the solicitation closing date, applicants are encouraged to use a traceable shipping method. Faxed or e-mailed applications will not be accepted. Postmark dates will not be accepted as proof of meeting the deadline. Applications received after 5 p.m. ET on December 30, 2002 will be deemed late and may not be accepted. The closing date and time apply to all applications. To ensure prompt delivery, please adhere to the following guidelines:

Applications sent by U.S. mail: Use registered mail to send applications to the following address: Office of Juvenile Justice and Delinquency Prevention, c/o Juvenile Justice Resource Center, 2277 Research Boulevard, Mail Stop 2K, Rockville, MD 20850. In the lower left-hand corner of the envelope, clearly write ''Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative.''

Applications sent by overnight delivery service: Allow at least 48 hours for delivery. Send applications to the following address: Office of Juvenile Justice and Delinquency Prevention, c/o Juvenile Justice Resource Center, 2277 Research Boulevard, Mail Stop 2K, Rockville, MD 20850; 800–638–8736 (phone number required by some carriers). In the lower left-hand corner of the envelope, clearly write ''Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative.''

Applications delivered by hand: Deliver by 5 p.m. ET, December 30, 2002, to the Juvenile Justice Resource Center, 2277 Research Boulevard, Rockville, MD 20850; 301–519–5535. Hand deliveries will be accepted daily between 8:30 a.m. and 5 p.m. ET, excluding Saturdays, Sundays, and Federal holidays. Entrance to the resource center requires proper photo identification.

FOR FURTHER INFORMATION CONTACT: Janet Chiancone, Program Manager, Research and Program Development Division, Office of Juvenile Justice and Delinquency Prevention, 202–353–9258 [This is not a toll-free number.] (e-mail: *chiancoj@ojp.usdoj.gov.*)

SUPPLEMENTARY INFORMATION:

Purpose

The purpose of the Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative is to replicate and test the effectiveness of two school-based substance abuse prevention programs: Project ALERT and Project SUCCESS.[1] OJJDP seeks to determine whether the positive outcomes found in prior evaluations can be replicated in other sites. Identifying programs that meet these requirements will enhance the field's knowledge about ''what works'' in youth substance abuse prevention and will help communities decide how to spend the limited resources that are available for prevention activities.

As a result of this solicitation, OJJDP will select a grantee to oversee the replication of Project ALERT and Project SUCCESS and then evaluate the outcomes.

Background

This program is authorized by Congress as set forth under the Fiscal Year 2002 Appropriations Act, Public Law 107–77 (November 28, 2001).

Substance abuse is one of the most troubling problems facing communities throughout the Nation. It touches many facets of Americans' lives, affecting crime, education, health care costs, and

[1] Detailed information about both program models is available on the OJJDP Web site at *ojjdp.ncjrs.org/grants/current.html.* To receive faxed information about the program models, call 800–638–8736 or 301–519–6556 and follow the step-by-step instructions to request item number 2005.

the productivity of the Nation as a whole. Estimates indicate that substance abuse contributes to 130,000 deaths annually and costs approximately $275 billion in health care expenses, lost productivity, related crime, and other social costs (U.S. Department of Justice, Office of Justice Programs, 2000).

Over the past several decades, prevention research has focused on identifying the factors that put young people at risk for delinquency (risk factors) and those that decrease the likelihood that they will engage in problem behaviors (protective factors). Studies of risk and protective factors for delinquency have enabled researchers to identify the probability that youth will become involved in delinquent and predelinquent behavior. These efforts have identified numerous risk factors for substance abuse, including the availability of drugs, early academic failure, family conflict, and extreme economic deprivation (Howell, 1995). Many of these risk factors are associated not only with substance abuse but also with an array of physical, mental, and behavioral problems. For example, school failure is a strong predictor of substance abuse, juvenile delinquency, and other problem behaviors (Howell, 1995). Research has also demonstrated that early youth involvement with any drug is a risk factor for later problem behavior and criminal activity. Further, the more severe the early involvement, the greater the likelihood that antisocial behaviors will emerge. OJJDP's Program of Research on the Causes and Correlates of Delinquency found a strong relationship between drug use and serious delinquent behavior (Huizinga *et al.*, 2000). Although none of these findings indicate that substance abuse is a direct cause of crime and/or violence, the two are clearly interrelated.

Exposure to these risk factors, however, does not guarantee that a youth will engage in problem behaviors or develop a substance abuse problem. Many youth exposed to multiple risk factors avoid problem behaviors as a result of protective factors that help to insulate them from these influences. Protective factors include bonds with adults who exert a positive influence, a positive social orientation, and/or a resilient temperament. Such factors appear to protect youth from initiating drug use and engaging in other problem behaviors.

A recent report published by The National Center on Addiction and Substance Abuse at Columbia University (CASA) indicates that religion may provide some protective influence for youth when it comes to substance abuse (National Center on Addiction and Substance Abuse, 2001). For example, CASA's annual teen surveys of attitudes on substance abuse have consistently found that adolescents who report attending religious services are less likely to report substance abuse. The CASA report also cites some other research studies which have found that involvement in faith-based activities is associated with lower levels of substance use.

Prevention efforts must seek to reduce youth's exposure to risk factors while increasing the number of protective factors in their lives. In addition, prevention programs must be appropriate for the culture, gender, and age of the target population.

As knowledge of risk and protective factors has grown, policymakers, funding agencies, and program administrators have increasingly called for more accountability from prevention programs. Efforts sponsored by Federal agencies, State governments, private foundations, and other organizations have stressed the importance of implementing approaches that have been researched and proven effective. This increased emphasis on performance has prompted many needed developments, including the recognition that programs with scientifically defensible findings must drive services. In addition, although effective drug prevention curriculums exist, research suggests that most of the drug prevention funding in this country is spent on aggressively marketed programs that have not been evaluated or proven effective (Dusenbury, Falco, and Lake, 1997).

Although prevention research has made great strides over the past several decades, the focus on research-based programs poses a challenge to prevention practitioners. It is particularly difficult for them to identify prevention efforts that have clearly linked program outcomes to program interventions. Therefore, it is critical to identify such approaches and to disseminate this information to the field so that research-based prevention programs are implemented.

Additionally, a lack of research funding often results in evaluations of substance abuse prevention programs that are limited in scope and do not have the level of rigor needed to determine true effectiveness. In an attempt to serve as many youth and families as possible, funds often are spent primarily on program activities, while spending on evaluation activities is restricted. Even when program effectiveness is measured, programs rarely conduct followup research to determine whether those effects are sustained over time. If OJJDP and the juvenile justice community are to identify what strategies prevent juvenile substance abuse, program evaluations must meet higher standards.

In developing this initiative, OJJDP relied on the knowledge and experience of two prevention centers: The Center for the Study and Prevention of Violence (CSPV) at the University of Colorado, Boulder (*http://www.colorado.edu/cspv/blueprints*) and The Center for Substance Abuse Prevention (CSAP) National Registry of Effective Prevention Programs (*http://www.samhsa.gov/centers/csap/modelprograms*). These centers provide communities with information about programs that effectively prevent substance abuse and/or violence among juveniles.

Goals

The overall goal of OJJDP's Promising Programs for Substance Abuse Prevention: Replication and Evaluation Initiative is to evaluate two substance abuse prevention program models that have shown promising results. Through this research initiative, OJJDP seeks to determine whether positive outcomes can be replicated in different communities and sustained over time. Specific research questions that OJJDP seeks to answer through this evaluation include:

- Are these programs effective in preventing, reducing, and/or eliminating youth substance abuse?
- Can the positive effects of these programs be replicated in other sites?
- Can the positive effects be sustained for 1 year after program completion?

Objectives

The objectives of this initiative are as follows:

- Select two appropriate replication sites and oversee the implementation of program activities in those sites.
- Work with the developer of each program model to document program implementation of the replication sites and to assess and promote program fidelity.
- Conduct a rigorous outcome evaluation of the replication efforts to measure the programs' effectiveness in preventing, reducing, and/or eliminating youth substance use.

Project Strategy

OJJDP will competitively award one cooperative agreement from this solicitation. The applicant selected will be responsible for overseeing the identification of appropriate replication sites, working with developers of the

program models to ensure that the programs are implemented with fidelity to the respective model, and conducting a rigorous outcome evaluation of both replication efforts. Given the purpose and goals of this initiative, OJJDP requires that the evaluation meet these minimum standards:

• *Experimental or quasi-experimental design.* The evaluator must use either an experimental or quasi-experimental design. Ideally, an evaluation design randomly assigns subjects to either experimental or control conditions. However, if a service intervention applies to a group (such as a classroom), this design may simply not be feasible (Wagner, Swenson, and Henggeler, 2000). In such cases, a quasi-experimental design in which experimental classrooms or schools are matched with control classrooms or schools might be more appropriate. For this initiative, OJJDP intends to use the most rigorous evaluation design possible for each program model.

• *Adequate sample sizes.* Evaluators must ensure that sample sizes are large enough to detect statistically significant differences between experimental and control groups. Although it is difficult to quantify in advance the actual number of subjects that will be needed, the national evaluator should plan on a minimum sample size of 200 subjects (100 in the experimental group and 100 in the control group) throughout the project period. Keeping in mind the probability of a high attrition rate (especially with at-risk subjects), the national evaluator must plan for a sample size that will be adequate after attrition.

• *Appropriate measures.* The evaluator must use measures proven to be reliable and valid. Because this initiative intends to further test the effectiveness of these two programs, the national evaluator should use instruments that, at a minimum, measure the same indicators as those measured in previous program evaluations. As part of their proposals, applicants must fully describe the measures they plan to use and justify their selection of those measures. However, the final selection of measures will occur in consultation with the Evaluation Advisory Board (discussed later in this solicitation) and OJJDP. The national evaluator must apply evaluation measures fairly, accurately, and consistently with regard to all study participants.

• *Measurement of sustained effects.* One factor that determines program effectiveness is whether the effects of the program extend beyond the program period. The national evaluator should plan to measure the effects of each program model 1 year after the program ends.

Eligibility Requirements

OJJDP invites applications from public and private agencies, organizations, institutions, and individuals. Applicants must demonstrate both a capacity to manage this replication effort and experience in evaluating substance abuse prevention programs. Private, for-profit organizations must agree to waive any profit or fee. Joint applications from two or more eligible applicants are welcome, as long as one is designated as the primary applicant and the others are designated as coapplicants.

Major Tasks

The applicant selected for funding will be required to perform the following activities.

Identify and Recommend Selection of Replication Sites

The applicant selected as the national evaluator should be prepared to work with OJJDP and the Advisory Board to identify and select two replication sites (one for each program model). A primary factor in determining whether to select a site for replication will be the site's preparedness to implement the program and participate in a rigorous evaluation.

Within the first 2 months of award, the evaluator will be responsible for developing the criteria that will determine the preparedness of a site for selection as a replication site. Identification of replication sites may include conducting site visits (possibly in conjunction with OJJDP staff and program model developers) and meeting with school personnel, potential project partners, and others to determine the readiness of a site to participate in this replication initiative and evaluation. The national evaluator will compile and analyze the results of the site visits and other data and provide that information to OJJDP and the Evaluation Advisory Board (see the ''Product Delivery and Timeline'' section).

Establish Evaluation Advisory Board

During the first 3 months of the project, the national evaluator will establish and convene an Evaluation Advisory Board to oversee the activities in this project. The Advisory Board membership will include representatives from OJJDP, CSAP, CSPV, Project ALERT, and Project SUCCESS. Applicants must include letters of commitment from three other individuals who will serve on this Advisory Board. These individuals should have expertise in one or more of the following areas: Research design and methodology, youth substance abuse, youth and family development, organizational development and community-based programming, and research in school and/or community settings. Applicants should anticipate that the Evaluation Advisory Board will meet three times during the first budget period (24 months) at a location to be determined.

Process Evaluation

During the first 24 months of the project, the national evaluator will conduct a process evaluation of the two replication sites to ensure that the implementation remains true to the chosen program model. This activity will include developing materials that inform the local project staff about the process evaluation strategy, including instruments, mechanisms, and procedures for collecting and processing data. The national evaluator will be responsible for compiling and analyzing results of the process evaluation and providing routine feedback to the sites on the program planning, development, and implementation process.

Outcome Evaluation Design

During months 7–9, the national evaluator will design a rigorous outcome evaluation for each of the two replication sites. As part of their proposals, applicants must submit a basic framework for evaluating each of the two program models. These frameworks must be included in the application package submitted to OJJDP. Once the replication sites have been selected, the national evaluator must expand the two basic frameworks to create a detailed outcome evaluation design for each site. The outcome evaluations should include a strong research design that, at a minimum, meets the four standards set forth in the ''Project Strategy'' section of this solicitation. The evaluation must also include an onsite component.

The final evaluation designs will be prepared in consultation with the replication sites, the Evaluation Advisory Board, and OJJDP. During this period, the applicant will work with OJJDP to prepare information that will be submitted to the Office of Management and Budget (OMB) as required under the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. (See ''Project Design'' for more information about this requirement.)

Outcome Evaluation Implementation

Once OJJDP approves the final designs for the outcome evaluation, the national evaluator will conduct the evaluation at each replication site. Implementation of the outcome evaluation is expected to begin in month 10 and continue through month 24—the end of the first budget period—and beyond (see ''Budget''). The national evaluator will provide onsite training and technical assistance to site staff regarding data handling procedures and confidentiality issues and will provide sites with the materials and expertise needed to collect and report data (including instruments, databases, and other materials).

Product Delivery and Timeline

The national evaluator will be required to develop several products, including the following:

- A draft document that outlines the criteria that will be used to select the two sites for replication and evaluation. This document is due to OJJDP and the Evaluation Advisory Board 3 months after the grant award.
- A document that recommends which two sites should be selected for participation in this evaluation initiative. This document is due to OJJDP and the Evaluation Advisory Board 6 months after the grant award.
- A draft document that details the evaluation designs for outcome evaluations of Project ALERT and Project SUCCESS. This document is due to OJJDP 9 months after the grant award.
- Copies of materials prepared for the replication sites; materials should communicate the process and outcome evaluation strategy, including instruments, mechanisms, and procedures to collect process data. These materials are due to OJJDP 12 months after the grant award.
- A draft article (written in a style appropriate for submission to a peer-reviewed research journal) that describes the methodology being used in conducting the outcome evaluations. This document is due to OJJDP 18 months after the grant award.
- An Interim Evaluation Report that documents the activities accomplished in the first budget period (24 months) and provides a workplan for the following budget period. This document is due to OJJDP 20 months after the grant award.

Following the first budget period, OJJDP may require the national evaluator to prepare additional products, including the following:

- An OJJDP Bulletin that details the activities and findings of the replication initiative, including the findings of the process and outcome evaluations.
- A minimum of two articles (written in a style appropriate for submission to a peer-reviewed research journal) that detail the findings of each program and of the outcome evaluation.

Selection Criteria

Applicants will be evaluated and rated by a peer review panel according to the criteria outlined below.

Problems To Be Addressed (25 points)

Applicants must clearly and concisely discuss their understanding of the effects of prevention, intervention, and treatment of youth substance abuse. The programs being replicated address risk and protective factors that include multiple domains and have causal linkages to youth substance abuse, including academic failure and mental health issues. Applicants should demonstrate an understanding of these risk factors, including their interrelationship and impact on youth substance abuse and delinquency. In addition, applicants should discuss evaluation methods for measuring the program's ability to prevent and/or reduce substance abuse among youth.

Applicants should also discuss how they will use rigorous evaluation methods to achieve the evaluation objectives. As part of this discussion, applicants should address any anticipated problems associated with identifying replication sites, carrying out the replication activities, and/or evaluating the two program models and should propose potential solutions. Applicants should demonstrate a thorough understanding of substance abuse prevention programming, theory-driven evaluation, school-based prevention and intervention programs, and experimental research methods.

Goals and Objectives (10 points)

To conduct and complete this evaluation effectively, applicants must define specific, measurable goals and objectives. These should be guided by the requirements of this solicitation.

Project Design (30 points)

Applicants must present a clear design, accompanied by a timetable, that details how they will accomplish the goals and objectives of this initiative and deliver the required products. Applicants should address the major activities described in this solicitation and how they will carry out the activities. Replication activities that should be discussed include the following:

- Developing criteria for site selection.
- Working with OJJDP and the program model developers to identify and select replication sites.
- Managing the distribution of funds to the replication sites.
- Providing oversight of program implementation activities.

Evaluation activities that should be discussed include, but are not limited to, the following:

- Consulting with the program model developers.
- Developing evaluation instruments.
- Determining methods.
- Disseminating information.
- Communicating with site personnel.
- Conducting (or managing) onsite evaluation activities.
- Monitoring the evaluation's progress.

Applicants must include in the proposal narrative two draft evaluation frameworks (each one no longer than four double-spaced pages) that outline the design and methodology proposed for evaluating each of the two program models. Applicants must propose evaluation designs that will foster a collaborative and supportive relationship between the program sites, the developers of the program models, OJJDP, and themselves.

The national evaluator should be prepared to work with OJJDP in preparing information that will be submitted to OMB as required under the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Under this Act, the national evaluator must submit an extensive narrative that both states what goals and methods are planned for data collection and justifies the burden placed on respondents. The OMB clearance process includes two public comment periods and takes a minimum of 90 days, although it can take up to 180 days. Applicants should incorporate the activities associated with PRA requirements into the timetable.

Management/Organizational Capability (25 points)

Applicants must include a discussion of how they will manage and coordinate this replication evaluation initiative to achieve its goals and objectives. Management structure and staffing must be adequate and appropriate for successful project implementation. Applicants must identify responsible individuals and key consultants and specify their time commitments and major tasks. Key staff and consultants must have significant experience with evaluation research, particularly research on substance abuse prevention

and research that uses an experimental or quasi-experimental design. Resumes for key staff and key consultants must be attached as part of the application's appendixes.

Applicants must demonstrate existing relationships and the ability to work effectively with a range of agencies and service providers, including, but not limited to, schools, courts, law enforcement agencies, child protective service agencies, mental health service providers, and other community agencies. Because the two models being replicated are school-based programs, experience in conducting evaluation research in a school setting is vital. In addition, applicants should highlight any previous experience in conducting evaluations of any of the programs being replicated through this initiative or any other prevention programs.

Applicants must present a detailed timeline that identifies responsible individuals and their time commitments, major tasks, and milestones (*e.g.*, advisory board meetings, products due to OJJDP).

Budget (10 points)

Applicants must provide a proposed budget that is complete, reasonable, and allowable in relation to the activities to be undertaken. The maximum funding available for the first budget period (24 months) is $2 million. This amount includes costs for all activities: The replication efforts, the process evaluations, and the outcome evaluations. Applicants should set aside $1 million of this amount for the replication efforts over a 3-year period ($650,000 for Project SUCCESS and $350,000 for Project ALERT). The remaining $1 million is for process and outcome evaluation activities for the first 24-month budget period, including the following mandatory items: costs related to site identification (including travel, if appropriate), costs for Evaluation Advisory Board meetings, travel costs, and costs associated with the evaluation activities. An applicant's budget should include the time, travel, and meeting costs incurred by the six non-Federal Advisory Board members. An applicant should also include in the budget any costs associated with process evaluation activities, including consultation with the developers of Project SUCCESS and Project ALERT.

The full project period is 5 years, and we anticipate that applicants will apply for continuation funding for the balance of the project during the 20th month.

Format

The narrative portion of this application must be submitted on 8½-by 11-inch paper, double spaced, on one side only, and printed in a standard 12-point font. All sections of the narrative must be double spaced, including bullets, lists, tables, and quotations. (References and/or endnotes at the end of the narrative, appendixes, forms, assurances, and budget worksheets and accompanying narrative do not count toward the page limit.) These requirements are necessary to maintain fair and uniform consideration of all applicants. If the narrative does not conform to these standards, OJJDP will deem the application ineligible for consideration. The application narrative must not exceed 50 pages, including the 8 pages describing the evaluation frameworks.

Award Period

OJJDP plans to fund the replication evaluation for 5 years. The present solicitation will award funding for the initial budget period of 24 months. Funding after the first budget period will depend on grantee performance, availability of funds, and other criteria established at the time of the award.

Award Amount

Up to $2 million is available for the initial 24-month budget period.

Human Subjects

Applicants are advised that any project that will involve the use of human research subjects must be reviewed by an Institutional Review Board (IRB), in accordance with U.S. Department of Justice regulations at 28 CFR 46. IRB review is not required prior to submission of the application. However, if an award is made and the project involves research using human subjects, OJJDP will place a special condition on the award requiring that the project be approved by an appropriate IRB before Federal funds can be expended on activities involving human subjects. Applicants should include plans for IRB review in the project timetable submitted with the proposal.

Performance Measurement

To ensure compliance under the Government Performance and Results Act (GPRA), Public Law 103–62, this solicitation notifies applicants that they are required to collect and report data that measure the results of the program implemented with this grant. Performance under this solicitation is to be measured by the number of youth served by each drug demonstration program.

Award recipients will be required to collect and report data to demonstrate performance on this measure. Specifically, award recipients will be required to collect and report the following performance data:

- Data on the selection of two replication sites (one for each school-based substance abuse prevention program model), implementation of the models, and the results of outcome evaluations of the program models.
- Data on whether both evaluation sites met the rigorous scientific standards of social science research (*e.g.*, appropriate sample sizes and instruments used) as determined after a formal, annual review to be conducted by the Advisory Board.
- Data on the review and resolution of any concerns identified in the Advisory Board's interim evaluation report.
- Best practices and methods for community prevention of juvenile substance abuse and allocation of limited substance abuse prevention resources, to be identified and disseminated after a peer review of the process and outcome evaluations.

Your assistance in obtaining this information will facilitate future program planning and will allow OJP to provide Congress with measurable results of federally funded programs.

Catalog of Federal Domestic Assistance (CFDA) Number

For this program, the CFDA number is 16.728. This number is required on Standard Form 424, Application for Federal Assistance. This form is included in the *OJJDP Application Kit,* available online at *http://www.ncjrs.org/pdffiles1/ojjdp/sl000480.pdf.*

Coordination of Federal Efforts

To encourage better coordination among Federal agencies in addressing State and local needs, DOJ requires applicants to provide information on the following items: (1) Active Federal grant award(s) from DOJ, (2) any pending application(s) for Federal funds for this or related efforts, and (3) plans for coordinating any funds described in items (1) and (2) with the funding sought by this application. For each Federal award, applicants must include the program and project title, Federal grantor agency, amount of the award, and a brief description of its purpose. For these purposes, the term ''related efforts'' is defined as one of the following:

- Efforts for the same purpose (i.e., the proposed award would supplement, expand, complement, or continue activities funded with other Federal grants).

• Another phase or component of the same program or project (e.g., to implement a planning effort supported by other Federal funds or to provide a substance abuse treatment or education component within a criminal justice project).

• Services of some kind (e.g., technical assistance, research, or evaluation) for the program or project described in the application.

Due Date

Applicants are responsible for ensuring that the original and five copies of the application package are received by 5 p.m. ET on December 30, 2002.

Contact Information

For further information, contact Janet Chiancone, Program Manager, Research and Program Development Division, 202–353–9258 (e-mail: *chiancoj@ojp.usdoj.gov*).

References

Dusenbury, L., Falco, M., and Lake, A. 1997. A review of the evaluation of 47 drug abuse prevention curricula available nationally. *Journal of School Health* 67(4):127–132.

Howell, J.C., ed. 1995. *Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

Huizinga, D., Loeber, R., Thornberry, T., and Cothern, L. 2000. *Co-occurrence of Delinquency and Other Problem Behaviors.* Bulletin. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

U.S. Department of Justice, Office of Justice Programs. 2000. *Promising Strategies to Reduce Substance Abuse.* Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs.

The National Center on Addiction and Substance Abuse (2001). So Help Me God: Substance Abuse, Religion and Spirituality (Report). New York, NY: The National Center on Addiction and Substance Abuse at Columbia University.

Wagner, E.F., Swenson, C.C., and Henggeler, S.W. 2000. Practical and methodological challenges in validating community-based interventions. *Children's Services: Social Policy, Research, and Practice* 3(4):211–231.

Suggested Readings

Ellickson, P.L., and Bell, R.M. 1990. Drug prevention in junior high: A multi-site longitudinal test. *Science* 247(4948):1299–1305.

Ellickson, P.L., Bell, R.M., and McGuigan, K. 1993. Preventing adolescent drug use: Long-term results of a junior high program. *American Journal of Public Health* 83(6):856–861.

Morehouse, E., and Tobler, N.S. 2000. Preventing and reducing substance use among institutionalized adolescents. *Adolescence* 35(137):1–28.

U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration. 2000. *Summary of Findings from the 1999 National Household Survey on Drug Abuse.* Washington, DC: U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration.

Dated: November 8, 2002.

J. Robert Flores,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 02–28970 Filed 11–14–02; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time to enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determination frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon and Related Acts,,'' shall be in the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or government agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determination Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Connecticut
CT020001 Mar. 1, 2002)
CT020002 Mar. 1, 2002)
CT020003 Mar. 1, 2002)
CT020004 Mar. 1, 2002)
CT020005 Mar. 1, 2002)
CT020008 Mar. 1, 2002)

Volume II

Mar.yland
MD020001 Mar. 1, 2002)
MD020002 Mar. 1, 2002)
MD020007 Mar. 1, 2002)
MD020011 Mar. 1, 2002)
MD020035 Mar. 1, 2002)
MD020042 Mar. 1, 2002)
MD020043 Mar. 1, 2002)
MD020058 Mar. 1, 2002)
Virginia
VA020003 Mar. 1, 2002)
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VA020087 Mar. 1, 2002)
VA020088 Mar. 1, 2002)
VA020092 Mar. 1, 2002)
VA020099 Mar. 1, 2002)
Volume III

South Carolina

SC020033 Mar. 1, 2002)
SC020037 Mar. 1, 2002)
SC020038 Mar. 1, 2002)
Volume IV

Minnesota

MN020001 Mar. 1, 2002)
MN020003 Mar. 1, 2002)
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MN020059 Mar. 1, 2002)
MN020061 Mar. 1, 2002)
Ohio
OH020002 Mar. 1, 2002)
OH020006 Mar. 1, 2002)
OH020018 Mar. 1, 2002)
OH020029 Mar. 1, 2002)

Volume V

New Mexico
NM020001 Mar. 1, 2002)

Volume VI

North Dakota
ND020002 Mar. 1, 2002)

Volume VII

California
CA020030 Mar. 1, 2002)
CA020032 Mar. 1, 2002)
Hawaii
HI020001 Mar. 1, 2002)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts''. This publication Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 7th day of November 2002.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 02–28933 Filed 11–14–02; 8:45 am]

BILLING CODE 4510–27–M

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors

TIME AND DATE: The Board of Directors of the Legal Services Corporation will meet on November 25, 2002 via conference call. The meeting will begin at 11 a.m. and continue until conclusion of the Board's agenda.

LOCATION: 750 First Street, NE., 11th Floor, Washington, DC 20002, in Room 11026.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the agenda.
2. Consider and act on Board of Directors' Semiannual Report to Congress for the period of April 1, 2002 through September 30, 2002.
3. Consider and act on other business.
4. Public comment.

FOR MORE INFORMATION CONTACT: Victor M. Fortuno, Vice President for Legal Affairs, General Counsel & Corporate Secretary, at (202) 336–8800.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Elizabeth Cushing, at (202) 336–8800.

Dated: November 12, 2002.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel & Corporate Secretary.

[FR Doc. 02–29122 Filed 11–12–02; 4:54 pm]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting Notice

AGENCY HOLDING MEETING: National Science Foundation, National Science Board.

DATE AND TIME: November 21, 2002: 11 a.m.–11:15 a.m.—Closed Session; November 21, 2002: 11:15 a.m.–11:30 a.m.—Closed Session; November 21, 2002: 12 noon–3:30 p.m. Open Session.

PLACE: The National Science Foundation, Room 1235, 4201 Wilson Boulevard, Arlington, VA 22230, *http://www.nsf.gov/nsb.*

STATUS: Part of this meeting will be closed to the public. Part of this meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Thursday, November 21, 2002

Executive Closed Session (11 a.m.–11:15 a.m.)

Closed Session Minutes, October, 2002.

Closed Session (11:15 a.m.–11:30 a.m.)

Awards and Agreements.

Open Session (12 Noon–3:30 p.m.)

Science Presentations
—Geosciences
—Mathematical and Physical Sciences
Open Session Minutes, October 2002
Closed Session Items for February 2003
Chairman's Report
Director's Report
Cost Sharing Resolution
Guidelines for Setting Priorities for Major Research Facilities
Infrastructure Task Force Report
NSF Advisory Committee for GPRA Performance Assessment
Committee Report
Other Business

Catherine J. Hines,

Operations Officer.

[FR Doc. 02–29158 Filed 11–13–02; 10:28 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* NRC Form 396, ''Certification of Medical Examination by Facility Licensee''.

3. *The form number if applicable:* NRC Form 396.

4. *How often the collection is required:* Upon application for an initial operator license, every six years for the renewal of operator or senior operator license, and upon notices of disability.

5. *Who will be required or asked to report:* Facility licensees who are tasked with certifying the medical fitness of an applicant or licensee.

6. *An estimate of the number of responses:* 1,240 (1,100 responses plus 140 recordkeepers).

7. *The estimated number of annual respondents:* 140.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* 751 (275 hours for reporting [.25 hours per response] and 476 hours for recordkeeping [3.4 hours per recordkeeper]).

9. *An indication of whether Section 3507(d), Public Law 104–13 applies:* Not applicable.

10. *Abstract:* NRC Form 396 is used to transmit information to the NRC regarding the medical condition of applicants for initial operator licenses or renewal of operator licenses and for the maintenance of medical records for all licensed operators. The information is used to determine whether the physical condition and general health of applicants for operator licensees is such that the applicant would not be expected to cause operational errors and endanger public health and safety.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F23, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by December 16, 2002. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. Bryon Allen, Office of Information and Regulatory Affairs (3150–0024), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated at Rockville, Maryland, this 7th day of November 2002.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 02–29061 Filed 11–14–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–443]

North Atlantic Energy Service Corporation; Notice of Partial Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of North Atlantic Energy Service Corporation (the licensee) to withdraw a portion of its August 9, 2001, application for proposed amendment to Facility Operating License No. NPF–86 for the Seabrook Station, Unit No. 1, located in Rockingham County, New Hampshire.

The withdrawn portion of the proposed amendment would have revised the Seabrook Station, Unit No. 1, Technical Specifications (TSs) to relocate TS 3/4.9.3, ''Decay Time,'' to the Seabrook Station Technical Requirements Manual.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on September 19, 2001 (66 FR 48290). However, by letters dated June 24, 2002, and October 14, 2002, the licensee withdrew this portion of the proposed change as discussed above.

For further details with respect to this action, see the application for amendment dated August 9, 2001, as supplemented September 17, 2001, and the licensee's letters dated June 24, 2002, and October 14, 2002, which withdrew a portion of the application

for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public ElectronicReading Room on the internet at the NRC Web site, *http://www.nrc. gov/reading-rm/adams/html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 8th day of November, 2002.

For the Nuclear Regulatory Commission.

Robert D. Starkey,

Project Manager, Section 2, Project Directorate I,Division of Licensing Project Management,Office of Nuclear Reactor Regulation.

[FR Doc. 02–29062 Filed 11–14–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–335 and 50–389]

Florida Power and Light Company, et al., St. Lucie, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from Title 10 of the CFR, part 54, section 54.21(b), for Facility Operating License Nos. DPR–67 and NPF–16, issued to Florida Power & Light Company, *et al.* (the licensee), for operation of St. Lucie, Units 1 and 2, located in St. Lucie County, Florida.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt the licensee from the requirement of 10 CFR 54.21(b), which specifies that an applicant (for the purposes of license renewal, the licensee is the applicant) must submit, each year following submittal of the license renewal application (LRA), and at least three months before scheduled completion of the NRC review, amendments to the renewal application that identify any change to the current licensing basis (CLB) of the facility that materially affects the contents of the LRA, including the final safety analysis report (FSAR) supplement.

The NRC staff initiated the proposed action on its own initiative.

The Need for the Proposed Action

In accordance with 10 CFR 54.21(b), the applicant is required to submit an LRA amendment by November 29, 2002, which is one year after the applicant submitted the application, and a second LRA amendment before April 3, 2003, which is three months prior to the scheduled completion of the NRC review. The exemption would allow the applicant to submit a single LRA amendment three months prior to the scheduled completion of the NRC review. The proposed action will reduce the burden on the staff and applicant associated with submitting two LRA amendments in a four month period.

Environmental Impacts of the Proposed Action

The exemption, if granted, will permit the applicant to prepare and submit a single LRA amendment at least three months prior to the scheduled completion of the NRC review. In short, granting of the exemption will not necessitate, or lead to, changes to the as-built plant design, or to existing procedures at St. Lucie, Units 1 and 2.

The staff evaluated potential radiological environmental impacts associated with the exemption. Since no plant design nor procedure changes will be made, no new accident causal mechanisms would be introduced.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to the potential nonradiological impacts, the proposed action does not affect any historic sites. The proposed action involves no plant design nor procedure changes, it does not increase or decrease nonradiological plant effluents, and has no other environmental impact from those previously evaluated by the staff in the final environmental statement (FES). Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered not issuing the exemption (*i.e.,* the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the FES, for the St. Lucie Plant (NUREG–0842).

Agencies and Persons Contacted

In accordance with its stated policy, on October 8, 2002, the staff consulted with Florida State official, William Passetti, Bureau of Radiation Control, regarding the environmental impact of the proposed action. The State official had no comments or objections.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the LRA for St. Lucie, Units 1 and 2. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible from the NRC Web site at *http//www.nrc.gov/reading-rm/ADAMS.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR reference staff at 1–800–397–4229, 301–415–4737, or by e-mail to *PDR@NRC.gov.*

Dated at Rockville, Maryland, this 6th day of November, 2002.

For the Nuclear Regulatory Commission.

Samson Lee,

Chief, License Renewal Section, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 02–29060 Filed 11–14–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

All Nuclear Power Reactor Licensees; 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 taken action on the October 24, 2001, Petition under § 2.206 of Title 10 of the Code of Federal Regulations (10 CFR 2.206) submitted by Mr. Michael D. Kohn (petitioner) on behalf of the National Whistleblower Center. By letter dated January 27, 2002, Mr. Michael D. Kohn submitted an amended Petition. The amended Petition included the names of six additional Petitioners who requested to be added to the Petition. The petitioner requested that the Nuclear Regulatory Commission (NRC) take corrective action to protect the public against the possibility of terrorists seizing control of a large commercial airliner and crashing it into a nuclear power plant in the United States. In addition, the petitioner requested that the NRC take compensatory measures, as set forth in the Petition, to protect the public and environment from the catastrophic impacts of any type of terrorist attack on a nuclear power plant or a spent fuel pool (SFP). The petitioner also requested that the NRC ensure that these compensatory measures are immediately implemented, and that the NRC issue permanent rules, as discussed in the Petition. As a basis for the request described above, the Petitioner stated that:

—No commercial nuclear power plant located in the United States can withstand the impact of a large commercial airliner.

—The NRC intentionally misled the public about its failure to adequately consider risks associated with an air assault on a nuclear facility.

—The NRC knew or should have known that the current design and security measures at the spent fuel pools [SFPs] located at each nuclear power plant are incapable of protecting the population from the catastrophic release of radiation from a potential terrorist attack and immediate and long-term compensatory measures are needed to protect the United States and its citizens.

—The NRC [sic] radioactive material contained in the spent fuel pools are [sic] extremely vulnerable to terrorist attack within six months of a refueling outage. Immediate and long-term compensatory measures are needed to protect the United States and its citizens from an attack on a spent fuel pool within this six month window.

—The NRC must work directly with other security offices in approving compensatory security measures and in approving utility security plans and must re-evaluate its 1979 EIS [Environmental Impact Statement] and 1998 Final Rule regarding SFPs.

—The current background screening requirements which permit ''temporary'' clearances at nuclear plants do not adequately protect the public.

—The current background screening requirements for long-term clearances at nuclear plants do not adequately protect the public.

—The NRC ended the public's ability to effectively challenge the NRC's decision not to require nuclear power plants to be able to withstand airborne assaults by changing its rules allowing nuclear plants to obtain new 40 year licenses without permitting citizens to challenge ''generic'' concerns, including risks from terrorist attack.

The NRC sent a copy of the proposed Director's Decision to the petitioner by letter dated May 16, 2002. The petitioner responded with comments by letter dated August 10, 2002. The comments and the staff response to them are enclosures to the Director's Decision.

The staff has partially granted the Petitioner's request to the extent that the NRC has addressed the Petitioner's concerns by issuing Orders on February 25, 2002, to all operating commercial nuclear power plant licensees to implement interim compensatory security measures for the generalized high-level threat environment. The reasons for this determination are explained in the Director's Decision pursuant to 10 CFR 2.206 (DD–02–04), the complete text of which is available in ADAMS for inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the ADAMS Public Library component on the NRC's Web site, *http://www.nrc.gov/reading-rm.html* (the Public Electronic Reading Room) at Accession No. ML022470090. If you do not have access to ADAMS or have problems in accessing the documents in ADAMS, contact the NRC Public Document Room reference staff at 1–800–397–4209 or 301–415–4737 or by e-mail to *pdr@nrc.gov.*

A copy of the Director's Decision will be filed with the Secretary of the Commission so that the Commission may review it in accordance with 10 CFR 2.206(c) 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 decision within that time.

Dated at Rockville, Maryland, this 1st day of November 2002.

For the Nuclear Regulatory Commission.

Jon R. Johnson,

Deputy Director, Office of Nuclear Reactor Regulation.

[FR Doc. 02–29059 Filed 11–14–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Availability of NUREG–1307, Revision 10, ''Report on Waste Burial Charges: Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities''

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The Nuclear Regulatory Commission is announcing the completion and availability of NUREG–1307, Revision 10, ''Report on Waste Burial Charges,'' dated October 2002.

ADDRESSES: NUREG–1307 may be purchased from The Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20402–9328; *www.access.gpo.gov/su_docs; 202–512–1800;* or The National Technical Information Service, Springfield, Virginia 22161–0002; *www.ntis.gov;* 1–800–553–6847 or, locally, 703–605–6000.

This publication is also posted in the Electronic Reading Room at NRC's Web site address *http://www.nrc.gov/reading-rm.html.*

FOR FURTHER INFORMATION CONTACT: Rebecca L. Karas, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation, Washington, D.C. 20555–0001 (telephone 301–415–3711).

SUPPLEMENTARY INFORMATION: Nuclear power reactor licensees are required, per 10 CFR 50.75, to adjust annually the estimated decommissioning costs of their nuclear facilities in order to ensure adequate funds are available for decommissioning. The regulation references NUREG–1307 as the appropriate source for obtaining the adjustment factor for waste burial/disposition costs; this Revision 10 of NUREG–1307 provides the current waste burial costs at the Washington

and South Carolina disposal sites. In addition, this revision provides costs for low-level radioactive waste disposition using waste vendors. Licensees can factor these numbers into the adjustment formula, as specified in 10 CFR 50.75(c)(2), to determine the minimum decommissioning fund requirement for their nuclear facilities.

Dated at Rockville, Maryland, this 8th day of November 2002.

For the Nuclear Regulatory Commission.

Dennis P. Allison,

Acting Section Chief, Policy and Rulemaking Program—Section B, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 02–29063 Filed 11–14–02; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Required Interest Rate Assumption for Determining Variable-Rate Premium; Interest Assumptions for Multiemployer Plan Valuations Following Mass Withdrawal

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of interest rates and assumptions.

SUMMARY: This notice informs the public of the interest rates and assumptions to be used under certain Pension Benefit Guaranty Corporation regulations. These rates and assumptions are published elsewhere (or can be derived from rates published elsewhere), but are collected and published in this notice for the convenience of the public. Interest rates are also published on the PBGC's Web site (*http://www.pbgc.gov*).

DATES: The required interest rate for determining the variable-rate premium under part 4006 applies to premium payment years beginning in November 2002. The interest assumptions for performing multiemployer plan valuations following mass withdrawal under part 4281 apply to valuation dates occurring in December 2002.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Variable-Rate Premiums

Section 4006(a)(3)(E)(iii)(II) of the Employee Retirement Income Security Act of 1974 (ERISA) and § 4006.4(b)(1) of the PBGC's regulation on Premium Rates (29 CFR part 4006) prescribe use of an assumed interest rate (the ''required interest rate'') in determining a single-employer plan's variable-rate premium. The required interest rate is the ''applicable percentage'' (currently 100 percent) of the annual yield on 30-year Treasury securities for the month preceding the beginning of the plan year for which premiums are being paid (the ''premium payment year''). (Although the Treasury Department has ceased issuing 30-year securities, the Internal Revenue Service announces a surrogate yield figure each month—based on the 30-year Treasury bond maturing in February 2031—which the PBGC uses to determine the required interest rate.)

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning in November 2002 is 4.93 percent.

The following table lists the required interest rates to be used in determining variable-rate premiums for premium payment years beginning between December 2001 and November 2002.

For premium payment years beginning in—	The required interest rate is—
December 2001	4.35
January 2002	5.48
February 2002	5.45
March 2002	5.40
April 2002	5.71
May 2002	5.68
June 2002	5.65
July 2002	5.52
August 2002	5.39
September 2002	5.08
October 2002	4.76
November 2002	4.93

Multiemployer Plan Valuations Following Mass Withdrawal

The PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) prescribes the use of interest assumptions under the PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). The interest assumptions applicable to valuation dates in December 2002 under part 4044 are contained in an amendment to part 4044 published elsewhere in today's **Federal Register**. Tables showing the assumptions applicable to prior periods are codified in appendix B to 29 CFR part 4044.

Issued in Washington, DC on this 8th day of November 2002.

Joseph H. Grant,

Deputy Executive Director and Chief Operating Officer, Pension Benefit Guaranty Corporation.

[FR Doc. 02–29023 Filed 11–14–02; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27598]

Filings Under the Public Utility Holding Company Act of 1935, as amended (''Act'')

November 8, 2002.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 3, 2002 to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 3, 2002, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Alliant Energy Corporation, et al. (70–9891)

Alliant Energy Corporation (''Alliant Energy''), a registered holding company, 4902 N. Biltmore Lane, Madison, Wisconsin 53718, and certain of its direct and indirect nonutility subsidiaries (collectively, ''Applicants'') have filed with the Commission a post-effective amendment to a previously filed application-declaration under sections 6(a) and 7 of the Act and rule 54 under the Act.

I. Current Authority

By order dated October 3, 2001 (HCAR No. 27448) (''Prior Order''), the Commission authorized, among other things, Alliant Energy to issue and sell through December 31, 2004 (''Authorization Period''), directly or indirectly through one or more financing subsidiaries, common stock, long-term debt, and preferred stock and other forms of preferred or equity-linked securities in an aggregate amount at any time outstanding not to exceed $1.5 billion. The issuances and sales of these securities are subject to certain conditions and restrictions, including the following (''Prior Order Limitations''):

(1) The interest rate on long-term debt securities and the dividend rate on preferred or equity-linked securities will not exceed at the time of issuance 500 basis points over the yield to maturity of a U.S. Treasury security having a remaining term equal to the term of such securities.

(2) All preferred and equity-linked securities will be redeemed no later than fifty years after issuance.

(3) Except in accordance with a further order of the Commission in this proceeding, Alliant Energy will not issue any long-term debt or preferred stock or other type of preferred or equity-linked securities unless such securities are rated at the investment grade level as established by at least one ''nationally recognized statistical rating organization'' (''NRSRO''), as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of rule 15c3–1 under the Securities Exchange Act of 1934.

II. Requested Authority

Alliant Energy now requests that the Commission issue a supplemental order to modify the Prior Order by replacing the Prior Order Limitations with the following ones:

(1) The interest rate on long-term debt securities issued by Alliant Energy may not exceed at the time of issuance the greater of 500 basis points over the yield to maturity of comparable term U.S. Treasury securities or a gross spread over U.S. Treasury securities that is consistent with similar securities of comparable credit quality and maturities issued by other companies.

(2) The dividend or distribution rate on preferred stock or other preferred or equity-linked securities issued by Alliant Energy may not exceed at the time of issuance the greater of 500 basis points over the yield to maturity of comparable term U.S. Treasury securities or a gross spread over U.S. Treasury securities that is consistent with similar securities of comparable credit quality and maturities issued by other companies.

(3) Preferred stock or other preferred securities issued by Alliant Energy may be redeemable or perpetual in duration.

(4) Without further order of the Commission, Alliant Energy will not publicly issue any long-term debt securities, preferred stock or other types of preferred or equity-linked securities unless such securities are rated as investment grade by at least one NRSO.

Applicants state that, since the Prior Order was issued, the credit markets have tightened significantly for energy companies in general and electric utilities and electric utility holding companies in particular. They state that spreads over U.S. Treasury securities have widened dramatically,[1] and Alliant Energy's current maximum interest rate and dividend spread (500 basis points) may limit the company's ability to access capital markets when necessary.

Applicants state that, except as specified above, no other modifications of the terms, conditions, or limitations imposed under the Prior Order are requested.

Alliant Energy Corporation, et al. (70–10052)

Alliant Energy Corporation (''Alliant Energy''), a registered holding company, 4902 N. Biltmore Lane, Madison, Wisconsin 53718, and certain of its utility and nonutility subsidiary companies (''Applicants''), including Interstate Power and Light Company (''IP&L''), a direct public-utility company subsidiary of Alliant Energy, Alliant Tower, 200 First Street S.E., Cedar Rapids, Iowa 52401, have filed with the Commission a post-effective amendment to a previously filed application-declaration under sections 6(a) and 7 of the Act and rule 54 under the Act.

I. Existing Authority

By order dated June 21, 2002 (HCAR No. 27542) (''Prior Order''), the Commission authorized Alliant Energy and certain of its public-utility company and nonutility subsidiaries to operate two separate money pools, a money pool for its public-utility company subsidiaries and Alliant Energy Corporate Services, Inc. (''Utility Money Pool'') and a money pool for certain of its direct and indirect nonutility subsidiaries (''Nonutility Money Pool''). To the extent required, participating subsidiaries were authorized to borrow from and extend credit to each other through the Utility Money Pool or Nonutility Money Pool, as applicable. In addition, the Commission authorized Alliant Energy to issue and sell, through December 31, 2004 (''Authorization Period''), commercial paper and/or unsecured notes evidencing short-term borrowings from banks or other institutional lenders (''Short-term Debt'') in an aggregate amount at any time outstanding not to exceed $1 billion.

Further, by order dated October 10, 2002 (HCAR No. 27575) (''Supplemental Order''), the Commission authorized IP&L, during the Authorization Period, to issue and sell Short-term Debt in an aggregate principal amount at any time outstanding which, when added to any borrowings by IP&L under the Utility Money Pool, will not exceed the lesser of the limit set by the Minnesota Public Utilities Commission (''MPUC'') or $300 million.[2]

II. Requested Authority

Applicants now request that the Commission issue another supplemental order modifying one condition imposed by the Prior Order. Specifically, by the Prior Order, the Commission specified that, for all Short-term Debt issued by Alliant Energy and IP&L, the effective cost of money at the time of issuance cannot exceed 300 basis points over the London Interbank Offered Rate (''LIBOR'') for maturities of one year or less. Applicants request that the Commission authorize Alliant Energy and IP&L to issue Short-term Debt that, at the time of issuance, has an effective cost that does not exceed the greater of 500 basis points over comparable-term LIBOR or a gross spread over LIBOR that is consistent with similar securities of comparable credit quality and maturities issued by other companies.

Both Alliant Energy and IP&L maintain commercial paper programs that are back-stopped by 364-day credit facilities with banks. Applicants state that the interest rates charged on borrowings under these bank facilities are a function of the current ratings on Alliant Energy's or IP&L's long-term unsecured debt, as the case may be. Applicants further state that, since the date of the Prior Order, spreads over LIBOR on unsecured short-term bank borrowings have widened significantly, and the authorized 300 basis-point spread over LIBOR could limit Alliant Energy's and IP&L's ability to borrow under back-up credit lines if the need

[1] Applicants state that, at the time that the Prior Order was issued, the spreads over U.S. Treasury securities for a company of Alliant Energy's credit quality ranged between 165 and 205 basis points for long-term unsecured holding company debt, and now those spreads have widened in recent weeks to between 190 and 590 basis points.

[2] At the time the Supplemental Order was issued, IP&L was authorized to issue up to $180 million through March 31, 2003.

should arise. Except as specified above, the terms, conditions, and limitations imposed under the Prior Order would remain unchanged.

Interstate Power and Light Company (70–10077)

Interstate Power and Light Company (''Applicant''), 200 First Street, Cedar Rapids, Iowa 52401, a wholly owned public utility subsidiary of Alliant Energy Corporation (''Alliant''), 4902 North Biltmore Lane, Madison, Wisconsin 53718, a registered holding company has filed an application-declaration (''Application'') under sections 6(a), 7, 9(a), 10, and 12(b) and rules 23, 24, 45 and 53 under the Act.

The Applicant proposes, from time to time through December 31, 2005 (''Authorization Period''):

(a) To organize and acquire the stock or other equity interests in one or more special purpose limited partnerships, statutory business trusts or limited liability companies (''Issuing Entities'') for the sole purpose of issuing one or more series of preferred securities (''Entity Interests'');

(b) For the Issuing Entities to issue and sell one or more series of preferred securities having a stated per share liquidation preference (''Entity Interests''). Applicant states that the issuance of the Entity Interests would also include the issuance of one or more series of the Applicant's subordinated debentures to Issuing Entities. Each series of subordinated debentures would be in an amount not to exceed the amount of the respective series of Entity Interests plus an equity contribution; and

(c) For the Applicant to issue one or more new series of the Applicant's preferred stock, par value $0.01 per share (''Preferred Stock'').

The Applicant proposes that the combined aggregate amount of Entity Interests and Preferred Stock issued under the authorization granted in the Application not exceed $200 million (''Aggregate Limit'') outstanding at any time. The Applicant anticipates that the issuance and sale of each series of Entity Interests and/or Preferred Stock will be by means of competitive bidding, negotiated public offering or private placement with institutional investors in order to secure the advantages of an advance marketing effort and/or the best available terms.

I. Issuing Entities

The Applicant proposes organize and acquire the Issuing Entities for the sole purpose of issuing Entity Interests. The Applicant requests authority to use Issuing Entities to issue preferred securities because these securities are assigned more equity content by certain rating agencies. Additionally, the Applicant states that the use of Issuing Entities will afford it greater access to new sources of capital and may offer increased state and federal tax efficiency. The Applicant states that the Entity Interests will be reflected on its consolidated balance sheet in accordance with accounting principles generally accepted in the United States of America.[3] One or more partners, trustees or members (individually and collectively, the ''Manager'') would conduct the business and affairs of the Issuing Entity. Provided that the Entity Interests are not then in default, the Applicant would, as a result of its ownership of all of the voting interests in the Issuing Entity, be entitled to appoint, remove or replace the Manager. In the case of a limited partnership, the Applicant proposes to either act as the general partner of the Issuing Entity or organize a special purpose, wholly owned corporation for the sole purpose of acting as the general partner (''Participating Subsidiary'') of the Issuing Entity.[4]

II. Entity Interests, Entity Subordinated Debentures, Guarantees

The Applicant proposes to issue Entity Interests through the Issuing Entities in an amount up to the Aggregate Limit, when combined with Preferred Securities issued under this Application, through the Authorization Period. The Applicant states that the Entity Interests would have a stated per share liquidation preference and may be registered under the Securities Act of 1933, as amended (''Securities Act''). The holders of the Entity Interests would be either (a) the limited partners (in the case of a limited partnership); (b) the holders of preferred interests (in the case of a business trust) or (c) non-managing members (in the case of a limited liability company) of the Issuing Entity, and the amounts paid by the holders for the Entity Interests would be treated as capital contribution to the Issuing Entity.

The Applicant proposes to issue, from time to time in one or more series, subordinated debentures (''Entity Subordinated Debentures'') to the Issuing Entity. The Issuing Entity would use the proceeds from the sale of its Entity Interests, plus the equity contributions made to it, directly or indirectly, by the Applicant, to purchase the Entity Subordinated Debentures. If the corresponding series of Entity Interests were registered under the Securities Act, then the Entity Subordinated Debentures would also be registered under the Securities Act. The Entity Subordinated Debentures would be issued by the Applicant under a debenture indenture, which, if the corresponding series of Entity Interests and Entity Subordinated Debentures are registered, will be qualified under the Trust Indenture Act of 1939, as amended.

The Applicant states that the interest rate, maturity, payment dates, redemption terms and other terms of each series of Entity Subordinated Debentures would be designed to parallel the distribution rate, maturity, payment dates, redemption terms and other terms of the Entity Interests to which they relate and would be determined by the Applicant at the time of issuance. The Applicant states that Entity Interests may be redeemable or may be perpetual in duration and, prior to maturity, the Applicant would pay interest only on the Entity Subordinated Debentures, at either a fixed or adjustable rate as set forth in the Entity Subordinated Debenture indenture. The interest paid by the Applicant on the Entity Subordinated Debentures would constitute the only source of income for the Issuing Entity and would be used by the Issuing Entity to make regular scheduled distributions on the Entity Interests.

The Applicant also proposes to enter into a guarantee (''Guarantee'') under which it will unconditionally guarantee (a) payment of distributions on the Entity Interests, if and to the extent the Issuing Entity has funds legally available therefore; (b) payments to the holders of Entity Interests of certain amounts due upon liquidation of the Issuing Entity or redemption of the Entity Interests and (c) certain additional ''gross up'' amounts that may be payable in respect of the Entity Interests.[5]

The Applicant states that the Entity Subordinated Debentures and any related Guarantee issued by the

[3] The Company states that by organizing Issuing Entities in jurisdictions and/or in forms that have favorable terms, it can indirectly offer securities with features and terms that are attractive to a wider investor base. The Company further states that increased tax efficiency can result if an Issuing Entity is located in a state or country that has tax laws that make the proposed financing transaction more tax efficient relative to the sponsor company's existing taxing jurisdiction.

[4] In the case of a limited liability company formed under the laws of a state in which a limited liability company is required to have at least two members, the Company may organize a Participating Subsidiary for the purpose of acquiring and holding a membership interest.

[5] Any Guarantee will be registered under the Securities Act if the corresponding Entity Interests are registered under the Securities Act.

Applicant will be expressly subordinated to senior indebtedness of the Applicant. The payment of interest on any Entity Subordinated Debentures may be deferred for specified periods without creating a default with respect thereto, so long as no dividends are being paid on, or certain actions are being taken with respect to the retirement of, the common or Preferred Stock of the Applicant during the period of deferral.

The Applicant states that distributions on the Entity Interests will be paid at regularly scheduled times as determined at the time of sale of each series and will be mandatory to the extent that the Issuing Entity has legally available funds sufficient for theses purposes. The availability of funds will depend entirely upon the Issuing Entity's receipt of the amounts due under the Entity Subordinated Debentures. The Applicant states that the Issuing Entity would have the right to defer distributions on the Entity Interests for a specified period, but only if and to the extent that the Applicant defers the interest payments on the Entity Subordinated Debentures as described below. The Applicant states that if distributions on the Entity Interests (including all previously deferred distributions, if any) are deferred beyond a specified period, then the holders of Entity Interests may have the right to appoint a special representative to enforce the Issuing Entity's rights under the Entity Subordinated Debentures indenture and Guarantee (if issued), including the right to accelerate the maturity of the Entity Subordinated Debentures.

The Applicant anticipates that interest payments on the Entity Subordinated Debentures made by the Applicant will be deductible by it for federal and state income tax purposes and that the Issuing Entity will be treated as either a partnership or a trust, as the case may be, for federal income tax purposes. Consequently, the holders of Entity Interests will be deemed to have received interest income rather than dividends, and will not be entitled to any ''dividends received deduction'' under the Internal Revenue Code.

The Applicant states that if, as a result of (a) the Entity Subordinated Debentures not being treated as indebtedness for federal income tax purposes, or (b) the Issuing Entity not being treated as either a partnership or a trust, as the case may be, for federal income tax purposes, the Issuing Entity is required under applicable tax laws to withhold or deduct from payments on the Entity Interests amounts that otherwise would not be required to be withheld or deducted, the Issuing Entity may also have the obligation to increase or ''gross up'' such payments so that the holders of Entity Interests will receive the same payment after the withholding or deduction as they would have received if no withholding or deduction were required.

The Applicant states that in the event of any voluntary or involuntary liquidation, dissolution or winding up of the Issuing Entity, holders of Entity Interests would be entitled to receive, an amount equal to the stated liquidation preference of the Entity Interests plus any accrued and unpaid distributions out of the assets of the Issuing Entity available for distribution before any distribution of assets to the Applicant.

Applicant propose that the distribution rate or interest rate payable on each series of Entity Interests (and any corresponding series of Entity Subordinated Debentures) would be determined at the time of sale and would be consistent with rates on similar securities of comparable credit quality and maturities issued by other companies, provided that, if no comparable securities have been issued recently, the Entity Interests (and corresponding series of Entity Subordinated Debentures) may have a fixed rate or initial adjustable rate thereon at the time of issuance not greater than (a) 500 basis points over the yield to maturity of a U.S. Treasury security having a remaining term comparable to the average life of such series (''Treasury Rate''), if issued at a fixed rate, or 500 basis points over the London Interbank Offered Rate (''LIBOR'') for the relevant interest rate period, if issued at an adjustable rate.

The Applicant states that the initial distribution or interest rate on Entity Interests of each series having an adjustable rate will be determined in negotiations between the Applicant and the underwriters or purchasers of the series. The Applicant further states that thereafter, the distribution or interest rate on the Entity Interests (''Adjustable Rate Entity Interests'' and on any corresponding series of Entity Subordinated Debentures) would be adjusted according to a pre-established formula or method of determination or would be that rate which, at the time of remarketing, would be sufficient to remarket the Entity Interests of the series (''Remarketed Interests'') at their principal amount, provided that the distribution or interest rate on Remarketed Entity Interests after the initial distribution or interest rate period will not exceed 500 basis points over LIBOR.

The Applicant proposes that the holders of Remarketed Interests will have the right to tender, or can be required to tender, their Remarketed Interests and have them purchased at a price equal to the liquidation preference plus accrued and unpaid distributions, if any, on dates specified in, or established in accordance with the instruments creating the Remarketed Interests. The Applicant proposes that a tender agent (''Tender Agent'') may be appointed to facilitate the tender of Remarketed Interests by holders. Any holder of Remarketed Interests wishing to have them purchased may be required to deliver the Remarketed Interests during a specified period of time preceding the purchase date to the Tender Agent, if one shall be appointed, or to the remarketing agent (''Remarketing Agent'') appointed to reoffer the tendered Remarketed Interests for sale.

The Applicant states that the Issuing Entity would be obligated to pay amounts equal to the amounts to be paid to the Remarketing Agent or the Tender Agent for the purchase of Remarketed Interests tendered (on the dates the payments by the Remarketing Agent or the Tender Agent are to be made), reduced by the amount of any other moneys available, including the proceeds of the sale of the tendered Entity Interests by the Remarketing Agent. Upon the delivery of the Entity Interests by holders to the Remarketing Agent or the Tender Agent for purchase, the Remarketing Agent would use its best efforts to sell the Remarketed Interests at a price equal to the liquidation amount of the Remarketed Interests.

III. Preferred Stock

The Applicant proposes to directly issue Preferred Securities in an amount up to the Aggregate Limit, when combined with Preferred Securities issued under this Application, through the Authorization Period. The Applicant states that as of June 30, 2002, it had 24,000,000 authorized shares of common stock, 13,370,788 of which were issued and outstanding, and 1,927,787 authorized shares of Preferred Stock, 1,127,787 of which were issued and outstanding. In September 2002, the Applicant redeemed all of its outstanding shares of preferred stock according to rule 42. The Applicant states that its parent company, Alliant Energy, as the sole holder of the Applicant's common stock, has approved a restatement (''Restatement'') of its Articles of Incorporation and the Applicant now requests authorization to act on the Restatement to authorize

16,000,000 shares of Preferred Stock. The Applicant proposes that Preferred Stock be issued in one or more series with rights and preferences as the Applicant's board of directors may fix and determine from time to time during the Authorization Period, including, without limitation, the voting power (if any) of any series of Preferred Stock; the redemption price; the dividend rate; the right (if any) of the holders of any series of Preferred Stock to convert the same into, or exchange the same for, other classes of stock of the Applicant; liquidation preferences and sinking fund provisions.

Applicant proposes that the price, exclusive of accumulated dividends, to be paid to the Applicant for each series of Preferred Stock will be fixed from time to time by the board of directors. The dividend rate on each series of Preferred Stock would be consistent with the dividend rate on similar securities of comparable credit quality and maturities issued by other companies. If no comparable securities have been issued recently, the Applicant proposes that the series of Preferred Stock may have a dividend rate at the time of issuance not greater than 500 basis points over the applicable Treasury Rate, if issued at a fixed rate, or 500 basis points over LIBOR for the relevant interest rate period, if issued at a floating rate.

The Applicant proposes that each series of Preferred Stock may be redeemable at specified redemption prices, subject to a restriction on optional redemption for a given number of years, or may be perpetual in duration. The Applicant proposes to include, for any series of Preferred Stock, provisions for a sinking fund designed to redeem annually, commencing a specified number of years, at the stated value per share of the series, plus accumulated dividends, a number of shares equal to a stated percentage of the total number of shares of the series. In the case of the sinking fund provision, the Applicant proposes to have an option to redeem an additional number of shares annually up to a certain percentage of the total number of shares of the series.

The Applicant commits that it will not publicly issue any Preferred Stock or Equity Interests unless the securities are rated at the investment grade level as established by at least one nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of rule 15c3–1 under the Securities Exchange Act of 1934 and that it will maintain its common equity as a percentage of capitalization (inclusive of short-term debt) at no less than thirty percent.

Union Electric Company (70–10089)

Union Electric Company (''AmerenUE''), 1901 Chouteau Avenue, St. Louis, Missouri 63103 (''Declarant''), an electric and gas utility subsidiary of Ameren Corporation (''Ameren''), a registered holding company, has filed a declaration under section 12(d) of the Act and rules 44 and 54 under the Act.

Declarant requests authority to sell its ownership interest in new electric generating facilities to the City of Bowling Green, Missouri (''Bowling Green''), and then lease back the facilities from Bowling Green for a term of approximately 20 years.

AmerenUE supplies electric service to approximately 1.2 million customers in a 24,500 square-mile area of Missouri and Illinois, including the greater St. Louis area. AmerenUE also provides retail gas service to approximately 130,000 customers in 90 Missouri communities and in the City of Alton, Illinois and vicinity. In 2001, AmerenUE derived approximately 95% of its revenues from electric operations and 5% from the sale of natural gas. At June 30, 2002, AmerenUE had $7.3 billion in total assets, including net property, plant and equipment of $5.8 billion. AmerenUE's consolidated capitalization at June 30, 2002, consisted of 55.7% common equity, 3.3% preferred stock, 33.5% long-term debt (excluding current maturities), and 7.5% of short-term debt (including current portion of long-term debt). AmerenUE's senior secured long-term debt is currently rated A+ by Standard & Poor's and Aa3 by Moody's Investors Service.

AmerenUE has constructed a new electric generating facility consisting of four 47 megawatt combustion turbine generating units, fueled primarily by natural gas with fuel oil as a back-up, in Bowling Green (the ''Project''). In order to provide a financing structure and economic incentives to construct the Project in Bowling Green, AmerenUE has entered into a Pre-Annexation and Development Agreement (the ''Grant Agreement'') dated as of November 9, 2001, with the City, which provides, among other things, that (a) AmerenUE will convey certain land (the ''Site'') and any improvements located on the site, including the four combustion turbine generating units to Bowling Green in exchange for the issuance by Bowling Green of its taxable industrial development revenue bond in a principal amount not to exceed $125,000,000 (the ''Bond''), and (b) Bowling Green will lease the Site and the Project to AmerenUE for a term of approximately 20 years.

The Trust Indenture will provide the specific terms of the Bond, including a final maturity of twenty years and an interest rate of 5.15%. The Trust Indenture will also specify the terms and details of the Bond and will contain various provisions, covenants and agreements to protect the security of the bondholders (initially AmerenUE). The Bond will be a special limited obligation of Bowling Green payable solely from the rental payments to be made by AmerenUE pursuant to a facility lease agreement, and in the event of a default by AmerenUE under such lease agreement, the rents, revenues and receipts of Bowling Green derived from the Site and the Project. The Bond will also be secured by a Deed of Trust and Security Agreement granted by Bowling Green encumbering the Site and the Project.

AmerenUE will transfer the Site and the Project to Bowling Green under to a Special Warranty Deed and a Bill of Sale. Concurrently with the issuance of the Bond, Bowling Green will lease the Site and Project constructed on the Site to AmerenUE pursuant to a Lease Agreement (the ''Lease'') between the City and AmerenUE. The Lease term will be the same as the final maturity of the Bond and will be a net lease, with AmerenUE being responsible for rental payments in an amount sufficient to pay the debt service on the Bond, equal to approximately $9.2 million per year. Under the Lease, AmerenUE will be responsible for maintaining, insuring, operating and paying any taxes related to the Project. AmerenUE will have the option, at any time during the term of the Lease, at the expiration of the twenty-year Lease, or if there is an early termination of the Grant Agreement, to purchase Bowling Green's interest in the Project and the Site upon providing for the payment of the principal balance of and interest on the Bond and the payment of a nominal fee to Bowling Green. AmerenUE will record the Lease as a capital lease on its accounting books and records.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28987 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27599]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 8, 2002.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 3, 2002, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 3, 2002, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

E.ON AG (70–10090)

E.ON AG (''E.ON''), located at E.ON-Platz 1, 40479 Dusseldorf, Germany, a registered holding company, has submitted an application under sections 9(c)(3) and 33 of the Act seeking an extension of the deadline set by prior Commission order to divest part of its interest in an affiliated company, Hypo-Vereinsbank AG (''HVB''), a large private bank in Germany with assets of approximately (euro)712 billion.

By applications filed in SEC File Nos. 70–9961 and 70–9985, E.ON sought authorization to acquire Powergen plc (''Powergen''), a registered holding company, and other authorizations under the Public Utility Holding Company Act of 1935 (the ''Act'') related to E.ON's activities as a registered holding company after the Powergen acquisition. The Commission authorized the proposed acquisition by order dated June 14, 2002, Holding Co. Act Release No. 27539 (''Acquisition Order''). E.ON completed the acquisition of Powergen and registered as a holding company on July 1, 2002.

One of the conditions imposed in the Acquisition Order related to the ability of E.ON and its subsidiaries to invest in the equity securities of companies held for investment purposes (''Portfolio Securities'') as reserves against two types of long-term liabilities: their pension obligations, and, for E.ON Energie only, its nuclear decommissioning obligations. These investments, which currently total approximately (euro)9 billion ($7.9 billion), include publicly traded common stocks of other companies.

The Acquisition Order authorized E.ON to continue to make these investments under section 9(c)(3) of the Act in the ordinary course of business provided that it complied with certain conditions. The Acquisition Order stipulated that equity investments for the purposes of funding future employee benefit and nuclear decommissioning obligations could be made only if, at the time of investment, the actuarial value of the prospective obligations exceeds the aggregate amount of the investments that will be held by E.ON immediately after the investment has been made. Further, E.ON was restricted from creating an affiliate relationship with any company within the terms of Section 2(a)(11) of the Act by acquiring 5% or more of the voting securities of any issuer. The Acquisition Order restated the commitment made by E.ON that during the year 2002, E.ON would reduce any stakes that it has that exceed 5% of a single company to below 5%.

E.ON's Portfolio Securities include only one stake in the voting securities of a company that exceeds 5%. This is E.ON's 6.72% voting equity interest in HVB. The application states that although E.ON continues to desire to reduce its voting equity interest in HVB to the level where it would not constitute an affiliate interest, recent declines in the market price of HVB shares have made share sales financially prohibitive at this time. Consequently, E.ON seeks an extension of the divestiture deadline until December 31, 2004. E.ON anticipates that the extension of the divestiture deadline would allow time for at least a partial recovery in the market price of its HVB shares.

For the Commission by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–29039 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 25799; 813–272]

GC&H Investments, LLC, et al.; Notice of Application

November 8, 2002.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(b) and 6(e) of the Investment Company Act of 1940 (the ''Act'') granting an exemption from all provisions of the Act, except section 9, section 17 (other than certain provisions of paragraphs (a), (d), (f), (g) and (j)), section 30 (other than certain provisions of paragraphs (a), (b), (e), and (h)), sections 36 through 53, and the rules and regulations under the Act.

SUMMARY OF THE APPLICATION: Applicants request an order to exempt certain investment funds formed for the benefit of eligible current and former employees of Cooley Godward LLP and its affiliates from certain provisions of the Act. Each fund will be an ''employees'' securities company'' as defined in section 2(a)(13) of the Act.

APPLICANTS: GC&H Investments, LLC (the ''Investment Fund'') and Cooley Godward LLP (together with any entity that results from a reorganization of Cooley Godward LLP into a different type of business organization or into an entity organized under the laws of another jurisdiction, the ''Company'').

FILING DATES: The application was filed on May 30, 2000 and amended on November 7, 2002.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 3, 2002, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues

contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0609. Applicants, One Maritime Plaza, 20th Floor, San Francisco, CA 94111–3580.

FOR FURTHER INFORMATION CONTACT: Marilyn Mann, Senior Counsel, at (202) 942–0582, or Mary Kay Frech, Branch Chief, at (202) 942–0564, (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 5th Street, NW., Washington, DC 20549–0102 (tel. 202–942–8090).

Applicants' Representations

1. The Company is a law firm organized as a California limited liability partnership. The Company and its ''affiliates,'' as defined in rule 12b-2 under the Securities Exchange Act of 1934 (the ''Exchange Act''), are referred to collectively as the ''Cooley Godward Group'' and individually as a ''Cooley Godward Entity.'' The Company's equity owners are partners (''Partners'').

2. The Investment Fund is a California limited liability company established pursuant to a limited liability company agreement. The applicants may in the future offer additional pooled investment vehicles identical in all material respects to the Investment Fund, other than investment objectives and strategies (the ''Subsequent Funds,'' and together with the Investment Fund, the ''Funds''). The applicants anticipate that each Subsequent Fund will also be structured as a limited liability company, although a Subsequent Fund could be structured as a limited partnership, corporation, trust or other business organization formed as an ''employees'' securities company'' within the meaning of section 2(a)(13) of the Act. The Funds will operate as non-diversified, closed-end management investment companies. The Funds will be established to enable the Partners and certain attorney and non-attorney employees of Cooley Godward Group to participate in certain investment opportunities that come to the attention of Cooley Godward Group. Participation as investors in the Funds will allow the Eligible Investors, as defined below, to diversify their investments and to have the opportunity to participate in investments that might not otherwise be available to them or that might be beyond their individual means.

3. A group of Eligible Investors (as defined below), appointed by the Company, who are current or former Partners of the Company (the ''Managers''), will manage the Funds. The Funds will have one or more investment committees (''Investment Committees''), each member of which shall be a current or former Partner. The Managers shall appoint the members of each Investment Committee. The Managers or any person involved in the operation of the Funds will register as investment advisers if required under the Investment Advisers Act of 1940 (the ''Advisers Act''), or the rules under the Advisers Act.

4. Interests in the Funds (''Interests'') will be offered without registration in reliance on section 4(2) of the Securities Act of 1933 (the ''Securities Act''), Regulation D under the Securities Act or rule 701 under the Securities Act, or any successor rule, and will be sold solely to Eligible Investors. Eligible Investors consist of ''Eligible Employees,'' ''Qualified Investment Vehicles,'' ''Immediate Family Members,'' each as defined below, and Cooley Godward Entities. The term ''Fund Investors'' refers to Eligible Investors who invest in the Funds. Prior to receiving a subscription agreement from an individual, the Managers must reasonably believe that the individual is a sophisticated investor capable of understanding and evaluating the risks of participating in the Fund without the benefit of regulatory safeguards. An ''Eligible Employee'' is a person who is, at the time of investment, a current or former Partner or an employee of Cooley Godward Group who (a) meets the standards of an ''accredited investor'' set forth in rule 501(a)(5) or rule 501(a)(6) of Regulation D under the Securities Act, (b) is one of 35 or fewer employees of Cooley Godward Group who meets certain salary and other requirements (''Category 2 investors''), or (c) is a lawyer employed by the Company who purchases Interests pursuant to an offering under rule 701 under the Securities Act (''rule 701'') (''Category 3 investors'').

5. Each Category 2 investor will be an employee of Cooley Godward Group, but not a lawyer employed by the Company, who meets the sophistication requirements set forth in rule 506(b)(2)(ii) of Regulation D under the Securities Act [1] and who (a) has a graduate degree, has a minimum of 3 years of business experience, has had compensation of at least $150,000 in the preceding 12 month period, and has a reasonable expectation of compensation of at least $150,000 in each of the 2 immediately succeeding 12 month periods, or (b) is a ''knowledgeable employee,'' as defined in rule 3c–5 under the Act, of the Fund (with the Fund treated as though it were a ''Covered Company'' for purposes of the rule). In addition, a Category 2 investor qualifying under (a) above will not be permitted to invest in any calendar or fiscal year (as determined by the Company) more than 10% of his or her income from all sources for the immediately preceding calendar or fiscal year in one or more Funds.

6. Each Category 3 investor will be a lawyer employed by the Company who reasonably expects to have compensation of at least $120,000 in the next 12 months and who has a reasonable expectation of compensation of at least $150,000 in each of the 2 immediately succeeding 12 month periods. In addition, any Category 3 investor who is not a Partner will not be permitted to invest in any calendar or fiscal year (as determined by the Company) more than 10% (or 5%, if he or she has been employed as a lawyer for less than 3 years) of his or her reasonably expected income from all sources for that year in one or more Funds. Category 3 investors will purchase Interests pursuant to an offering under rule 701. Prior to receiving a subscription agreement from any potential Fund Investor pursuant to an offering in reliance on rule 701, the Company will make available at no charge to potential Fund Investors the services of an independent third party (''Financial Consultant'') qualified to provide advice concerning the appropriateness of investing in a Fund.

7. A Qualified Investment Vehicle is a trust or other entity the sole beneficiaries of which are Eligible Employees or their Immediate Family Members or the settlors and trustees of which consist of Eligible Employees or Eligible Employees together with Immediate Family Members.[2] Immediate Family Members include any parent, child, grandchild, spouse of a child, spouse, brother or sister, and includes any step and adoptive relationships. A Qualified Investment Vehicle must be either (a) an accredited

[1] Some or all Category 2 investors may purchase their Interests in an offering under rule 701 rather than under Regulation D.

[2] A Qualified Investment Vehicle is not permitted to participate in a rule 701 offering. The Company or the Managers may, however, in their discretion and in compliance with rule 701, permit an Eligible Employee who purchases Interests in the Fund in a rule 701 offering to transfer some or all of those Interests to a Qualified Investment Vehicle.

investor as defined in rule 501(a) of Regulation D or (b) an entity for which an Eligible Employee is a settlor and principal investment decision-maker. An Immediate Family Member who purchases Interests must be an accredited investor as defined in rule 501(a)(5) or rule 501(a)(6) of Regulation D.

8. Each Fund may issue its Interests in series (each, a ''Series'' and collectively, the ''Series'') with new Series of Interests being offered from time to time. Each Series may be further divided into two or more separate classes (each, a ''Class''), having such terms and conditions as the Managers may establish. Each Series will represent an interest in some or all of those Fund investments made by the Fund during a specified period of time (the ''Investment Period''). Following the end of a Series' Investment Period, no new investments will be made for that Series, although following a Series' Investment Period additional money may be contributed to an existing investment.

9. In order to comply with the requirements of rule 701, at the beginning of each Investment Period (and, if necessary, periodically thereafter), the Fund will accept capital contributions or irrevocable commitments for the relevant Series from those Eligible Investors investing pursuant to Regulation D (the ''Regulation D Investors''), and then prepare a balance sheet as required by rule 701. The Fund may then receive and accept subscription agreements, and thereafter accept capital contributions or commitments for that Series from those Eligible Investors investing pursuant to rule 701 (the ''Rule 701 Investors''). The capital contributions and commitments of the Rule 701 Investors, in the aggregate, will not exceed 15% of the total amount of capital contributions and irrevocable commitments received from the Regulation D Investors. No more than approximately 13% (*i.e.*, 15% of the total amount of capital contributions and irrevocable commitments received from the Regulation D Investors) of all Fund investments and other authorized expenditures for each Series will at any time be paid for out of money contributed to the Fund by Rule 701 Investors.

10. The terms of a Fund will be fully disclosed in the private offering memorandum of the Fund, and each Eligible Investor will receive a private offering memorandum and the Fund's limited liability company agreement (or other organizational documents) prior to his or her investment in the Fund. Each Fund will send its Fund Investors annual reports, which will contain audited financial statements with respect to those Series in which the Fund Investor has Interests, as soon as practicable after the end of each fiscal year. In addition, as soon as practicable after the end of each fiscal year, the Funds will send a report to each Fund Investor setting forth such tax information as shall be necessary for the preparation by the Fund Investor of his or her federal and state tax returns.

11. Eligible Investors will be permitted to transfer their Interests only with the express consent of the Managers. Any such transfer must be to another Eligible Investor. No fee of any kind will be charged in connection with the sale of Interests.

12. The Managers may require a Fund Investor to withdraw from a Fund if: (a) A Fund Investor ceases to be an Eligible Investor; (b) a Fund Investor is no longer deemed to be able to bear the economic risk of investment in a Fund; (c) adverse tax consequences were to inure to the Fund were a particular Fund Investor to remain; (d) the continued membership of the Fund Investor would violate applicable law or regulations; or (e) the Managers, in their sole discretion, deem such withdrawal in the best interest of the Fund. If the Managers require a Fund Investor to withdraw, the Fund may (a) directly repurchase the Eligible Investor's Interest in any or all Series, or (b) require such Eligible Investor to sell his or her Interest in any or all Series to any person or entity designated by the Managers who is an Eligible Investor and who agrees to pay any remaining capital contributions of the withdrawing Eligible Investor and to assume the withdrawing Eligible Investor's other obligations under the partnership or other governing agreements with respect to such investments.

13. The Company reserves the right to impose vesting provisions on a Fund Investor's investments in a Fund. In an investment program that provides for vesting provisions, all or a portion of a Fund Investor's Interests will be treated as unvested, and vesting will occur through the passage of a specified period of time or may be based on certain performance milestones (such as admission of an associate lawyer as a Partner of the Company). To the extent a Fund Investor's Interests are or become vested, the termination of the Fund Investor's employment with the Company will not affect the Fund Investor's rights with respect to the vested Interests. The portion of a Fund Investor's Interests that are unvested at the time of the termination of a Fund Investor's employment with the Company may be subject to repurchase or cancellation.

14. Upon any repurchase or cancellation of all or a portion of a Fund Investor's Interests, a Fund will at a minimum pay to the Fund Investor the lesser of (a) the amount actually paid by the Fund Investor to acquire the Interests less the amount of any distributions received by that Fund Investor from the Fund (plus interest at or above the prime rate, as determined by the Managers) and (b) the fair market value of the Interests determined at the time of repurchase or cancellation, as determined in good faith by the Managers. Any interest owed to a Fund Investor pursuant to (a) above will begin to accrue at the end of the Investment Period.

15. The Company may be reimbursed by a Fund for reasonable and necessary out-of-pocket costs directly associated with the organization and operation of the Funds, including administrative and overhead expenses. There will be no allocation of any of the Company's operating expenses to a Fund. In addition, the Company may allocate to a Series any out-of-pocket expenses specifically attributable to the organization and operation of that Series. No separate management fee will be charged to a Fund by the Managers, and no compensation will be paid by a Fund or by Fund Investors to the Managers for their services.

16. The Funds may borrow from Cooley Godward Group, a Partner, or a bank or other financial institution, provided that a Fund will not borrow from any person if the borrowing would cause any person not named in section 2(a)(13) of the Act to own outstanding securities of the Fund (other than short-term paper). Any borrowings by a Fund will be non-recourse other than to the Cooley Godward Group. If a Cooley Godward Entity or a Partner makes a loan to the Funds, the interest rate on the loan will be no less favorable to the Funds than the rate that could be obtained on an arm's length basis.

17. No Fund will acquire any security issued by a registered investment company if immediately after the acquisition the Fund would own more than 3% of the outstanding voting stock of the registered investment company.

Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission will exempt employees' securities companies from the provisions of the Act to the extent that the exemption is consistent with the protection of investors. Section 6(b) provides that the Commission will consider, in determining the provisions

of the Act from which the company should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests. Section 2(a)(13) defines an employees' securities company as any investment company all of whose securities (other than short-term paper) are beneficially owned (a) by current or former employees, or persons on retainer, of one or more affiliated employers, (b) by immediate family members of such persons, or (c) by such employer or employers together with any of the persons in (a) or (b).

2. Section 7 of the Act generally prohibits investment companies that are not registered under section 8 of the Act from selling or redeeming their securities. Section 6(e) provides that, in connection with any order exempting an investment company from any provision of section 7, certain provisions of the Act, as specified by the Commission, will be applicable to the company and other persons dealing with the company as though the company were registered under the Act. Applicants request an order under sections 6(b) and 6(e) of the Act exempting the Funds from all provisions of the Act, except section 9, section 17 (other than certain provisions of paragraphs (a), (d), (f), (g), and (j)), section 30 (other than certain provisions of paragraphs (a), (b), (e) and (h)), sections 36 through 53 of the Act, and the rules and regulations under the Act.

3. Section 17(a) generally prohibits any affiliated person or principal underwriter of a registered investment company, or any affiliated person of such an affiliated person or principal underwriter, acting as principal, from knowingly selling or purchasing any security or other property to or from the company. Applicants request an exemption from section 17(a) to permit a Fund to: (a) Purchase, from the Company or any affiliated person thereof, securities or interests in properties previously acquired for the account of the Company or any affiliated person thereof; (b) sell, to the Company or any affiliated person thereof, securities or interests in properties previously acquired by the Funds; (c) invest in companies, partnerships or other investment vehicles offered, sponsored or managed by the Company or any affiliated person thereof; and (d) purchase interests in any company or other investment vehicle (i) in which the Company owns 5% or more of the voting securities, or (ii) that otherwise is an affiliated person of the Fund (or an affiliated person of such a person) or an affiliated person of the Company.

4. Applicants state that an exemption from section 17(a) is consistent with the protection of investors and the purposes of the Act. Applicants state that the Eligible Investors will be informed in the Fund's private offering memorandum of the possible extent of the Fund's dealings with the Company or any affiliated person thereof. Applicants also state that, as financially sophisticated professionals, Eligible Investors will be able to evaluate the attendant risks. Applicants assert that the community of interest among the Fund Investors and the Company will provide the best protection against any risk of abuse.

5. Section 17(d) of the Act and rule 17d–1 under the Act prohibit any affiliated person or principal underwriter of a registered investment company, or any affiliated person of an affiliated person or principal underwriter, acting as principal, from participating in any joint arrangement with the company unless authorized by the Commission. Applicants request relief to permit affiliated persons of each Fund, or affiliated persons of any of these persons, to participate in any joint arrangement in which the Fund is a participant. Joint transactions in which a Fund may participate could include the following: (a) An investment by one or more Funds in a security in which the Company or its affiliated person, or another Fund, is a participant, or with respect to which the Company or an affiliated person of the Company is entitled to receive fees (including, but not limited to, legal fees, consulting fees, or other economic benefits or interests); (b) an investment by one or more Funds in an investment vehicle sponsored, offered or managed by the Company; and (c) an investment by one or more Funds in a security in which an affiliate is or may become a participant.

6. Applicants state that strict compliance with section 17(d) would cause the Funds to forego investment opportunities simply because a Fund Investor, the Company or other affiliates of the Fund also had made or contemplated making a similar investment. In addition, because investment opportunities of the types considered by the Funds often require that each participant make available funds in an amount that may be substantially greater than that available to the investor alone, there may be certain attractive opportunities of which a Fund may be unable to take advantage except as a co-participant with other persons, including affiliates. Applicants note that, in light of the Company's purpose of establishing the Funds so as to reward Eligible Investors and to attract highly qualified personnel to the Company, the possibility is minimal that an affiliated party investor will enter into a transaction with a Fund with the intent of disadvantaging the Fund. Finally, applicants contend that the possibility that a Fund may be disadvantaged by the participation of an affiliate in a transaction will be minimized by compliance with the lockstep procedures described in condition 4 below. Applicants assert that the flexibility to structure co-investments and joint investments will not involve abuses of the type section 17(d) and rule 17d–1 were designed to prevent.

7. Section 17(f) of the Act designates the entities that may act as investment company custodians, and rule 17f–2 allows an investment company to act as self-custodian, subject to certain requirements. Applicants request an exemption from section 17(f) and rule 17f–2 to permit the following exceptions from the requirements of rule 17f–2: (a) A Fund's investments may be kept in the locked files of the Company or of a Partner; (b) for purposes of paragraph (d) of the rule, (i) employees of the Company will be deemed employees of the Funds, (ii) the Managers of a Fund will be deemed to be officers of the Fund, and (iii) the Managers of a Fund will be deemed to be the board of directors of the Fund; and (c) in place of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two employees of the Company. Applicants assert that the securities held by the Funds are most suitably kept in the Company's files, where they can be referred to as necessary.

8. Section 17(g) and rule 17g–1 generally require the bonding of officers and employees of a registered investment company who have access to its securities or funds. Rule 17g–1 requires that a majority of directors who are not interested persons (''disinterested directors'') take certain actions and give certain approvals relating to fidelity bonding. Paragraph (g) of rule 17g–1 sets forth certain materials relating to the fidelity bond that must be filed with the Commission and certain notices relating to the fidelity bond that must be given to each member of the investment company's board of directors. Paragraph (h) of rule 17g–1 provides that an investment company must designate one of its officers to make the filings and give the notices required by paragraph (g).

Paragraph (j) of rule 17g–1 exempts a joint insured bond provided and maintained by an investment company and one or more other parties from section 17(d) of the Act and the rules thereunder. Rule 17g–1(j)(3) requires that investment companies relying on this exemption have a majority of disinterested directors, that those disinterested directors select and nominate any other disinterested directors, and that any legal counsel for those disinterested directors be independent.

9. Applicants request an exemption from section 17(g) and rule 17g–1 to the extent necessary to permit each Fund to comply with rule 17g–1 without the necessity of having a majority of the disinterested directors take such actions and make such approvals as are set forth in the rule. Specifically, each Fund will comply with rule 17g–1 by having the Managers take such actions and make such approvals as are set forth in rule 17g–1. Applicants state that, because the Managers will be interested persons of the Fund, a Fund could not comply with rule 17g–1 without the requested relief. Applicants also request an exemption from the requirements of rule 17g–1(g) and (h) relating to the filing of copies of fidelity bonds and related information with the Commission and the provision of notices to the board of directors and from the requirements of rule 17g–1(j)(3). Applicants believe the filing requirements are burdensome and unnecessary as applied to the Funds. The Managers will maintain the materials otherwise required to be filed with the Commission by rule 17g–1(g) and agree that all such material will be subject to examination by the Commission and its staff. The Managers will designate a person to maintain the records otherwise required to be filed with the Commission under paragraph (g) of the rule. Applicants also state that the notices otherwise required to be given to the board of directors would be unnecessary as the Funds will not have boards of directors. The Funds will comply with all other requirements of rule 17g–1.

10. Section 17(j) and paragraph (b) of rule 17j–1 make it unlawful for certain enumerated persons to engage in fraudulent or deceptive practices in connection with the purchase or sale of a security held or to be acquired by a registered investment company. Rule 17j–1 also requires that every registered investment company adopt a written code of ethics and that every access person of a registered investment company report personal securities transactions. Applicants request an exemption from the requirements of rule 17j–1, except for the anti-fraud provisions of paragraph (b), because they are unnecessarily burdensome as applied to the Funds.

11. Applicants request an exemption from the requirements in sections 30(a), 30(b) and 30(e), and the rules under those sections, that registered investment companies prepare and file with the Commission and mail to their shareholders certain periodic reports and financial statements. Applicants contend that the forms prescribed by the Commission for periodic reports have little relevance to the Funds and would entail administrative and legal costs that outweigh any benefit to the Fund Investors. Applicants request exemptive relief to the extent necessary to permit each Fund to report annually to its Fund Investors. Applicants also request an exemption from section 30(h) to the extent necessary to exempt the Managers of each Fund and any other persons who may be deemed members of an advisory board of a Fund from filing Forms 3, 4 and 5 under section 16 of the Exchange Act with respect to their ownership of Interests in the Fund. Applicants assert that, because there will be no trading market for Interests and transfers of Interests will be severely restricted, these filings are unnecessary for the protection of investors and burdensome to those required to make them.

Applicants' Conditions

The applicants agree that any order granting the requested relief will be subject to the following conditions:

Fund Operations

1. Each proposed transaction to which a Fund is a party otherwise prohibited by section 17(a) or section 17(d) and rule 17d–1 (each, a ''Section 17 Transaction'') will be effected only if the Managers determine that: (a) The terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to the Fund Investors of the participating Fund and do not involve overreaching of the Fund or its Fund Investors on the part of any person concerned; and (b) the Section 17 Transaction is consistent with the interests of the Fund Investors of the participating Fund, the Fund's organizational documents and the Fund's reports to its Fund Investors.

In addition, the Managers will record and preserve a description of such Section 17 Transactions, their findings, the information or materials upon which their findings are based and the basis therefor. All such records will be maintained for the life of a Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

2. If purchases or sales are made by a Fund from or to an entity affiliated with the Fund by reason of a Partner or employee of the Cooley Godward Group (a) serving as an officer, director, general partner or investment adviser of the entity, or (b) having a 5% or more investment in the entity, such individual will not participate in the Fund's determination of whether or not to effect the purchase or sale.

3. The Managers will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any Section 17 Transaction, with respect to the possible involvement in the transaction of any affiliated person or promoter of or principal underwriter for the Funds, or any affiliated person of such a person, promoter, or principal underwriter.

4. The Managers will not make on behalf of a Fund any investment in which a Co-Investor, as defined below, has or proposes to acquire the same class of securities of the same issuer, where the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d–1 in which the Fund and the Co-Investor are participants, unless any such Co-Investor, prior to disposing of all or part of its investment: (a) Gives the Managers sufficient, but not less than one day's, notice of its intent to dispose of its investment, and (b) refrains from disposing of its investment unless the participating Fund holding such investment has the opportunity to dispose of its investment prior to or concurrently with, on the same terms as, and on a *pro rata* basis with, the Co-Investor. The term ''Co-Investor'' with respect to any Fund means any person who is (a) an ''affiliated person'' (as defined in section 2(a)(3) of the Act) of the Fund; (b) the Cooley Godward Group; (c) a Partner, lawyer, or employee of the Cooley Godward Group; (d) an investment vehicle offered, sponsored, or managed by the Company or an affiliated person of the Company; or (e) an entity in which a Cooley Godward Entity acts as a general partner, or has a similar capacity to control the sale or other disposition of the entity's securities.

The restrictions contained in this condition, however, shall not be deemed to limit or prevent the disposition of an investment by a Co-Investor: (a) To its direct or indirect wholly owned subsidiary, to any

company (a ''Parent'') of which the Co-Investor is a direct or indirect wholly owned subsidiary, or to a direct or indirect wholly owned subsidiary of its Parent; (b) to Immediate Family Members of the Co-Investor or a trust established for any such Immediate Family Member; (c) when the investment is comprised of securities that are listed on a national securities exchange registered under section 6 of the Exchange Act; (d) when the investment is comprised of securities that are national market system securities pursuant to section 11A(a)(2) of the Exchange Act and rule 11Aa2–1 thereunder; or (e) when the investment is comprised of securities (i) that meet the requirements of and are authorized as Nasdaq SmallCap Market securities by The Nasdaq Stock Market, Inc., (ii) that have an average daily trading volume value over the last 60 calendar days of at least $1 million, and (iii) are issued by an issuer whose common equity securities have a public float value of at least $150 million.

5. The Managers of each Fund will send to each person who was a Fund Investor in such Fund at any time during the fiscal year then ended audited financial statements with respect to those Series in which the Fund Investor held Interests. At the end of each fiscal year, the Managers will make a valuation or have a valuation made of all of the assets of the Fund as of the fiscal year end in a manner consistent with customary practice with respect to the valuation of assets of the kind held by the Fund. In addition, as soon as practicable after the end of each fiscal year of each Fund, the Managers of the Fund shall send a report to each person who was a Fund Investor at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Fund Investor of his or her federal and state income tax returns and a report of the investment activities of such Fund during such year.

6. Each Fund and the Managers will maintain and preserve, for the life of each Series of that Fund and at least two years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the audited financial statements and annual reports of such Series to be provided to its Fund Investors, and agree that all such records will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

Compliance With Rule 701

7. Prior to receiving a subscription agreement from any potential Fund Investor pursuant to an offering in reliance on rule 701, the Company will make available at no charge to potential Fund Investors the services of a Financial Consultant qualified to provide advice concerning the appropriateness of investing in a Fund. Specifically, the Financial Consultant will hold one or more group meetings with potential Fund Investors at which the Financial Consultant will discuss the risks and other considerations relevant to determining whether to invest in a Fund. The Financial Consultant also will be available to the group of potential Fund Investors during the meeting to answer general questions regarding an investment in the Fund. In addition, potential Fund Investors will be given the opportunity to submit relevant questions and issues to the Financial Consultant in advance of the group meetings, so that the Financial Consultant can address those questions and issues at the meetings. The Company will not need to reveal the specific investments made by any Fund to the Financial Consultant, as long as the investment objectives, risk characteristics and other material information about the Fund of the type that would be disclosed in the offering documents for the Fund is made available to the Financial Consultant.

8. The Managers will at all times control each Fund, within the meaning of rule 405 under the Securities Act. In this regard, the Managers will be the sole managers of the Fund and make all investment and other operational decisions for the Fund.

9. The Company or a wholly-owned subsidiary will own not less than 5% of the economic Interests issued each year by the Fund, and at least 95% of the voting Interests of the Fund. In addition, the Company and its Partners (directly or through Qualified Investment Vehicles) together will own at least 80% of the economic Interests of each Series.

10. The Company prepares its financial statements on a modified cash basis, and does not consolidate the Fund's financial statements with its own. If, however, the Company prepared its financial statements in accordance with GAAP, it would consolidate the Fund's financial statements with its own.

11. The Company, when offering Interests pursuant to rule 701 under the Securities Act, will issue Interests in each Series in compliance with rule 701(d)(2),[3] and will comply with all applicable requirements of rule 701(e).[4]

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–29041 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–25800; File No. 812–12618]

Fortis Benefits Insurance Company, et al.; Notice of Application

November 8, 2002.

AGENCY: Securities and Exchange Commission. (''Commission'').

ACTION: Notice of amended and restated application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 (the ''Act'') approving certain substitutions of securities.

APPLICANTS: Fortis Benefits Insurance Company (''Fortis Benefits''), First Fortis Life Insurance Company (''First Fortis''), Variable Account D of Fortis Benefits Insurance Company (''Account D''), and Separate Account A of First Fortis Life Insurance Company (''Account A'') (together, the ''Applicants'').

SUMMARY OF APPLICATION: Applicants request an order to permit Fortis Benefits and First Fortis to substitute shares of the Mid Cap Growth Fund II of Strong Variable Insurance Funds, Inc. (''Strong'') for shares of the Discovery Fund II of Strong, and shares of the International Portfolio of Alliance Variable Products Series Funds, Inc. (''Alliance'') for shares of the International Stock Fund II of Strong held by Account D and Account A to support variable annuity contracts (''Contracts'').

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[3] If the Company relies on rule 701(d)(2)(ii), it will not sell pursuant to rule 701, during any consecutive 12-month period, Interests in the Fund if the sales price of those Interests exceeds 15% of the total assets of the Fund.

[4] In order to comply with the requirements of rule 701, at the beginning of each Investment Period the Fund will accept capital contributions or irrevocable commitments from Regulation D Investors for the relevant Series, and then prepare a balance sheet as required by rule 701. The Fund may then receive and accept subscription agreements, and thereafter accept capital contributions or commitments, from Rule 701 Investors for that Series, which in the aggregate will not exceed 15% of the total amount of capital contributions and irrevocable commitments received from Regulation D Investors.

FILING DATE: The application was filed on August 29, 2001 and amended and restated on November 1, 2002.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 3, 2002, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, c/o Thomas S. Clark, Esq., Assistant Counsel, Hartford Life Insurance Company, 200 Hopmeadow Street, Simsbury, CT 06089. Copy to David S. Goldstein, Esq., Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004–2415.

FOR FURTHER INFORMATION CONTACT: Kenneth C. Fang, Attorney, or Zandra Y. Bailes, Branch Chief, Office of Insurance Products, Division of Investment Management at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the Public Reference Branch of the Commission, 450 Fifth Street, NW., Washington, DC 20549–0102 (tel. (202) 942–8090).

Applicants' Representations

1. Fortis Benefits is a stock life insurance company incorporated under the laws of Minnesota. Fortis Benefits is engaged in the underwriting and sale of life insurance and annuity products in the District of Columbia and all states but New York. Fortis Benefits is a wholly-owned indirect subsidiary of Fortis, Inc. As of December 31, 2001, Fortis Benefits had assets of approximately $10 billion. For purposes of the Act, Fortis Benefits is the depositor and sponsor of Account D as interpreted by the Commission with respect to variable annuity separate accounts.

2. First Fortis is a stock life insurance company incorporated under the laws of New York. First Fortis is engaged in the business of writing individual and group life insurance and annuity contracts in New York. First Fortis is a wholly-owned subsidiary of Fortis, Inc. As of December 31, 2001, First Fortis had assets of approximately $374 million. For purposes of the Act, First Fortis is the depositor and sponsor of Account A as interpreted by the Commission with respect to variable annuity separate accounts.

3. Fortis Benefits established Account D on October 14, 1987 as a segregated investment account under Minnesota law. Under Minnesota law, the assets of Account D attributable to the Contracts through which interests are issued are owned by Fortis Benefits but are held separately from all other assets of Fortis Benefits for the benefit of the owners of, and the persons entitled to payment under, those Contracts. Consequently, such assets in Account D are not chargeable with liabilities arising out of any other business that Fortis Benefits may conduct. Income, gains, and losses, realized and unrealized, from the assets of Account D are credited to or charged against Account D without regard to the income, gains, or losses arising out of any other business that Fortis Benefits may conduct. Account D is a ''separate account'' as defined by Rule 0–1(e) under the Act and is registered with the Commission as a unit investment trust (File No. 811–05439), and interests in Account D offered through such Contracts have been registered under the Securities Act of 1933, as amended (the ''1933 Act'') on Form N–4 (File No. 33–63935).

4. First Fortis established Account A on October 1, 1993 as a segregated investment account under New York law. Under New York law, the assets of Account A attributable to the Contracts through which interests are issued are owned by First Fortis but are held separately from all other assets of First Fortis for the benefit of the owners of, and the persons entitled to payment under, those Contracts. Consequently, such assets in Account A are not chargeable with liabilities arising out of any other business that First Fortis may conduct. Income, gains, and losses, realized and unrealized, from the assets of Account A are credited to or charged against Account A without regard to the income, gains, or losses arising out of any other business that First Fortis may conduct. Account A is a ''separate account'' as defined by Rule 0–1(e) under the Act and is registered with the Commission as a unit investment trust (File No. 811–08154), and interests in Account A offered through such Contracts have been registered under the 1933 Act on Form N–4 (File No. 333–20343).

5. On April 2, 2001, Fortis Benefits and First Fortis consummated agreements with Hartford Life and Annuity Insurance Company (''Hartford L&A'') and Hartford Life Insurance Company (''Hartford Life''), respectively, pursuant to which Hartford L&A and Hartford Life would reinsure all of the individual life insurance and annuity business of Fortis Benefits and First Fortis, respectively. Additionally, Fortis Benefits and First Fortis have contracted the administrative servicing obligations for the Contracts to Hartford L&A and Hartford Life, respectively. Although Fortis Benefits or First Fortis remains responsible for all Contract terms and conditions, Hartford L&A and Hartford Life are responsible for administering the Contracts, including processing premium payments, paying benefits, providing other Contract owner services, oversight of investment management of general account assets supporting the fixed account portion of the Contracts, and administration of the Accounts. With regard to administration of the Accounts, Hartford L&A and Hartford Life are responsible for making filings with the Commission, including the preparation and filing of applications for orders under section 26(c) of the Act if such becomes necessary for Fortis Benefits, First Fortis or the Accounts to respond to various contingencies involving underlying funds.

6. Strong was incorporated in Wisconsin on December 28, 1990. Strong is a series investment company as defined by Rule 18f–2 under the Act and is registered under the Act as an open-end management investment company (File No. 811–6553). Strong issues a separate series of shares of stock in connection with each fund and has registered these shares under the 1933 Act on Form N–1A (File No. 33–45321). Strong Capital Management, Inc. serves as investment adviser to the Strong Discovery Fund II (''Discovery''), the Strong International Stock Fund II (''Strong International''), and the Strong Mid Cap Growth Fund II (''Mid Cap Growth'').

7. Discovery seeks capital growth. This fund primarily invests in a diversified portfolio of common stocks from small-, medium-, and large-capitalization companies that offer attractive opportunities for growth. If market conditions favor fixed-income investments, Discovery may invest a significant portion of its assets in intermediate- and long-term investment grade bonds as well as in foreign investments to a limited extent.

8. Strong International seeks capital growth. This fund primarily invests in stocks of foreign issuers that appear to have strong growth potential relative to their risk.

9. Mid Cap Growth seeks capital growth. This fund invests at least 80% of its assets in stocks of medium-capitalization companies that have favorable prospects for growth of earnings and capital appreciation. Other Mid Cap Growth investments include futures and options transactions as well as writing put and call options and foreign securities. Except to the extent that Fortis Benefits or First Fortis may, from time to time, hold 5% or more of the shares of Mid Cap Growth, Mid Cap Growth is not an affiliated person of Fortis Benefits or First Fortis.

10. Alliance was incorporated in Maryland on November 17, 1987. Alliance is a series investment company as defined by Rule 18f–2 under the Act and is registered under the Act as an open-end management investment company (File No. 811–5398). Alliance issues a separate series of shares of common stock in connection with each portfolio and has registered these shares under the 1933 Act on Form N–1A (File No. 33–18647). Alliance Capital Management, L.P. serves as investment adviser to the International Portfolio (''Alliance International'').

11. Alliance International seeks a total return on its assets from long-term growth of capital. This fund normally invests 80% of its assets in a broad portfolio of marketable securities of established international companies, companies participating in foreign economies with prospects for growth, and foreign government securities, including U.S. companies that have their principal activities and interests outside the U.S. Except to the extent that Fortis Benefits or First Fortis may, from time to time, hold 5% or more of the shares of Alliance International, Alliance International is not an affiliated person of Fortis Benefits or First Fortis.

12. The Contracts are individual and group flexible premium deferred combination variable and fixed annuity contracts. The Contracts provide for the accumulation of values on a variable basis, fixed basis, or both, during the accumulation period, and provide settlement or annuity payment options on a variable basis, fixed basis, or both. Under the Contracts, Fortis Benefits and First Fortis reserve the right to substitute shares of one fund for shares of another.

13. Under the Contracts, a Contract owner may make unlimited transfers of all or part of the Contract value from one subaccount to another during the accumulation period and four times per year during the annuity period. Fortis Benefits and First Fortis currently do not assess a charge on transfers; however, Fortis Benefits and First Fortis reserve the right to restrict the frequency of, or otherwise condition, terminate, or impose charges upon transfers from a subaccount in the future.

14. Fortis Benefits and First Fortis, on their behalf and on behalf of the Accounts, propose to substitute: (1) shares of Mid Cap Growth for shares of Discovery; and (2) shares of Alliance International for shares of Strong International. Applicants believe that by making the proposed substitutions, they can better serve the interests of the Contract owners.

15. On April 5, 2001, the board of directors of Discovery and Strong International (the ''Board'') voted to close these Funds (the ''Old Funds'') to new life insurance separate account investors effective April 6, 2001. Subsequently, on June 1, 2001, Strong Investments, Inc., Strong's distributor, notified Fortis Benefits and First Fortis of Strong's intention to terminate its participation agreements with them—to the extent that such agreements apply to the Old Funds—effective December 2001 and cease the Old Funds' operations soon thereafter. Strong Investments, Inc. indicated that the Board decided to close the Old Funds because of the Old Funds' small asset base, lack of expected asset growth, and lack of economies of scale. The Board also requested that all of the insurance companies currently having separate accounts invested in the Old Funds, including Fortis Benefits and First Fortis, seek an order from the Commission approving the substitutions of other securities for shares of Discovery and Strong International held currently by these separate accounts. Strong Investments, Inc. therefore suggested that closing the Old Funds would be best for the Applicants and the Contract owners.

16. Applicants represent that they had no control over the Board's decision to terminate the Old Funds. Further Applicants believe that some or all of these other insurance companies will seek an order from the Commission to substitute shares of certain securities for shares of the Old Funds. Accordingly, Applicants believe that the resulting decrease in assets of the Old Funds would likely result in higher expenses and less favorable performance, to the detriment of the Contract owners.

17. Mid Cap Growth and Discovery have an identical investment objective of capital growth. The investment strategies of both funds are somewhat similar; however, they differ in that Discovery invests in stocks having a wide range of capitalizations whereas Mid Cap Growth invests at least 80% of its assets in medium-capitalization stocks. If the market dictates, both funds will place their assets in other types of investments: Discovery may invest in intermediate- and long-term investment grade bonds, and Mid Cap Growth may invest in futures and options transactions and in foreign securities, as well as write put and call options. Overall, Applicants believe that both funds have substantially similar investment risk profiles; although Mid Cap Growth is permitted to invest in more types of investments, some of which could entail greater risks than most of the securities in Discovery's investment portfolio, Mid Cap Growth's actual portfolio, taken as a whole, is quite comparable to that of Discovery. After the proposed substitution, Contract owners will still have the ability to invest in a fund seeking capital growth through medium-capitalization stocks. Applicants believe that Contract owners will be better off with the proposed substitution because Mid Cap Growth has more assets and has had better performance than Discovery in recent periods.

18. Discovery has proven unpopular with investors. Over the last four years, Discovery has lost 43% of its assets, declining from $214 million at the end of 1997 to only $121 million as of December 31, 2001. Although Mid Cap Growth's assets experienced a decline in 2001, overall the fund's assets have grown by approximately $321 million over the last four years. The large growth in Mid Cap Growth's assets has created greater economies of scale than it had when its asset base was smaller. Mid Cap Growth currently maintains an expense ratio comparable to that of Discovery.

19. Mid Cap Growth has cumulative four-year returns that surpass or are comparable to its benchmark indices, the S&P Mid Cap 400, the Russell Midcap Index, and the Lipper Multi-Cap Index, even though Mid Cap Growth averaged returns below its benchmark indices last year.

20. The investment objectives and strategies of Alliance International and Strong International are substantially the same as they both seek capital growth through foreign investments. Alliance International, however, also invests in U.S. companies that have their principal activities and interests outside of the U.S. Overall, Applicants believe that both Funds have substantially similar investment risk

profiles. In fact, Applicants believe that an investment in Alliance International would generally entail less risk than would an investment in Strong International in that Alliance International may invest in a broader spectrum of investments leading to greater diversification and correspondingly less risk. After the proposed substitution, Contract owners will still have the ability to invest in a fund that invests in the stocks of issuers located or doing business in foreign countries. Applicants believe that Contract owners will be better off with the proposed substitution because Alliance International has more assets, lower expenses, and better performance than Strong International.

21. Alliance International's expense ratio has consistently been lower than Strong International's expense ratio over the last four years. Alliance International has an expense ratio of 1.44% as of December 31, 2001. However, because of expense caps, Contract owners only paid 0.95%.

22. Alliance International has performed on par with its benchmark index, the MSCI EAFE Index. Whereas Alliance International has a five-year cumulative return of 0.38%, its benchmark index returned 0.90% over the same period. Last year, Alliance International and its benchmark posted somewhat comparable losses of −22.35% and −21.21% respectively.

23. The following charts show the approximate year-end size (in net assets), expense ratio (ratio of operating expenses as a percentage of average net assets), and annual total returns for each of the past five years for each of the funds.

	Net assets at year-end (millions)	In percent			
		Expense ratio (before imposition of expense caps)	Actual expense ratio	Management fee	Total return
Strong Discovery Fund II:					
1997	$214	1.2	1.2	1.00	11.4
1998	196	1.2	1.2	1.00	7.3
1999	152	1.2	1.1	1.00	5.1
2000	136	1.3	1.2	1.00	4.4
2001	121	1.2	1.2	1.00	4.1
Strong Mid Cap Growth Fund II:					
1997	2	2.0	1.2	1.00	29.8
1998	18	1.6	1.2	1.00	28.7
1999	324	1.2	1.1	1.00	89.9
2000	531	1.2	1.2	1.00	−14.8
2001	323	1.4	1.2	0.75	−30.8
Strong International Stock Fund II:					
1997	60	1.5	1.5	1.00	−13.50
1998	47	1.6	1.6	1.00	−4.80
1999	125	1.3	1.2	1.00	87.20
2000	55	1.6	1.2	1.00	−39.50
2001	33	1.5	1.0	1.00	−22.10
Alliance International Portfolio:					
1997	61	1.42	0.95	0.53	3.33
1998	65	1.37	0.95	0.67	13.02
1999	81	1.36	0.95	0.69	40.23
2000	79	1.34	0.95	0.69	−19.86
2001	64	1.44	0.95	0.61	−22.35

24. Prior to the date the substitution is effected, Fortis Benefits and First Fortis will send Contract owners a current prospectus for Alliance International and Mid Cap Growth (the ''New Funds''). In addition, by supplements to the various prospectuses for the Contracts and the Accounts, Fortis Benefits and First Fortis will notify all owners of the Contracts of their intention to take the necessary actions, including seeking the orders requested by the Application, to substitute shares of the Funds as described herein. The supplements will inform Contract owners that until the date of the proposed substitutions, owners are permitted to make one transfer of all amounts under a Contract invested in any one of the affected subaccounts on the date of the supplement to another subaccount under a Contract (other than the other affected subaccount) without that transfer being treated as a transfer for the purpose of assessing transfer charges or for determining the number of remaining permissible transfers in a Contract year. The supplements also will inform Contract owners that Fortis Benefits and First Fortis will not exercise any rights reserved under any Contract to impose additional restrictions on transfers until at least 30 days after the proposed substitutions.

25. Fortis Benefits and First Fortis will redeem the shares: (1) Of Discovery for cash and use the redemption proceeds to purchase shares of Mid Cap Growth; and (2) of Strong International for cash and use the redemption proceeds to purchase shares of Alliance International. The proposed substitutions will take place at relative net asset value with no change in the amount of any Contract owner's Contract value or in the dollar value of his or her investment in either of the Accounts. As a result, Contract owners will remain fully invested. Contract owners will not incur any fees or charges as a result of the proposed substitutions, nor will their rights or Fortis Benefits' and First Fortis' obligations under the Contracts be altered in any way. All expenses incurred in connection with the proposed substitutions, including legal, accounting, brokerage, and other fees and expenses, will be the responsibility of Fortis Benefits and/or First Fortis. In addition, the proposed substitutions will not impose any tax liability on Contract owners. The proposed substitutions will not cause the Contract fees and charges currently being paid by

existing Contract owners to be greater after the proposed substitutions than before the proposed substitutions. The proposed substitution will not, of course, be treated as a transfer for the purpose of assessing transfer charges or for determining the number of remaining permissible transfers in a Contract year. Fortis Benefits and First Fortis will not exercise any right they may have under the Contracts to impose additional restrictions on transfers under any of the Contracts for a period of at least 30 days following the substitutions. Contract owners having Contract value transferred to a New Fund by the proposed substitutions, may transfer out of the subaccount investing in that Fund during the 30 days following the date of the proposed substitutions without that transfer being treated as a transfer for the purpose of assessing transfer charges or for determining the number of remaining permissible transfers in a Contract year.

26. In addition to the supplements described above, Fortis Benefits and First Fortis will, if necessary, by supplements to the various prospectuses for the Contracts and the Accounts, notify all owners of the Contracts of the substitutions immediately after they occur.

27. In addition to the prospectus supplements distributed to Contract owners, within five days after the proposed substitution, any Contract owners who were affected by the substitutions will be sent a written notice informing them that the substitution was carried out and that they may transfer to another subaccount. Contract value invested in one of the affected subaccounts may be transferred free of charge for 30 days following the date of the substitutions without that transfer counting as one of a limited number of transfers permitted in a Contract year or as one of a limited number of transfers permitted in a Contract year. The notice will also reiterate the fact that Fortis Benefits and First Fortis will not exercise any rights reserved by them under the Contracts to impose additional restrictions on transfers until at least 30 days after the proposed substitutions. The notice will be preceded or accompanied by current prospectuses for the Alliance International and Mid Cap Growth.

Applicants' Legal Analysis

1. Section 26(c) was added to the Act by the Investment Company Amendments of 1970. Prior to the enactment of the 1970 amendments, a depositor of a unit investment trust could substitute new securities for those held by the trust by notifying the trust's security holders of the substitution within five days of the substitution. In 1966, the Commission, concerned with the high sales charges then common to most unit investment trusts and the disadvantageous position in which such charges placed investors who did not want to remain invested in the substituted fund, recommended that section 26 be amended to require that a proposed substitution of the underlying investments of a trust receive prior Commission approval.

2. Congress responded to the Commission's concerns by enacting section 26(c) to require that the Commission approve all substitutions by the depositor of investments held by unit investment trusts.

3. The proposed substitutions appear to involve the substitution of securities within the meaning of section 26(c) of the Act. Applicants therefore request an order from the Commission pursuant to section 26(c) approving the proposed substitutions.

4. Applicants state that the Contracts expressly reserve for Fortis Benefits and First Fortis the right, subject to compliance with applicable law, to substitute shares of another management company for shares of a management company held by a subaccount of the Accounts. Applicants state that Fortis Benefits and First Fortis reserved this right of substitution both to protect themselves and their Contract owners in situations where either might be harmed or disadvantaged by circumstances surrounding the issuer of the shares held by one or more of their separate accounts and to afford the opportunity to replace such shares where to do so could benefit themselves and Contract owners.

5. In addition to the foregoing, Applicants generally submit that the proposed substitutions meet the standards that the Commission and its staff have applied to similar substitutions that have been approved in the past.

6. Applicants further assert that the proposed substitutions are not the type of substitutions that section 26(c) was designed to prevent. Unlike traditional unit investment trusts where a depositor could only substitute an investment security in a manner which permanently affected all the investors in the trust, the Contracts provide each Contract owner with the right to exercise his or her own judgment and transfer Contract or cash values into other subaccounts. Moreover, the Contracts will offer Contract owners the opportunity to transfer amounts out of the affected subaccounts into any of the remaining subaccounts without cost or other disadvantage. Applicants believe the proposed substitutions, therefore, will not result in the types of costly forced redemption that section 26(c) was designed to prevent.

7. Applicants also believe that the proposed substitutions are unlike the type of substitutions that section 26(c) was designed to prevent in that by purchasing a Contract, Contract owners select much more than a particular investment company in which to invest their account values. They also select the specific type of insurance coverage offered by Fortis Benefits and First Fortis under their Contract as well as numerous other rights and privileges set forth in the Contract. Contract owners may also have considered Fortis Benefits' and First Fortis' size, financial condition, type, and reputation for service in selecting their Contract. Applicants state that these factors will not change as a result of the proposed substitutions.

8. Fortis Benefits and First Fortis will not receive, for three years from the date of the substitutions, any direct or indirect benefits from the New Funds, their advisers or underwriters, or from affiliates of the New Funds, their advisers or underwriters, in connection with assets attributable to the Contracts affected by the substitutions, at a higher rate than each received from the Old Funds, their advisers or underwriters, or from affiliates of the Old Funds, their advisers or underwriters, including without limitation Rule 12b-1 fees, shareholder service or administrative or other service fees, revenue sharing or other arrangements. Fortis Benefits and First Fortis each represent that the substitutions it carries out and its selection of New Funds was not motivated by any financial consideration paid or to be paid to it or to any of its affiliates by any of the New Funds, their advisers or underwriters, or by affiliates of the New Funds, their advisers or underwriters.

9. Applicants request an order of the Commission pursuant to section 26(c) of the Act approving the proposed substitutions by Fortis Benefits and First Fortis. Applicants submit that, for all the reasons stated above, the proposed substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the reasons summarized above, Applicants assert that the proposed substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act and therefore request that the substitutions be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–29040 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46779; File No. SR–Amex–2001–07]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the American Stock Exchange LLC Relating to the Review of a Floor Official's Market Decision

November 6, 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 February 14, 2001, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, and amended such proposed rule change on August 27, 2001[3] and October 8, 2002,[4] as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from William Floyd-Jones, Jr., Assistant General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated August 24, 2001, replacing Form 19b–4 in its entirety (''Amendment No. 1''). In Amendment No. 1, the Amex, in part, amended the Exchange Constitution to clarify that there is no right to appeal a Floor Official's market decision or ruling to the Board of Governors (''Board''); clarified the definition of ''market decision'' and what types of market decisions may be subject to arbitration; provided more detail regarding the appeal process; and clarified the individuals who can hold various offices and hear appeals.

[4] *See* letter from William Floyd-Jones, Jr., Assistant General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 7, 2002, replacing Form 19b-4 in its entirety (''Amendment No. 2''). In Amendment No. 2, the Amex deleted the proposed amendment to the Exchange Constitution originally proposed in Amendment No. 1; provided a separate procedure in Amex Rule 22 for appealing a decision of a Floor Official that is made with the concurrence of a Senior Floor Official; and amended the rule text to state that not all decisions or rulings on the Trading Floor may be subject to arbitration.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rule 22 to change the procedure for reviewing a Floor Official's market decision and to eliminate the right of appealing a Floor Official's market decision or ruling to the Board. Below is the text of the proposed rule change, as amended.[5] New text is italicized. Deleted text is bracketed.

* * * * *

Authority of Floor Officials

Rule 22. (a) through (d). No change.

(d) Review of Rulings.—[On request of a] *Any* member wishing a prompt (*i.e., prior to scheduled settlement*) on-Floor review of a Floor Official's market decision, [or a decision required to be made by a Floor Official with the concurrence of a Senior Floor Official, the Market Operations Division] shall, forthwith *and in the presence of the ruling Floor Official, present the matter to an Exchange Official* [arrange a meeting of the Senior Supervisory Officer on the Floor and the available Senior Floor Officials,] who shall confirm, amend, or overrule the decision. *An Exchange Official's decision in a matter may be promptly presented on appeal to a Governor who shall confirm, amend, or overrule the decision. A Governor's decision in a matter may be promptly presented on appeal to a panel of three Governors who have not already ruled on the matter which panel shall confirm, amend, or overrule the decision. The Senior Supervisory Officer on the Floor may serve on a panel as a Governor. In the event that three Governors are not available, Senior Floor Officials who have not already ruled on the matter may serve on a panel. Any remaining vacancies on a panel may be filled by Exchange Officials (who have not already ruled on the matter) in order of their seniority as Exchange Officials. Any member wishing a prompt (i.e., prior to scheduled settlement) on-Floor review of a market decision of a Floor Official made with the concurrence of a Senior Floor Official shall, forthwith and in the presence of the ruling Floor Official and Senior Floor Official, present the matter to a panel of three Governors who have not already ruled on the matter.*

[5] The proposed rule text in Amendment No. 2 replaces the proposed rule text in the original rule filing and Amendment No. 1 in its entirety. Telephone conversation between William Floyd-Jones, Jr., Assistant General Counsel, Amex, and Cyndi Nguyen, Attorney, Division, Commission, on November 4, 2002.

Any member wishing a prompt (i.e., prior to scheduled settlement) on-Floor review of a market decision of a Floor Official made with the concurrence of a Senior Floor Official shall, forthwith and in the presence of the ruling Floor Official and Senior Floor Official, present the matter to a panel of three Governors who have not already ruled on the matter which panel shall confirm, amend, or overrule the decision. The Senior Supervisory Officer on the Floor may serve on a panel as a Governor. In the event that three Governors are not available, Senior Floor Officials who have not already ruled on the matter may serve on a panel. Any remaining vacancies on a panel may be filled by Exchange Officials (who have not already ruled on the matter) in order of their seniority as Exchange Officials.

The decision or ruling of a Floor Official or Officials, [or, if reviewed, the determination of the] *Exchange Official, Governor, or three-Governor panel* [Senior Supervisory Officer on the Floor and Senior Floor Officials,] shall be binding on members[, subject to any right of appeal under the Constitution or Rules of the Exchange]. *Notwithstanding the foregoing, at any point after establishing a loss (or profit) through clearance and complying with the highest decision (if any) made in a matter, either party to the matter may elect to submit it to arbitration pursuant to Article VIII of the Constitution. The final decision or ruling on the Trading Floor shall not be binding on the arbitrators, but they may give it such weight as they feel is appropriate. Not all decisions or rulings on the Trading Floor may be subject to arbitration.*

Commentary * * * 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, the Amex included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Floor Officials are generally responsible for the supervision of operations on the Exchange Floor.[6] There are four classifications of a Floor Official. In ascending order of responsibility, these classifications are: (1) Floor Official, (2) Exchange Official, (3) Senior Floor Official, and (4) Senior Supervisory Officer. The Vice Chairman of the Exchange is a Floor Governor and serves as the Senior Supervisory Officer.[7] Governors of the Exchange that spend a substantial amount of time on the Floor are Senior Floor Officials.[8] The Board, in addition, may appoint additional Senior Floor Officials from among the Exchange Officials who have previously served on the Board and who spend a substantial part of their time on the Floor.[9] Three Floor Governors and three former Floor Governors currently serve as Senior Floor Officials. Article II, Section 3 of the Exchange Constitution (''Delegation of Powers'') authorizes the Board to appoint a number of members and persons that are associated with member organizations in a senior capacity as Exchange Officials. Exchange Officials that spend a substantial portion of their time on the Floor are deemed to be Floor Officials.[10] Currently, there are approximately 38 on-Floor Exchange Officials that function as Floor Officials. Amex Rule 21(b) also authorizes the Chairman to appoint as Floor Officials, ''such other persons familiar with the Floor as the Chairman, or the Chief Executive Office if delegated by the Chairman, shall determine to be necessary for the effective and orderly supervision of the operations on the Floor.'' [11] Currently there are approximately 80 ''other'' Floor Officials. Numerous provisions of the Exchange's rules specifically call for a Floor Official's involvement in the Exchange's operations.

Floor Officials make ''rulings'' or ''market decisions'' (the terms are synonymous) in two distinct sets of circumstances.[12] In the first set of circumstances, Floor Officials make rulings on behalf of the Exchange on matters that require action or review by the Exchange. Examples of situations where Floor Officials make decisions on behalf of the Exchange include decisions to (1) halt or reopen trading in a security,[13] (2) approve the specialist granting a stop in a minimum variation market,[14] (3) approve the cancellation or revision of a trade,[15] and (4) approve the specialist as a dealer electing a stop order by taking the offer or hitting the bid.[16] In the second set of circumstances, Floor Officials rule with respect to market disputes submitted to them by members.[17] An example of where Floor Officials may be called upon to resolve market disputes includes a situation where there is a disagreement between two members as to the price or size of a trade. In either circumstances, a Floor Official may not rule on a matter in which the Floor Official has a personal interest. A Floor Official also may not decide, or be part of a panel that decides, an appeal of a ruling that the same Floor Official previously made.

Members are not required to submit market disputes to Floor Officials for rulings. However, once they do so, they must conduct themselves in accordance with the rulings. The Exchange believes that the ability of Floor Officials to make prompt rulings on market disputes submitted to them by members is a time honored and important feature both of the Exchange and other Floor-based markets. The Exchange believes that a Floor Official's review of member disputes permits the prompt (*i.e.*, prior to settlement) resolution of trading disputes and thereby limits financial risk to members and their customers from such disputes. Therefore, the Exchange believes that the ability of Floor Officials to rule on member disputes is in the public interest and the interest of investors.

Exchange Rule 22(d) currently provides that a member wishing a prompt, on-Floor review of a Floor Official's market decision (or a decision required to be made by a Floor Official with the concurrence of a Senior Floor Official) could request and Market Operations would ''arrange a meeting of the Senior Supervisory Officer on the Floor and the available Senior Floor Officials, who shall confirm, amend or overrule the decision.'' Currently, the decisions would be binding, subject to a right of appeal under Article II, Section 3 of the Exchange Constitution.

When the Floor Official and appeal systems were originally adopted, the Amex had a different mix of securities, a smaller Trading Floor, fewer members, and far less volume than it has currently.[18] Aside from the new securities and a larger Trading Floor, the Exchange believes that the increased number of orders and transactions on the Floor and the speed with which market prices change and information needs to be provided to customers make the current appeals process unsatisfactory. Further, the Exchange believes that the ability to subject a ruling of a Floor Official to review by the Board or a Board level committee facilitated pointless rather than constructive appeals since, by the time the Board considered the appeal, the trade had long since settled and the Board could not award monetary damages.

To address these concerns, the Exchange is proposing to change the system of appealing Floor Official rulings. The Exchange believes that the proposed system takes advantage of the increased number of Exchange Officials as well as the speed with which an appeal could be handled if conducted by a single Exchange Official in the same vicinity as the matter in question.

As is currently the case, a member that seeks a Floor Official review either of a dispute or an event that requires a Floor Official's approval would seek a Floor Official with an understanding of the matter at hand and is in close physical proximity to the member. For example, a member with a market dispute involving options is unlikely to contact a Floor Official with limited options experience to rule on the matter. Under the proposed system, a member concerned with the appropriateness of the initial Floor Official's ruling could appeal to an Exchange Official. Next, a

[6] *See* Exchange Rule 21(b).

[7] *See* Exchange Rule 21(a). Telephone conversation between William Floyd-Jones, Jr., Assistant General Counsel, Amex, and Cyndi Nguyen, Attorney, Division, Commission, on November 4, 2002 (clarifying the applicability of a reference to Amex's Constitution).

[8] *See* Exchange Rule 21(a).

[9] *See* Exchange Rule 21(a).

[10] *See* Exchange Rule 21(b).

[11] There was a technical correction in this quoting of the rule text in Exchange Rule 21(b). Telephone conversation between William Floyd-Jones, Jr., Assistant General Counsel, Amex, and Cyndi Nguyen, Attorney, Division, Commission, on November 4, 2002.

[12] Floor Officials also may issue fines under the Exchange's Minor Rule Violation Fine Plan. The review of these fines is subject to a separate process described in Exchange Rule 590 that is not changed by the current proposal. *See* Part 2 of Exchange Rule 590. Telephone conversation between William Floyd-Jones, Jr., Assistant General Counsel, Amex, and Cyndi Nguyen, Attorney, Division, Commission, on November 4, 2002 (clarifying the Floor Officials' authority to issue fines only under Part 2 of Exchange Rule 590).

[13] *See* Exchange Rule 22(c)(2).

[14] *See* Exchange Rule 109(c).

[15] *See* Exchange Rule 135.

[16] *See* Exchange Rule 154.04.

[17] *See* Exchange Rule 22(c)(3).

[18] In 1965, there were 650 members, 25 Floor Officials, 2 Senior Floor Officials, and 10 Floor Governors.

member aggrieved by an Exchange Official's ruling could then appeal the Exchange Official's ruling to a Floor Governor. The third appeal would be to a three-Governor panel. The proposed appeal process thus provides three levels of prompt review of a Floor Official's ruling. The Exchange believes that the several levels of review would assure that Floor Officials' decisions are fair and impartial as well as prompt.

There would be a slightly different appeal process for the limited number of situations where a Floor Official and a Senior Floor Official must rule together.[19] In these situations, the appeal would go directly to a three Governor panel since a Senior Floor Official either is a Floor Governor or is the equivalent of a Floor Governor in his or her authority to make rulings.

The proposed rule change, as amended, would eliminate the right of appeal to the Board which the Exchange believes only facilitates pointless appeals due to the time required to convene the Amex Adjudicatory Council to review matters.[20] The proposed rule change, as amended, however, would leave unchanged any right that a member or its customer may have to submit a market dispute to arbitration. The rule filing does not seek in any way to define the matters that may be brought to arbitration, and the arbitrability of claims would remain a matter to be determined by arbitrators or the courts.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act [21] in general, and furthers the objectives of Section 6(b)(5) of the Act [22] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by providing for the prompt and fair resolution of a Floor Official's market decision.

[19] *See* Amendment No. 2, *supra* note . An example of a situation where a Floor Official must act jointly with a Senior Floor Official is found in Commentary .02 to Amex Rule 1. This rule provides that if an option trading rotation is in progress prior to 4:02 p.m., and a Senior Floor Official and a Floor Official determine that a final trading rotation is needed to assure a fair and orderly market, the rotation in progress shall be halted and the final rotation begun as promptly as possible after 4:02 p.m.

[20] The Board has delegated to the Amex Adjudicatory Council, a board level committee, the responsibility for reviewing appeals to the Board.

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received written comments with respect to the proposed rule change, as amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2001–07 and should be submitted by December 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28991 Filed 11–14–02; 8:45 am]

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[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46792; File No. SR–CME–2002–01]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Thereto, by Chicago Mercantile Exchange, Inc. Relating to Customer Margin Requirements for Security Futures

November 8, 2002.

On September 27, 2002, Chicago Mercantile Exchange, Inc. (''CME'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to customer margin requirements for security futures. On October 7, 2002, CME submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change was published for comment in the **Federal Register** on October 21, 2002.[4] On November 7, 2002, CME submitted Amendment No. 2 to the proposed rule change.[5] The Commission received no comment letters directly addressing the proposed rule change. However, the Commission received nine comment letters from ten commenters regarding a proposed rule change submitted by OneChicago, LLC (''OneChicago''), which is substantially similar to CME's proposed rule change.[6] Accordingly, the Commission has considered those comments in its review of the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[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.

[4] Securities Exchange Act Release No. 46637 (October 10, 2002), 67 FR 64672.

[5] In Amendment No. 2, CME modified certain aspects of its exclusion for market making activity.

[6] *See* Securities Exchange Act Release No. 46555 (September 26, 2002), 67 FR 61707.

rule change.[7] On November 7, 2002, CME submitted a letter in response to those comments.[8] This order approves the proposed rule change and Amendment No. 1 thereto, accelerates approval of Amendment No. 2, and solicits comments from interested persons on Amendment No. 2.

I. Description of the Proposed Rule Change

Introduction

On August 1, 2002, the Commodity Futures Trading Commission (CFTC) and SEC (collectively, the Commissions) jointly adopted customer margin requirements for security futures.[9] Under the Commissions' ''account specific'' approach, the Commissions'' margin rules apply certain core requirements to all security futures, and direct that the more specific requirements depend on the type of account in which the security futures are held (*i.e.*, a futures account or securities account).

Proposal

The proposed rule change sets forth margin requirements for security futures traded on CME that are held in futures accounts.[10] Specifically, the proposed rule change sets the minimum initial and maintenance customer margin rates for such security futures and provides for lower margin levels for permitted strategy-based offset positions. The proposed rules exclude certain financial relations to which the Commissions' margin rules do not apply. The proposed rule change also establishes standards under which members may qualify as Security Futures Dealers and therefore be excluded from CME's margin rules.

Margin Levels

The Commissions' margin rules require that customers deposit in their accounts minimum margin of 20 percent of the current market value of security futures.[11] In addition, the Commissions' rules permit national securities exchanges to set margin levels below 20 percent of the current market value of security futures for certain offsetting positions in security futures and other securities or futures. The proposed rule change establishes a minimum margin rate of 20 percent for both long and short positions in security futures, except with respect to specified, permitted offsetting positions. Under the proposed rule change, CME permits reduced margin levels for eighteen specific offsetting positions.[12]

Security Futures Dealers

As noted above, the proposed rule change provides an exclusion from CME's margin rules for market makers. Under the proposed rule change, CME's market maker exclusion provides that in order to qualify for the exclusion from the margin rules, a person must (1) be a CME member that is registered with the Exchange as a dealer in security futures; (2) 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 Commission under section 15(b) of the Act; (3) maintain records sufficient to prove compliance with the requirements of CME Rule 930 and Rule 41.42(c)(2)(v) under the CEA and Rule 400(c)(2)(v) under the Act, as applicable, including without limitation trading account statements and other financial records sufficient to detail activity; and (4) hold itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis. In addition, the market maker exclusion provides that any market maker that fails to comply with the applicable rules of the exchange or the margin rules adopted by the Commission and the CFTC shall be subject to disciplinary action in accordance with Chapter 4 of CME's rules, and that appropriate sanctions in the case of any such failure shall include, without limitation, a revocation of such market maker's registration as a dealer in security futures.

The CME's proposal, as amended by Amendment No. 1, provided that a market maker would be considered to be holding itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis if either (1) At least 75% of its gross revenue 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 (2) except for unusual circumstances, at least fifty percent (50%) of its trading activity on CME in any calendar quarter is in classes of security futures contracts to which it is assigned by CME.

In Amendment No. 2, CME amended this aspect of its proposed rule change. Specifically, the market maker exclusion now provides three alternatives ways for a member to satisfy the requirement that a security futures dealer hold itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis. Under the first alternative, the market maker must (1) Provide continuous two-sided quotations throughout the trading day for all delivery months of security futures representing a meaningful proportion of the total trading volume on the Exchange,[13] subject to relaxation during unusual market conditions as determined by CME (such as a fast market in either a security future an underlying security) at which times the market maker must use its best efforts to quote continuously and competitively; and (2) when providing quotations, quote with a maximum bid/ask spread of no more than the greater of $0.20 or 150% of the bid/ask spread in the

[7] *See* letters to Jonathan Katz, Secretary, Commission, from: Philip D. DeFeo, Chairman and Chief Executive Officer, Pacific Stock Exchange, dated October 15, 2002 (''PCX Letter''); Marc Menchel, Senior Vice President and General Counsel, National Association of Securities Dealers, dated October 23, 2002 (''NASD Letter''); Richard Ketchum, Deputy Vice Chairman and President, The Nasdaq Stock Market, Inc., dated October 23, 2002 (''Nasdaq Letter''); Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, Inc., dated October 22, 2002 (''ISE Letter''); Michael J. Ryan, Jr., Executive Vice President and General Counsel, American Stock Exchange, Inc., dated October 22, 2002 (''Amex Letter''); John P. Davidson, Managing Director, Morgan Stanley & Co. Inc., and Mitchell J. Lieberman, Managing Director, Goldman, Sachs & Co., dated October 23, 2002 (''Morgan/Goldman Letter''); Kathleen M. Hamm, Senior Vice President, Nasdaq Liffe Markets, LLC, dated October 22, 2002 (''NQLX Letter''); Darla C. Stuckey, Corporate Secretary, New York Stock Exchange, Inc., dated October 24, 2002 (''NYSE Letter''); and Michael R. Schaefer, Managing Director, Salomon Smith Barney, dated October 25, 2002 (''SSB Letter'').

[8] Letter from CME to Office of Market Supervision, Division of Market Regulation, Commission, dated November 7, 2002 (''CME Letter'').

[9] Securities Exchange Act Release No. 46292, 67 FR 53146 (August 14, 2002).

[10] The proposed rule change limits the scope of CME's customer margin rules to positions in futures accounts.

[11] Rule 403(b)(1) under the Act and Rule 41.45(b)(1) under the Commodity Exchange Act (''CEA'') 17 CFR 240.403(b)(1) and 17 CFR 41.45(b)(1).

[12] In its release adopting the customer margin rules for security futures, the Commissions published a table of eighteen offsetting positions and corresponding margin levels that are consistent with comparable offsets permitted for positions involving exchange-traded options. The proposed rule change includes all of the offsetting positions that the Commissions included in their table. However, CME's customer margin rules only apply to positions held in futures accounts. Because any offset that includes a security (other than a security future) must be carried in a securities account, CME's rule applies only to those offsetting positions that may be carried in a futures account (*i.e.*, offsets that do not include securities other than security futures).

[13] Beginning on the 181st calendar day after the commencement of trading on the Exchange, a ''meaningful proportion of the total trading volume on the Exchange from time to time'' shall mean a minimum of 20% of such trading volume.

primary market for the security underlying each security future.

Under the second alternative, the market maker must (1) respond to at least 75% of the requests for quotation for all delivery months of security futures representing a meaningful proportion of the total trading volume on the Exchange,[14] subject to relaxation during unusual market conditions as determined by the CME (such as a fast market in either a security future or an underlying security) at which times such Market Maker must use its best efforts to quote competitively; and (2) when responding to requests for quotation, quote within five seconds with a maximum bid/ask spread of no more than the greater of $0.20 or 150% of the bid/ask spread in the primary market for the security underlying each security future.

Under the third alternative, the market maker is assigned to a group of security futures that is either unlimited in nature (''Unlimited Assignment'') or is assigned to no more than 20% of the security futures listed on the Exchange (''Limited Assignment''). In addition, this alternative provides that: (a) At least 75% of the market maker's total trading activity in CME products is in its assigned security futures, measured on a quarterly basis; (b) during at least 50% of the trading day the market maker has bids or offers in the market that are at or near the best market, except in unusual market conditions (such as a fast market in either a security future or an underlying security), with respect to at least 25% (in the case of an Unlimited Assignment) or at least one (in the case of a Limited Assignment) of its assigned security futures; and (c) the first two requirements are satisfied on at least 90% (in the case of an Unlimited Assignment) or 80% (in the case of a Limited Assignment or in the case where the Exchange is listing four or fewer security futures contracts) of the trading days in each calendar quarter. CME has requested approval of this alternative on a six-month pilot basis beginning on the date of this order.

II. Summary of Comments

As noted above, the Commission received no comment letters directly addressing the proposed rule change, but did receive nine comment letters from ten commenters regarding a similar proposed rule change submitted by OneChicago. Accordingly, the Commission has considered those comments in its review of the proposed rule change.[15] CME submitted a letter in response to those comments.[16]

Market Maker Exclusion

All of the comments expressed concern with the proposed market maker exclusion. In particular, the commenters objected to the provision that would allow members to qualify for the market maker exclusion based on the amount of revenue they derive from trading listed financial derivatives and underlying instruments. Six comments expressed the view that this test was inconsistent with the guidelines provided by the Commission and the CFTC,[17] and six comments maintained that the proposed revenue requirement was not consistent with the margin requirements for comparable exchange-traded options and therefore did not satisfy the requirements of section 7(c)(2) of the Act.[18] Commenters argued that the revenue test would allow members to qualify for the market maker exclusion without actually providing liquidity to the market for security futures.[19] Other commenters contended that the revenue test would increase systemic risk in the marketplace for security futures, and therefore did not satisfy section 7(c)(2) of the Act, by allowing an excessively high number of market professionals to trade security futures with reduced margin requirements.[20]

In response to the commenters' concerns, CME stated that it had modified the tests that a CME member must satisfy in order to qualify for the market maker exclusion by eliminating the test based on revenue and revising the test based on trading activity. CME also stated that the futures industry tends to rely upon ''local traders'' acting as individual entrepreneurs as a primary source of liquidity, and that these local traders are typically not obligated to participate or otherwise be tied to a specific marketplace during the course of the trading day. In addition, CME stated that electronic trading systems developed to support futures trading have been developed to parallel open outcry trading practices, under which local traders may be physically unable to voice a bid and an offer simultaneously or to voice either a bid or offer continuously throughout the entire trading day on each and every trading day. CME maintained that, as a result, electronic futures trading systems may not necessarily support features such as request for quotes or the entry of two-sided quotations.

CME expressed the view that the first and second revised tests are substantively identical to tests that the Commission approved for Nasdaq Liffe Markets.[21] In addition, CME maintained that the third revised test is crafted to reflect the realities of the its electronic trading platform, as well as the fact that a number of CME's floor traders and floor brokers are individual entrepreneurs who cannot physically represent themselves in the market at all times on all trading days. Finally, CME stated that it requested that the third revised test of its market maker exclusion in proposed Rule 930.B.2.b.(3) be adopted on a six-month pilot basis, subject to public comment and subsequent approval by the Commission so that there would be an opportunity for the study of the effects and implications of the test before it is adopted on a permanent basis.

In addition, two comments expressed the view that the proposed market maker exclusion would encourage imprudent risk taking, speculation, and leverage because there would be no net capital requirements imposed either on a floor broker that qualifies for the market maker exclusion or on its carrying broker-dealer or FCM.[22] The commenters' concern is that the regulatory capital requirements for certain security futures market participants is inadequate. Moreover, those commenters expressed concern that in the event of a bankruptcy of a carrying firm, a bankruptcy receiver or trustee would pay out to the floor broker a pro rata share of the available pool of assets on the same terms as customers, notwithstanding that the floor broker was not required to post customer margin.

The Commission believes that the determination of what amount of capital is sufficient for a market participant is within the purview of the participant's primary regulator and does not believe that it would be appropriate to require CME's margin rules to address these

[14] Beginning on the 181st calendar day after the commencement of trading on the Exchange, a ''meaningful proportion of the total trading volume on the Exchange from time to time'' shall mean a minimum of 20% of such trading volume.

[15] PCX Letter, NASD Letter, Nasdaq Letter, ISE Letter, Amex Letter, Morgan/Goldman Letter, NQLX Letter, NYSE Letter, and SSB Letter. *See supra* note 7. The SSB Letter stated that it agreed generally with the comments expressed in the Morgan/Goldman Letter.

[16] CME Letter, *supra* note 8.

[17] NASD Letter, Morgan/Goldman Letter, NQLX Letter, NYSE Letter, Nasdaq Letter, SSB Letter, and Amex Letter.

[18] PCX Letter, NASD Letter, ISE Letter, Amex Letter, Morgan/Goldman Letter, and SSB Letter.

[19] PCX Letter, ISE Letter, and NQLX Letter, Morgan/Goldman Letter.

[20] Morgan/Goldman Letter, NASD Letter, SSB Letter.

[21] *See* Securities Exchange Act Release No. 46771 (November 5, 2002).

[22] Morgan/Goldman Letter and SSB Letter.

concerns indirectly. In addition, the Commission believes that any concerns regarding a market maker's share of a customer's estate in a bankruptcy proceeding would be more properly addressed by changes to the insolvency regime applicable to those market participants.

Finally, one commenter expressed concern with the fact that certain aspects of the margin rules would apply to positions carried in securities accounts. One commenter objected to the proposal to adopt margin levels for offsetting positions that only may be held in securities accounts even though its rules only apply to positions in futures accounts because the proposal gave the impression that those offsets were permitted to be carried in a futures account.[23] The Commission reiterates that because any offset that includes a security (other than a security future) must be carried in a securities account, CME's rule applies only to those offsetting positions that may be carried in a futures account (*i.e.*, offsets that do not include securities other than security futures). In addition, the Commission emphasizes that approval of the proposed rule change does not affect the applicability of the rules of another self-regulatory organization to its members.

III. Discussion

Under section 19(b)(2) of the Act, the Commission is directed to approve the proposed rule change if it finds that it is consistent with the requirements of the Act and the rules and the rules and regulations thereunder applicable to a national securities exchange.[24] Section 6(b)(5) of the Act[25] requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[26] In addition, section 7(c)(2)(B) of the Act[27] provides, among other things, that the margin rules for security futures must preserve the financial integrity of markets trading security futures, prevent systemic risk, and be consistent with the margin requirements for comparable exchange-traded options. Section 7(c)(2)(B) also provides that the margin levels for security futures may be no lower than the lowest level of margin, exclusive of premium, required for any comparable exchange-traded option. For the reasons discussed below, after careful review and consideration of the commenters' views, the Commission finds that the rule change is consistent with CME's obligations under the Act and the rules and regulations thereunder.

The Commission believes that the rule change is generally consistent with the customer margin rules for security futures adopted by the Commission and the CFTC. In particular, the Commission notes that, consistent with Rule 403 under the Act, CME's proposed rule provides for a minimum margin level of 20% of current market value for all positions in security futures. The Commission believes that 20% is the minimum margin level necessary to satisfy the requirements of section 7(c)(2)(B) of the Act. Rule 403 under the Act[28] also provides that a national securities exchange may set margin levels lower than 20% of the current market value of the security future for an offsetting position involving security futures and related positions, provided that an exchange's margin levels for offsetting positions meet the criteria set forth in section 7(c)(2)(B) of the Act. The offsets proposed by CME are consistent with the strategy-based offsets permitted for comparable offset positions involving exchange-traded options and therefore consistent with Section 7(c)(2)(B) of the Act.

Finally, the Commission believes that the standards for CME's market maker exclusion, as amended by Amendment No. 2, are consistent with the Act, and Rule 400(c)(2)(v) thereunder.[29] Specifically, the Commissions' margin rules do not apply to a member of a national securities exchange that is registered with such exchange as a ''security futures dealer'' pursuant to exchange rules that must meet several criteria, including a requirement that a security futures dealer be required ''to hold itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis.'' The Commission believes that the affirmative obligations required by CME Rule 930.B.2.b satisfy this requirement.

IV. Accelerated Approval of Amendment No. 2

CME has asked the Commission to approve Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing. Amendment No. 2 modifies CME's market maker exclusion. Specifically, Amendment No. 2 modifies the trading obligations that market maker must meet to qualify for the exclusion. The amendments to the trading obligations are in response to the commenters' concerns, and clarify the minimum trading requirements imposed on market makers in order to satisfy the requirement of the exclusion that a market maker hold itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis. CME has also requested that the Commission approve the revised test in CME Rule 930.B.2.b.(3) as a pilot program for six months beginning on the date of this order.

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 proposed rule change should enable CME to begin trading security futures from the outset of security futures trading.[30] In addition, the Commission believes that granting accelerated approval to Amendment No. 2 thereto should clarify the obligations that CME members must meet in order to qualify for the market maker exclusion from the margin requirements. In addition, the Commission notes that certain of the modifications to the trading obligations of the market maker exclusion set forth in Amendment No. 2 will take effect as a temporary pilot to give members of the public an opportunity to comment on the substance of those aspects of Amendment No. 2 before CME requests permanent approval. Accordingly, the Commission believes that there is good cause, consistent with section 19(b) of the Act, to approve Amendment No. 2 to the proposed rule change on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 2 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

[23] NQLX Letter.

[24] 15 U.S.C. 78s(b)(2).

[25] 15 U.S.C. 78f(b)(5).

[26] In approving this rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78*o*–3(b)(9).

[27] 15 U.S.C. 78g(c)(2)(B).

[28] 17 CFR 240.403(b)(2).

[29] 17 CFR 200.400(c)(2)(v).

[30] The Commission understands that trading in security futures is scheduled to begin on November 8, 2002.

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CME–2002–01 and should be submitted by December 6, 2002.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[31] that the proposed rule change, as amended, (File No. SR–CME–2002–01) be, and hereby is, approved, *provided, however*, that CME Rule 930.B.2.b.(3) is approved until May 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[32]

J. Lynn Taylor,

Assistant Secretary.

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[31] 15 U.S.C. 78s(b)(2).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46790; File Nos. SR–GSCC–2002–09 and SR–MBSCC–2002–01]

Self-Regulatory Organizations; Government Securities Clearing Corporation and MBS Clearing Corporation; Notice of Filing of Proposed Rule Changes Relating to the Merger of MBS Clearing Corporation into the Government Securities Clearing Corporation to Form the Fixed Income Clearing Corporation

November 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 7, 2002, the Government Securities Clearing Corporation (''GSCC'') and the MBS Clearing Corporation (''MBSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes (File Nos. SR–GSCC–2002–09 and SR–MBSCC–2002–01). On October 31, 2002, and on November 5, 2002, GSCC and MBSCC amended the proposed rule changes. The proposed rule changes are described in Items I, II, and III below, which items have been prepared primarily by GSCC and MBSCC. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested parties.

[1] 15 U.S.C. 78s(b)(1).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The proposed rule changes propose arrangements for the combination of GSCC with MBSCC. The subject proposal provides the following:

- MBSCC will merge into GSCC.
- GSCC will be renamed the Fixed Income Clearing Corporation (''FICC'').
- FICC will provide services currently offered by GSCC and MBSCC through separate divisions of FICC (''Government Securities Division'' and ''Mortgage-Backed Securities Division'' collectively referred to as ''Divisions''). FICC will adopt the current rules of GSCC, as amended and described herein, as rules of the Government Securities Division and the current rules of MBSCC, as amended and described herein, as rules of the Mortgage-Backed Securities Division.
- After the merger, current GSCC members will receive the services they currently receive from GSCC from the Government Securities Division, and current MBSCC participants, limited purpose participants, and Electronic Pool Notification (''EPN'') users will receive the services they currently receive from MBSCC from the Mortgage-Backed Securities Division. The membership agreements between GSCC and its members and between MBSCC and its participants, limited purpose participants, and EPN users will be modified to reflect the merger.
- The rules of GSCC and MBSCC will be modified to reflect that the formerly separate clearing corporations will be separate divisions of FICC.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, GSCC and MBSCC included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. GSCC and MBSCC have prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

[2] The Commission has modified the text of the summaries prepared by GSCC and MBSCC.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

GSCC and MBSCC became wholly-owned, indirect subsidiaries of The Depository Trust and Clearing Corporation (''DTCC'') as a result of merger and exchange offer transactions that took place in late 2001 (''DTCC Integration'').[3] GSCC and MBSCC provide clearing and certain ancillary services for government securities and mortgage-backed securities, respectively. The clearing and other services for these different types of fixed-income products have many common elements. The handling of such products by different clearing corporations hinders development of uniform standards for the fixed-income services industry. The combination of GSCC and MBSCC will lead to development of uniform standards for messaging, reporting, netting and settlement mechanisms, standardized settlement practices, and coordinated cash and mark-to-market flows for fixed-income products. Moreover, combining GSCC and MBSCC will help the clearing corporations achieve important membership and risk management goals, such as building a consolidated risk management platform, optimizing cross-margining among various fixed-income products, and establishing uniform membership standards. Furthermore, redundant facilities, services, and operational aspects[4] will be eliminated as a result of the merger thereby reducing the costs of processing transactions in fixed-income products over time.

To effect the merger, MBSCC will be merged into GSCC under New York law. At the time of the merger, GSCC Acquisition Company LLC (''GSCC Parent''), the sole shareholder of GSCC, will pay MBSCC Holding Company, Inc., the sole shareholder of MBSCC, a nominal amount of money in consideration for canceling its shares of capital stock of MBSCC, and shares of capital stock of MBSCC will be cancelled. GSCC will be the surviving corporation of the merger and will be renamed FICC. GSCC Parent will be the sole direct shareholder of FICC. The current Certificate of Incorporation and Bylaws of GSCC will be amended to be the Certificate of Incorporation and

[3] Securities Exchange Act Release Nos. 44988 (October 25, 2001), 66 FR 55222 [SR–MBSCC–2001–01] and 44989 (October 25, 2001), 66 FR 55220 [SR–GSCC–2001–11].

[4] Operational aspects include such things as separate annual reports, regulatory reports, audits, financial statements, and regulatory examinations.

Bylaws of FICC. FICC will form the Government Securities Division as the vehicle for delivering the services now provided by GSCC to GSCC members. FICC will form the Mortgage-Backed Securities Division as the vehicle for delivering the services now provided by MBSCC to MBSCC participants, limited purpose participants, and EPN users of MBSCC.

The members and participants receiving services from the Divisions will retain their shareholdings in DTCC and their rights to be shareholders in DTCC that they received during the DTCC Integration. The structure implemented during the DTCC Integration to assure fair representation for, among others, the members of GSCC and participants of MBSCC will also remain in place. After the DTCC shareholders that are members of GSCC begin receiving services from the Government Securities Division and after the DTCC shareholders that are participants of MBSCC begin receiving services from the Mortgage-Backed Securities Division, they will continue to elect persons to serve on the Board of Directors of DTCC (''DTCC Board'') as they did prior to the creation of FICC. The individuals elected to serve on the DTCC board will, in turn, be selected by DTCC to serve as directors of FICC. On a periodic basis to be determined by DTCC pursuant to the DTCC shareholders agreement, DTCC common stock will continue to be reallocated to the shareholders using the services of The Depository Trust Company (''DTC''), Emerging Markets Clearing Corporation (''EMCC''), National Securities Clearing Corporation (''NSCC''), and the Divisions of FICC based upon their usage. The members receiving services from the Government Securities Division and the participants receiving services from the Mortgage-Backed Securities Division will continue to have the right but not the obligation to purchase some or all of the DTCC common stock to which they are entitled.

The charters of the two committees formed during the DTCC Integration, the DTCC/DTC/GSCC/MBSCC/NSCC Fixed Income Operations and Planning Committee of DTCC, which includes representatives of members of GSCC and participants of MBSCC, and the GSCC/MBSCC Membership and Risk Management Committee, which is comprised of the representatives of members of GSCC and participants of MBSCC, will be amended to refer to members receiving services from the Government Securities Division and participants receiving services from the Mortgage-Backed Securities Division.

The DTCC/DTC/GSCC/MBSCC/NSCC Fixed Income Operations and Planning Committee will be renamed the DTCC/DTC/FICC/NSCC Fixed Income Operations and Planning Committee. It will continue to advise the DTCC Board and management on its policies and procedures with respect to fixed-income products processed by and services of DTC, EMCC, NSCC, and FICC. The GSCC/MBSCC Membership and Risk Management Committee will be renamed the FICC Membership and Risk Management Committee. It will advise the Board of Directors and management of FICC with respect to membership, credit, and risk matters. Other functions may be assigned to the committees as they are today.

After the merger, FICC will satisfy the fair representation requirement of section 17A of the Act [5] by (i) continuing to give the members receiving services from the Government Securities Division and the participants receiving services from the Mortgage-Backed Securities Division, the right to purchase shares of DTCC common stock on a basis that reflects their use of the services of the Divisions, DTC, EMCC, and NSCC; (ii) continuing to allow members and participants receiving services from the Divisions to take part in the selection of individuals to be directors of DTCC (who will also be directors of FICC, DTC, EMCC, and NSCC) to ensure that all major constituencies in the securities industry will have a voice in the business and affairs of each of these companies; and (iii) utilizing the committee structure described above to ensure that the members and the participants receiving services from the Divisions will have a voice in the operations and affairs of the Divisions.

As a result of the merger, GSCC's Certificate of Incorporation and Bylaws will be amended to reflect the change of GSCC's name to FICC. The Rules of MBSCC will be adopted by FICC as part of the merger as the rules of the Mortgage-Backed Securities Division. The Rules of GSCC and MBSCC will be amended to reflect that (i) the Government Securities Division and the Mortgage-Backed Securities Division will be separate Divisions of FICC; (ii) neither Division of FICC will be liable for the obligations of the other Division; and (iii) that the clearing fund and other assets of each Division will not be available to satisfy the obligations of the other Division.

GSCC and MBSCC believe that the proposed rule changes are consistent with the requirements of section 17A of the Act [6] and the rules and regulations thereunder applicable to GSCC and MBSCC because they facilitate the prompt and accurate clearance and settlement of transactions in government securities and mortgage-backed securities by ensuring the continued availability of efficient and cost-effective clearing services to GSCC members and MBSCC participants.

(B) Self-Regulatory Organization's Statement on Burden on Competition

GSCC and MBSCC do not believe that the proposed rule changes 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 Changes Received From Members, Participants or Others

No written comments relating to the proposed rule changes have been solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within thirty-five 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 ninety 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 changes or

(B) institute proceedings to determine whether the proposed rule changes 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 changes 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the

[5] 15 U.S.C. 78q–1(b)(3)(C).

[6] 15 U.S.C. 78q–1.

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices of GSCC and MBSCC.

All submissions should refer to File Nos. SR-GSCC–2002–09 and SR–MBSCC–2002–01 and should be submitted by December 6, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28989 Filed 11–14–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46783; File No. SR–NASD–2002–153]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish as Permanent Two Pilot Programs Currently Contained in NASD Rule 6541 Relating to Manning Rule Protection for Customer Limit Orders Executed on the Over-the-Counter Bulletin Board

November 7, 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 25, 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. 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 establish as permanent two pilot programs currently contained in NASD Rule 6541. Rule 6541, which generally prohibits member firms from trading ahead of customer limit orders in designated Over-the-Counter Bulletin Board (''OTCBB'') securities, was established on a pilot basis for approximately 325 securities quoted on the OTCBB.[3] No new rule language is proposed.

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

On February 8, 2001, the Commission approved NASD Rule 6541, which, on a pilot basis, applied the basic customer limit order protection principles that presently apply to Nasdaq-listed securities to designated securities that are traded on the OTCBB.[4] Rule 6541(a) generally prohibited member firms that accepted customer limit orders in these securities from ''trading ahead'' of their customers for their own account at prices equal or superior to the limit orders, without executing them at the limit price. Rule 6541(b) required member firms to provide a minimum level of price improvement of the lesser of $0.05 per share or one-half of the current inside spread to incoming orders in OTCBB securities if the member chose to trade as principal with those incoming orders while holding customer limit orders. If a member failed to provide the minimum level of price improvement to the incoming order, the member was required to execute its held customer limit orders.

The limit order protection embodied in Rule 6541 is an investor protection tool based on NASD IM–2110–2 (commonly known as the ''Manning Rule''). In *Manning,* the NASD found and the Commission affirmed that a member firm that accepts a customer limit order has a fiduciary duty not to trade for its own account at prices more favorable than the customer order.[5] Rule 6541 expands to securities traded on the OTCBB the protections that IM–2110–2 provides to trading of Nasdaq National Market and SmallCap securities.

On March 2, 2001, and April 6, 2001, the Commission approved modifications to IM–2110–2 in Nasdaq listed securities.[6] In general, these modifications narrowed the amount of price improvement required to avoid the obligation to fill a customer limit order, in recognition of the introduction of decimal pricing of Nasdaq-listed securities. On July 26, 2001, Nasdaq filed and implemented an amendment to Rule 6541(b) (SR–NASD–2001–39) that likewise narrowed the amount of required price improvement in OTCBB securities.[7] Under SR–NASD–2001–39, the price improvement requirement was narrowed from $0.05 or one-half the inside spread to $0.01 or one-half the inside spread (whichever is less) for a member wishing to trade in front of held customer limit orders that are priced at or inside the current inside spread for an OTCBB security. For customer limit orders priced less than $0.01 outside the inside spread, however, SR–NASD–2001–39 required a member seeking to trade in front of such limit orders to execute its trades at a price at least equal to the inside bid (with respect to held customer limit orders to buy) or inside offer (for held orders to sell). Moreover, SR–NASD–2001–39 provided that limit order protection would not apply to customer limit orders that are priced more than $0.01 outside the current inside spread. The amendment to Rule 6541(b) adopted by SR–NASD–2001–39 was effective for a three-month pilot period that ended on November 1, 2001.

On November 1, 2001, Nasdaq amended Rule 6541(b) to eliminate the minimum price improvement requirement for limit orders outside the inside spread.[8] Accordingly, any degree of price improvement would relieve a member from the obligation to fill a limit order that is outside of the inside spread. The amendment also clarified that the basic prohibition on trading

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[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43944 (February 8, 2001), 66 FR 10541 (February 15, 2001) (SR–NASD–00–22).

[4] *See* Securities Exchange Act Release No. 43944 (February 8, 2001), 66 FR 10541 (February 15, 2001) (SR–NASD–00–22).

[5] *See In re E.F. Hutton & Co.,* Securities Exchange Act Release No. 25887 (July 6, 1988).

[6] *See* Securities Exchange Act Release No. 44030 (March 2, 2001), 66 FR 14235 (March 9, 2001) (SR–NASD–2001–09); Securities Exchange Act Release No. 44165 (April 6, 2001), 66 FR 19268 (April 13, 2001) (SR–NASD–2001–27). *See also* Securities Exchange Act Release No. 44529 (July 9, 2001), 66 FR 37082 (July 16, 2001) (SR–NASD–2001–43).

[7] *See* Securities Exchange Act Release No. 44593 (July 26, 2001), 66 FR 40304 (August 2, 2001) (SR–NASD–2001–39).

[8] *See* Securities Exchange Act Release No. 34–45011 (November 1, 2001); 66 FR 56587 (November 8, 2001) (SR–NASD–2001–78).

ahead of held limit orders at prices equal or superior to the limit orders applies to limit orders that are priced more than $0.01 away from the current inside spread. Thus, the basic prohibition on trading ahead of a customer limit order at a price equal or superior to the limit order without filling the limit order applies to all limit orders in OTCBB securities covered by Rule 6541. The amount of required price improvement for limit orders priced at or inside the current inside spread remained the lesser of $0.01 or one-half of the current inside spread. The pilots are currently scheduled to expire on December 15, 2002.[9]

Nasdaq has concluded that it is in investors' best interest to establish limit order protection requirements on a permanent basis for all securities quoted on the OTCBB. Nasdaq believes that limit order protection provides substantial protection to small investors by ensuring that members consider those orders when executing their own orders. In addition, Nasdaq believes that limit order protection prevents the isolation of customer limit orders that could otherwise occur when a member trades for its own account and a customer order fails to receive an execution. Nasdaq believes that the rule bolsters investors' confidence in the fairness of the market as a whole.

Nasdaq's Department of Economic Research (''ER'') closely analyzed the impact of the Manning pilot on relevant aspects of the operation of the OTCBB. Nasdaq sought to ensure that the potential negative effects on the trading of OTCBB securities do not offset the positive effects of limit order protection. ER studied the following areas: impact on trading, market maker quoting activity, and spread behavior. To determine the impact of the pilot on trading activity, the study analyzed total volume, number of trades, and number of riskless principal trades (as a proxy for customer limit orders executed). ER studied changes to the number of market makers, quote updates, and bid/ask midpoint to determine that the pilot had no statistically significant impact on market maker quoting behavior. Finally, ER looked at a variety of spread statistics (quoted, effective, relative, relative effective). Overall, ER found no material negative implications on the measurable market quality of the OTCBB.

Based upon this study and its experience with the operation of the Manning rule in securities listed on Nasdaq, Nasdaq has concluded that limit order protection is a necessary and appropriate rule in the OTCBB marketplace. Nasdaq believes that it is a highly visible investor protection advancement that is consistent with the maintenance of a viable, liquid market. Nasdaq believes that the pilot program has effectively demonstrated that limit order protection is not detrimental to trading of less-liquid, low priced securities on the OTCBB. Accordingly, Nasdaq is extending limit order protection to all securities on the OTCBB.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act[10] in general, and with Section 15A(b)(6) of the Act[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster competition and coordination with person engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to a free and open market, and 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 would 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–153 and should be submitted by December 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28993 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46786; File No. SR–NYSE–2002–52]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange, Inc., Relating to Transactional Fees for Certain Exchange Traded Funds

November 7, 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 21, 2002, the New York Stock Exchange, Inc. (''NYSE'' or ''the Exchange'') filed with the Securities and Exchange

[9] On January 14, 2002, and again on July 16, 2002, Nasdaq filed to extend the pilot programs. *See* Securities Exchange Act Release No. 45276 (January 14, 2002), 67 FR 2936 (January 22, 2002) (SR–NASD–2002–06); Securities Exchange Act Release 46248 (July 24, 2002), 67 FR 49727 (July 31, 2002) (SR–NASD–2002–95).

[10] 15 U.S.C. 78o–3.

[11] 15 U.S.C. 78o–3(b)(6).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Amendment No. 1 to the proposed rule change was filed on October 21, 2002. Amendment No. 2 to the proposed rule change was filed on November 7, 2002.[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

The Exchange proposes that no transactional fees will be charged for shares of the Fresco℠ Dow Jones STOXX 50℠ Fund and Fresco℠ Dow Jones EURO STOXX 50℠ Fund (the ''Funds''), to be listed and traded on the Exchange.[4]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE 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 anticipates that the Funds will shortly be listed and traded on the Exchange. The Exchange states that it desires to garner experience in providing a market for the Funds. Accordingly, the Exchange proposes to implement a ''fee holiday,'' constituting zero transaction charges, for trading the Funds on the Exchange at this time.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)[5] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, which establishes or changes a due, fee or other charge imposed by the Exchange, has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4 thereunder.[7] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–2002–52 and should be submitted by December 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28992 Filed 11–14–02; 8:45 am]

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[3] In Amendment Nos. 1 and 2, the NYSE corrected typographical errors and added specific text to its schedule of transaction fees to reflect the ''fee holiday'' that is the subject of the proposed rule change. *See* letters from Darla Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 21, 2002 and November 6, 2002. The amendments were solely technical in nature.

[4] *See* Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Regarding Listing and Trading of Exchange Traded Funds Based on Dow Jones STOXX 50 and Dow Jones EURO STOXX 50 Indexes, Securities Exchange Act Release No. 46686 (October 18, 2002), 67 FR 65388 (October 24, 2002).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46781; File No. SR–NYSE–2002–54]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the New York Stock Exchange, Inc. Amending NYSE Rule 60 to Eliminate Depth Indications and Depth Conditions

November 7, 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 22, 2002, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete Supplementary Material .30 of NYSE Rule 60 (''Dissemination of Quotations'') relating to the dissemination of depth indications and depth conditions that reflect market interest in a security below the current published bid and above the current published offer. The text of the proposed rule change is available at the NYSE or at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is 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

In March 2001, the Exchange amended NYSE Rule 60 to permit an Exchange specialist to indicate that there is additional market interest in a security not shown in the published quotation (*i.e.*, interest to buy below the current published bid, or interest to sell above the current published offer).[3] The additional market interest reflected in the depth indication and depth condition could include the specialist's proprietary interest, orders the specialist has on his or her book, and other orders, such as percentage orders, which the specialist is representing as agent.

The dissemination of a depth indication or depth condition by a specialist is made on a ''best efforts basis.'' The specialist is allowed to use his or her professional judgment to determine whether disseminating additional market interest would be useful with respect to current conditions in the security or the market in general. Depth indications and depth conditions are purely informational in nature and, therefore, do not themselves constitute a ''firm'' quotation for purposes of NYSE Rule 60 or Rule 11Ac1–1 under the Act.[4]

The Exchange now proposes to discontinue the use of depth indications and depth conditions. Since the initiation of depth indication and depth condition, the Exchange has undertaken the development of other means to provide market participants with current and useful market information to provide greater transparency with respect to the actual depth of the market below the best bid and above the best offer. One such initiative is NYSE OpenBook™, which was launched on January 24, 2002.[5] OpenBook provides a comprehensive view of NYSE limit order books for all Exchange-traded securities, enabling market participants to see aggregate limit order interest at price levels outside the displayed Exchange quotation.

The Exchange is currently developing another mechanism to provide greater transparency with respect to the existence of additional interest in Exchange-traded securities, which will consist of the display of a ''liquidity quote'' along with the best quote.[6] In the Liquidity Quote Proposal, the Exchange will be proposing to have liquidity quotes reflect aggregated trading interest at a specific price interval below the best bid or above the best offer. In addition, in the Liquidity Quote Proposal, the Exchange will be proposing that liquidity quotes are ''firm'' quotes for the purposes of NYSE and Commission rules. The Exchange therefore believes that the discontinuance of depth indications and depth conditions will allow the Exchange to utilize system capacity currently dedicated to depth conditions and depth indications to facilitate the development and testing of liquidity quotes.[7]

2. Statutory Basis

The Exchange believes that the statutory basis for this proposed rule change is Section 6(b)(5) of the Act,[8] which requires that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder[10] because the proposal: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, provided that the NYSE has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change or such shorter time as designated by the Commission.[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, or otherwise in furtherance of the purposes of the Act.

The Exchange believes that the advent of the OpenBook service and the Exchange's plan to introduce liquidity quote information will adequately replace information provided by depth indications and conditions and, therefore, the proposal is non-controversial.

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

[3] *See* Securities Exchange Act Release No. 44084 (March 16, 2001), 66 FR 16307 (March 23, 2001) (SR–NYSE–01–06).

[4] 17 CFR 240.11Ac1–1.

[5] For further details on NYSE OpenBook™, *see* Securities Exchange Act Release No. 45138 (December 18, 2001), 66 FR 66491 (December 26, 2001) (order approving the establishment of Exchange fees for NYSE OpenBook™).

[6] On October 28, 2002, the NYSE filed with the Commission a proposed rule change to amend its rules to display additional quotations showing the depth of market. *See* File No. SR–NYSE–2002–55 (''Liquidity Quote Proposal'').

[7] The Exchange intends to provide notice before discontinuing dissemination of the depth condition and depth indicator to members via a floor memorandum, subscribers via e-mail, and vendors by telephone. Telephone conversation between Donald Siemer, Director, Market Surveillance, NYSE, and Kelly Riley, Senior Special Counsel, Division of Market Regulation, Commission, dated November 5, 2002.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] The NYSE has requested and the Commission has agreed to waive the five-day pre-filing notice requirement.

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE.

All submissions should refer to File No. SR–NYSE–2002–54 and should be submitted by December 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28994 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46784; File No. SR–PCX–2002–68]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. To Amend Its Schedule of Fees and Charges To Increase the User Transaction Credit for Certain Transactions in American Depositary Receipts

November 7, 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 8, 2002, the Pacific Exchange, Inc. (''PCX'' 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 Exchange. On November 5, 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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange through its wholly owned subsidiary PCX Equities, Inc. (''PCXE''), proposes to amend its fee schedule to increase the user transaction credit for ETP Holders and Sponsored Participants who provide liquidity in exchange-listed American Depositary Receipts (''ADRs'') that are traded on the Archipelago Exchange, the equities trading facility of PCXE. The text of the proposed rule change is available at the Exchange and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 amend the Exchange's fee schedule by increasing the level of the transaction credit paid to ETP Holders[4] and Sponsored Participants[5] (collectively ''Users'') who provide liquidity in exchange-listed ADRs that are traded on the Archipelago Exchange (''ArcaEx'').

Currently, Users who provide liquidity in ADRs by entering into the ArcaEx Book[6] resting limit orders that are subsequently executed against incoming marketable orders, earn a credit of $0.001 per share. The Exchange proposes to increase the level of the transaction credit for ADRs from $0.001 to $0.002 per share. The increased credit of $0.002 is the same amount that is currently applied to orders that provide liquidity in Exchange-Traded Funds. This credit is intended to create additional incentives to Users to provide liquidity in ADRs that are traded on the ArcaEx facility.

2. Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[7] in general, and Section 6(b)(4)[8] of the Act in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge and, therefore, has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder.[10] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Peter D. Bloom, Director, Policy Development, PCX to Rebekah Liu, Special Counsel, Division of Market Regulation, Commission, dated November 5, 2002. In Amendment No. 1, the Exchange corrected the fee schedule attached as Exhibit A to the rule filing to accurately reflect that existing underlined text would be double-underscored. Amendment No. 1 contained no substantive changes to the fee schedule.

[4] See PCXE Rule 1.1(n).

[5] A ''Sponsored Participant'' means ''a person which has entered into a sponsorship arrangement with a Sponsoring ETP Holder pursuant to [PCXE] Rule 7.29.'' See PCXE Rule 1.1(tt).

[6] ArcaEx maintains an electronic file of orders, called the ArcaEx Book, through which orders are displayed and matched. The ArcaEx Book is divided into four components, called processes—the Directed Order Process, the Display Order Process, the Working Order Process, and the Tracking Order Process. *See* PCXE Rules 7.36 and 7.37 for a detailed description of these order execution processes.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

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 also will be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-PCX–2002–68 and should be submitted by December 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–29042 Filed 11–14–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46789; File No. SR–Phlx–2002–71]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 and Amendment No. 2 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Maintenance Listing Criteria for Underlying Securities in Phlx Rule 1010 and Original Listing Criteria for Underlying Securities in Phlx Rule 1009

November 7, 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 31, 2002, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. On November 5, 2002, Phlx filed Amendment No. 1 to the proposed rule change.[3] On November 6, 2002, Phlx filed Amendment No. 2 to the proposed rule change.[4] 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 Substance of the Proposed Rule Change

The Phlx proposes to amend Commentaries .01 and .02 to Phlx Rule 1010 to allow the Exchange to list additional options series where the underlying security satisfies all of the maintenance listing requirements other than the underlying security trading at $3.00 per share of the underlying security, the series the Exchange wants to list is traded on at least one other registered national securities exchange, and at the time the other exchange listed the series the underlying security was trading at $3.00 or more.

The Exchange proposes to amend Commentary .01 to Phlx Rule 1009 to allow the Exchange to list an option on an underlying security that satisfies all of the initial listing requirements except the $7.50 share price requirement,[5] as long as the option that the Exchange wants to list trades on another options exchange, meets continued listing guidelines, and during the three calendar months preceding the date of selection to originally list an option on the Exchange, the average daily trading volume for such options has been at least 5,000 contracts.

The Exchange also proposes to make non-substantive changes to Commentary .02 to Phlx Rule 1009 to indicate a change in the name of the department of the Exchange that will perform certain listing-related functions noted therein.

The text of the proposed rule change is below. Proposed new language is italicized; deleted language is in brackets.

Rule 1010. Withdrawal Of Approval Of Underlying Securities Rule 1010. No change.

Commentary:

.01 The Board of Governors has established guidelines to be considered by the Exchange in determining whether an underlying security previously approved for Exchange option transactions no longer meets its requirements for the continuance of such approval. Absent exceptional circumstances, with respect to items 1, 2, 3, or 4 listed below, an underlying security will not be deemed to meet the Exchange's requirements for continued approval whenever any of the following occur:

1. No change.
2. No change.
3. No change.
4. *Subject to Commentary .02 below*, [T]the market price per share of the underlying security closed below $3 on the previous trading day as measured by the highest closing price reported in the primary market in which the underlying security traded.
5. No change.
6. No change.
7. No change.

.02 In connection with paragraph 4 of Commentary .01 above, the Exchange shall not open for trading any additional series of option contracts of the class covering an underlying security at any time when the market price per share of such underlying security is less than $3 in the primary market in which it is traded *unless the additional series is traded on at least one other registered national securities exchange and at the time the additional series was listed by such other registered national securities exchange it met the $3 market price requirement.* Subject to paragraph 4 of Commentary .01 above, the Exchange may open for trading additional series of option contracts of a class covering an underlying security when the market price per share of such underlying security is at or above $3 at the time such additional series are authorized for trading. For purposes of this Commentary .02, the market price of such underlying security is measured by (i) for intra-day series additions, the last reported trade in the primary market in which the underlying security traded at the time the Exchange determines to add these additional series intra-day, and (ii) for next-day and expiration series additions, the closing price reported in the primary market in which the underlying security is traded on the last trading day before the series are added.

Commentary .03 to .10 No change.

Rule 1009. Criteria for Underlying Securities

Rule 1009. (a) No change.
(b) No change.

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 7 CFR 240.19b–4.

[3] *See* letter to Florence Harmon, Senior Special Counsel, Office of Market Supervision, Commission, from Jurij Trypupenko, Phlx, dated November 1, 2002 (''Amendment No. 1''). In Amendment No. 1, Phlx clarified that another purpose of the proposal was to allow the Exchange to reflect a change in the name of the department of the Exchange that will perform certain listing-related functions noted in Commentary .02 to Phlx Rule 1009. Specifically, the Exchange proposes to modify the language in Commentary .02 to Phlx Rule 1009 so that references to the Business and Operations Planning Department (''BOP'') are changed to the Department of Securities (''DOS'').

[4] *See* letter to Florence Harmon, Senior Special Counsel, Office of Market Supervision, Commission, from Jurij Trypupenko, Phlx, dated November 5, 2002 (''Amendment No. 2''). In Amendment No. 2, Phlx corrected a typographical error in Commentary .01 to Phlx Rule 1009 by changing ''$7½'' to ''$7.50''.

[5] Telephone call between Jennifer Lewis, Attorney, Division of Market Regulation, Commission, and Jurij Trypupenko, Phlx, on November 7, 2002.

(c) No change.

Commentary:

.01 The Board of Governors has established guidelines to be considered by the Exchange in evaluating potential underlying securities for Exchange option transactions. Absent exceptional circumstances with respect to items 1, 2, 3, or 4 listed below, at the time the Exchange selects an underlying security for Exchange options transactions, the following guidelines with respect to the issuer shall be met:

1. No change.
2. No change.
3. No change.
4. *Either (i)* [T]*t*he market price per share of the underlying security has been at least $7.50 for the majority of business days during the three calendar months preceding the date of selection, as measured by the lowest closing price reported in any market in which the underlying security traded on each of the subject days *or (ii)(a) the underlying security meets the guidelines for continued listing in Rule 1010; (b) options on such underlying security are traded on at least one other registered national securities exchange; and (c) the average daily trading volume for such options over the last three (3) calendar months proceeding the date of selection has been at least 5,000 contracts.*

.02 (a) Members, member organizations or any person proposing to list any option not currently listed on the Exchange shall submit a form of request (a ''Request to List an Option''), available from the Exchange's [Business and Operations Planning Department (BOP), to BOP] *Department of Securities (''DOS''), to DOS* staff.

(b) As soon as practicable, but not later than three (3) business days following receipt of the Request to List an Option, [BOP] *DOS* staff shall review the proposed option's eligibility for listing, using the objective listing criteria set forth in Commentary .01 of this Rule. If [BOP] *DOS* staff determines that the proposed option does not meet the objective listing criteria set forth in Commentary .01 of this Rule, [BOP] *DOS* staff shall prepare a responsive form (a ''Notification Memorandum'') stating the reason(s) why the proposed option is not eligible for listing. [BOP] *DOS* staff shall forward the Notification Memorandum to the member or member organization that submitted the Request to List an Option within three (3) business days of its determination that the proposed option does not meet objective listing criteria. [BOP] *DOS* staff shall maintain all Requests to List an Option and Notification Memoranda in a central file for a period of not less than five (5) years.

(c) If [BOP] *DOS* staff determines that the proposed option meets the objective listing criteria set forth in Commentary .01 of this Rule, [BOP] *DOS* staff shall present the initial Request to List an Option and the subsequent review to the Chairman of the Board of Governors or his designee, who shall, within ten (10) business days of receipt of the Request to List an Option, instruct [BOP] *DOS* staff to:

(i) Solicit options specialists to submit applications for specialist privileges in the option; or

(ii) Within three (3) business days, prepare and forward a letter to the member or member organization that submitted the Request to List an Option, setting forth in reasonable detail the basis on which the decision not to list, or to place limitations or conditions upon, the proposed option was made.

(d) In considering underlying securities, the Exchange shall ordinarily rely on information made publicly available by the issuer and/or the markets in which the security is traded.

(e) In determining whether to list an option that otherwise meets objective listing criteria, the Chairman of the Board of Governors or his designee may consider such factors as the Exchange's current and projected computer capacity, and the current and projected demands for that capacity, including telecommunications and Option Price Reporting Authority (''OPRA'') inbound and outbound message capacity or message volume restrictions placed on the Exchange by OPRA; the projected likely number of series and open interest in the option; the projected likely volatility of the option; the projected likely liquidity of the option; name recognition of the option or underlying security; the projected volume of trading in the option that is likely to occur on the Exchange; the projected share of total trading in the option that is likely to occur at the Exchange; whether any intellectual property right or license thereof exists with respect to the option; whether the proposal is consistent with Exchange rules and/or the Securities Exchange Act of 1934 and the rules, regulations, and orders thereunder; whether unusual or unfavorable market conditions exist with respect to the option; and whether it is in the bona fide business interest of the Exchange to list the option. If, in denying a request or approving a request subject to conditions or limitations, the Exchange relies upon a factor of other bona fide business interests, the Exchange shall, in addition to providing the member with a written response specifying that the Exchange has relied upon other bona fide business interests, maintain a record of the bona fide business interests supporting its decision.

Commentary .03 to .07 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, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Phlx 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 represents that the purpose of the proposed rule change is to ensure that the Exchange will not be at a competitive disadvantage by not being able to list additional option series or to originally list options that are listed on other exchanges. The Exchange notes that, although maintenance listing and original listing standards are generally similar among the options exchanges, several exchanges have recently adopted changes similar to those proposed by the Phlx.[6]

Specifically, the Exchange seeks to list additional options series where the underlying security satisfies all of the maintenance listing requirements other than the underlying security trading at $3 per share of the underlying security,[7] the series the Exchange wants to list is traded on at least one other registered

[6] *See* maintenance listing filings at Securities Exchange Act Release Nos. 46375 (August 16, 2002), 67 FR 54628 (August 26, 2002) (SR–AMEX–2002–68); 46501 (September 16, 2002), 67 FR 59585 (SR–CBOE–2002–52); 46647 (October 11, 2002), 67 FR 64426 (October 18, 2002) (SR–ISE–2002–21); and 46406 (August 23, 2002), 67 FR 55446 (August 29, 2002) (SR–PCX–2002–51). *See also* original listing filings at Securities Exchange Act Release Nos. 45505 (March 5, 2002), 67 FR 10941 (March 11, 2002) (SR–AMEX–2002–13); 45220 (December 31, 2001), 67 FR 760 (January 7, 2002) (SR–ISE–2001–33); and 46382 (August 20, 2002), 67 FR 55054 (August 27, 2002) (SR–PCX–2002–41).

[7] The maintenance requirements of Phlx Rule 1010, which will continue to be applied under the proposal, include: (a) the underlying security consists of a large number of outstanding shares by non-affiliates of the issuer, (b) there is a large number of holders of the underlying security, (c) the underlying security is actively traded, and (d) the underlying security continues to be listed on a national securities exchange or traded through the facilities of a national securities association.

national securities exchange, and the underlying security traded at least at $3.00 when that exchange listed the series. The purpose is also to allow the Exchange to list an option where the underlying security satisfies all of the initial listing requirements except that the price of the underlying security is below $7.50, as long as the option that the exchange wants to list trades on another options exchange, meets all continued listing guidelines, and during the three calendar months preceding the date of selection to originally list an option on the Exchange, the average daily trading volume for such options has been at least 5,000 contracts.

$3.00 Maintenance Listing

Currently, Commentary .01 to Phlx Rule 1010 provides the guidelines to be used in determining whether an underlying individual equity security, previously approved for options trading, meets the requirements for continued approval. In particular, Commentary .01 (4) of Rule 1010 provides that that the Exchange may not list additional series for an options class if the market price per share of the underlying security closed below $3.00 on the previous trading day as measured by the highest closing price reported on the primary market in which the underlying security traded.

The Exchange therefore proposes to amend Commentaries .01 and .02 to Phlx Rule 1010 to allow the Exchange to add additional series of options that satisfy all of the maintenance listing requirements other than the $3.00 per share requirement, so long as such series are traded on at least one other registered national securities exchange, and at the time that the additional series were listed by such other exchange, the underlying security met the $3.00 market price requirement. Without the proposed filing, the Exchange believes it would be at a significant competitive disadvantage if it could not list options series that are listed on other exchanges simply because the underlying security has fallen to a market price that is less than $3.00 when the Exchange wanted to list such series.

The Exchange believes that once an options series is trading on another exchange and the series is therefore already available to the investing public, the $3.00 market price threshold is not necessary and becomes an impediment to competition. The Exchange believes allowing the Exchange to list such series will increase competition for order flow and benefit investors.[8] Moreover, the Exchange believes that the maintenance listing standards other than the $3.00 market price would assure that options would be listed and traded on the securities of companies that should be financially sound.

$7.50 Original Listing

Currently, Commentary .01 to Phlx Rule 1009 sets forth the guidelines that must be used in order to determine whether the Exchange may originally list options covering underlying securities. In particular, Commentary .01(4) to Phlx Rule 1009 states that in order to list an equity option, the market price per share of the underlying security must be at least $7.50 for the majority of business days during the three calendar months preceding the date of selection (listing) of the option, as measured by the lowest closing price reported in any market in which the underlying security traded on each of the subject days.

The Exchange therefore proposes to amend Commentary .01 to Phlx Rule 1009 to allow an alternative listing standard.[9] Specifically, the Exchange proposes to allow listing an option where the underlying security satisfies all of the initial listing requirements except that the price of the underlying security is below $7.50, as long as the option that the Exchange wants to list:

—Trades on another options exchange,
—Meets the continued listing guidelines of Exchange Rule 1010, and
—During the three calendar months preceding the date of selection to originally list an option on the Exchange, the average daily trading volume for such options has been at least 5,000 contracts.

The Exchange believes that this proposal is narrowly drafted to address particularly those circumstances where an actively-traded option is currently ineligible for listing on the Phlx while at the same time, the option is trading on another options exchange. The Exchange believes that when one or more exchanges have listed and begun trading an option, allowing the Exchange to likewise list such option (regardless of the market price of the underlying security) will increase competition for order flow and benefit investors. Moreover, the Exchange believes that the proposal would not introduce any additional options classes.

Phlx believes the proposed amendments to Phlx Rule 1010 and 1009 listing standards would enhance competition among the options exchanges and would enable the Exchange to remain competitive in the current volatile options market.

Change in Department Name

Finally, the Phlx represents that the purpose of the proposal is also to allow the Exchange to make non-substantive changes to Commentary .02 to Phlx Rule 1009 for the sole purpose of reflecting a change in the name of the department of the Exchange that will perform certain listing-related functions noted in Commentary .02 to Phlx Rule 1009. In particular, the Exchange proposes to modify the language in Commentary .02 to Phlx Rule 1009 so that references to the Business and Operations Planning Department (''BOP'') are changed to the Department of Securities (''DOS'').

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest in that it would allow the Exchange to list additional options series and allow original listings where such series or listings are already traded on another exchange and meet certain requirements, and thereby promote competition to the benefit of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

[8] The Exchange represents that the proposal would not serve to introduce additional option series, and does not believe that it will be susceptible to manipulation.

[9] The Exchange will continue to be able to apply original listing criteria pursuant to Exchange Rule 1009 where the market price of the underlying security has been $7.50 or higher for the requisite period of time and the other requirements of Commentary .01 to the rule are met.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2002–71 and should be submitted by December 6, 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, the requirements of Section 6(b)(5) of the Act.[12]

The Commission believes investors benefit from the competition among options exchanges that results when options are listed on more than one options exchange; and that investors are sufficiently protected, even though, with respect to the portion of the proposal relating to the $3.00 maintenance requirement, Phlx will be permitted to list a series of option contracts when the market price of the underlying security is below $3, because the Exchange must comply with all of the other maintenance listing requirements, and the market price of the underlying security was at or above $3 when the options series was listed on the first options exchange.[13] With respect to the portion of the proposal relating to the $7.50 original listing requirement, Phlx will be permitted to list a series of options contracts when the market price of the underlying security is below $7.50 for the majority of business days during the three calendar months preceding the date of selection, because the Exchange must comply with all of the other listing requirements in Phlx Rule 1009 other than the $7.50 per share requirement, and must meet the guidelines for continued approval under Phlx Rule 1010. The Commission believes that these requirements should help to ensure that options traded on the Phlx are based on securities of companies that are financially sound and subject to adequate minimum standards. Therefore, the Commission finds that the proposed rule change, as amended, will promote just and equitable principles of trade, and, in general, protect investors and the public interest consistent with section 6(b)(5) of the Act.[14]

The Phlx has requested that the proposed rule change, as amended, be given accelerated approval pursuant to Section 19(b)(2) of the Act.[15] The Commission believes accelerated approval of the proposal would enhance competition among the options exchanges. Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[16] to approve the proposed rule change, as amended, prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[17] that the proposed rule change (SR–Phlx–2002–71), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–28990 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–P

[12] *Id.*

[13] The Commission notes that such series must have been properly listed by the original options exchange.

[14] 15 U.S.C. 78f(b)(5). 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).

[15] 15 U.S.C. 78s(b)(2).

[16] *Id.*

[17] *Id.*

[18] 17 CFR 240.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Statement of Organization, Functions and Delegations of Authority

This statement amends Part T of the Statement of Organization, Functions and Delegations of Authority that covers the Social Security Administration (SSA). Chapter TA covers the Deputy Commissioner for Disability and Income Security Programs. Notice is hereby given that Chapter TA, which covers the Office of the Deputy Commissioner, Disability and Income Security Programs, is being amended to reflect a reorganization. Notice is given that the following Subchapters are being deleted:

Subchapter TAE, The Office of Disability

Subchapter TAS, The Office of Program Support

Notice is further given that the following Subchapters are being established:

Subchapter TA, The Office of Disability Determinations

Subchapter TA, The Office of Disability Programs

Subchapter TA, The Office of Program Development and Research

Also, Subchapter (TAP), ''The Office of Program Benefits'' is being retitled as ''The Office of Income Security Programs.'' In addition, Subchapter (TAP), The Office of Program Benefits and Subchapter (TAT), the Office of Employment Support Programs are being amended to reflect the realignment and redistribution of functions resulting from the abolishment of the Office of Disability and the Office of Program Support and the establishment of the Office of Program Development and Research. The Office of Hearings and Appeals and the Office of International Programs are excluded from this reorganization. The new material and changes are as follows:

Section TA.00 The Office of the Deputy Commissioner, Disability and Income Security Programs—(Mission)

Add as the 4th sentence, line 10:

''The Office manages SSA's disability and SSI policy and research agendas and long-term disability initiatives.''

Delete the 10th sentence, line 21:

''Oversees the collection, use and dissemination of both personal and non-personal information to ensure consistency with Agency objectives, law and the expectations of the American public.''

Section TA.10 The Office of the Deputy Commissioner, Disability and Income Security Programs—(Organization)

Delete:

D. The Office of Disability (TAE).

H. The Office of Program Support (TAS).

Establish:

D. The Office of Disability Determinations ( ).

H. The Office of Disability Programs ( ).

J. The Office of Program Development and Research ( ).

Retitle:

G. ''The Office of Program Benefits'' to ''The Office of Income Security Programs''

Section TA.20 Section (TA–20) The Office of the Deputy Commissioner, Disability and Income Security Programs—(Functions)

Amend C in its entirety to read as follows:

C. ''The Immediate Office of the Deputy Commissioner, Disability and Income Security Programs provides the Deputy Commissioner with staff assistance on the full range of his/her responsibilities. The Immediate Office includes the Agency's Regulations Officer and establishes and maintains Agency standards for the development of regulations and rulings. Provides expert advice and support to the Deputy Commissioner and Assistant Deputy Commissioner on Agency-level projects and initiatives that impact the Agency's policymaking processes and the technology that supports them. Provides user support to all its subordinate components. Directs all systems activities supporting the Agency's electronic programmatic instructional system.''

Add:

D. The Office of Disability Determinations (TA) provides operational standards, instructions, operational and procedural advice, technical support and management direction to central office, regional and field components and State agencies in support of the SSA-administered disability programs. Processes State agency workloads on a temporary or transitional basis and evaluates the impact of policy and procedural changes in State agency operations.

Retitle:

G. ''The Office of Program Benefits'' to ''The Office of Income Security Programs''

Amend G in its entirety to read as follows:

G. ''The Office of Income Security Programs provides SSA-wide leadership and direction to the development, coordination and promulgation of Retirement and Survivors Insurance (RSI) and Supplemental Security Income (SSI) policies and procedures. It develops, coordinates, evaluates and issues the policies, standards and instructions for the RSI and SSI programs. The Office develops agreements with the States and other agencies that govern State supplementation programs, Medicaid eligibility, data exchange programs, food stamps, fiscal reporting processes, and electronic computer matches. The Office of Income Security Programs is responsible for all aspects of SSA's policy process and the migration of RSI and SSI program services to the Internet.''

Add:

H. The Office of Disability Programs (TA) plans, develops, evaluates and issues the operational and administrative appeals process policies, standards and instructions for the SSA-administered disability programs. Develops and promulgates policies and guidelines for use by state, federal or private contractor providers which implement the disability provisions of the Social Security Act, as amended. Evaluates the effects of proposed legislation and legislation pending before Congress to determine the impact on the disability programs. Ensures that interrelated policy areas are coordinated.

I. The Office of Employment Support Programs (TAT)

Delete the 4th sentence, line 12:

''Evaluates the effects of proposed legislation, policy and regulatory changes to determine the operational impact on employment support programs.''

Add as the 4th sentence, line 12:

''Implements legislation related to employment support programs.''

Add:

J. The Office of Program Development and Research (TA) provides broad program analysis and development in support of the Disability Insurance (DI) and Supplemental Security Income (SSI) programs. Maintains awareness of issues concerning the broad program policy environment including Congress, the private sector and other government agencies, and ensures the Agency's policy and research agendas consider and reflect these points of view. Directs studies of program policy issues related to the development and evaluation of disability and SSI program initiatives and legislative and policy proposals. Identifies trends in the SSI and the disability programs and compiles and analyzes data on various aspects of those programs. Designs, implements and evaluates demonstration projects to target special populations and program issues. Formulates Agency policy regarding crosscutting programs or issues related to disability and/or income assistance programs and works with other agencies, including the Department of Health and Human Services, toward this end.

Add:

Subchapter (TA)

The Office of Disability Determinations

TA.00 Mission
TA.10 Organization
TA.20 Functions

Section (TA .00) The Office of Disability Determinations—(Mission)

The Office of Disability Determinations provides operational standards, instructions, operational and procedural advice, technical support, and management direction to central office, regional office and field components, and State agencies in support of the SSA-administered disability programs. Processes State agency workloads on a temporary or transitional basis and evaluates the impact of policy and procedural changes on State agency operations.

Section (TA .10) The Office of Disability Determinations—(Organization)

The Office of Disability Determinations under the leadership of the Associate Commissioner for Disability Determinations includes:

A. The Associate Commissioner for Disability Determinations (TA).

B. The Deputy Associate Commissioner for Disability Determinations (TA).

C. The Immediate Office of the Associate Commissioner for Disability Determinations (TA).

D. The Office of Federal Disability Determination Services (TA).

E. The Office of Field Disability Operations (TA).

F. The Office of Continuing Disability Reviews Support (TA).

Section (TA .20) The Office of Disability Determinations—(Functions)

A. The Associate Commissioner for Disability Determinations (TA) is directly responsible to the Deputy Commissioner, Disability and Income Security Programs for carrying out its mission and provides general supervision to its major components.

B. The Deputy Associate Commissioner for Disability Determinations (TA) assists the Associate Commissioner in carrying out his/her responsibilities and performs other duties as the Associate Commissioner may prescribe.

C. The Immediate Office of the Associate Commissioner for Disability Determinations (TA) provides the Associate Commissioner and the Deputy Associate Commissioner with advisory services and staff assistance on the full range of their responsibilities and coordinates the administrative and program activities of its components.

D. The Office of Federal Disability Determination Services (TA):

1. The Office of Federal Disability Determination Services develops and adjudicates disability determinations either temporarily as help for one or more Disability Determination Services (DDS) or as a transition until a permanent alternative case processing operation is fully operational in the event that SSA must assume the disability determination function for a State because of noncompliance with regulations and guidelines, or voluntary withdrawal.

2. Pilot tests new work processes, procedures and systems prior to nationwide implementation; validates and conducts usability tests on new and/or revised systems processes; evaluates new or revised disability adjudication policies for national consistency and practical application; and conducts special studies and policy reviews required for management purposes.

3. Reviews and makes disability decisions on applications for disability under Title II and Title XVI of the Social Security Act on initial applications, on reconsideration requests and continuing disability.

4. Screens disability applicants for, and makes referrals to, vocational rehabilitation (VR) agencies, develops and evaluates medical/vocational evidence; and arranges for procurement and payment of such evidence, as required.

5. Reviews state hearing officer and federal hearing officer decisions; prepares decisions on foreign claims and revises hearing officers' determinations in accordance with the regulations at 20 CFR 404.918 and 20 CFR 416.1418; participates in hearing process studies; and prepares statistical and narrative reports and recommendations for training and policy and procedural changes based on case review and analysis or study findings.

6. In conjunction with the Office of Medical Policy and the Office of Disability Evaluation Policy, provides medical consultation required in the formulation of medical evaluation policies and guides. Conducts medical reviews of evidence for purposes of adjudication of medical aspects of claims, as part of an evaluation of the application of policies and procedures and/or as part of a study to develop new medical policies, guides and training.

E. The Office of Field Disability Operations (TA).

1. The Office of Field Disability Operations provides national guidance for the administrative aspects of the disability determination function whether administered through State DDSs, contracted out to the private sector or accomplished by designated SSA organizational components.

2. Develops pertinent policies, regulations and procedures related to DDS performance by establishing standards and guides for performance; monitoring performance, initiating corrective action where needed, coordinating workloads and administering the funds for the DDSs, etc. Conducts such studies and reviews as are necessary to the disability determination function.

3. Plans, coordinates and manages the systems-related activities including DDS and Federal Disability Determination Services automation, information resource management, expert systems, development of user specifications, and installation and testing of hardware, networks and communications links for DDSs.

4. Analyzes, plans, distributes and monitors all DDS funding on a state-by-state basis; this includes establishing and monitoring workload and productivity targets for each DDS.

F. The Office of Continuing Disability Reviews Support (TA).

The Office of Continuing Disability Reviews Support develops guidelines and technical procedures for the continuing disability review (CDR) process and oversees this process. Estimates the number of CDRs that must be processed on an annual basis for SSA to be current in its review responsibilities.

Develops and implements processing strategies based on the currency estimates. The processing strategies include establishing the schedules and processes for CDRs directly released as full medical reviews and those released as mailers to determine if a full medical review is required. Coordinates with all appropriate operational components.

1. Applies sophisticated profiling methodology to ''score'' every SSDI and SSI beneficiary on the rolls for potential CDRs.

2. On an ongoing annual basis, selects individuals for a CDR medical review or mailer.

3. Designs and maintains databases and extracts in support of the continuing disability review process.

4. Tracks and reports on all medical CDRs and mailers to ensure yearly currency and to meet the requirement for yearly reports to Congress.

5. Conducts yearly integrity checks of the CDR mailer process for Title II and Title XVI.

Add:

Subchapter (TA)

The Office of Disability Programs

TA .00 Mission
TA .10 Organization
TA .20 Functions

Section (TA .00) The Office of Disability Programs—(Mission)

The Office of Disability Programs plans, develops, evaluates and issues the operational and administrative appeals process policies, standards and instructions for the SSA administered disability programs. Develops and promulgates policies and guidelines for use by State, Federal or private contractor providers which implement the disability provisions of the Social Security Act as amended. Evaluates the effects of proposed legislation and legislation pending before Congress to determine the impact on the disability programs. Ensures that interrelated policy areas are coordinated.

Section (TA .10) The Office of Disability Programs—(Organization)

The Office of Disability Programs under the leadership of the Associate Commissioner for Disability Programs, includes:

A. The Associate Commissioner for Disability Programs (TA).

B. The Deputy Associate Commissioner for Disability Programs (TA).

C. The Immediate Office of the Associate Commissioner for Disability Programs (TA).

D. The Office of Medical Policy (TA).

E. The Office of Disability Evaluation Policy (TA).

F. The Office of Process Policy (TA).

G. The Office of Disability Program Information and Studies (TA).

H. The Office of Acquiescence and Litigation Coordination (TA).

Section (TA .20) The Office of Disability Programs—(Functions):

A. The Associate Commissioner for Disability Programs (TA) is directly responsible to the Deputy Commissioner, Disability and Income Security Programs for carrying out its mission and providing general supervision to its major components.

B. The Deputy Associate Commissioner(s) for Disability Programs (TA) assists the Associate Commissioner in carrying out his/her responsibilities and performs other duties as the Associate Commissioner may prescribe.

C. The Immediate Office of the Associate Commissioner for Disability Programs (TA) provides the Associate Commissioner and the Deputy Associate

Commissioner(s) with advisory services and staff assistance on the full range of their responsibilities and coordinates the administrative and program activities of ODP components. Other duties include:

1. Development, coordination and oversight of disability policies, procedures and process requirements supporting creation of a paperless disability claims process; and

2. Development and oversight of a policy framework supporting consistent application of disability program policy through all levels of disability adjudication and the quality assurance process.

D. The Office of Medical Policy (TA)

1. The Office of Medical Policy develops broad medical concepts and policies for the administration of the Title II and Title XVI programs.

2. Develops studies and research evaluating impairment severity and other medical disability issues.

3. Provides leadership and professional direction to Regional Medical Officers and consultants, and to state Disability Determination Services medical personnel engaged in Title II and Title XVI disability program-related activities.

4. Provides medical consultation required in the formulation of medical evaluation policies and guides and develops orientation and training program for all adjudicative personnel in SSA, including state Disability Determination Services.

5. Develops, evaluates, implements and maintains disability program policy for all medical issues, both adults and children, including evaluation policies for all body systems, standards for evaluating medical evidence, the Psychiatric Review Technique, impairment duration, medical diaries and presumptive disability/blindness criteria, to be used in deciding disability claims at all adjudicative levels.

6. Provides medical policy consultation for individual court cases and class actions ensuring that policies and procedures reflect specific court orders and legal precedents.

E. The Office of Disability Evaluation Policy (TA)

1. The Office of Disability Evaluation Policy develops broad vocational and other non-medical concepts and policies for the administration of the Title II and Title XVI disability programs.

2. Develops studies and research evaluating vocational and other non-medical disability issues.

3. Provides leadership and professional direction to regional and State Disability Determination Services personnel engaged in Title II and Title XVI-related activities.

4. Develops orientation and training programs in the vocational and other non-medical areas for all adjudicative personnel in SSA, including State Disability Determination Services.

5. Develops, evaluates, implements and maintains disability program policy for all vocational and other non-medical issues, both adults and children, including age, education, work experience, vocational rules, vocational data and reference materials (*e.g.*, Dictionary of Occupational Titles), work evaluations, disability onset, disability standards, credibility, claimant responsibility, evidence development and evaluation, medical source opinions, residual functional capacity, interview and function forms, medical improvement review standards and Title XVI childhood policy (including functional equivalence, evidence development, age 18 redeterminations, and other issues) to be used at all adjudicative levels.

6. Provides vocational and other non-medical policy consultation for individual court cases and class actions ensuring that policies and procedures reflect specific court orders and legal precedent.

F. The Office of Process Policy (TA)

1. The Office of Process Policy develops procedures and instructions for the disability provisions of other programs including certain Titles XVI and XVIII provisions unique to the disability programs. Maintains the integrity of the consultative examination process by developing regulations and conducting oversight activities.

2. Develops the procedures and instructions that define the administrative appeals process, including policies and procedures for the disability hearing process. Develops notice policy and issues language and forms for use in disability claims and notices including foreign language and Braille notices.

3. Carries out professional relation efforts in support of SSA's efforts to gain support from professional medical associations. Maintains liaison and assists with professional relations efforts to gain the support of non-vocational rehabilitation advocacy groups, federal, state and local agencies and the public and provides guidance and assistance on disability professional relations issues to the SSA regional and DDS field networks.

G. Office of Disability Program Information and Studies (TA)

1. The Office of Disability Program Information and Studies conducts studies on the disabled population and recipients relative to specific operational/administrative program issues.

2. Develops and maintains databases for statistical activities and program information. Provides recurring and specialized reports and coordinates information requirements.

H. Office of Acquiescence and Litigation Coordination (TA)

1. Develops, evaluates, maintains and implements acquiescence regulations and policies. Evaluates all circuit court decisions to assess the need to publish an Acquiescence Ruling.

2. Coordinates litigation activities with respect to class action lawsuits and significant individual cases for all programmatic policy areas.

3. Provides recommendations for policy, regulatory and/or legislative changes to remedy weaknesses identified as a result of litigation. Maintains the Civil Action Tracking System used to monitor activities related to class action lawsuits and acquiescence.

Revise and Retitle:

Subchapter (TAP)

Office of Income Security Programs

TAP.00 Mission
TAP.10 Organization
TAP.20 Functions

Retitle:

Section TAP.00 ''The Office of Program Benefits'' to ''The Office of Income Security Programs''—(Mission)

Amend in its entirety:

''The Office of Income Security Programs provides SSA-wide leadership and direction to the development, coordination and promulgation of Retirement and Survivors Insurance (RSI) and Supplemental Security Income (SSI) policies and procedures. Develops, coordinates, evaluates and issues the policies, standards and instructions for the RSI and SSI programs. Develops agreements with the States and other agencies that govern State supplementation programs, Medicaid eligibility, data exchange programs, food stamps, fiscal reporting processes, electronic computer matches. Is responsible for all aspects of SSA's policy process and the migration of RSI and SSI program services to the Internet.''

Retitle:

Section (TAP.10) The Office of Program Benefits'' to ''The Office of Income Security Programs''—(Organization)

The Office of Income Security Programs under the leadership of the

Associate Commissioner for Income Security Programs includes:

Retitle:

D. ''The Division of Coverage and Support'' to ''The Office of Earnings and Information Exchange (TAPB)''.

E. ''The Division of Eligibility and Enumeration Policy'' to ''The Office of Eligibility and Enumeration Policy'' (TAPJ).

F. ''The Division of Representative Payment and Evaluations'' to ''The Office of Beneficiary Determinations and Services (TAPK).

G. ''The Division of Payment Policy'' to the ''Office of Payment Policy (TAPE)''.

Add:

H. The Office of Technology and Services Policy (TAPF).

Retitle:

Section (TAP.20) The Office of Program Benefits'' to ''The Office of Income Security Programs''—(Functions)

Retitle:

D. ''The Division of Coverage and Support'' to ''The Office of Earnings and Information Exchange (TAPB)''.

Amend D in its entirety:

1. ''Plans, develops and evaluates the policies, standards and instructions, and provides guidance to field components on issues related to the RSI program, in the areas of coverage earnings records and corrections, and pre-1987 State and local reporting and corrections. Also establishes policy, provides guidance and manages the implementation of the provisions of the Computer Matching and Privacy Protection Act of 1988.

2. Develops and issues guidelines, directives, instructions and procedures for such subject areas as wages, coverage and exceptions, earnings records and earnings records corrections and discrepancies, self-employment status and income, religious exemptions (including determinations as to whether sects meet legal requirements for exemptions to apply), State and local coverage, statutes of limitations, State and local agreements, SSA benefit statements, and territory agreements. Coordinates SSA's interaction with other agencies in negotiating data releases and exchanges and negotiates with these agencies at all levels regarding electronic data sharing and direct terminal access to computer records.

Retitle:

E. The ''Division of Eligibility and Enumeration Policy'' to ''The Office of Eligibility and Enumeration Policy'' (TAPJ)

Amend E in its entirety:

1. ''Plans, develops and evaluates the policies, standards and instructions and provides guidance to field components on issues related to the RSI and SSI programs in the areas of applications, eligibility and enumeration.

2. Develops and issues guidelines, directives, instructions and procedures for such eligibility and enumeration subject areas as assignment of social security numbers and issuance of cards, non-citizen issues, evidentiary standards, liaison with Immigration and Naturalization Services, insured status, applications for benefits and SSNs, adjudication, claims development, relationships, and inter-program relationships with food stamps.''

Retitle:

F. ''The Division of Representative Payment and Evaluations'' to ''The Office of Beneficiary Determinations and Services (TAPK)''.

Amend F in its entirety:

1. ''Plans, develops and evaluates the policies, standards and instructions and provides guidance to field components on issues related to the RSI and SSI programs in the areas of representative payment, outreach, deeming, income, resources, in-kind support and maintenance, institutions and living arrangements.

2. Develops and issues guidelines, directives, instructions and procedures for such representative payment subject areas as (in)capability assessment, investigation and selection of payees, use and conservation of benefits, misuse of benefits, payment for payee services and payee oversight, inter-program relationship with Medicaid and Medicare, deeming, income, resources, in-kind support and maintenance, institutions and living arrangements.''

Retitle:

G. ''The Division of Payment Policy'' to ''The Office of Payment Policy (TAPE)''.

Amend G in its entirety:

1. ''Plans, develops and evaluates the policies, standards and instructions and provides guidance to field components on issues related to the RSI and SSI programs in the areas of compliance and payment policy.

2. Develops and issues guidelines, directives, instructions and procedures for such payment policy subject areas as payment accuracy, notices, redeterminations, reporting, change of address, computations, offset, overpayments and underpayments, suspensions and terminations, garnishments, administrative finality, res judicata, due process, IRS levies, appeals, retirement earnings test and Agency notice improvement activities.''

Add:

H. The Office of Technology and Services Policy (TAPL)

1. Directs the management of all activities supporting production, publication, distribution, indexing and storage of SSA's program operational instructions system (both electronic and hardcopy), programmatic-related documents. Facilitates the migration of RSI and SSI program services to the Internet and to other electronic mediums that enable the public to interact with SSA electronically by developing a foundation for Internet program policy expertise that ensures uniformity and consistency of Internet applications and resources.

2. Oversees SSA's policy process including establishing and maintaining Agency standards for the development of program instructions. Directs the ongoing evaluation and improvement of SSA's policy process and solicits external stakeholder input to the policy process and assists authoring components in developing policy documents. Directs technical research into improved methods of delivering complex policy knowledge and oversees maintenance of SSA's technical documents including the Compilation of the Social Security Act. Directs change management initiatives aimed at achieving more efficient and effective policy-related processes and assists the organization and individual employees in the transition to new work environments. Identifies crosscutting program and authentication issues when implementing Internet applications and recommends changes to meet both program and client needs. Develops and issues guidelines, directives, instructions, and procedures to field components on Internet and electronic services activities.

Revise:

Subchapter (TAT)

The Office of Employment Support Programs

TAT.00 Mission
TAT.10 Organization
TAT.20 Functions

Section (TAT.00) The Office of Employment Support Programs—(Mission)

Delete the 4th sentence, which reads: ''Evaluates the effects of proposed legislation, policy, and regulatory changes to determine the operational impact on employment support programs.''

Add as the 4th sentence: ''Implements legislation and analyzes the effects of policy and regulatory changes to

determine the operational impact on employment support programs''.

Section (TAT.10) The Office of Employment Support Programs—(Organization)

Retitle:

D. ''The Division of Employment Policy'' to ''The Office of Employment Policy (TATB)''.

E. ''The Division of Employment Support and Program Acquisitions'' to ''The Office of Employment Support and Program Acquisitions (TATC)''.

Section TAT.20 The Office of Employment Support Programs—(Functions)

Retitle:

D. ''The Division of Employment Policy'' to ''The Office of Employment Policy (TATB)''.

Delete: the first two words in paragraph #1, ''develops, evaluates...''

Add: at the end of paragraph #4, ''and operational activities.''

Retitle:

E. ''The Division of Employment Support and Program Acquisitions'' to ''The Office of Employment Support and Program Acquisitions (TATC)''.

Amend E in its entirety:

1. ''Implements the provisions of the Social Security Act which facilitate access to rehabilitation and other forms of employment support services through the Ticket to Work and Self-Sufficiency Program.

2. Evaluates the performance of service providers in the public and private sectors. Certifies payment to service providers and ensures that beneficiary participation in the program is appropriate.

3. Develops, implements, evaluates and maintains regulations, program operating policies, and instructional and other materials on employment services and service provider operations. Interfaces with the vocational rehabilitation programs administered under the Rehabilitation Act. Develops proposals and plans for new employment support services and other related program changes.''

Add:

Subchapter (TA)

The Office of Program Development and Research

TA .00 Mission
TA .10 Organization
TA .20 Functions

Section (TA .00) The Office of Program Development and Research—(Mission)

The Office of Program Development and Research provides broad program analysis and development in support of the Disability and Supplemental Security Income (SSI) programs. The Office maintains awareness of issues concerning the broad program policy environment including Congress, the private sector and other government agencies, and ensures the Agency's policy and research agendas consider and reflect these points of view. Directs studies of program policy issues related to the development and evaluation of disability and the SSI program initiatives and legislative and policy proposals. The Office identifies trends in the SSI and the disability programs and compiles and analyzes data on various aspects of those programs. Designs, implements and evaluates demonstration projects to target special populations and program issues. Formulates Agency policy regarding crosscutting programs or issues related to disability and/or income assistance programs and works with other agencies, including the Department of Health and Human Services, toward this end.

Section (TA .10) The Office of Program Development and Research—(Organization)

The Office of Program Development and Research under the leadership of the Associate Commissioner for Program Development and Research, includes:

A. The Associate Commissioner for Program Development and Research (TA).

B. The Deputy Associate Commissioner for Program Development and Research (TA).

C. The Immediate Office of the Associate Commissioner for Program Development and Research (TA).

D. The Office of Program Development (TA).

E. The Office of Program Evaluation (TA).

F. The Office of Data Analysis (TA).

G. The Office of Program Research (TA).

Section (TA .20) The Office of Program Development and Research—(Functions)

A. The Associate Commissioner for Program Development and Research (TA) is directly responsible to the Deputy Commissioner, Disability and Income Security Programs for carrying out the mission of the office and providing general supervision to its major components.

B. The Deputy Associate Commissioner for Program Development and Research (TA) assists the Associate Commissioner in carrying out his/her responsibilities and performs other duties as the Associate Commissioner may prescribe.

C. The Immediate Office of the Associate Commissioner for Program Development and Research (TA) provides the Associate Commissioner and the Deputy Associate Commissioner with advisory services and staff assistance on the full range of their responsibilities and coordinates the administrative and program activities of OPDR components.

D. The Office of Program Development (TA).

1. Develops and implements disability and SSI-related demonstration projects including projects that would encourage work and self-sufficiency.

2. Administers grants, interagency agreements, contracts and unsolicited proposals for ODISP.

3. Conducts outreach for demonstration projects and other initiatives relevant to program development.

E. The Office of Program Evaluation (TA).

1. Maintains awareness of issues concerning the broad program policy environment including Congress, the private sector and other government agencies, and ensures the Agency's policy and research agendas consider and reflect these points of view.

2. Formulates Agency policy regarding cross-cutting programs or issues related to disability and/or income assistance programs and works with other agencies, including the Department of Health and Human Services, toward this end.

3. Formulates Agency policy regarding crosscutting programs or issues related to disability and/or income assistance programs and works with other agencies, including the Department of Health and Human Services, toward this end.

4. Conducts analyses of international disability and income assistance programs.

F. The Office of Data Analysis (TA).

1. Identifies trends in disability programs and emerging issues and policy implications.

2. Compiles and analyzes data on various aspects of the SSDI and SSI disability programs, including such areas as SSI children, demonstration projects, denied applicants and work incentives.

G. The Office of Program Research (TA).

1. Identifies and develops potential research projects that will support future policy initiatives.

2. Reviews current research and determines SSDI/SSI disability policy implications.

3. Conducts studies and analyses on the national disabled population, applicants for benefits, disability beneficiaries, work incentives and disability assessment tools.

4. Conducts analyses of the interrelationships between SSA's disability programs, the national economy and other income maintenance programs, as well as various socioeconomic factors.

Dated: November 4, 2002.

Jo Anne B. Barnhart,

Commissioner.

[FR Doc. 02–28956 Filed 11–14–02; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4206]

Bureau of Educational and Cultural Affairs Request for Grant Proposals (RFGPs): The FREEDOM Support Act/ Future Leaders Exchange (FSA/FLEX) Program: Host Family and School Placement

NOTICE: Request for grant proposals.

SUMMARY: The Youth Programs Division of the Bureau of Educational and Cultural Affairs announces an open competition for the placement component of the FREEDOM Support Act/Future Leaders Exchange (FSA/FLEX) program. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals to recruit and select host families and schools for high school students between the ages of 15 and 17 from countries of the former Soviet Union, thereafter referred to as Eurasia. In addition to identifying schools and screening, selecting, and orienting families, organizations will be responsible for: Orienting students at the local level; providing support services for students; arranging enhancement activities and leadership opportunities that reinforce program goals; monitoring students during their stay in the U.S.; providing re-entry training; and assessing student performance and progress. The award of grants and the number of students who will participate is subject to the availability of funding in fiscal year 2003.

Program Information

Overview

Background: Academic year 2003/2004 will be the eleventh year of the FSA/FLEX program, which now includes over 11,000 alumni. This inbound, academic year component was originally authorized under the FREEDOM Support Act of 1992 and is funded by annual allocations from the Foreign Operations and State Department appropriations. The goals of the program are to promote mutual understanding and foster a relationship between the people of Eurasia and the U.S.; to assist the successor generation of Eurasian countries in developing the qualities it will need to lead in their aspirations for transformation in the 21st century; and to promote democratic values and civic responsibility by giving Eurasian youth the opportunity to live in American society and participate in focused activities for an academic year.

Objectives:

- To place approximately 1,400 pre-selected high school students from Eurasian countries in qualified, well-motivated host families.
- To place students in schools that have been accredited by the respective state departments of education.
- To expose program participants to American culture and democracy through homestay experiences and enhancement activities that will enable them to attain a broad view of the society and culture of the U.S.
- To encourage FSA/FLEX program participants to share their culture, lifestyle and traditions with U.S. citizens.
- To provide Eurasian students with leadership opportunities that will foster skills they can take back with them and use in their home countries.

Through participation in the FLEX program, students should:

1. Acquire an understanding of important elements of a civil society. This includes concepts such as volunteerism, the idea that American citizens can and do act at the grassroots level to deal with societal problems, and an awareness of and respect for the rule of law.
2. Acquire an understanding of a free market economy and private enterprise. This includes awareness of privatization and an appreciation of the role of the entrepreneur in economic growth.
3. Develop an appreciation for American culture and an understanding of the diversity of American society.
4. Interact with Americans and generate enduring ties.
5. Teach Americans about the cultures of their home countries.
6. Gain leadership capacity that will enable them to initiate and support activities in their home countries that focus on development and community service in their role as FLEX alumni.

Other Components: One organization has been awarded a grant to perform the following functions: Recruitment and selection of students; targeting recruitment for students with disabilities; assistance in documentation and preparation of DS–2019 visa forms; preparation of cross-cultural materials; predeparture orientation; international travel from home to host community and return; facilitation of ongoing communication between the natural parents and placement organization, as needed; maintenance of a student database and provision of data to the U.S. Department of State; and ongoing follow-up with alumni after their return to the Eurasia. Most of the students with disabilities, as well as a select number of additional students who are identified as needing English language enhancement before entering their host communities, will attend a Language and Cultural Enhancement (LCE) program in July 2003, which will be conducted under a separate grant awarded exclusively for that purpose.

Guidelines: Organizations chosen under this competition are responsible for the following:

(1) Recruitment, screening, selection, and Eurasia/FLEX-specific orientation of host families;

(2) Enrollment in an accredited school;

(3) Local orientation for participants;

(4) Placement of a small number of students with disabilities;

(5) Ensuring that all students identified for the preacademic-year LCE program have their permanent year-long placement by the time they arrive at the LCE program in July;

(6) Specialized training of local staff and volunteers to work with FLEX students from Eurasia;

(7) Preparation and dissemination of materials to students pertaining to the respective placement organization;

(8) Dispersal of program-specific information, such as alumni activity reports and School Administrator handbooks, to respective persons involved with the program (*e.g.,* host families, school administrators, local coordinators);

(9) Program-related enhancement and leadership activities;

(10) Troubleshooting;

(11) Communication with the organizations conducting other program components, when appropriate;

(12) Evaluation of the students' performance;

(13) Quarterly evaluation of the organiation's success in achieving program goals;

(14) Eurasia-specific re-entry training to prepare students for readjustment to their home environments.

Applicants must request a grant for the placement of at least 40 students. There is no ceiling on the number of students who may be placed by one organization. It is anticipated that approximately 10–15 grants will be awarded for this component of the FLEX program. Placements may be in any region in the U.S. Strong preference will be given to organizations that choose to place participants in clusters of at least three students. Applicants must demonstrate that training of local staff ensures their competence in providing Eurasia-specific orientation programs, appropriate enhancement activities, and quality supervision and counseling of students from Eurasian countries. Please refer to the Solicitation Package, available on request from the address listed below, for details on essential program elements, permissible costs, and criteria used to select students.

We anticipate grants beginning no later than April, 2003, subject to the availability of funds.

Most participants arrive in their host communities during the month of August and remain for 10 or 11 months until their departure during the period mid-May to late June 2004.

Administration of the program must be in compliance with reporting and withholding regulations for federal, state, and local taxes as applicable. Recipient organizations should demonstrate tax regulation adherence in the proposal narrative and budget.

Applicants should submit the health and accident insurance plans they intend to use for students on this program. If use of a private plan is proposed, the State Department will compare that plan with the Bureau plan and make a determination of which will be applicable.

Budget Guidelines: Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000.

Applicants must submit a comprehensive budget for the entire program. *Per capita* costs should not exceed $5,450.

There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Allowable costs for the program include the following:

(1) A monthly stipend and a one-time incidentals allowance for participants, as established by the Department of State;

(2) Costs associated with student enhancement activities and orientations;

(3) Health and accident insurance.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Announcement Title and Number: All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/PY–03–24.

FOR FURTHER INFORMATION CONTACT: The Office of Youth Programs, ECA/PE/C/PY, Room 568, U.S. Department of State, 301 4th Street, SW., Washington, DC 20547, tel. (202) 619–6299, and fax (202) 619–5311, e-mail *lbeach@pd.state.gov* to request a Solicitation Package. The Solicitation Package contains detailed award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation. Please specify Bureau of Education and Cultural Affairs Program Officer Anna Mussman on all other inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/RFGPs.* Please read all information before downloading.

Deadline for Proposals: All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on December 19, 2002. Faxed documents will not be accepted at any time. Documents postmarked the due date but received on a later date will not be accepted. It is the responsibility of each applicant to ensure that the proposals are received by the above deadline. Applicants must follow all instructions in the Solicitation Package. The original and 8 copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/PY–03–24, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Pub. L. 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Pub. L. 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

Adherence to All Regulations Governing the J Visa

Participants will travel on J–1 visas issued by the State Department using a government program number.

The Bureau of Education and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR 6Z, including the oversight of Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements. A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at:

http://exchanges.state.gov/education/jexchanges.

Or from:

United States Department of State, Department Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547.

Telephone: (202) 401–9810. FAX: (202) 401–9809.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the State Department's Office for U.S. Assistance to Europe and Eurasia (EUR/ACE) and Public Diplomacy section at the U.S. embassy overseas, where appropriate. Eligible proposals will be forwarded to panels of Bureau officers for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (grants or cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the program idea:* Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission.

2. *Program planning:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above.

3. *Ability to achieve program objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the organization will meet the program's objectives and plan. Strategies should utilize and reinforce exchange activities creatively to ensure an efficient use of program resources.

4. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages. Proposals should include creative ways to involve students in their U.S. communities.

5. *Support of diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, host families, schools, program venue and program evaluation) and program content (orientations, program meetings, resource materials and follow-up activities).

6. *Organization's record/institutional capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting and J–1 Visa requirements for past Bureau grants as determined by Bureau Grant Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

7. *Project evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. Submission of a sample FLEX-specific draft survey questionnaire, or other technique, plus description of a methodology to use to link outcomes to original project objectives are highly recommended. The final project evaluation should provide qualitative and quantitative data about the project's influence on the participants as well as their surrounding communities. Successful applicants will be expected to submit quarterly reports, which should be included as an inherent component of the work plan.

8. *Cost-effectiveness/cost sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through legislation pertaining to the Department of State and FREEDOM Support Act appropriations.

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: November 7, 2002.

Patricia S. Harrison,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 02–29198 Filed 11–14–02; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments and Notice of Public Hearing Concerning Proposed Free Trade Agreement Negotiations With Southern Africa

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of intent to initiate negotiations, request for public comments, and notice of public hearing on negotiation of a free trade agreement between the United States and five southern African countries.

SUMMARY: The United States intends to initiate negotiations on a free trade agreement (FTA) with Botswana, Lesotho, Namibia, South Africa and Swaziland, which collectively comprise the Southern African Customs Union. The interagency Trade Policy Staff Committee (TPSC) will convene a public hearing and seeks public comments to assist the United States Trade Representative (USTR) in amplifying and clarifying negotiating objectives for the proposed FTA and to provide advice on how specific goods and services and other matters should be treated under the proposed agreement.

DATES: Persons wishing to testify orally at the hearing must provide written notification of their intention, as well as their testimony, by December 6, 2002. A hearing will be held in Washington, DC, beginning on December 16, 2002, and continuing as necessary on subsequent days. Written comments are due by noon on December 20, 2002.

ADDRESSES: Submissions by electronic mail:

FR0046@ustr.gov (notice of intent to testify and written testimony);
FR0047@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, at (202) 395–3475. All other questions should be directed to Chris Moore, Director for African Affairs, Office of the United States Trade Representative, at (202) 395–9514.

SUPPLEMENTARY INFORMATION:

1. Background

On February 16, 2002, the USTR met with Trade Ministers and other officials from Botswana, Lesotho, Namibia, South Africa, and Swaziland in Pretoria, South Africa, to discuss the possibility of a free trade agreement. Subsequent discussions with these countries have demonstrated their readiness, individually and collectively, to be free trade partners.

Botswana, Lesotho, Namibia, South Africa and Swaziland constitute the largest U.S. export market in sub-Saharan Africa, with sales valued at $3.1 billion in 2001. Each is a member of the World Trade Organization, and is pursuing regional free trade through the Southern African Development Community (SADC). Namibia and Swaziland are also members of the Common Market for Eastern and Southern Africa (COMESA). South Africa signed a free trade agreement with the European Union in 1999, in which it agreed to eliminate duties on 86 percent of imports from the EU by 2012.

Botswana, Lesotho, Namibia, South Africa and Swaziland are beneficiaries of the African Growth and Opportunity Act (AGOA). Section 116 of the AGOA calls for the negotiation of free trade agreements with interested countries in sub-Saharan Africa, in order to serve as the catalyst for increasing trade between the United States and the region and increasing private sector investment in sub-Saharan Africa.

Under section 2104 of the Trade Act of 2002 (19 U.S.C. 3804), for agreements that will be approved and implemented through Trade Promotion Authority procedures, the President must provide the Congress with at least 90 days' written notice of his intent to enter into negotiations and must identify specific objectives for the negotiations. Before and after the submission of this notice, the President must consult with appropriate Congressional committees and the Congressional Oversight Group regarding the negotiations. Under the Trade Act of 1974, as amended, the President must (a) afford interested persons an opportunity to present their views regarding any matter relevant to any proposed agreement, (b) designate an agency or inter-agency committee to hold a public hearing regarding any proposed agreement, and (c) seek the advice of the U.S. International Trade Commission (ITC) regarding the probable economic effects on U.S. industries and consumers of the removal of tariffs and non-tariff barriers on imports pursuant to any proposed agreement.

On November 4, 2002, after consulting with relevant Congressional committees and the Congressional Oversight Group, the USTR notified the Congress that the President intends to initiate negotiations on an FTA with southern Africa and identified specific objectives for the negotiations. In addition, the USTR has requested the ITC's probable economic effects advice. The ITC intends to provide this advice within five months. This notice solicits views from the public on the proposed FTA and provides information on a hearing which will be conducted pursuant to the requirements of the Trade Act of 1974.

2. Public Comments and Testimony

To assist the Administration as it continues to develop its negotiating objectives for the proposed FTA, the Chairman of the TPSC invites written comments and/or oral testimony of interested parties at a public hearing. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any article provided for in the Harmonized Tariff Scheduled of the United States (HTS) that is a product of Botswana, Lesotho, Namibia, South Africa or Swaziland, any concession which should be sought by the United States, or any other matter relevant to the proposed FTA. The TPSC invites comments and testimony on all of these matters, and in particular, seeks comments and testimony addressed to:

(a) General and commodity-specific negotiating objectives for the proposed FTA.

(b) Economic benefits and costs to U.S. producers and consumers of the removal of tariffs and non-tariff barriers on trade between the United States and southern Africa.

(c) Treatment of specific goods (described by HTS numbers) under the proposed FTA, including comments on (1) product-specific import and export interests or barriers, (2) experience with particular measures that should be addressed in the negotiations, and (3) in the case of articles for which immediate elimination of tariffs is not appropriate, the recommended staging schedule for such elimination.

(d) Adequacy of existing customs measures to ensure Botswana, Lesotho, Namibia, South Africa or Swaziland origin of imported goods, and appropriate rules of origin for goods entering the United States under the proposed FTA.

(e) Existing sanitary and phytosanitary measures and technical barriers to trade in Botswana, Lesotho, Namibia, South Africa or Swaziland.

(f) Existing barriers to trade in services between the United States and the southern African countries that should be addressed in the negotiations.

(g) Relevant trade-related intellectual property rights issues that should be addressed in the negotiations.

(h) Relevant investment issues that should be addressed in the negotiations.

(i) Relevant government procurement issues that should be addressed in the negotiations.

(j) Relevant environmental and labor issues that should be addressed in the negotiations.

Comments identifying as present or potential trade barriers laws or regulations that are not primarily trade-related should address the economic, political or social objectives of such laws or regulations and the degree to which they discriminate against producers of the other country.

At a later date, the USTR, through the TPSC, will publish notice of reviews regarding (a) the possible environmental effects of the proposed agreement and the scope of the U.S. environmental review of the proposed agreement, and (b) the impact of the proposed agreement on U.S. employment and labor markets.

A hearing will be held on December 16, 2002, in Rooms 1 and 2, 1724 F Street, NW., Washington, DC 20508. If necessary, the hearing will continue on subsequent days.

Persons wishing to testify at the hearing must provide written

notification of their intention by December 6, 2002. The notification should include: (1) The name, address, and telephone number of the person presenting the testimony; and (2) a short (one or two paragraph) summary of the presentation, including the subject matter and, as applicable, the product(s) (with HTS number(s)), service sector(s), or other subjects (such as investment, intellectual property and/or government procurement) to be discussed. A copy of the testimony must accompany the notification. Remarks at the hearing should be limited to no more than five minutes to allow for possible questions from the TPSC. Persons with mobility impairments who will need special assistance in gaining access to the hearing should contact Gloria Blue at the number given above.

Interested persons, including persons who participate in the hearing, may submit written comments by noon, December 20, 2002. Written comments may include rebuttal points demonstrating errors of fact or analysis not pointed out at the hearing. All written comments must state clearly the position taken, describe with particularity the supporting rationale, and be in English. The first page of the written comments must specify the subject matter including, as applicable, the product(s) (with HTS number(s)), service sector(s), or other subjects (such as investment, intellectual property and/or government procurement).

3. Requirements for Submissions

To facilitate prompt processing of submissions, the Office of the U.S. Trade Representative strongly urges and prefers electronic (e-mail) submissions in response to this notice. In the event that an e-mail submission is impossible, submissions should be made by facsimile.

Persons making submissions by e-mail should use the following subject line: ''Free Trade Agreement with Southern Africa'' followed by (as appropriate) ''Notice of Intent to Testify,'' ''Testimony,'' or ''Written Comments.'' Documents should be submitted as either WordPerfect, MSWord, or text (.TXT) files. Supporting documentation submitted as spreadsheets are 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 characters ''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. 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, notice of testimony, and testimony 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. Business confidential information submitted in accordance with 15 CFR 2006.6 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 nonconfidential summary of the confidential information. All public documents and nonconfidential summaries shall be available for public inspection in the Reading Room at the Office of the United States Trade Representative. The Reading Room is open to the public, by appointment only, from 10 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file may be made by calling (202) 395–6186. 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 Web site (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. 02–29095 Filed 11–12–02; 3:33 pm]

BILLING CODE 3190–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Review Under 49 U.S.C. 41720 of Delta/Northwest/Continental Agreements

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of access on restricted basis to unredacted agreements.

SUMMARY: Delta Air Lines, Northwest Airlines, and Continental Airlines have submitted code-sharing and frequent-flyer program reciprocity agreements to the Department for review under 49 U.S.C. 41720. That statute requires such agreements between major U.S. passenger airlines to be submitted to the Department at least 30 days before the agreements' proposed effective date. The Department is providing outside parties access on a restricted basis to unredacted copies of the agreements. Comments by interested persons reflecting their review of the unredacted copies may assist the Department in determining whether to extend the waiting period or take other action on the agreements.

ADDRESSES: Comments must be filed with Randall Bennett, Director, Office of Aviation Analysis, Room 6401, U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590. To facilitate consideration of comments, each commenter should file three copies of its comments.

FOR FURTHER INFORMATION CONTACT: Thomas Ray, Office of the General Counsel, 400 Seventh St. SW., Washington, DC 20590, (202) 366–4731.

SUPPLEMENTARY INFORMATION: On August 23, Delta, Northwest, and Continental submitted code-sharing and frequent-flyer program reciprocity agreements to us for review under 49 U.S.C. 41720. That statute requires such joint venture agreements among major U.S. passenger airlines to be submitted to us at least thirty days before they can be implemented. We may extend the waiting period by 150 days with respect to a code-sharing agreement and by 60 days for other types of agreements. At the end of the waiting period (either the 30 day period or any extended period established by us), the parties are free to implement their agreement, unless we have issued an order under 49 U.S.C. 41712 (formerly section 411 of the Federal Aviation Act) in a formal enforcement proceeding determining that the agreement's implementation would be an unfair or deceptive practice or unfair method of competition that would violate that section.

As required by 49 U.S.C. 47120, Delta, Continental, and Northwest provided us with unredacted copies of their agreements and asked that we give the agreements confidential treatment under 49 CFR 7.13 and rule 12 of the Department's rules of practice for airline industry economic regulatory proceedings, 14 CFR 302.12. Rule 12 sets forth the procedures for objections to the public disclosure of information submitted pursuant to a statutory requirement.

We have been reviewing the agreements submitted by Delta, Continental, and Northwest under 49 U.S.C. 41720 on an informal basis. In our review we are focusing on whether the agreements may constitute unfair methods of competition that would violate 49 U.S.C. 41712. Airline practices that violate the antitrust laws

or antitrust principles would be unfair methods of competition. *See United Air Lines* v. *CAB,* 766 F.2d 1101 (7th Cir. 1985). Our role under 49 U.S.C. 41720 is analogous to the review of major mergers and acquisitions conducted by the Justice Department and the Federal Trade Commission under the Hart-Scott-Rodino Act, 15 U.S.C. 18a, in that we consider whether we should institute a formal proceeding for determining whether an agreement would violate section 41712.

Although our review has been informal, due to the public interest in the matter, we gave interested persons an opportunity to submit comments on the Delta/Continental/Northwest agreements. To assist outside parties in preparing their comments, we required the three airlines to submit redacted copies of the agreements that could be reviewed by other parties. 67 FR 56340 (September 3, 2002). We took similar action during our review of the code-share and frequent flyer reciprocity agreements filed earlier by United and US Airways. 67 FR 50745 (August 5, 2002). In the course of our review of the Delta/Northwest/Continental agreements, we have thus far extended the waiting periods for a total of 60 days. 67 FR 59328 (September 20, 2002); 67 FR 64960 (October 22, 2002).

Several of the outside parties that wish to comment on the agreements among Delta, Continental, and Northwest have alleged that their lack of access to unredacted copies of the agreements has substantially handicapped their ability to comment on the agreements' potential competitive effects. *See, e.g.*, Joint Motion of Air Tran *et al.* (October 15, 2002).

After considering these comments and the nature of the agreements at issue, we have determined that, as contemplated by rule 12, we should allow other parties to see unredacted copies of the agreements on a restricted basis and that doing so should facilitate our consideration of the issues presented by the agreements. For example, the incentives of Delta, Continental, and Northwest to compete with each other will depend in large part on the applicable financial terms when one airline sells seats under its code on a flight operated by one of the other two airlines. That kind of information has been redacted in the copies of the agreements submitted by Delta, Continental, and Northwest for public review, precluding outside parties from fully analyzing the likely competitive impact of the agreements.

As noted, Delta, Continental, and Northwest have requested confidential treatment of the agreements under rule 12. The rule states that we can make confidential information available to other parties on a restricted basis notwithstanding a request for confidential treatment. Subparagraph (d)(3) of rule 12 thus provides, ''During the pendency of such motion, the ruling official may, by notice or order, allow limited disclosure to parties' representatives, for purposes of participating in the proceeding, upon submission by them of affidavits swearing to protect the confidentiality of the documents at issue.'' Allowing outside parties to review unredacted copies of the Delta/Continental/Northwest agreements under our standard restrictions thus will be consistent with the rule.

Providing this kind of restricted access will also be consistent with our practice in docketed proceedings involving applications for approval and antitrust immunity for international alliance agreements. *See, e.g., Joint Application of American Airlines and British Airways,* Docket OST–2001–10387, notice of August 16, 2001. While we are not conducting a formal review of the Delta/Continental/Northwest agreements and have not established a docketed proceeding, we have determined that we should provide comparable access to the agreements in order to give parties an adequate opportunity to comment.

We will follow our established procedures for providing access on a restricted basis. Only counsel and outside experts may review the unredacted agreements, and they may do so only after submitting affidavits representing that they will maintain confidentiality. Each such affidavit must state, at a minimum, that (i) the affiant is counsel for an interested party or an outside expert providing services to such a party; (ii) the affiant will use the information only for the purpose of participating in the submission of comments on the agreements; (iii) the affiant will disclose such information only to other persons who have filed a valid affidavit respecting the confidentiality of the agreements; and (iv) the affiant will destroy or return all copies of the agreements when the Department has concluded its review. Affiants and interested parties must understand and agree that any filing that includes or discusses information obtained through the review of the unredacted agreements must itself be accompanied by a rule 12 motion requesting confidential treatment. Affidavits must be filed with the Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590, and must be served on Delta, Continental, and Northwest. Affiants who have filed affidavits may examine the documents at Room PL–401, if they present a stamped copy of the affidavit filed with the Department before examination of the documents.

We will allow persons submitting affidavits to copy the agreements, subject to their representation in the affidavits that they will destroy or return all such copies to Delta, Continental, or Northwest within one week after we have determined that we will or will not institute a formal investigation under 49 U.S.C. 41712 of the agreements. *Cf. Joint Application of American Airlines and British Airways,* Order 2001–9–12 (September 17, 2001) at 4.

We are not setting a deadline for submission of any supplemental comments based on the review of the unredacted agreements. However, any party that wishes to submit such comments should do so promptly, since the three airlines have asked us to decide expeditiously whether to allow them to implement the agreements. We will also be considering whether any additional extension of the waiting period for the code-share agreement would be appropriate.

This notice will be effective at 3 p.m. on November 12. We are serving Delta, Continental, and Northwest with a copy of this notice by FAX.

Issued in Washington, DC on November 8, 2002.

Read C. Van de Water,

Assistant Secretary for Aviation and International Affairs.

[FR Doc. 02–29068 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed During the Week Ending November 1, 2002

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2002–13694.
Date Filed: October 28, 2002.
Parties: Members of the International Air Transport Association.
Subject:

PTC123 0202 dated September 16, 2002

Mail Vote 240—TC123 Mid Atlantic

Resolutions r1–r6
PTC123 0211 dated October 11, 2002 (Affirmative)
PTC123 0203 dated September 16, 2002
Mail Vote 241—TC123 South Atlantic Resolutions r7–r19
PTC123 0212 dated October 11, 2002 (Affirmative)
Minutes—PTC123 0217 dated October 22, 2002
Fares—PTC123 Fares 0073 dated October 11, 2002
PTC123 Fares 0077 dated October 15, 2002 (Technical Correction)
PTC123 Fares 0074 dated October 15, 2002
Intended effective date: March 1, 2003

Docket Number: OST–2002–13709.
Date Filed: October 29, 2002.
Parties: Members of the International Air Transport Association.
Subject:
CBPP/10/Meet/004/2002 dated October 1, 2002
Finally Adopted Resolution 686 r1
Minutes—CBPP/10/Meet/003/2002 dated September 25, 2002
Intended effective date: December 1, 2002

Docket Number: OST–2002–13710.
Date Filed: October 29, 2002.
Parties: Members of the International Air Transport Association.
Subject:
Mail Vote 245
PTC23 ME–TC3 0153 dated October 4, 2002
TC23/TC123 Middle East-South East Asia
Special Passenger Amending Resolution 010d
PTC23 ME–TC3 0158 dated October 29, 2002 (Affirmative)
Intended effective date: November 15, 2002

Docket Number: OST–02–13711.
Date Filed: October 29, 2002.
Parties: Members of the International Air Transport Association.
Subject:
PTC23 EUR–JK 0088 dated October 15, 2002
Europe-Japan/Korea Resolutions r1–r28
Minutes—PTC23 EUR–JK 0089 dated October 25, 2002
Tables—PTC23 EUR–JK Fares 0041 dated October 15, 2002
Intended effective date: April 1, 2003

Docket Number: OST–02–13722.
Date Filed: October 30, 2002.
Parties: Members of the International Air Transport Association.
Subject:
PTC23 ME–TC3 0156 dated October 11, 2002
TC23/TC123 Middle East–TC3 (except South East Asia)
Resolutions r1–r37
Minutes—PTC23 ME–TC3 0157 dated October 15, 2002
Tables—PTC23 ME–TC3 FARES 0063 dated October 18, 2002
Intended effective date: April 1, 2003

Docket Number: OST–02–13726.
Date Filed: October 30, 2002.
Parties: Members of the International Air Transport Association.
Subject:
PTC23 EUR–SWP 0070 dated October 29, 2002.
Europe-South West Pacific Expedited Resolutions r1–r3
Intended effective date: December 15, 2002

Dorothy Y. Beard,
Federal Register Liaison.
[FR Doc. 02–28969 Filed 11–14–02; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Spotsylvania County, VA

AGENCY: Federal Highway Administration, DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public of its intent to prepare an Environmental Impact Statement in cooperation with the Virginia Department of Transportation (VDOT) for the Spotsylvania Parkway Location Study in Spotsylvania County.

FOR FURTHER INFORMATION CONTACT: John Simkins, Environmental Protection Specialist, Federal Highway Administration, Post Office Box 10249, Richmond, Virginia 23240–0249, Telephone 804–775–3342.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA), in cooperation with the Virginia Department of Transportation (VDOT), will prepare an environmental impact statement (EIS) for the Spotsylvania Parkway Location Study. The study area is located in northeastern Spotsylvania County, southwest of the City of Fredericksburg. The study window is roughly defined by the Ni River, State Route 3 to the north, and Interstate 95 to the east.

Recognizing that the National Environmental Policy Act (NEPA) process requires the consideration of a reasonable range of alternatives that will address the purpose and need, the EIS will consider a range of alternatives for detailed study. These consist of a no-build alternative as well as alternatives consisting of transportation system management strategies, mass transit, improvements to existing facilities, and new alignment facilities. The alternatives will be developed, screened, and carried forward for detailed analysis in the draft EIS based on the ability to address the purpose and need.

The FHWA and VDOT are seeking input as part of the scoping process to assist in determining and clarifying issues relative to the project. Letters describing the proposed study and soliciting input have been sent to the appropriate Federal, State, and local agencies who have expressed an interest or are known to have an interest or legal role in the proposal. A Citizen Information Meeting was held in July 2002 to provide organizations, citizens, and interest groups an opportunity to provide input into the development of the EIS and identify issues that should be addressed. No formal scoping meeting is planned at this time.

A public hearing will be held upon completion of the draft EIS. Notices of the public hearing will be given through various forums providing the time and place of the hearing along with other relevant information. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are identified and taken into account, comments and input are invited from all interested parties. Comments and questions concerning the proposed action and draft EIS should be directed to FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed action.)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: November 7, 2002.

John Simkins,
Environmental Protection Specialist.
[FR Doc. 02–28955 Filed 11–14–02; 8:45 am]
BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2002–13743; Notice 1]

Continental Tire North America Inc., Receipt of Application for Decision of Inconsequential Noncompliance

Continental Tire North America Inc., (Continental) has determined that a total of 159 P265/70R16 AmeriTrac SUV Radial Passenger Tires and 7,131 P265/70R16 ContiTrac SUV Radial Tires do not meet the labeling requirements mandated by Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New Pneumatic Tires.'' The noncompliant tires were produced during the periods March 11–24, 2001, and May 14, 2000–March 24, 2001, respectively.

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Continental has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, ''Defect and Noncompliance Reports.''

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the application.

The petitioner argued as follows: FMVSS No. 109 (S4.3.4(b)) requires both the maximum load in kilograms and pounds be molded on the tires sidewall. The rated maximum kilogram load was incorrectly marked 1190 kg rather than 1090 kg. The rated maximum load in pounds was marked correctly. These tires are primarily sold in the domestic replacement market, where the load in pounds would be the predominant consumer unit of measurement.

Continental stated that test results confirm that the subject tires meet other test requirements of FMVSS No. 109 and support the petition of an inconsequential stamping error, which does not effect performance and is not safety related.

Interested persons are invited to submit written data, views, and arguments on the application described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation, Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. It is requested that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below. Comment closing date: December 16, 2002.

Authority: (49 U.S.C. 301118, 301120; delegations of authority at 49 CFR 1.50 and 501.8).

Issued on: November 12, 2002.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 02–29066 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34274]

Illinois Central Railroad Company—Trackage Rights Exemption—Union Pacific Railroad Company

Union Pacific Railroad Company (UP), pursuant to a written trackage rights agreement to be entered into with Illinois Central Railroad Company (IC),[1] will grant nonexclusive overhead trackage rights to IC over UP's Salem Subdivision extending from milepost 242.85 at Kinmundy, IL, to milepost 252.96 at Salem, IL, a distance of approximately 10.11 miles.

The transaction was scheduled to be consummated no earlier than November 4, 2002, the effective date of the exemption (7 days after the exemption was filed).

The purpose of the trackage rights is to grant IC the right to use the trackage for overhead operation of freight trains between Kinmundy and Salem and for the interchange of carload traffic with UP at Salem.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

[1] IC is a wholly owned subsidiary of Canadian National Railway Company.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34274, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Michael J. Barron, Jr., 455 North Cityfront Plaza Drive, Chicago, IL 60611–5317.

Board decisions and notices are available on our Web site at *'WWW.STB.DOT.GOV.'*

Decided: November 8, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 02–29081 Filed 11–14–02; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

[Docket BTS–2002–13790]

Notice of Request To Renew Approval of Information

AGENCY: Bureau of Transportation Statistics (BTS), DOT

ACTION: Notice and request for comments.

Collection: OMB No. 2139–0003 (Financial and Operating Statistics for Motor Carriers of Passengers).

OMB Control Numbers: 2139–0003 (Form MP–1, Quarterly and Annual Reports).

SUMMARY: This notice announces that the Bureau of Transportation Statistics (BTS) intends to request the Office of Management and Budget (OMB) to renew approval for the information collection, the Annual and Quarterly Reports for Class I Motor Carriers of Passengers (Form MP–1). This information collection is necessary to ensure that motor carriers comply with financial and operating statistics requirements as prescribed in the BTS regulations (49 CFR 1420). This notice is required by the Paperwork Reduction Act (PRA).

DATES: January 14, 2003.

ADDRESSES: Send comments to the U.S. Department of Transportation, Dockets Management System (DMS). You may submit your comments by fax, Internet, in person or via the U.S. mail to the Docket Clerk, Docket No. BTS–2002–13790, Department of Transportation, 400 Seventh Street, SW., Room PL–401, Washington, DC 20590–0001. Please note that in case of delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that

persons consider an alternative method (the Internet, fax, or professional delivery service) to submit comments to the docket and to ensure their timely receipt at U.S. DOT. You may fax your comments to the DMS at (202) 493–2251.

If you wish to file comments using the Internet, you may use the DOT DMS Web site at *http://dms.dot.gov*. Please follow the online instructions for submitting an electronic comment. Comments should identify the docket number and be submitted in duplicate. If you would like the Department to acknowledge receipt of your comments, you must submit a self-addressed stamped postcard on which the following statement is made: Comments on Docket BTS–2002–13790. The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. The DMS is open for examination and copying, at the above address, from 9 a.m. to 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Paula R. Robinson, Compliance Program Manager, Office of Motor Carrier Information, K–13, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590–0001; (202) 366–2984; fax: (202) 366–3364; e-mail: *paula.robinson@bts.gov*.

SUPPLEMENTARY INFORMATION:

I. The Data Collection

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; as amended) and 5 CFR part 1320 require each Federal agency to obtain an OMB approval to continue an information collection activity for which the agency received prior approval. BTS is seeking OMB approval for the following BTS information collection activity whose prior OMB approval is near the expiration date:

Title: Class I Quarterly and Annual Reports of Motor Carriers of Passengers.

OMB Control Number: 2139–0003.

Form Number: BTS Form MP–1.

Type of Review: Extension of a currently approved collection.

Respondents: Class I Motor Carriers of Passengers.

Number of Respondents: 26.

Estimated Time Per Response: 1.5 hours.

Expiration Date: February 28, 2003.

Frequency: Quarterly and annually.

Total Annual Burden: 195 hours.

Abstract: This report provides financial and operating data. The Department of Transportation uses this information to assess the health of the industry and identify industry changes that may affect national transportation policy. The data also show company financial stability and traffic.

Background: The Quarterly and Annual Reports of Motor Carriers of Passengers (Form MP–1) is a mandated reporting requirement for for-hire Class I motor carriers of passengers. Motor carriers required to comply with the BTS regulations are classified on the basis of their annual gross carrier operating revenues (including interstate and intrastate). Under the financial and operating statistics (F&OS) program the BTS collects balance sheet and income statement data along with information on tonnage, mileage, employees, transportation equipment, and other related data. The data and information collected is made publicly available as prescribed in the BTS regulations (49 CFR 1420). The regulations were formerly administered by Interstate Commerce Commission (ICC), the Interstate Commerce Act, 49 U.S.C. 11145, 49 U.S.C. 11343(d)(1) and the Bus Regulatory Act of 1982 and later transferred to the U.S. Department of Transportation on January 1, 1996, by the ICC Termination Act of 1995 (the Act), 49 U.S.C. 14123.

II. Request for Comments

BTS requests comments on any aspects of these information collections, including (1) the accuracy of the estimated burden; (2) ways to enhance the quality, usefulness, and clarity of the collected information; and (3) ways to minimize the collection burden without reducing the quality of the information collected including additional use of automated collection techniques or other forms of information technology.

Russell B. Capelle, Jr.,

Assistant BTS Director for Motor Carrier Information, Department of Transportation.

[FR Doc. 02–28966 Filed 11–14–02; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 31, 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 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 16, 2002, to be assured of consideration.

Departmental Offices/Office of Foreign Assets Control (OFAC)

OMB Number: 1505–0170.

Form Number: TD F 90–22.54.

Type of Review: Extension.

Title: Form for OFAC License Applications to Unblock Funds Transfers.

Description: Assets blocked pursuant to sanctions administered by Office of Foreign Assets Control (OFAC) may be released only through a specific license issued by OFAC. Since February 2000, use of this form to apply for the unblocking of funds transfers has been mandatory pursuant to 31 CFR 501.801(b)(2). Use of this form greatly facilitates and speeds applicants' submissions and OFAC's processing.

Respondents: Business or other for-profit, individuals or households, not-for-profit institutions.

Estimated Number of Respondents: 3,000.

Estimated Burden Hours Per Respondent: 30 minutes.

Frequency of Response: Other (once).

Estimated Total Reporting Burden: 1,500 hours.

Clearance Officer: Lois K. Holland, Departmental Offices, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220, (202) 622–1563.

OMB Reviewer: Joseph F. Lackey, Jr., Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, (202) 395–7316.

Mary A. Able,

Departmental Reports Management Officer.

[FR Doc. 02–28967 Filed 11–14–02; 8:45 am]

BILLING CODE 4811–16–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

AGENCY: Bureau of Alcohol, Tobacco and Firearms, 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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, is soliciting comments concerning the Beer For Exportation.

DATES: Written comments should be received on or before January 14, 2003, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Marjorie Ruhf, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8202.

SUPPLEMENTARY INFORMATION:

Title: Beer For Exportation.

OMB Number: 1512–0096.

Form Number: ATF F 5130.12.

Abstract: ATF collects this information in order to monitor export activities by brewers. Certification as to type and quanity of beer exported is analyzed by brewers' operational reports to ensure compliance with tax laws enforced by ATF. The record retention period for this information collection is 3 years.

Current Actions: There are no changes to this information collection and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 392.

Estimated Total Annual Burden Hours: 38,808.

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.

Dated: November 7, 2002.

William T. Earle,

Assistant Director (Management) CFO.

[FR Doc. 02–29043 Filed 11–14–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

AGENCY: Bureau of Alcohol, Tobacco and Firearms, 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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury is soliciting comments concerning the Usual and Customary Business Records Relating to Wine.

DATES: Written comments should be received on or before January 14, 2003, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Jennifer Berry, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8210.

SUPPLEMENTARY INFORMATION:

Title: Usual and Customary Business Records Relating to Wine.

OMB Number: 1512–0298.

Recordkeeping Requirement ID Number: ATF REC 5120/1.

Abstract: Usual and customary business records relating to wine are routinely inspected by ATF officers to ensure the payment of alcohol taxes due to the Federal Government. The record retention period for this information collection is 3 years.

Current Actions: The only change to this information collection is an increase in burden hours due to an increase in the number of wine premises.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 3,131.

Estimated Total Annual Burden Hours: 313.

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.

Dated: November 7, 2002.

William T. Earle,

Assistant Director (Management) CFO.

[FR Doc. 02–29044 Filed 11–14–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury is soliciting comments concerning the Notification to Fire Marshal and Chief, Law

Enforcement Officer of Storage of Explosive Materials.

DATES: Written comments should be received on or before January 14, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Gail Davis, Chief, Public Safety Branch, 800 K Street, NW., Room 710,Washington, DC 20001, (202) 927–7930.

SUPPLEMENTARY INFORMATION:

Title: Notification to Fire Marshall and Chief, Law Enforcement Officer of Storage of Explosive Materials.

OMB Number: 1512–0536.

Abstract: ATF requires all persons who store explosives to notify local law enforcement officials and fire departments orally before the end of the day on which the storage of the explosive materials commenced and in writing within 48 hours from the time such storage commenced. The information is necessary for the safety of emergency response personnel responding to fires at sites where explosives are stored.

Current Actions: There are no changes to this information collection and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit, individuals or households, farms, State, Local or Tribal Government.

Estimated Number of Respondents: 10,057.

Estimated Total Annual Burden Hours: 60,342.

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.

Dated: November 7, 2002.

William T. Earle,

Assistant Director (Management) CFO.

[FR Doc. 02–29045 Filed 11–14–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

AGENCY: Bureau of Alcohol, Tobacco and Firearms, 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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, is soliciting comments concerning the Bond for Drawback Under 26 U.S.C. 5131.

DATES: Written comments should be received on or before January 14, 2003, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Steve Simon, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8210.

SUPPLEMENTARY INFORMATION:

Title: Bond for Drawback Under 26 U.S.C. 5131.

OMB Number: 1512–0537.

Form Number: ATF F 5154.3.

Abstract: ATF F 5154.3 is required pursuant to 26 U.S.C. 5131 from all persons who claim, on a monthly basis, drawback of tax on distilled spirits used in the manufacture of approved nonbeverage products. The form is used to establish eligibility to file drawback claims on a monthly basis and, when necessary, to enforce collection of money owed to the Government.

Current Actions: There are no changes to this information collection and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 60.

Estimated Total Annual Burden Hours: 12.

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.

Dated: November 7, 2002.

William T. Earle,

Assistant Director (Management) CFO.

[FR Doc. 02–29046 Filed 11–14–02; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0610]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This

notice solicits comments for information needed to review the credentials of chaplain applicants.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2003.

ADDRESSES: Submit written comments on the collection of information to Ann W. Bickoff (193B1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *ann.bickoff@hq.med.va.gov.* Please refer to ''OMB Control No. 2900–0610'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Ann W. Bickoff at (202) 273–8310 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Ecclesiastical Endorsing Organization Verification/Reverification Information, VA Form 10–0379.

OMB Control Number: 2900–0610.

Type of Review: Extension of a currently approved collection.

Abstract: The information collected on VA Form 10–0379 is used to assure that individuals employed by VA as chaplains are qualified to provide for the constitutional rights of veterans to free exercise of religion. Each applicant submits an official statement (''ecclesiastical endorsement'') from their religion or faith group, certifying that the applicant is in good standing with the faith group and is qualified to perform the full range of ministry required in VA setting. VA uses this information to determine (1) who the faith group designates as its endorsing official(s); (2) whether the faith group provides ministry to a lay constituency; and (3) what is the constituency to which person endorsed by this group may minister.

Affected Public: Not-for-profit Institutions.

Estimated Annual Burden: 3 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 10.

Dated: November 6, 2002.

By direction of the Secretary.

Loise Russell,

Acting Director, Records Management Service.

[FR Doc. 02–28974 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0358]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to evaluate veterans' and other eligible person's suitability to change their program of education objectives.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2003.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0358'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C., 3501—3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct or Progress, VA Form 22–8873.

OMB Control Number: 2900–0358.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and other eligible persons may change their program of education under conditions prescribed by Title 38 U.S.C., Section 3691. Before VA may approve benefits for a second or subsequent change of program, VA must first determine that the new program is suitable to the claimant's aptitudes, interests, and abilities. VA Form 22–8873 is used to gather the necessary information only if the suitability of the proposed training program cannot be established from information already available in the claimant's VA file.

Affected Public: Individuals or households.

Estimated Annual Burden: 8,750 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 17,500.

Dated: October 30, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28979 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0198]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine a veteran's eligibility for clothing allowance payment.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2003.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0198'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Annual Clothing Allowance, VA Form 21–8678.

OMB Control Number: 2900–0198.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8678 is used by veterans to apply for clothing allowance. Without this information, VA would be unable to determine eligibility for this benefit.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,120 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 6,720.

Dated: October 30, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28980 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0178]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine a claimant's continuing eligibility for education benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2003.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0178'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Monthly Certification of On-the-Job and Apprenticeship Training, VA Form 22–6553d.

Note: A reference to VA Form 22–6553d also includes VA Form 22–6553d–1 unless otherwise specified. VA Form 22–6553d–1 contains the same information as VA Form 22–6553d.

OMB Control Number: 2900–0178.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 22–6553d is used by trainees and employers to report the number of hours worked in on-the-job training programs and apprenticeships, and to report terminations of training in such programs. VA uses the information to determine whether a trainee's education benefits are to be continued, changed or terminated, and the effective date of such action. VA is authorized to pay education benefits to veterans and other eligible persons pursuing approved programs not leading to a standard college degree under Title 38, U.S.C., Chapters 32 and 35, Title 10, U.S.C., Chapter 1606, and Public Law 96–342, Section 903. Benefits are authorized monthly based upon the

number of hours worked by the trainee and verified by the training establishment.

Affected Public: Individuals or households, business or other for-profit, not-for-profit institutions, Federal Government, and State, Local or Tribal Government.

Estimated Annual Burden: 20,100 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 13,400.

Number of Responses Annually: 120,600.

Dated: October 30, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28981 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0613]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 16, 2002.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0613.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0613'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Recordkeeping at Flight Schools (38 U.S.C. 21.4263 (h)(3).

OMB Control Number: 2900–0613.

Type of Review: Extension of a currently approved collection.

Abstract: Flight schools are required to maintain records on students to support continued approval of their courses. State approving agencies that approve courses for VA training use these records to determine if courses offered by a flight school should be approved. VA representative inspects the records to determine if payments made to VA students at the flight school are correct.

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 Federal Register Notice with a 60-day comment period soliciting comments on this collection of information was published on August 26, 2002, at page 54844.

Affected Public: Business or other for-profit, not-for-profit institutions, and Federal Government.

Estimated Annual Burden: 800 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,400.

Dated: November 6, 2002.

By direction of the Secretary.

Loise Russell,

Acting Director, Records Management Service.

[FR Doc. 02–28975 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0104]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 16, 2002.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0104.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0104'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Report of Accidental Injury in Support of Claim for Compensation or Pension, VA Form 21–4176.

OMB Control Number: 2900–0104.

Type of Review: Extension of a currently approved collection.

Abstract: The form is used in support of claims for disability benefits based on disability which is the result of an accident. The information given by the veteran is used as a source to gather specific data regarding the accident and to afford the veteran an opportunity to provide information from his or her own knowledge regarding the accident. Benefits may be paid if a disability is incurred in line of duty and is not the result of the veteran's own willful misconduct.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 23, 2002, at pages 54697–54698.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,200 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 4,400.

Dated: November 6, 2002.

By direction of the Secretary.

Loise Russell,

Acting Director, Records Management Service.

[FR Doc. 02–28976 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0098]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 16, 2002.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0098.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0098'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Application for Survivors' and Dependents' Educational Assistance (Under Provisions of Chapter 35, Title 38, U.S.C.), VA Form 22–5490.

OMB Control Number: 2900–0098.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 22–5490 serves as an application for Dependents' Educational Assistance (DEA). Spouses, surviving spouses, and children of veterans must submit evidence to establish eligibility and entitlement to DEA under Title 38, U.S.C., 3513.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 26, 2002, at pages 54842—54843.

Affected Public: Individuals or households.

Estimated Annual Burden: 12,500 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 25,000.

Dated: November 6, 2002.

By direction of the Secretary.

Loise Russell,

Acting Director, Records Management Service.

[FR Doc. 02–28977 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0002]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 16, 2002.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0002.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0002'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Income—Net Worth and Employment Statement (In support of Claim for Total Disability Benefits), VA Form 21–527.

OMB Control Number: 2900–0002.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–527 is used by claimant to submit a supplemental claim for disability pension or disability compensation based on the individual's unemployability. The information requested is necessary to determine veteran's eligibility to these benefits.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 26, 2002, at page 54843.

Affected Public: Individuals or households.

Estimated Annual Burden: 104,440 hours.

Estimated Average Burden Per Respondent: 60 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 104,440.

Dated: November 6, 2002.

By direction of the Secretary.

Loise Russell,

Acting Director, Records Management Service.

[FR Doc. 02–28978 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0067]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 16, 2002.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs,

810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0067.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0067'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Application for Automobile or other Conveyance and Adaptive Equipment (under 38 U.S.C. 3901–3904), VA Form 21–4502.

OMB Control Number: 2900–0067.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–4502 is used to gather the necessary information to determine a veteran's entitlement to automobile allowance and adaptive equipment.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 14, 2002, at pages 53044–53045.

Affected Public: Individuals or households.

Estimated Annual Burden: 375 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,500.

Dated: October 30, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28982 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Chiropractic Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Chiropractic Advisory Committee will meet Wednesday, December 4, 2002, from 8 a.m. until 12:30 p.m. and Thursday, December 5, 2002, from 8 a.m. until 5 p.m. at the Department of Veterans Affairs Central Office, 810 Vermont Avenue NW., Room 230, Washington, DC 20420. The meeting is open to the public.

The purpose of the Committee is to provide direct assistance and advice to the Secretary of Veterans Affairs in the development and implementation of the chiropractic health program. Matters on which the Committee shall assist and advise the Secretary include protocols governing referrals to chiropractors, direct access to chiropractic care, scope of practice of chiropractic practitioners, definitions of services to be provided and such other matters as the Secretary determines to be appropriate.

On December 4, the Committee will discuss chiropractic education, training, licensure, and techniques. On December 5, the Committee will receive an update on matters pending from the September 2002 meeting; begin discussion of scope of chiropractic services; and if time permits, begin discussion of services to be provided in the VA chiropractic program.

Any member of the public wishing to attend the meeting is requested to contact Ms. Sara McVicker, RN, MN, Committee Manager, at (202) 273–8558, by noon on December 3, 2002, in order to facilitate entry to the building. No time will be allocated at this meeting for receiving oral presentations from the public. However, the Committee will accept written comments from interested parties on issues affecting the development and implementation of the chiropractic health program within VA. It is preferred that such comments be transmitted electronically to the Committee at *sara.mcvicker@mail.va.gov* or mailed to: Chiropractic Advisory Committee, Primary and Ambulatory Care SHG (112), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: November 8, 2002.

By Direction of the Secretary.

Nora E. Egan,

Committee Management Officer.

[FR Doc. 02–28973 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Professional Certification and Licensure Advisory Committee; Notice of Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Professional Certification and Licensure Advisory Committee will meet on Wednesday, December 4, 2002, from 8:30 a.m. to 4 p.m. The meeting will be held at the Department of Veterans Affairs, Veterans Benefits Administration Education Conference Room 601V, 1800 G Street, NW., Washington, DC. The meeting is open to the public.

The purpose of the committee is to review the requirements of organizations or entities offering licensing and certification tests to individuals for which payment for such tests may be made under chapters 30, 32, 34, or 35 of Title 38, United States Code. The agenda for this meeting will include discussion of ''owning a test'' versus ''offering a test'' as part of an approval criterion; tracking and data reporting; and other related issues the Committee deems appropriate.

Those planning to attend the open meeting should contact Mr. Giles Larrebee or Mr. Michael Yunker at (202) 273–7187. Interested persons may attend, appear before, or file statements with the Committee. Statements, if in written form, may be filed before the meeting, or within 10 days after the meeting. Oral statements will be heard at 2 p.m., Wednesday, December 4, 2002.

Dated: November 8, 2002.

By Direction of the Secretary.

Nora E. Egan,

Committee Management Officer.

[FR Doc. 02–28971 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on the Readjustment of Veterans will be held Thursday and Friday, December 12 and 13, 2002, from 8:30 a.m. until 4:30 p.m. on both days, at The American Legion, Washington Office, 1608 K Street, NW., Washington, DC. The meeting is open to the public.

The purpose of the Committee is to review the post-way readjustment needs of veterans and to evaluate the availability and effectiveness of VA programs to meet these needs.

The agenda for December 12 will include a review of the Readjustment Counseling Service Vet Center program and an update on VA medical center treatment programs for post-traumatic stress disorder (PTSD). The Committee will also review the Veterans Health Initiative, a series of in-service training

modules for specific veterans' health care programs. A best practices model of VA partnerships for serving homeless veterans will also be presented.

On December 13, the Committee will be provided with an update from the Veterans Benefits Administration on service-connected compensation for PTSD. The Committee will also focus on available information regarding the military-related service needs of returning combatants from the war on terrorism in Afghanistan, and a follow-up on the mental health needs of older veterans one year after the terrorist attacks in the United States.

The agenda for both days will also include strategic planning activities to formulate goals and objectives for the coming year. In addition, the Committee will formulate recommendations for submission to Congress in its annual report.

Those who plan to attend or have questions concerning the meeting may contact Mr. Charles M. Flora, M.S.W., Readjustment Counseling Service, Department of Veterans Affairs Central Office, at (202) 273–8969.

Dated: November 8, 2002.

By Direction of the Secretary.

Nora E. Egan,

Committee Management Officer.

[FR Doc. 02–28972 Filed 11–14–02; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Friday,
November 15, 2002

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 405

Medicare Program; Changes to the Medicare Claims Appeal Procedures; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 405

[CMS–4004–P]

RIN 0938–AL67

Medicare Program: Changes to the Medicare Claims Appeal Procedures

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

ACTION: Proposed rule.

SUMMARY: Under sections 1869 and 1879 of the Social Security Act (the Act), Medicare beneficiaries and, under certain circumstances, providers and suppliers of health care services, may appeal adverse determinations regarding claims for benefits under Medicare Part A and Part B. Section 521 of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 amends section 1869 of the Act to substantially revise the Medicare claim appeals process. The statute mandates a series of structural and procedural changes to the existing appeals process, including: The establishment of a uniform process for handling all Medicare Part A and Part B appeals; revised time limits for filing appeals; reduced decision-making time frames throughout all levels of the Medicare administrative appeals system; the introduction of new entities known as qualified independent contractors (QICs) to conduct reconsiderations of contractors' initial determinations or redeterminations; and the establishment of the right to an expedited determination when an individual disagrees with a provider's decision to discharge the individual or terminate services.

This proposed rule sets forth the regulations that would be needed to implement the new statutory provisions.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on January 14, 2003.

ADDRESSES: In commenting, please refer to file code CMS–4004–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission or e-mail. Mail written comments (one original and three copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4004–P, P.O. Box 8017, Baltimore, MD 21244–8017.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and three copies) to one of the following addresses:

Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for commenters wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Michele Edmondson (410) 786–6478 (for issues relating to appeal rights). Jennifer Eichhorn (410) 786–9531 (for issues relating to initial determinations and redeterminations). Arrah Tabe (410) 786–7129 (for issues relating to QIC reconsiderations). Jennifer Collins (410) 786–1404 (for issues relating to ALJ hearings and DAB reviews). Rhonda Greene-Bruce (410) 786–7579 (for issues relating to expedited determinations).

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* Timely comments will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7197.

To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 (or toll-free at 1–888–293–6498) or by faxing to (202) 512–2250. The cost for each copy is $9. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

This **Federal Register** document is also available from the **Federal Register** online database through GPO Access, a service of the U.S. Government Printing Office. The Web site address is *http://www.access.gpo.gov/nara/index.html*.

Note: The former name of the Centers for Medicare & Medicaid Services (CMS) was the Health Care Financing Administration (HCFA). The terms CMS and HCFA can be used interchangeably.

Since the Social Security Administration (SSA) became an independent agency in 1995 pursuant to Public Law 103–296, it has continued to provide CMS with support for the administration of the Medicare Parts A and B programs pursuant to a Memorandum of Understanding between SSA and DHHS. That support has involved, among other duties, continuing to provide hearings and decisions in Medicare appeals using SSA administrative law judges (ALJs) as well as utilizing SSA offices to forward various Medicare-related paperwork to CMS. While CMS has greatly appreciated SSA's assistance over the years in these areas, at this time CMS is considering taking over these Medicare responsibilities. Our hope is to have this in place on or before October 1, 2003. Until such time as CMS may take over the function, SSA will continue to provide Medicare claimants with the valuable assistance that it has traditionally provided. Thereafter, CMS will assume such responsibilities. CMS will provide appropriate notice to the public as to when such responsibilities will be assumed and also as to the procedures Medicare claimants will follow in dealing with CMS rather than SSA. Therefore, references in this NPRM to SSA, including SSA, ALJs, and field offices, should be read as references to SSA assistance to CMS up to the point in time when CMS takes over the SSA responsibilities.

I. Background

A. Overview of Existing Medicare Program

The original Medicare program consists of two parts. Part A, known as the hospital insurance program, covers

certain care provided to inpatients in hospitals, critical access hospitals, skilled nursing facilities (SNFs), as well as hospice care and some home health care. Part B, the supplementary medical insurance program, covers certain physicians' services, outpatient hospital care, and other medical services that are not covered under Part A. In addition to the original Medicare program, beneficiaries may elect to receive health care coverage under Part C of Medicare, the Medicare+Choice (M+C) program. Under the M+C program, an individual is entitled to those items and services (other than hospice care) for which benefits are available under Part A and Part B. An M+C plan may provide additional health care items and services that are not covered under the original Medicare program.

Under the original Medicare program, a beneficiary may generally obtain health services from any institution, agency, or person qualified to participate in the Medicare program that undertakes to provide the service to the individual. After the care is provided, the provider or supplier (or, in some cases, a beneficiary) would submit a claim for benefits under the Medicare program to the appropriate government contractor, either a fiscal intermediary (for all Part A claims and certain Part B claims) or a carrier (for most claims under Part B). If the claim is for an item or service that falls within a Medicare benefit category, is reasonable and necessary for the individual, and is not otherwise excluded by statute or regulation, then the contractor would pay the claim. However, the Medicare program does not cover all health care expenses. If the Medicare contractor determines that the medical care is not covered under the Medicare program, it denies the claim. In fiscal year 2001, Medicare contractors adjudicated over 930 million initial claims and approximately 6.7 million claim appeals.

When a contractor denies a claim, it notifies the provider, supplier and/or beneficiary of the denial and offers the opportunity to appeal this decision. The existing appeals procedures for original Medicare are set forth in regulations at 42 CFR part 405, subparts G and H. Separate procedures for appealing determinations made under the M+C program are set forth at subpart M of part 422. After an appellant has exhausted the administrative appeals procedures offered under the Medicare program, the Medicare statute provides the opportunity for a dissatisfied individual to seek review in Federal court.

The regulations in part 405 subpart G, beginning at § 405.700, describe reconsiderations and appeals under Medicare Part A. When a Medicare contractor makes a determination with respect to a Part A claim, the beneficiary, or the provider, in some circumstances, may appeal the determination. (Consistent with section 1861(u) of the Act and 400.202, the term ''provider'' generally includes hospitals, SNFs, home health agencies (HHAs), comprehensive outpatient rehabilitation facilities (CORFs), and hospices.) The contractor then reconsiders the initial determination. If the contractor upholds the original determination, the appellant may request a hearing before an Administrative Law Judge (ALJ), provided that the amount in controversy is at least $100. (ALJs are employed by the Social Security Administration (SSA), but they adjudicate Medicare appeals under a Memorandum of Understanding between SSA and the Department of Health and Human Services (DHHS.) If the appellant is dissatisfied with the ALJ's decision, he or she may request review by the Departmental Appeals Board (DAB). The component within the DAB that is responsible for Medicare claim appeals is the Medicare Appeals Council (MAC). (Note that although the Medicare appeals regulations in part 405 contain some limited provisions regarding ALJ and MAC proceedings, these proceedings are generally governed by existing SSA regulations at 20 CFR part 404, subparts J.) MAC decisions constitute the final decision of the Secretary of DHHS (the Secretary) and may be appealed to Federal court. In each case, the lower level of appeal must be exhausted before the appeal can be elevated to the next level.

Medicare Part B appeal procedures are set forth in part 405 subpart H (§ 405.800 *et seq.*). Under these regulations, beneficiaries and suppliers that accept assignment for Medicare claims may appeal to a Medicare contractor for a review of the contractor's initial determination that a claim should not be paid, either in full or in part. (The term ''supplier'' is also defined at § 400.202 and means a physician or other practitioner, or an entity other than a ''provider,'' that furnished health care services under Medicare.) If the contractor's review results in a continued denial of the claim, and the amount in controversy is at least $100, the appellant may request a 2nd level appeal known as a ''fair hearing.'' If the hearing officer upholds the denial, the appellant may request a hearing before an ALJ, provided that the amount in controversy is at least $500. Subsequent aspects of the appeals process for a Part B claim are identical to those described above for a Part A claim.

Quality improvement organizations (QIOs), formerly known as peer review organizations, also make certain types of Medicare determinations, mostly involving inpatient hospital discharges under sections 1154 and 1155 of the Act. These decisions are also subject to ALJ hearings, if the amount in controversy is at least $200. Judicial review is also available if the amount in controversy is $2000. Regulations for these appeals are currently found at 42 CFR part 478. Finally, note that appeals under Medicare Part C are also subject to adjudication by ALJs and the MAC, although these appeals follow an entirely separate path before the ALJ level.

B. Changes to the Appeals Process Under BIPA 2000

Section 521 of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), Public Law 106–554, amends section 1869 of the Act to require revisions to the Medicare appeals process. Among the major changes required by the BIPA amendments are—

- Establishing a uniform process for handling Medicare Part A and B appeals, including the introduction of a new level of appeal for Part A claims.
- Revising the time frames for filing a request for a Part A and Part B appeal.
- Imposing a 30-day timeframe for certain ''redeterminations'' made by the contractors who made the initial determination.
- Requiring the establishment of a new appeals entity, the qualified independent contractor (QIC), to conduct ''reconsiderations'' of contractors' initial determinations (including redeterminations) and allowing appellants to escalate cases to an ALJ hearing, if reconsiderations are not completed within 30 days.
- Establishing a uniform amount in controversy threshold of $100 for appeals at the ALJ Level.
- Imposing 90-day time limits for conducting ALJ and MAC appeals and allowing appellants to escalate a case to the next level of appeal if ALJs or the MAC do not meet their deadlines.
- Imposing ''de novo'' review when the MAC reviews an ALJ decision made after a hearing.

Revised section 1869 also requires that the Secretary establish a process by which an individual may obtain an expedited determination if he/she

receives a notice from a provider of services that the provider plans to terminate services or discharge the individual from the provider. Currently, this right to an expedited review only exists with respect to hospital discharges (under sections 1154 and 1155 of the Act).

The statute specifies that the new appeals provisions are effective for initial determinations made on or after October 1, 2002. As this proposed rule demonstrates, we are making significant efforts to ensure that the public has an opportunity to comment on the procedures used to implement section 521 and to ensure that a rule is in place for implementing section 521. However, as noted in the CMS ruling published October 7, 2002 (67 FR 62478–62482) on this subject, this rulemaking effort is greatly complicated by the possibility of further changes to the statutory appeals provisions. We need to ensure that this statutory mandate will not risk disruptions to other fundamental functions of the Medicare program, such as processing and payment of Medicare claims. Thus, we seek comments on this proposed rule so that we can be in the best possible position for implementation.

Rather than listing here all the detailed provisions of section 521 of BIPA, we will discuss the individual provisions in detail below in the context of the proposed implementing regulations. However, for the convenience of the reader, we are providing below a detailed chart illustrating the current appeals procedures for both Part A and B claims and the new procedures that are required by BIPA:

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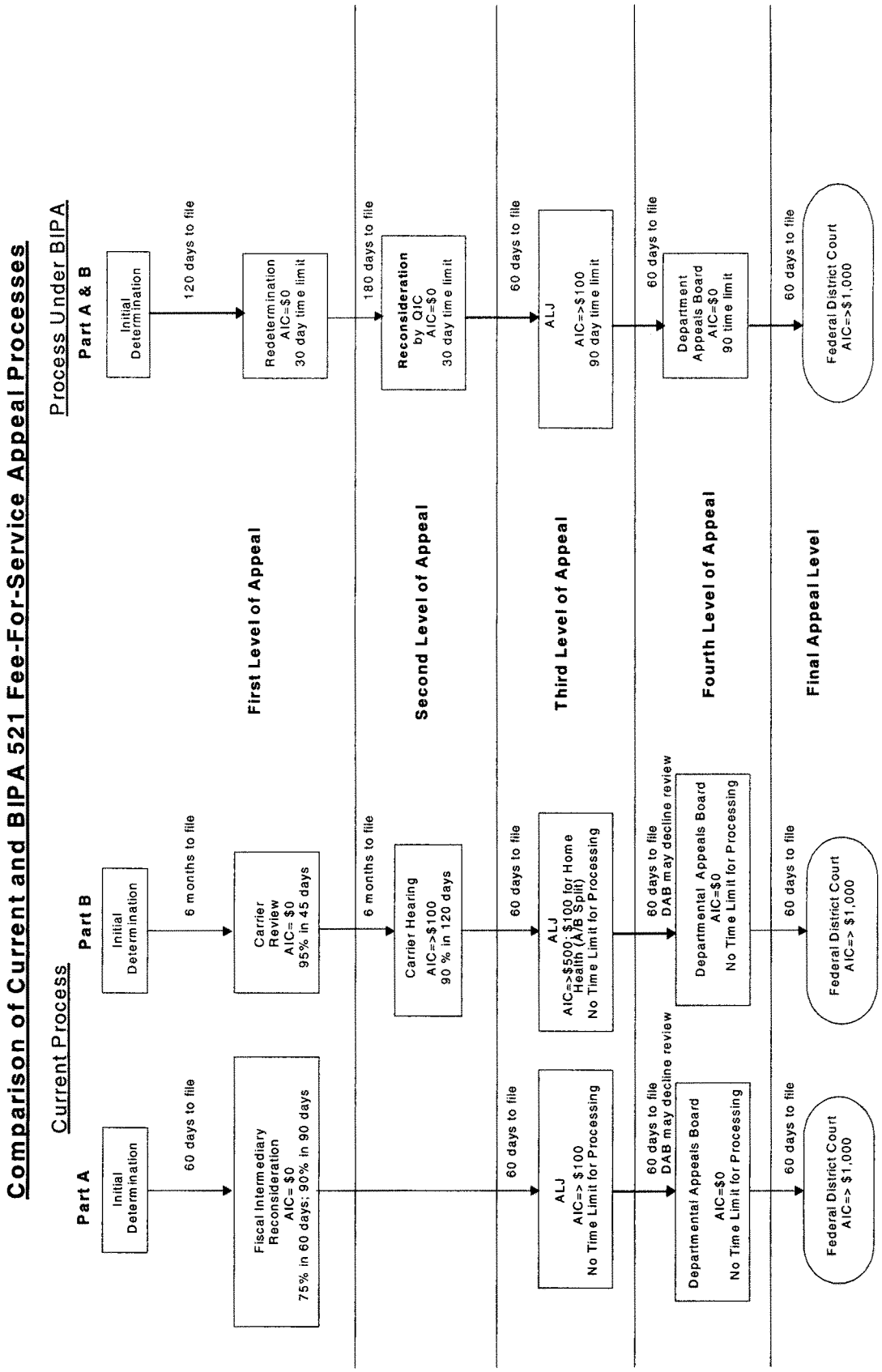

BILLING CODE 4120–01–P

C. Codification of Regulations

As noted above, the current regulations governing Medicare administrative appeals are set forth in 42 CFR part 405, subparts G and H. These regulations will continue to be needed for an indefinite transition period until all appeals resulting from initial determinations before the implementation of the new procedures required under BIPA are completed. We are considering what rules should apply during the transition period and whether it would be possible or prudent to operate dual appeals systems depending on the date of an initial claim determination. Clearly, the new BIPA provisions make possible a largely uniform set of appeals procedures that can be applied both for part A and B of Medicare. Therefore, this proposed rule would establish a new subpart I of part 405 that will set forth in one location the administrative appeals requirements for Medicare carriers, Fiscal Intermediaries (FIs) and QICs. We note that BIPA section 521 (see 1869(a)(1)(C)) also requires that certain determinations made by QIOs under section 1154(a)(2) be subject to the revised appeals process under section 1869, therefore, we anticipate publishing a separate proposed rule to accommodate needed changes to the existing regulations at 42 CFR parts 476 and 478 regarding QIO determinations and appeals. (In addition, we note that the changes set forth here do not apply for purposes of Part C of Medicare, that is, the Medicare+Choice program. We also intend to address necessary changes to 42 CFR part 422 in future rulemaking.)

We are also proposing to include in new subpart I the provisions needed to govern Medicare claims appeals to ALJs and the MAC. The existing ALJ regulations are quite voluminous and are intended primarily to apply to appeals of SSA disability cases, rather than to Medicare appeals. The need for the Medicare program to establish its own regulations for these upper level appeals has been recognized by many parties, including, most recently, the Office of the Inspector General in its January 2002 report: ''Medicare Administrative Appeals—The Potential Impact of BIPA,'' OEI–04–01–00290. Many of these provisions will effectively carry over the existing requirements with respect to appeals to the ALJ and the MAC, rather than implementing substantive changes. However, both the firm time frames for ALJ and DAB decisions and the opportunity for escalation of cases are provisions that apply only to Medicare claims, and not to SSA disability cases—presenting another compelling argument to take this opportunity to codify the ALJ and MAC requirements for Medicare administrative appeals within the Medicare regulations at Title 42 of the Code of Federal Regulations. Thus, the new subpart I will codify in one location key regulations governing all aspects of Medicare claim appeals, beginning with the statutory requirements that apply to initial determinations and proceeding through all four levels of the administrative appeals process. For the convenience of the reader, regulations contained in existing subparts G and H of part 405 that have not been affected by the changes mandated in section 521 of BIPA generally will be repeated in the new subpart. However, we note that we are not carrying over regulations that deal with challenges to coverage policy (such as §§ 405.732 or 405.860 concerning the review of national coverage decisions), which instead will be dealt with in the regulations implementing section 522 of BIPA concerning the new procedures for appealing coverage policies to ALJs and the DAB. Since we are not eliminating regulations contained in existing subparts G and H, we also will not reflect provisions in subpart I that deal with appeals of carrier decisions that supplier standards are not met, or appeals of a categorization of a device as experimental or investigational (see §§ 405.874–75 and 405.753).

II. General Provisions of the Proposed Rule

A. Overview

Clearly, the changes introduced by section 521 of BIPA are aimed at introducing greater efficiency and accuracy into the Medicare appeals system. The Secretary is equally committed to these goals. However, the introduction of QICs and the establishment of drastically reduced mandatory time frames for appeals decisions do not in themselves provide remedies to the longstanding problems that Congress intended to address in the new BIPA appeals provisions. To make these changes work, we need to examine carefully how the effects of changes at a given level of the appeals process may affect the entire appeals system, as well as to determine how to allocate the limited Medicare resources available to effectuate the changes to the appeals system.

In developing the proposals below, we have carefully considered how best to achieve these goals within the BIPA construct, keeping in mind the limited resources likely available for appeals system changes. We are also acutely aware of the possibility that the volume of appeals could increase significantly with the implementation of BIPA. (The OIG pointed out three reasons that such increases are likely, including the attractiveness of a speedier system, with drastically reduced time frames, the increased control given to appellants through the new escalation provisions, and the reductions in the required amounts in controversy to appeal a denied claim.) We also needed to consider the fact that, although the existing appeals provisions were designed primarily for beneficiary appeals, the overwhelming majority of appeals are now filed by providers and suppliers. We have attempted to reflect this reality by proposing changes that will work efficiently for appellants with some knowledge and experience of the Medicare appeals procedures, while at times incorporating exceptions for beneficiary appellants.

Outlined below are the proposed changes to the Medicare appeals regulations needed to implement section 521 of BIPA. Our general approach is to explain briefly the new statutory provisions, and to point out significant differences with the law or regulations that have been in effect prior to BIPA. For proposed regulations that are substantively unchanged from existing requirements, we have merely consolidated the current regulatory requirements into unified provisions that apply for both Medicare Part A and Part B appeals, consistent with the BIPA approach. In doing so, we have made some editorial changes to increase the clarity and simplicity of the regulations, to the extent that this is possible given the inherent complexity of appeals regulations. The discussion that follows touches only briefly, if at all, on sections of the proposed regulations that do not set forth substantive changes to the existing appeals procedures.

B. Statutory Basis, Definitions, and General Procedures (§§ 405.900–405.902)

Proposed subpart I begins with a brief section (§ 405.900) that sets forth the general statutory authority for the ensuing provisions and establishes that the scope of the subpart is to establish the regulations needed to implement the provisions of section 1869 of the Act concerning initial determinations and appeals. Consistent with section 1869(a)(1) of the Act, § 405.900 (b) specifies that the Secretary shall make initial determinations with respect to whether an individual is entitled to benefits under Medicare Part A or B and with respect to the amount of benefits

available under those parts. Section 405.902 would set forth the definitions for terms used in subpart I that we believe may need clarification. These definitions provide the generally applied meaning for terms that are used throughout the subpart.

For the most part, the definitions presented here are taken directly from the statute, or from existing subparts G or H of part 405, or are essentially self-explanatory. We have not restated in subpart I definitions of terms that are already defined in part 400 of the Medicare regulations, such as ''provider'' or ''supplier'' (see § 400.202) and that have the same meaning in the appeals context. Thus, the term ''supplier'' encompasses physicians, other practitioners, and various entities (such as laboratories or durable medical equipment (DME) suppliers) other than providers that furnish Medicare services. Discussed below are two terms that we believe may need further clarification.

1. Assignment of Appeal Rights

Section 1869(b)(1)(C) provides that an individual's appeal rights may be assigned to the provider or supplier that furnishes the item or service in question. Our proposed definition states that ''assignment of appeal rights'' means the transfer by a beneficiary (the ''assignor'') of his or her right to appeal an initial determination to a provider or supplier (the ''assignee''). Although this definition is relatively straightforward, it is important that this term not be confused with the term ''assignment,'' as defined under existing § 405.802. In that context, assignment refers to the transfer of a claim for payment under Part B of Medicare from a beneficiary to a physician or other supplier. For purposes of Subpart I, the terms ''assignment,'' ''assignor,'' and assignee'' are used to refer only to the transfer of appeal rights, rather than in the more traditional context of payment on an assignment-related basis. A full discussion of our proposals regarding appeal rights is presented below.

2. Party

The meaning of the term ''party'' also has important implications, mainly for purposes of appeal rights and notification requirements. We would simply define party as an individual or entity with standing to appeal an initial determination or subsequent administrative appeal determination. Then, we list in § 405.906(a) who would be considered a party to an initial determination. Beneficiaries are considered parties. Also, in keeping with our previous regulations, physicians or suppliers who have accepted a valid assignment executed by a beneficiary to transfer his or her claim for payment to the physician or supplier, in return for the physician or supplier's promise not to charge more for his or her services than a carrier finds to be a reasonable charge or other approved amount, would also be considered a party. A party also includes a physician liable for refund under section 1842(l) of the Act, a supplier liable for refund under sections 1834(a)(18) and 1834(j)(4) of the Act, or a provider. Additionally, § 405.906(b) identifies parties for purposes of an appeal. A provider or supplier taking assignment of appeal rights under section 1869(b)(1)(C) would be considered a party to an appeal. Also, in accordance with § 405.908, we note that for dually entitled beneficiaries, States have the right to file appeals on behalf of the beneficiary pursuant to Title XIX of the Act.

Proposed § 405.904 provides a general description of the post-BIPA appeals process, much as existing § 405.801 does for the pre-BIPA, part B process. In addition, § 405.904(b) establishes the general rule that the same appeals procedures that are available to beneficiaries, and to individuals acting as representatives of beneficiaries, are also available to a provider and supplier that is a party to a given determination. This section also explains that in some circumstances, a provider's rights to judicial review are limited, unless the beneficiary has formally assigned his or her appeal rights to the provider. Note that although beneficiary appeals and provider and supplier appeals follow identical paths, we are proposing slightly more lenient evidentiary rules for unrepresented beneficiaries or beneficiaries represented by family or friends, given their likely lack of familiarity with Medicare coverage rules and appeals procedures. We would hold State agencies, providers, suppliers, and attorneys to a higher standard based on their presumed knowledge and experience with the Medicare program. We believe that these individuals and entities are essentially ''businesses'' and can be held to a reasonableness standard. These proposals are discussed in detail below.

C. Appeal Rights (§§ 405.906–405.912)

Historically, providers have had limited rights to appeal Medicare initial determinations. Consistent with section 1879(d) of the Act, providers may appeal Medicare determinations only when the determination involves a finding that (i) the item or service was not covered because it constituted custodial care, was not reasonable and necessary, or for certain other reasons; and (ii) the provider knew or could reasonably be expected to know that the service in question was not covered under Medicare (that is, a finding with respect to the limitation of liability provision under section 1879 of the Act). Despite these restrictions, providers have routinely accessed the appeals process in situations where they would otherwise not have appeal rights by acting as a beneficiary's appointed representative.

Another underlying principle of BIPA was the establishment of uniform appeal procedures for providers and suppliers. In keeping with this approach we believe the interests of the appeals process would be best served by ensuring that providers are afforded an equal opportunity to be heard with regard to all Medicare initial determinations. In BIPA, we believe it was the intent of the Congress to ensure that Medicare providers, physicians, and other suppliers had easier access to the Medicare administrative appeals system. As discussed below, Congress expanded the appeal rights of providers, physicians and other suppliers with regard to Medicare appeals by authorizing the assignment of appeal rights.

Therefore, in this rulemaking we are proposing to end the distinction limiting the appeal rights of providers to determinations involving the knowledge aspect of the limitation on liability provision. We propose to allow providers to file for administrative appeal of Medicare initial determinations to the same extent as beneficiaries. With this change, we would achieve consistency in our approach to appeals standing under Parts A and B.

We also would continue to maintain current appeals policies with respect to non-participating providers, physicians and other suppliers. We considered extending appeal rights to non-participating physicians and other suppliers to the same extent as providers. However, we believe that such a change would result in a negative impact on Medicare participation rates and, potentially, a contraction of beneficiary access to care. Also, we note that non-participating physicians and other suppliers may attain party status by securing an assignment of appeal rights from beneficiaries as provided in new section 1869(b)(1)(C).

In this proposed rule, we also clarify our policy with regard to the continuation of an appeal when a beneficiary-appellant dies while an appeal is in progress. Under our current

rules, a substitute entity may be entitled to receive or obligated to make payment for Medicare claims. See 42 CFR part 424 subpart E. If a person becomes financially responsible for Medicare claims under our rules, we are proposing that such person or entity may be made a party to the initial determination and have the right to continue the appeal.

We are proposing to implement these expanded appeal rights in proposed § 405.906, which would clearly identify all individuals or entities that may be a party to an initial determination. This approach identifies parties explicitly and replaces current regulations where party status is conferred to ''* * * any other party whose rights with respect to the particular claim being reviewed may be affected by such review.'' See 42 CFR 405.808. This standard has occasionally led to questions being raised about who should be a party to appeal. In this proposed rule we have attempted to address this issue by generally listing as a party, the individual or entity listed in § 405.906 that has standing to appeal an initial determination and/or a subsequent administrative appeal determination. We believe the list of parties is exhaustive, but welcome comments to rectify any omissions.

Proposed § 405.908 pertains to the right of a Medicaid State agency, which acts as a subrogee, to pursue an appeal on behalf of a beneficiary entitled to benefits under both Medicare and Medicaid. We do not consider a Medicaid State agency to be a party, unless the agency actually pursues a redetermination on behalf of a dually eligible beneficiary. In other words, a Medicaid State agency will not automatically be sent notices on determinations made during the administrative appeals process, nor will the agency be permitted to request reconsiderations or hearings by ALJs or the MAC, unless the agency actually files a request for redetermination for a beneficiary. If a Medicaid State agency files a redetermination it retains party status for the claim throughout the rest of the appeals process. Also, a Medicaid State agency automatically has authorization to file an appeal of a denied claim without following the process prescribed at § 405.910. Section 1912(a) of the Act provides that as a condition of eligibility for medical assistance, an individual must assign the State any rights to payment for medical care from any third party. Thus, to avoid confusion, we have drafted a separate provision acknowledging the right of a Medicaid State agency to pursue an appeal on behalf of a dually eligible individual.

Sections 1869(b)(1)(B) and (C) address provider and supplier representation and assignment issues. To the extent that these provisions represent departures from existing requirements, we believe that they warrant notice and comment rulemaking before they can be implemented. As discussed below, the new statutory provisions include several changes in the existing appointment of representative procedures, which are currently set forth at 20 CFR part 404, subpart R (the provisions that govern SSA disability insurance claims).

Proposed § 405.910 incorporates and modifies several of the current provisions in 20 CFR part 404, subpart R, and 42 CFR part 405, subparts G and H, as they relate to the representation of parties. The proposed provisions would eliminate the need for incorporation of the existing SSA regulations as they apply to appeals. Note that under our existing regulations at §§ 405.701 and 405.801, the appointment of representative provisions set forth in 20 CFR part 404 also apply for purposes of initial determinations. This proposed rule would not change the applicability of those provisions with respect to initial determinations; however, we are considering the extent to which the new provisions should also apply to initial determinations and welcome comments on whether we should apply these provisions uniformly.

Since entities or individuals other than beneficiaries may wish to have someone represent their interests in the appeals process, we have defined a representative as an individual authorized by a party, or under State law, to act on the party's behalf in dealing with any levels of the appeals process. Representatives do not have independent party status and may only take action on behalf of the individual or entity they represent. We note that a party may not designate, as an authorized representative, any individual or entity that has been suspended, or otherwise prohibited by law, from participating in the Medicare program.

We have received numerous requests for clarification on how individuals or entities must make out valid appointments consistent with the Privacy Act. An agency that maintains a system of records must ''establish appropriate administrative * * * safeguards to ensure the * * * confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity * * * which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom the information is maintained.'' The Privacy Act of 1974, as amended, 5 U.S.C. 552a(e)(10). As is the case under existing procedures, we want to emphasize that in order to be valid, an appointment must be in writing, and signed by both the party making the appointment and the individual agreeing to accept such appointment. However, to ensure consistency in these proposed provisions, we also would make a change in the case of attorney representatives. Under current regulations, only the party making the appointment needs to sign a statement authorizing the representation. In the case of an attorney representative, the attorney does not have to sign a notice of appointment. Instead, in the absence of information to the contrary, an attorney's assertion that he or she has such authority is accepted as evidence of the attorney's authority to represent the party. In establishing procedures that comply with the Privacy Act, we would now require that attorneys also sign a statement to represent a party.

We appreciate that the signature requirements might be perceived as burdensome; however, we believe that a representative's signature is important because it ensures that adjudicators are sharing and disseminating confidential medical information with the appropriate individuals. In addition, it indicates that the individual whom the party has appointed does in fact accept the role and responsibilities associated with being a representative.

We propose to establish a time frame governing the duration of representation. Even under the BIPA time frames, we recognize that there may be substantial lapses in time between a party's request for an appeal at any given stage of this multi-tiered appeals process, and receipt of a final decision. Thus, we propose that under § 405.910(e) the appointment (1) shall be valid for the life of an individual appeal, and (2) for purposes of appeals of other initial determinations, the authorization shall be considered valid for one year from its original effectuation. For example, if a party makes a valid appointment on January 1, 2003, the representative would be authorized to request multiple appeals on the party's behalf until January 1, 2004. Suppose that a representative requests a redetermination of a denied claim on November 1, 2003 and the contractor affirms the denial on November 30, 2003. Since a party has up to 180 days to file a request for a reconsideration, if the representative files an appeal on March 15, 2004, the appointment of representation would still be valid for purposes of this individual appeal because the rights

associated with it have not expired. However, the representative would not be able to initiate any new appeals on other claims because the appointment would have been valid only through January 1, 2004.

We believe that it would be too burdensome to require representatives to renew representation documentation once an appeal has been undertaken; however, we also believe that a representative's ability to file appeals of future claims should continue for an indefinite period of time. While we propose that representation documentation shall be renewed at least annually (for purposes of filing new appeals), we welcome comments on whether another time frame would be more appropriate.

Prior to its amendment by BIPA, section 1869(b)(1)(D) required the Secretary to apply the provisions of section 206(a) governing the representation of beneficiaries. New section 1869(b)(1)(B)(iv) removes section 206(a)(4), which permits the award of attorney fees (not to exceed 25 percent) from a claimant's entitlement to past-due disability benefits. Therefore, in § 405.910(f), we make explicit that no award of attorney fees may be made against the Medicare trust fund. We recognize that section 1869(b)(1)(B)(iv) requires CMS to apply § 205(j) and 206 provisions to the Medicare appeals process; therefore we welcome comments on those provisions. Specifically, we request comments on petitions to ALJs to review and approve attorney fees. We believe that we should not establish such a process since we do not have authority to award attorney fees. We also welcome comments on procedures to govern the conduct of representatives.

Proposed §§ 405.910(g)–(l) are self-explanatory provisions concerning the responsibilities and rights of a representative. For example, a representative must ensure that a party receives information about appeal decisions, and disclose to a beneficiary any financial risk or liability associated with a non-assigned claim. In the past, there has been some confusion about whether the representative or the party should receive information about the appeal, including the decision. We believe that a representative should have the right to obtain any information applicable to the claim at issue since the representative acts on behalf of the party. Section 405.910(i)–(j) would require adjudicators to send notices of their decisions and otherwise communicate with representatives rather than parties. We considered whether beneficiaries that are represented also should receive copies of decision letters, but decided to maintain the existing provision at 20 CFR § 404.1715. Therefore, any communication with a representative would have the same force and effect as if it had been sent to the party.

Proposed section § 405.910(m) deals with the extent to which a representative may delegate responsibilities. A representative may not designate another individual to act as the representative unless the representative notifies the party of the name of the designee, and the designee's acceptance to comply with the requirements of authorized representation. Also, the represented party must evidence its acceptance of this arrangement by a signed, written consent. We believe that these provisions are necessary to protect the privacy and confidentiality of medical records. They would also provide adjudicators with an effective way to resolve any conflicting information as to who has authority to proceed in an appeal.

The decision on whether to have a representative is left with the party, and we neither encourage nor discourage representation. Therefore, proposed § 405.910(n) gives a party the ability to revoke an appointment for any reason, at any time. To ensure a seamless process, a revocation of an appointment is not effective until the entity processing the appeal receives a signed, written statement from the party. We also propose that the death of a party will terminate the authority of the representative. However, when a party dies, we do not intend to terminate an appeal that is in progress since another individual or entity may be entitled to receive or obligated to make payment for Medicare claims.

In section 1869(b)(1)(C) of the Act, Congress added a new provision that permits Medicare beneficiaries to assign their appeal rights to a provider or supplier of services, pursuant to a written agreement using a form developed by the Secretary. This provision appears similar to the provisions that allow a party to an appeal to appoint a person, including the provider or supplier of services, as a representative for the appeal. Under our current rules, though, in acting as the representative, the provider or supplier does not achieve party status to the appeal; the representative simply acts on behalf of the party. With the new assignment provision, we believe the Congress intended the arrangement to differ from the provision enabling a party to appoint a representative.

Proposed § 405.912 creates new regulatory procedures for the assignment of appeal rights by a beneficiary to a supplier or provider of service. Provider/supplier representation rules impose certain limits'the provider/supplier cannot charge a representation fee for actions in connection with services it furnished, and the provider/supplier must waive any right to payment from the beneficiary for the services at issue if the representation involves a claim where limitation of liability, under section 1879 of the Act, is an issue. Similarly, we believe that a provider or supplier wishing to take assignment of a beneficiary's appeal rights for a particular claim must waive any right to payment from the beneficiary in order to fully protect beneficiaries when their appeal rights are assigned. We do not intend, however, to prohibit the provider/supplier from recovery of any coinsurance or deductible, or where the beneficiary signed an advance beneficiary notice accepting responsibility for payment. The nature of assignment means that beneficiaries must relinquish their party status in an appeal, as well as any further rights to appeal on their own behalf. Additionally, BIPA expressly requires us to develop the form that will be used to make an assignment valid, thereby giving us the discretion to determine the requirements of a valid assignment. Thus, the proposed waiver provision is necessary to protect beneficiaries from potential liability in the event the supplier or provider is unsuccessful in the appeals process.

As noted above, an appointment of representation would be valid for one year for any appeal by the individual, and for the duration of the administrative review process for an appeal related to specific items or services. Note that a different standard would apply for assignment purposes. Section 1869(b)(1)(c) clearly indicates that the assignment of appeal rights applies with ''respect to an item or service.'' Accordingly, we are proposing that an assignment would be valid for the duration of the appeals process, but only for the items or services listed on the assignment form. Thus, a supplier or provider of service would need to perfect a valid assignment for subsequent appeals of other items or services.

Like in the representation provisions, we also are proposing rules for the revocation of an assignment. We are soliciting comments on whether an assignment should be irrevocable, particularly since it only applies on a per item or service basis, and thus does

not have any effect on other appeal rights. However, we are concerned about reinstating a beneficiary's appeal rights in the event of abandonment by a provider or supplier. We have proposed that if a beneficiary revokes an assignment, the appeal rights on the item or service at issue would revert to the beneficiary.

D. Initial Determinations (§§ 405.920–405.926)

As noted above, section 1869(a)(1) of the Act continues to provide that the Secretary shall make initial determinations with respect to whether an individual is entitled to benefits under part A or part B and to the amount of benefits available to an individual under those parts. However, section 1869(a)(2)(A) of the Act establishes that, on all claims other than clean claims, the initial determination shall be concluded and a notice of such determination must be mailed by no later than 45 days after receiving the claim, in contrast to the existing 60-day deadline for such non-clean claims. Section 1869(a)(2)(B) currently requires that interest will accrue if clean claims are not processed within 30 days. This standard remains unchanged (as specified in sections 1816(c)(2) and 1842(c)(2) of the Act). Nothing in BIPA, however, requires that interest would accrue on non-clean claims, regardless of whether they are adjudicated within 45 days. The proposed regulations to implement these statutory provisions regarding the timing and notice requirements pursuant to an initial determination are contained in §§ 405.920 and 405.922.

In § 405.920, we require that claims must be filed in the manner and form described in 42 CFR part 424 subpart C, which continues our current policies for filing claims. When a claim is filed with the appropriate carrier or FI, the carrier or FI will determine whether the items and/or services are covered under Part A or Part B of title XVIII. The contractor will then determine any amounts due and make payment accordingly. The parties to the initial determination, as specified in § 405.906, will be notified of the initial determination in writing by the contractor. This notice will also contain the basis for the determination and information on how to request a redetermination. As with our current policy, the Remittance Advice and Medicare Summary Notice will be used as a notice of initial determination.

In accordance with section 1869(a)(2) of the Act, proposed § 405.922 sets forth the time frames for initial Medicare claims determinations. That is, a contractor shall issue initial determinations on clean claims (as defined in § 405.901) within 30 days of receipt and, on all other claims, the contractor shall issue initial determinations within 45 days of receipt.

Our proposed regulations at § 405.922 currently state that all other claims, other than clean claims, must be processed within 45 days of receipt. While we plan to monitor contractors on their compliance with the 45-day standard, we also recognize that 45 days may not be achievable in every case. By definition, non-clean claims are often claims that require additional documentation, and therefore take time to process. Under the current process, providers or suppliers are given 45 days to produce additional medical documentation. Thus, the imposition of a 45-day decision-making time frame on non-clean claims could jeopardize effective medical review. Currently, our plans are to monitor, on average, contractors' compliance with the 45-day standard. However, we do not propose escalation or other remedies when the 45-day deadline is missed.

In existing section 1842(b)(3)(C) of the Act, the Congress provided a special appeals rule in cases where a Part B Medicare claim was not acted upon promptly, defined previously as 60 days following the submission of the claim. The rule provides for an appeal directly to a carrier-hearing officer, bypassing the first level of appeal, the review determination. In BIPA, Congress reduced the time period within which contractors must make initial determinations on claims to 45 days. However, section 1842(b)(3)(C) of the statute was not amended to reflect the change in the appeals process, that is, that the carrier hearing officer appeal was eliminated and effectively replaced by an appeal to the QIC. Our opinion is that the Congress, by implication, repealed this provision as the remedy specified in the statute will no longer exist since the Congress eliminated the carrier fair hearing level of appeal. We considered providing for a reconsideration by the QIC when a claim is not acted upon with reasonable promptness (that is, an initial determination is not issued within 45 days following the date the claim was received by the contractor). However we believe that this is not an economically feasible approach since the QIC will, in essence, simply direct the contractor to process the claim. We also considered the fact that this rule only applies to Part B claims and concluded that it would be confusing and contrary to the general approach mandated by BIPA to have two separate processes. Therefore, we are not carrying over this rule.

Proposed §§ 405.924 and 405.926 list the types of actions that are, and are not, considered initial determinations. In these sections, we have generally maintained current policies concerning initial determinations, although we have unified the existing part A and part B rules. In § 405.924(a) we maintain our longstanding policy that, through a memorandum of understanding with the Secretary, SSA makes initial Part A and Part B entitlement determinations and initial determinations on applications for entitlement. In § 405.924(b), we provide an extensive, but not necessarily exhaustive, list of actions that constitute initial determinations and thus are subject to the administrative appeals rules that follow.

We are proposing to clarify the circumstances under which an appeal may be filed when a beneficiary disputes the computation of coinsurance amounts. Previously our rules stated that beneficiaries could appeal Medicare determinations regarding the ''application of the coinsurance feature.'' We are clarifying this provision to state that the contractor's ''computation of coinsurance'' is considered an initial determination and, thus, may be appealed. In making this proposal we considered that for most Part B services, beneficiaries are responsible for a 20 percent coinsurance payment and, since the 20 percent is calculated by the contractor, a beneficiary may appeal the contractor's computation of the coinsurance amount to be paid by the beneficiary. In instances where the coinsurance amount is not computed by the contractor, but rather it is an amount prescribed by regulation, for example, outpatient services, the issue of whether the coinsurance amount is appropriate is not appealable since it is not an amount computed by the contractor. Also, we are proposing clarifying language specifying that determinations regarding the timeliness of claims submission are initial determinations. We are also clarifying which Medicare secondary payer (MSP) determinations are initial determinations for purposes of this subpart. A determination regarding the applicability of the MSP provisions to a particular claim is an initial determination. A determination that Medicare has a recovery claim against a provider/supplier or beneficiary with respect to items or services that have already been paid by the Medicare program is also an initial determination except where the recovery claim against the provider/supplier is based upon a failure to file

a proper claim as defined in 42 CFR part 411. Finally, under proposed § 405.924(c), we would state that expedited determinations by QIOs under new section 1869(b)(1)(F) are also considered initial determinations.

In proposed § 405.926, we list examples of determinations that are not initial determinations, and therefore not subject to the administrative appeal procedures of this subpart. Again, we continue our longstanding policies in this area, subject to several minor clarifications. First, for certain aspects of initial determinations, there are no administrative appeal rights available. For example, under section 1833(t) of the Social Security Act, administrative appeals are prohibited for issues involving the calculation of coinsurance amounts for outpatient services subject to prospective payment rules, and under 1848(i) of the Act, the values used to calculate allowable amounts under the physician fee schedule may not be the subject of an administrative appeal. In addition, here, too, we have proposed new examples of MSP-related determinations that do not constitute initial determinations for purposes of section 1869 of the Act. We have also clarified that decisions by contractors or QICs with respect to reopenings are not considered initial determinations.

Section 405.928 describes the effects of an initial determination. In proposed § 405.928(a), we would clarify that initial determinations by SSA with respect to an individual's entitlement are binding upon the individual or the individual's estate unless revised or reconsidered under SSA's regulations at 20 CFR 404.907. Then, under § 405.928(b), we would state the general rule that other initial determinations shall be binding upon all parties to the initial determination unless a redetermination is completed in accordance with § 405.940 through §§ 405–950 or the initial determination is revised as a result of a reopening in accordance with proposed § 405.980. Please refer to our discussions on the redetermination and reopenings process below.

E. Redeterminations (§§ 405.940–405.958)

1. Overview of Statute

Section 1869(a)(3) contains certain requirements for redeterminations that are specific to fiscal intermediaries and carriers, and do not apply to the initial determinations made by other entities, such as SSA or QIOs. Section 1869(a)(3) of the Act mandates that FIs and carriers make redeterminations, upon request, with respect to claims for benefits that are denied in whole or in part. Section 1869(a)(3)(B) specifies that an initial determination may not be reconsidered or appealed unless the contractor has made a redetermination of that initial determination and that no redetermination may be made by an individual involved in the initial determination, two requirements that essentially mirror existing policy. The time frames for requesting and carrying out redeterminations are set forth under section 1869(a)(3)(C). A request for a redetermination must be made within 120 days from the date the individual receives the initial determination. The carrier or FI then must make a redetermination decision and notify the parties of the decision within 30 days of receiving the request for redetermination. Under section 1869(a)(3)(D), for purposes of subsequent appeals, a redetermination is considered part of the initial determination. For purposes of contractor performance evaluation, we plan to monitor how effectively fiscal intermediaries and carriers meet the 30-day deadline, on average, for redeterminations. However, we do not propose escalation or other remedies if the carrier or fiscal intermediary does not complete a redetermination within the 30-day time frame.

A critical feature of the new statutory language with respect to redeterminations is that the same provisions apply for these first level appeals of both Part A and Part B claim determinations. Thus, parties wishing to appeal initial determinations will need to meet identical time frames for filing requests for redeterminations and the time frame for redetermination decisions is significantly shorter than the previous time frames for either Part B reviews or Part A reconsiderations. This means, for example, that CMS' contractors must complete all redeterminations within 30 days, even though the cases in need of redetermination may differ considerably in terms of complexity and dollar amounts. (Currently, under sections 1816(f)(2) and 1842(b)(2) of the Act, respectively, contractors now must complete 75 percent of part A reconsiderations within 60 days, and 90 percent within 90 days, while 95 percent of part B reviews must be completed within 45 days.) In developing the proposed regulations needed to implement the new system, we have attempted to construct procedural requirements that can work for all types of redeterminations, while still permitting contractors the flexibility needed to conduct redeterminations using methods that are both efficient and fair to appellants.

2. Redetermination Requests (§§ 405.940–405.946)

Proposed § 405.940 establishes the general rule that any party to an initial determination that is dissatisfied with that determination may request a redetermination. Sections 405.942 and 405.944 then set forth the proposed requirements concerning the time frames and procedures for filing a redetermination request. Consistent with section 1869(a)(3)(C) of the Act, a request for redetermination must be filed within 120 days from the date an individual receives the notice of initial determination. In § 405.942(a)(1), we would establish that the date of receipt of the initial determination is presumed to be 5 days after the date of such notice, unless there is evidence to the contrary. This is consistent with our longstanding policy that we allow 5 days for the individual to receive the notice of initial determination.

Under proposed §§ 405.942(a)(2) and 405.944(a), we propose to continue the current policy of permitting parties to file their requests for a redetermination not only with the appropriate CMS contractor, as indicated on the notice of initial determination, but also at a local SSA or CMS office. In view of the requirement that a contractor must issue a written notice of the redetermination decision within 30 days of a request for redetermination, we strongly considered requiring that all redetermination requests be filed directly with the contractor indicated on the notice of initial determination. Clearly, such a policy would eliminate confusion about where to file appeal requests and promote efficiency—we have often experienced lengthy delays in receiving requests filed with SSA offices, for example. However, we recognize that local SSA offices provide a valuable service to individuals who would like assistance in filing requests for redeterminations. In maintaining this policy for filing requests, we thus propose that the date the redetermination request is considered to be filed means the date the contractor, SSA, or CMS receives the request. As discussed below, however, we also propose under § 405.950 that for purposes of issuing a redetermination decision, the date of timely filing will be considered as the date that the contractor responsible for the redetermination receives the redetermination request. This proposed policy would benefit appellants by promoting flexible access to the appeals system without unfairly reducing the

time a contractor would have to issue a redetermination decision.

Section 405.942(b) contains the proposed rules concerning request for extensions to the time frames for redetermination requests. In general, a contractor may extend the time frame for requesting a redetermination if a party shows good cause for missing the 120-day deadline. In order to request an extension, the party must file a request for the extension with the contractor. The request for extension and request for redetermination must be in writing and state why the request for redetermination was not filed within the required time frame. In order to determine whether a party has shown good cause for missing the deadline, the contractor considers: The circumstances that kept the party from making the request on time; whether the contractor's actions misled the party; and whether the party had any physical, mental, educational, or language limitations that prevented the party from filing a timely request or from understanding or knowing about the need to file a timely request for redetermination. Proposed § 405.942(b)(3) sets forth examples of ''good cause,'' including serious illness, death or serious illness in the party's immediate family, the destruction or damage of important records due to fire or other accidental cause, incomplete or incorrect information supplied to the party about how or when to request a redetermination from the contractor, lack of notice of initial determination, and evidence of requests made with another Government agency in good faith, within the time limit, where the request did not reach the contractor until after the time period to file a redetermination had expired.

Proposed § 405.944(b) specifies that the request for a redetermination must be in writing and describes the content of the redetermination request. Under our existing regulations, requests for reconsiderations of Part A initial claim determinations have been required to be made in writing (§ 405.711) but request for reviews of Part B initial determinations have been accepted both in writing and orally. However, even for Part B reviews, this policy has never been well understood and has proven very difficult to administer for a number of reasons. First, it is important to recognize that in practice, an oral request for a review generally implied that the review itself would take place over the telephone, usually at the same time as the request. Moreover, although some very simple reviews could be carried out orally, many reviews did not lend themselves to this approach, although the regulations did not limit the availability of oral requests for review. (For example, many cases, such as reviews of DME claims, frequently involve issues that are either too complex to handle in a brief telephone call or require the submission and review of medical documentation and records that are too voluminous to provide over facsimile.) Requests for oral reviews of more complex cases could result in repeated requests for documentation and extended delays in review decisions, even under the longer time frames that were in effect for appeals of Part B initial claim determinations before the implementation of new section 1869 of the Act.

Therefore, in implementing the BIPA provisions, we would require that requests for redeterminations be accepted only in writing. We believe that the best method of accepting requests for redetermination is in writing because it provides a reliable record of the request and promotes the submission of evidence to support the request. (As discussed below, under § 405.946, we propose that parties should present evidence related to the issue in dispute with the request for a redetermination.) This position is consistent with our general belief that an efficient and accurate appeals system will necessitate better notices from CMS concerning the reasons for denials of claims and their appeals and by subsequently encouraging parties to submit relevant evidence as early as possible in the appeals process. Although we recognize that it may be efficient to take some requests by telephone, it would be extremely difficult to offer such a process and still meet the 30-day redetermination decision deadline without severely restricting the types of redeterminations that can be requested over the telephone.

We welcome comments on alternative approaches that are convenient and easy for appellants. We note that providers, suppliers, and beneficiaries can still make inquiries and some adjustments to a claim over the phone, using the telephone number indicated on the Remittance Advice or Medicare Summary Notice. In addition, we are continuing to work with contractors to identify the best methods for conducting redeterminations, such as permitting call back responses to requests for redeterminations. Again, our goals here are to improve the accuracy and efficiency of the appeals process, to make the procedures as accessible and user friendly as possible for appellants, and to avoid causing confusion and dissatisfaction as to the available procedures.

Section 405.944(b) also specifies the required elements of a redetermination request. Requests are to be made on a standard CMS form and when not made on a CMS form must contain the beneficiary's name, the insurance claim (HIC) number, the specific date of service and identification of the item or service with which the party is requesting the redetermination, and the name and signature of the party or appointed representative filing the request. These required elements mirror the requirements contained on the current standard CMS forms to request a review or reconsideration and correspond to the requirements detailed on the Medicare Summary Notice (MSN) that beneficiaries receive. Thus, a beneficiary or beneficiary representative may continue to file a request for an appeal using the instructions on the MSN—that is, he or she could satisfy the requirements by circling an item on the MSN, signing the bottom of the MSN, and returning the MSN to the contractor.

Under proposed § 405.944(c), we would specify that if more than one party files a request for redetermination on the same initial determination, the contractor shall consolidate the separate requests into one proceeding. To the extent that two or more entities may have appeal rights on a single request for payment, there is potential for a duplicate administrative process and differing resolution of the appeal. To prevent this occurrence, we are codifying the longstanding practice that when multiple parties request a redetermination, the requests are to be joined into a single administrative action.

As noted above, proposed § 405.946 specifies that when filing a redetermination request, a party should explain why he or she disagrees with the contractor's initial determination and include any evidence that the party believes should be considered by the contractor in making its redetermination. Although we are not proposing to make presentation of evidence a prerequisite to filing an appeal, we believe that encouraging parties to present evidence to support the redetermination request will facilitate the correction of erroneous initial determinations at the earliest possible stage of the appeals system.

Even when appellants are unable to submit relevant documentation along with the request for redetermination, we still wish to encourage appellants to submit documents and make their case at the earliest possible level. Therefore,

proposed § 405.946(b) permits later submission of documentation to be considered as part of the redetermination. However, since it would be difficult to process redeterminations within 30 days when documents are submitted after the request, we propose an automatic 14-day extension of the redetermination decision time frame when an appellant submits evidence after the request.

3. Conduct of Redeterminations (§§ 405.940–405.958)

Section 1869 of the Act provides little or no guidance with respect to the conduct of redeterminations, with the exception of establishing the filing and decision making time frames as noted above. Thus, with few exceptions, we are not proposing major changes to the existing procedures for first level appeals of claim determinations. Proposed § 405.948 simply specifies that in conducting a redetermination the contractor would examine the evidence and findings upon which the initial determination was based and any additional evidence submitted by the parties or obtained by the contractor on its own. As with our current process, the individual who makes the redetermination decision must not have been involved in making the initial determination.

Consistent with section 1869 (a)(3)(C)(ii) of the Act, proposed § 405.950(a) would require contractors to issue a written notice of the redetermination decision to the parties within 30 days of receiving a request for redetermination. In general, we will maintain our current policy in calculating the 30-day time frame for decision-making based on the date the request for redetermination is actually received at the contractor. As discussed above, however, if the request is made to an entity other than the contractor (such as an SSA office), we would use the date the request is actually received by the contractor as the date of the request for a redetermination for purposes of calculating the 30-day decision making time frame.

Proposed § 405.952 contains provisions relating to the withdrawal or dismissal of a request for a redetermination. Under § 405.952(a), a party may withdraw a request for redetermination within 14 days of the original request. The withdrawal request must be made in writing to the redetermination contractor. Currently, a withdrawal request may be made at any time before a contractor mails an appeals decision, but we are proposing the 14-day time frame in order to avoid the confusion and uncertainty that can result from decisions and withdrawal requests crossing in the mail. However, a contractor has the option of accepting a late withdrawal request if it has not issued a redetermination decision. For example, a contractor may accept a withdrawal request at any time when the withdrawal is based upon a party entering into an agreement with CMS to compromise the amount of a debt.

Section 405.952(b) would set forth the reasons a contractor will dismiss a request for a redetermination, including:

- If a person or entity who is not a party to an initial determination files a request for redetermination.
- If a request for redetermination does not contain the minimum elements for a redetermination request set forth in proposed § 405.944.
- If a party to an initial determination files a request for a redetermination more than 120 days following receipt of the initial determination from the contractor and does not establish good cause for late filing in accordance with § 405.942(c).
- If the party filing the request dies and there is no information in the record to determine whether there is another party who may be prejudiced by the determination.
- If the party filing the request submits a request for withdrawal.
- If the contractor has not issued an initial determination on the claim for which a redetermination is requested.

Section 405.942(c) specifies that when a request for redetermination is dismissed, the contractor will mail a written notice to the parties at their last known addresses. Under proposed § 405.952(d), a dismissal may be vacated at any time within 6 months from the date of the notice of dismissal if good and sufficient cause is shown. An appellant may request QIC reconsideration of a redetermination dismissal. The request for a QIC reconsideration of the decision must be made within 180 days of the redetermination dismissal notice. A dismissal is binding unless it is vacated in accordance with § 405.952(d), or is subject to a reconsideration by a QIC.

Proposed §§ 405.954 and 405.956 address redetermination decisions and notification rules. When the contractor concludes its redetermination, it is responsible for issuing a decision that affirms or reverses, in whole or in part, the initial determination in question. When a decision fully reverses the initial determination, we propose to maintain our current policy that proper notification is achieved through the MSN or the remittance advice notices that are sent to beneficiaries, and providers and suppliers, respectively. We welcome comments on maintaining this policy for decisions that are fully favorable to the appellant.

Under proposed § 405.956(b), for decisions that affirm the initial determination either in whole or in part, a redetermination decision notice must contain: (1) A clear statement indicating the extent to which the redetermination is favorable or unfavorable; (2) a summary of the facts; (3) an explanation of how the pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case; (4) a summary of the rationale for the decision; (5) notification to the parties of their right to a reconsideration, the procedures that a party must follow in order to request a reconsideration, and the time limit for requesting a reconsideration; (6) a statement of the specific supporting documentation that must be submitted with a request for a reconsideration; (7) an explanation that if the specific supporting documentation indicated in the notice is not submitted with the request for a reconsideration, this evidence will not be considered at an ALJ hearing, unless the appellant demonstrates good cause as to why the evidence was not provided previously; and (8) any other requirements specified by CMS.

To a large extent, these requirements are similar to the current instructions concerning the content of contractor appeals decision (for example, Medicare Carriers Manual, section 12002). However, these policies add more detail to the required elements. They also include one major substantive addition—the requirement that notifications identify any specific supporting documentation that must be submitted with a request for a reconsideration. By setting forth clear, detailed requirements for redetermination notices in the regulations, in concert with the proposed requirement for more information about specific supporting documentation that resulted in an unfavorable determination and redetermination, we believe we are setting the stage for the most accurate and efficient reconsideration process possible. In concert with these changes, we believe that placing a requirement for full and early presentation of evidence at the QIC level is fair to appellants and can stem the volume of cases that are now appealed to ALJs and the MAC. As discussed in further detail below, if available supporting documentation that is identified as needed in the redetermination denial notice is not submitted at the QIC level, an appellant who is dissatisfied with a QIC reconsideration decision and

desires an ALJ hearing generally would not be able to introduce such evidence at an ALJ hearing, absent good cause for not submitting the evidence to the QIC.

The proposed redetermination provisions end with the straightforward requirement under § 405.958 that the redetermination decision is binding on all parties unless there is a subsequent QIC reconsideration or a reopening by the contractor consistent with § 405.980.

F. QIC Reconsiderations (§§ 405.960–978)

1. Introduction

Section 1869(b)(1) of the Act entitles any individual dissatisfied with an initial determination of a Part A or Part B claim denial, to file a request, within 180 days, for reconsideration of the initial determination, including the redetermination. In accordance with § 1869(c), reconsiderations are to be processed, generally within 30 days, by entities called qualified independent contractors (QICs). Section 1869(c)(4) requires CMS to contract with no fewer than twelve QICs. The introduction of QICs creates an additional appeals level for Part A claim determinations and replaces the Part B carrier hearing level of appeal. We believe that the QIC process, which will entail reviews of medical necessity determinations by health care professionals, routine participation in ALJ hearings, and mandatory development of an appeals-specific database, can result in significant improvements in the Medicare fee-for-service appeals system. The statute gives CMS a great deal of latitude in designing the reconsideration component of the Medicare appeals process, and we have attempted to use this discretion to design a process that will prove to be impartial, efficient, and accurate.

2. Reconsideration Requests (§§ 405.960–405.966)

Section 1869(a)(3)(B)(i) states that initial determinations made by fiscal intermediaries and carriers may be reconsidered only after the fiscal intermediary or carrier has performed a redetermination of the initial determination. Thus, proposed § 405.960 states that any person or entity who is a party to a redetermination, and is dissatisfied with the determination, may file a request for reconsideration of the redetermination in accordance with the requirements set out in §§ 405.962–966.

Consistent with section 1869(b)(1)(D) of the Act, § 405.962(a) specifies that appellants who wish to file a request for reconsideration must do so within 180 days of the date on which they receive the notice of the redetermination, or within such additional time as CMS may allow. For good cause, the QIC may extend the time frame for filing a reconsideration request. Section 405.942(b)(2) describes the process QICs are to use in determining if good cause for late filing exists. Examples of good cause, as provided in § 405.942(b)(3), would include: Circumstances beyond the appellant's control, including mental or physical impairment that prevented timely filing of the reconsideration request; significant communication difficulties; receipt of incorrect or incomplete information about the subject reconsideration from official sources (for example, CMS, the contractor, QIC or SSA); delay in filing caused by destruction of or damage to the appellant's records; and unusual or unavoidable circumstances, the nature of which demonstrate that the appellant could not reasonably be expected to have been able to file timely. The request for an extension of the reconsideration filing deadline must be in writing, signed by the party requesting the appeal, and state the reason(s) why the appellant did not file the request within 180 days. In addition, the appellant's request for reconsideration must accompany the request for an extension, so that if the QIC grants the extension, it may begin a substantive review of the appeal without further delay.

The QICs' 30-day decision-making deadline, to a large extent, dictates the procedural parameters that need to apply to the reconsideration process. Because of the equally challenging time frames for concluding ALJ and DAB appeals (combined with the provision that unresolved appeals can be escalated to the next level of administrative review, including Federal court), it is essential that the QIC procedures be designed to facilitate timely, accurate decision-making by these new administrative review bodies. As we developed the proposed QIC procedures, we have been careful to balance these efficiency concerns with the need to ensure a consistent, fair process for appellants.

We set forth the place and method for filing a request for reconsideration in § 405.964(a). Existing regulations give appellants wide discretion in terms of where an appeal may be filed. For example, under § 405.964, requests for carrier fair hearings may be filed with not only the carrier, but also at any CMS or SSA office. We recognize that some appellants, especially beneficiaries, rely on SSA offices to assist them in filing an appeal request. While we do not want to create a process that might make it difficult for appellants to file appeals, we cannot ignore the stringent decision-making time frames imposed by the statute. Thus, as an accommodation to appellants, we propose in § 405.964 that in addition to filing reconsideration requests with the QICs, parties be permitted to file their requests with the CMS and SSA offices as well (just as they may now for carrier fair hearings). For purposes of establishing whether an appellant has timely filed a request for reconsideration, a request will be considered filed on the date it is received by the QIC, SSA, or CMS. However, to ensure that QICs have adequate time to adjudicate reconsiderations that they do not receive directly, we subsequently propose under § 405.970(b)(1) that for reconsideration requests submitted to CMS or SSA offices, the QIC's 30-day decision-making period would begin on the date such request is received by the QIC. This policy will allow appellants to continue receiving assistance in filing reconsideration requests, without shortening the QIC's decision-making time frame.

Since multiple parties may request reconsideration of the same claim (for example, a beneficiary and a physician, or a beneficiary and a provider), we propose in §§ 405.964(c) and 405.970(b)(3) that QICs consolidate multiple requests for reconsideration into a single proceeding and issue one reconsideration determination to all parties within 30 days of the latest reconsideration request.

Under our existing regulations, a party's request for a Part A reconsideration or Part B fair hearing must be in writing (see §§ 405.711 and 405.821), but we do not require use of a standard form for making the appeal request. In practice, appellants now use a CMS form, a contractor's form, or submit written requests of their own design. In implementing the BIPA provisions, CMS will develop and make available a standard filing form for reconsideration requests and we considered making use of this form mandatory. However, in § 405.964, we are proposing that reconsideration requests either be made on the standard CMS form, or must contain the key elements captured by that form (for example, name, HIC number, date(s) of service and service(s) at issue). We believe that these requirements are not onerous, as they are the same as those listed on existing forms (Form HCFA–2649 and Form HCFA–1965) used to request Part A reconsiderations and Part B hearings. If the reconsideration request does not contain any one of

these essential elements referenced above, we propose that the QIC dismiss the reconsideration on the basis that the party failed to make out a valid request.

In addition to the basic information required by § 405.964(a), we believe that it is in the appellant's best interest for a reconsideration request to include additional information, including a statement of evidence and allegations of fact or law related to the issue(s) in dispute and an explanation of why the contractor's determination should be reversed. Therefore, proposed § 405.966(a) describes the type of evidence that should accompany reconsideration requests. Although such documentation is not mandatory, we note that proposed § 405.966(a)(2) specifies that failure to submit documentation that was specified as necessary in a redetermination notice generally would preclude the introduction of such evidence for consideration at subsequent appeal levels. We strongly believe that this requirement for the full and early presentation of relevant evidence is critical for accurate QIC decisions and for avoiding backlogs of appeals at the ALJ level that could have been satisfactorily resolved by QICs. Submission of such evidence should not only lead to a more efficient appeal system, but should also facilitate QIC decisions that pertain directly to the concerns of appellants, as opposed to decisions on reconsideration requests that simply state ''I appeal,'' without elaboration.

In the current appeals process, appellants may continually supplement their initial appeal request with additional evidence. Although we agree that appellants should have an opportunity to provide supplementary evidence to support their initial filing of reconsideration requests, allowing appellants multiple opportunities to submit documentation would make it impossible to adjudicate a case within the 30-day decision-making period. In general, we believe that the 180-day reconsideration filing time frame provides parties with sufficient opportunity to gather the information that they need to complete their requests. However, if appellants need to submit additional documentation after their request for reconsideration has been filed we are proposing under § 405.966(b) that such late submission of evidence would result in an automatic 14-day extension of the QIC's 30-day decision-making time frame.

3. Reconsideration Process (§§ 405.968–405.970)

For existing second level appeals of Part B determinations (the fair hearing level), appellants may request one of three types of hearings: In-person, telephone, or on-the-record. We considered applying this concept to QIC proceedings. However, we concluded that such a system was both impractical and unnecessary under the requirements of new section 1869 of the Act. Instead, we believe that only through on-the-record proceedings could QICs be expected to meet the requirements, under section 1869(c)(3)(C), that reconsideration decisions be issued within 30 days of receipt of a timely filed reconsideration request. In addition, nothing in section 1869 requires a hearing at the QIC level. Also, we note that the requirement for a panel of physicians or other qualified health care professionals to conduct reconsiderations of § 1862(a)(1)(A) denials, makes QIC reconsiderations less like the traditional fee-for-service fair hearings, and more like the independent review process that now applies to Medicare+Choice (M+C) appeals. M+C appeals primarily involve reviews by a physician or other qualified health care professional and are currently conducted within 30 days. Therefore, we elected to apply the existing M+C model to QIC reconsiderations and propose making reconsiderations on-the-record reviews. Thus in § 405.968, we define a reconsideration as ''an independent, on-the-record review of an initial determination, including the redetermination, performed by a QIC.'' In conducting reconsiderations, QICs would be required to review the evidence and findings upon which the initial determination was based and any other evidence the parties submit, or the QIC obtains. The QIC then must make an independent determination affirming or reversing, in whole or in part the initial determination in question. We also specify that if an initial determination involves a finding on whether an item or service is reasonable and necessary for the diagnosis or treatment of illness or injury (under section 1862(a)(1)(A)), a QIC's reconsideration must be based on clinical experience and medical, technical, and scientific evidence, to the extent applicable.

Section 405.968 would also reflect the statutory requirements regarding the relevance of national and local coverage determinations, and who conducts reconsiderations. Section 1869(c)(3)(B)(ii)(I) of the Act states that national coverage determinations (NCDs) shall bind the QIC with respect to issuing reconsiderations. However, unlike intermediaries and carriers (including carrier fair hearing officers) QICs would not be required to follow local coverage determinations (LCDs) in making their determinations. Instead, QICs, like ALJs, would be bound only by law, regulations, CMS Rulings, and NCDs. This constitutes an important change from the current appeals system, which has been marked by high reversal rates at the ALJ level. Often these reversals stem from the different criteria applied by Medicare contractors and ALJs in ruling on Medicare payment and coverage issues. Section 1869(c)(3)(B)(ii)(II) does require that QICs ''shall consider'' LCDs in issuing reconsideration decisions, but it provides no guidance on the extent to which QICs are bound by CMS manuals or other instructions. Under § 405.968(b)(3), we propose that QICs be required to ''give deference'' to LCDs, local medical review policies (LMRPs), and CMS program guidance, including manual instructions (for example, the Medicare Coverage Issues Manual, the Medicare Intermediary Manual, the Medicare Carriers Manual). A QIC's decision must explain why it agrees or disagrees with the appellant's reasoning. Although QICs would not be bound by these types of policies, we would require that QIC reconsiderations follow these policies unless the appellant questions the policy and provides a reason that the QIC finds persuasive as to why the policy should not be followed. (See 66 FR 54536 for a detailed explanation of the distinction between LCDs and LMRPs.) We believe that the use of consistent review criteria and the establishment of strong standards to ensure sufficiency of a QIC's rationale for its decisions will serve several important purposes, including better explaining QIC decisions, identifying recurrent problems with CMS policies, and potentially reducing both ALJ appeals volume and the ALJ reversal rate.

Consistent with section 1869(c)(3)(D) of the Act, no physician or health care professional employed by a QIC may review a determination regarding the health care services furnished to a beneficiary if the physician or health care professional was directly responsible for furnishing such services or items. Also, a physician or health care professional may not review a redetermination if the physician or health care professional or a family member of the physician or health care professional has a significant financial

interest in the institution, organization, or agency that provided the health care services. Family is defined in section 1869(c)(1)(ii) as the spouse (other than a spouse who is legally separated from the physician or health care professional under a decree of divorce or separate maintenance), children (including stepchildren and legally adopted children), grandchildren, parents, and grandparents of the physician or health care professional. Section 405.968(c) would also implement the statutory requirement that reconsiderations involving a determination as to whether an item or service is reasonable and necessary under section 1862(a)(1)(A) of the Act, shall include consideration by a panel of physicians or other appropriate health care professionals. Under proposed § 405.968(c)(2), a QIC would be required to designate a panel to consider the facts and circumstances of any case involving a ''reasonable and necessary determination.'' We note that the estimated workload for QICs is expected to be close to 1 million cases per year, the majority of which we believe will involve medical necessity determinations. Given the prohibitively expensive nature of requiring a sitting panel to review each of these million cases, we plan to define what will constitute a panel. One option we are considering is that, rather than requiring that a panel be made up of at least two physicians or health care professionals simultaneously reviewing the issue, we would allow the physicians or health care professionals to review the issue sequentially. This would allow one professional to propose a determination on the matter and a second professional to then review the proposed reconsideration determination.

Section 405.970 sets forth the general requirement that QICs complete their reconsiderations within 30 days of receiving a timely filed request. Proposed § 405.970(c) specifies that, by no later than the close of the 30-day decision-making period, a QIC must issue the parties either a reconsideration decision or a notice stating that the QIC will not be able to complete its review by the decision-making deadline. This notice must also advise the appellant of the right, pursuant to § 1869(c) of the Act, to request escalation of his or her appeal to an ALJ. Under § 405.970(d), appellants must submit a written request directing the QIC to escalate their appeal. Appellants who are anxious to have their cases escalated clearly could make this request before receiving notice of a delay, that is, on their own, rather than in response to a QIC notice. In all instances, while awaiting the appellant's response, the QIC must continue processing the reconsideration ''unless and until it receives a written request from the appellant to escalate the case to an ALJ.'' Section 1869(c)(3)(C)(ii) makes clear that when a QIC fails to meet its reconsideration deadline, an appellant may request an ALJ hearing. Under any system where escalation is at the appellant's option, we believe it is possible that in some instances, the QIC will complete its reconsideration before receiving an escalation request from an appellant. To avoid confusion and establish an efficient system for processing reconsiderations, we propose that whenever a QIC receives an escalation request, the QIC must take one of two actions within 5 days: (1) Complete its reconsideration and notify the parties of its decision; or (2) acknowledge the escalation request in writing and forward the case file to the ALJ. This provision should lend administrative finality to the QIC process and avoid any uncertainty in the inevitable situations where escalation requests and QIC reconsideration decisions cross in the mail. In cases where such QIC decisions are favorable to appellants, this process will eliminate unnecessary additional delays and administrative burden that appellants would face in ALJ hearings. See the ALJ and DAB portions of this preamble for further discussion of the escalation provisions.

4. Withdrawal or Dismissal of Reconsideration Requests (§ 405.972)

Section 405.972 sets forth provisions for withdrawing and dismissing requests for reconsideration. We are proposing that appellants be able to withdraw their reconsideration request by filing a written request for withdrawal with the QIC within 14 calendar days of filing the reconsideration request. A QIC, however, may accept a withdrawal request at any time when the withdrawal is based upon a party entering into an agreement with CMS to compromise the amount of a debt. A QIC will dismiss a reconsideration request, either entirely or as to any stated issue, pursuant to a timely filed request for withdrawal, or on its own motion. For example, if the person or entity filing for reconsideration does not meet the proper definition of a party, or does not otherwise have a right to reconsideration under § 1869(b) of the Act, the QIC will dismiss the request. The QIC also may dismiss a request for reconsideration where the party fails to file the reconsideration request within 180 days of receipt of the redetermination notice, or if the party fails to make out a valid request consistent with the essential reconsideration requirements identified in § 405.964. In addition, if the party who filed the request dies before the adjudicator renders a decision, and the record does not reflect that some other party may be prejudiced by the redetermination, the QIC will dismiss the reconsideration.

An appellant may request ALJ review of a QIC's dismissal of a request for reconsideration. The request for ALJ review must be filed with an ALJ within 60 days of the date of the QIC's notice of dismissal. Additionally, at any time within 6 months of the date of the QIC's dismissal notice, the QIC may vacate its dismissal of a request for reconsideration if good and sufficient cause is shown.

5. Content and Effect of the Reconsideration Decision (§§ 405.976–978)

With regard to the content of the reconsideration decision notice, we propose in § 405.976 that these decisions be in writing and contain several substantive elements, including: (1) A clear statement as to whether the reconsideration decision is favorable or unfavorable; (2) a summary of the facts; (3) an application of the pertinent laws, regulations, coverage rules, and CMS policies to the facts; (4) an explanation of the medical and scientific rationale for the decision, when the case involves determining whether an item or service is reasonable or necessary for the diagnosis or treatment of an illness or injury; and (5) a clear statement of the QIC's rationale for its decision. Consistent with proposed § 405.968(b)(3), as discussed above, if the QIC's decision conflicts with an LCD, LMRP, or with program guidance, such as a CMS manual instruction, the notice must include the QIC's rationale for doing so. Similarly, consistent with the proposed § 405.976(b)(5), the reconsideration notice must address how any missing documentation affected the reconsideration decision and the evidence limitations at the ALJ hearing level. The notice must also contain key procedural information such as advice to the parties of the right to an ALJ hearing; if appropriate, advice regarding the requirements for use of the expedited appeals process; and a description of the procedure that a party must follow in order to obtain an ALJ hearing or expedited appeal.

Finally, § 405.678 establishes that reconsiderations are final and binding on all parties unless a timely appeal is filed and a higher adjudicative body

overturns the reconsideration decision, or unless the reconsideration is reopened and revised by the QIC.

G. Reopenings of Initial Determinations, Redeterminations, Reconsiderations, Hearings and Reviews (§§ 405.980–405.986)

Section 1869(b)(1)(G) of the Act provides for the reopening and revision of any initial determination or reconsidered determination according to guidelines prescribed by the Secretary. These provisions are needed not only for BIPA purposes but to deal with longstanding concerns over the reopening rules for Medicare claim determinations. Over the years these provisions (existing §§ 405.750(b), 405.841, 405.842, and 405.850) have concerned providers, suppliers, physicians, and contractors. Providers have been vocal about the need for reopening for purposes of recovering underpayments at any point beyond 60 days or the initial timely billing period of 15–27 months.

Some providers have commented that some contractors do not grant requests to reopen claims for underpayments and clerical errors. We believe that the goal of the Medicare payment system should be to pay the correct amount. Thus, we believe that the purpose for conducting a reopening should be to change the determinations or decisions that result in either overpayments or underpayments. The proposed provisions below are intended to establish clear and concise rules to enable contractors to reopen claims and appeals in a fair and consistent manner.

Proposed § 405.980(a) establishes that a reopening is a remedial action taken by a carrier, intermediary, QIC, ALJ, or MAC to change a final determination or decision made with respect to an initial determination, redetermination, reconsideration, hearing, or review, even though the determination or decision may have been correct based upon the evidence of record. (Note that in this section of the proposed rule, we use the term ''contractors'' to signify carriers, intermediaries, and program safeguard contractors.)

Reopenings often have been misconstrued as a level of the appeals process, so we clarify the conditions for when to use the reopening process instead of the appeals process. We believe that in order to give meaning to the reopening process, we should identify well-defined parameters for how parties must proceed, and how contractors, QICs, ALJs, and the MAC will conduct reopenings. First, unlike the appeals process, a party must establish that good cause exists in order for an adjudicator to grant a request for a reopening. We discuss in detail below the ways that good cause may be established. Because some of the same types of issues may be raised in either process, we believe that a party's appeal rights must be exhausted, or the time limit for appealing must have expired, in order for an adjudicator to grant a request for a reopening and take jurisdiction. A decision on whether to grant a request for reopening is at the sole discretion of the adjudicator and is not subject to appeal.

We also draw the distinction that requests for adjustments to claims resulting from clerical errors must be handled through the reopening process. Therefore, when a contractor makes an adjustment to a claim, the contractor is not processing an appeal, but instead, conducting a reopening. Nevertheless, the revised initial determination that results from the adjustment may be appealed. Finally, some providers argue that contractors will only initiate a reopening for clerical errors when the error can be attributed to the contractor, but not the provider. We make clear in this proposed rule that the clerical error may be that of the contractor or party. We also define clerical error as human and mechanical mistakes such as mathematical, computational, or inaccurate data entry. We welcome comments on other types of mistakes that would warrant reopenings on the basis of clerical errors.

Proposed § 405.980(b)–(e) sets forth the time frames and requirements for reopening initial determinations, redeterminations, reconsiderations, hearing decisions, and reviews, both for those initiated by contractors, QICs, ALJs, the MAC, and those requested by parties. An adjudicator's notice of intent to reopen preserves the time frame by which it is required to initiate a reopening. Either a party may request a reopening, or a contractor may reopen on its own motion, within one year from the date of the notice of the initial determination or redetermination for any reason. We believe that one year is a reasonable time frame for a party to bring issues to the contractor's attention, considering that it is the party's responsibility and obligation to bill and code correctly, discover errors timely, and respond to documentation requests in order to facilitate appropriate payment determinations by the contractors.

A party and a contractor have the same 4-year time frame for initiating reopenings for good cause, but although a party may request a reopening, the contractor may find that there is not adequate reason to reopen the case. A contractor's decision on whether good cause exists is final.

A contractor may reopen within 5 years from the date of the initial determination or redetermination if the contractor discovers a pattern of billing errors or identifies an overpayment. In protecting the Medicare Trust Fund, CMS grants contractors the authority to reopen and revise initial determinations on claims that have been procured through similar fault and/or are believed to have been procured through fraud. Under proposed § 405.980, we are proposing significant revisions to existing rules concerning reopening initial determinations procured through similar fault or fraud.

We are proposing a definition for the term similar fault and outline its evidentiary requirements. Similar fault is intended to cover instances where Medicare payment is obtained by those with no legal rights to the funds, but falls short of outright fraud. In order for the initial determination to be procured by similar fault, Medicare funds must have been obtained, retained, converted, or received by a person who knows, or reasonably should be expected to know, that the person has no legal entitlement to those funds. This covers instances where a provider has been paid twice for the same claim (such as through different payors); where the contractor erroneously pays for codes that should not be paid, and the provider does not refund the money; or manipulation of legitimate codes contrary to Medicare policy to obtain a higher reimbursement. Examples of how knowledge can be shown include: Provider bulletins and educational efforts, standard practices in the community, and previous errors that have been brought to the provider's attention.

A contractor may reopen at any time if reliable evidence shows fraud or similar fault. Evidence is reliable if it is relevant, credible, and material. Since a reopening of an initial determination is an administrative action to correct erroneous payments, there is no requirement for a burden of proof. The contractor only must show that its evidence is reliable. If the reopening results in a revised determination that is unfavorable, the affected party has the right to use the administrative appeals process to rebut the contractor's evidence. In the appeals process, however, the contractor's evidence must satisfy the burden of proof placed upon it.

Proposed §§ 405.980(d)(1) and (e)(3) provide 180 days from the date of a reconsideration decision for either a party to request, or a QIC to initiate, a

reopening. Similarly, both the parties and adjudicators at the ALJ and MAC levels also would have 180 days from the date of a hearing or review decision to request or initiate a reopening. The party, QIC, ALJ, or the MAC must establish good cause for a reopening. We considered whether a QIC, ALJ, or the MAC should have to establish good cause like parties in order to reopen matters that did not pertain to overpayments, investigations, or fraud. However, in an effort to propose a more equitable process, we believe that a QIC, ALJ, or the MAC should be held to the same standards as a party and should not be able to arbitrarily reopen its decision. We believe that a party should be able to rely on the finality of an appeal decision without undue concern that an adjudicator may reopen and revise its decision.

Proposed § 405.982–.984 would require contractors, QICs, ALJs, or the MAC to mail notices of revisions based on reopened determinations, reconsiderations, or decisions to the appropriate parties at their last known addresses. The notice must state the rationale and basis for the revision, and the parties' right to appeal. The revision of an initial determination, redetermination, or reconsideration shall be binding upon all parties unless a party files a written request for a subsequent appeal. Where a contractor reopens an initial determination, we considered whether it might be more efficient to allow a party to request a reconsideration by a QIC. However, since a redetermination is the first level of the appeals process, we have proposed that a revised initial determination is final unless a party files a written request for a redetermination.

Proposed § 405.986 creates a section on how a party, contractor, QIC, ALJ, or the MAC must establish good cause for a reopening. We modified and incorporated some of the provisions at §§ 405.750(b) and 405.841 of 42 CFR, and § 404.989 of 20 CFR to establish guidelines on what constitutes good cause for a reopening, such as ''new and material evidence'' and ''error on the face of the evidence.'' The existing provisions have been viewed by some to be ambiguous as to the meaning or context of these terms.

New and material evidence means information that was not available or known at the time the determination or decision was furnished, which, had it been available or known, may have resulted in a different conclusion. Error on the face of the evidence means an obvious mistake in the determination or decision.

We believe that we have exhausted the full range of circumstances that should give rise to good cause, but welcome comments on whether other provisions should be added to apply to good cause. Finally, we would also incorporate the longstanding rule that a change resulting from a judicial decision, legal interpretation, or administrative ruling upon which a determination or decision was made should not constitute a good cause for reopening.

H. Expedited Appeals Process (§ 405.990 Through § 405.992)

We are incorporating the current regulations governing expedited review at §§ 405.718 and 405.853 with only two changes. First, since under BIPA the appeals process is the same for both Part A and B claims, there will be one regulation governing expedited review of cases involving those claims. Second, under BIPA, ALJs are bound by all NCDs rather than only by NCDs based on section 1862(a)(1) of the Act. Therefore, the regulations will no longer limit expedited review to cases involving NCDs based on section 1862(a)(1)(A) of the Act.

In addition, we would establish under proposed § 405.992 the standards that would apply to ALJs and the MAC for policies that are not subject to the expedited appeals process. We are proposing that in general ALJs and the MAC should consider and give deference to an LCD, LMRP, or CMS manual instruction. An ALJ or the MAC may disregard such a policy at a party's request, if the ALJ or the MAC finds the party's explanation of why the policy should be disregarded to be persuasive, finds that the policy has been applied incorrectly, or finds for other reason that the policy is invalid for purposes of the party's appeal. A decision of the ALJ or the MAC would include its rationale for disregarding such a policy. We believe that these provisions will not only lend greater consistency to the appeal decisions, but also ensure that CMS is aware of policies that are being repeatedly overturned by adjudicators.

I. ALJ Hearings

1. Introduction

Consistent with new section 1869 of the Act, this proposed rule contains a series of changes to the existing procedures for ALJ hearings and DAB reviews. In addition, as discussed above, we are proposing in this rule to codify in the Medicare regulations at 42 CFR part 405, subpart I, all the requirements that apply to these proceedings. Most of these regulations have previously been set forth in 20 CFR part 404 of SSA's regulations, which focuses on SSA's disability procedures. These voluminous regulations contain many provisions that are not applicable for Medicare purposes. For the most part, the proposed regulations that are being carried over from part 404 simply incorporate relevant provisions of those rules and do not involve substantive changes. To the extent that the new regulations do make substantive changes, the changes are discussed below.

One of the changes required under section 521 of BIPA is the introduction of an appellant's right to escalate a case to an ALJ if a QIC fails to make a timely reconsideration, or to the DAB if an ALJ hearing does not produce a timely decision on an appeal of a QIC reconsideration. How escalation is implemented will affect all aspects of the ALJ and MAC proceedings discussed below. Therefore, before presenting a detailed discussion of our proposals with respect to ALJ and MAC procedures, we believe it is important to first discuss the issues associated with the new escalation requirements.

2. Escalation

a. General Principles

Section 1869(a)(3)(B)(I) provides that ''[n]o initial determination may be reconsidered or appealed under subsection (b) unless the fiscal intermediary or carrier has made a redetermination of that initial determination under [section 1869(a)(3)].'' Section 1869(a)(3)(D) provides that for purposes of pursuing appeals beyond the fiscal intermediary or carrier levels, the redetermination is considered an initial determination. Given the above provisions, it is clear that an appellant may not proceed beyond the initial contractor level until he or she has received a redetermination from that contractor, even if the contractor does not issue the initial determination or redetermination within the statutory time frames. This is consistent with the current regulations, which require an appellant to complete all steps of the appeals process in sequence, except when an appellant invokes the expedited review process described at §§ 405.718 [Part A appeals] and 405.853 [Part B appeals].

After the initial contractor has made its redetermination, however, a case may be advanced to the next level of appeal if an adjudicator does not act on the appeal within the statutory deadline. We call this movement of a case to the next level of appeal ''escalation.'' In this section, we

describe how escalation will affect the procedures the adjudicator will conduct at the next level of appeal.

Sections 1869(c) and (d) provide deadlines for QICs, ALJs, and the MAC within the DAB to issue their decisions. If the adjudicator does not meet the specified deadline, the party requesting the appeal (the appellant) ''may request'' an appeal at the next level without completing the appeal level below. Specifically, the statute allows an appellant to escalate an appeal by (1) requesting an ALJ hearing if the QIC does not decide the appeal within 30 or 44 days (depending on whether the appellant requested additional time to submit evidence to the QIC); (2) requesting a review by the MAC if the ALJ does not decide the appeal within 90 days; and; (3) requesting judicial review in federal district court if the MAC does not complete its review within 90 days. (At the ALJ and MAC levels, the statutory time period for completing the action begins on the date the appeal is timely filed.)

If an appellant does not request escalation to the next level, the case will remain with the current adjudicator until a final action is issued. Because there are different procedures at each of the appeals steps, appellants must carefully consider the type of review that is best to resolve their case before deciding to escalate an appeal. For example, appellants who escalate a case from the QIC level to an ALJ will not have the benefit of a review by health care professionals that the QIC provides before they proceed to a hearing. Similarly, when a case is escalated from the ALJ level to the MAC, an appellant will lose the right to present his or her case during an oral hearing; rather, in most circumstances the MAC will issue its action after reviewing the written record. Therefore, appellants who consider escalating their appeals must carefully weigh whether their case will be better served by completing a particular level of appeal or proceeding to the next level.

In addition, appellants who escalate their appeals will, in essence, be waiving their right to obtain a decision within the statutory deadline at the next level. For example, section 1869(d)(1)(A) provides that unless the appellant waives the statutory adjudication deadline, the ALJ ''shall conduct and conclude a hearing on a *decision* of a [QIC]'' and issue a decision by the 90th day from the date a request for hearing is timely filed. (Emphasis added.) We interpret this as requiring an ALJ to decide a case within 90 days when the QIC has issued a final action in a case, but not when the appellant has escalated the case to the ALJ level before the QIC issues a decision. A similar distinction is found in the provisions governing MAC review, which provide that the MAC must complete its ''review of a decision'' within 90 days. Therefore, when an appellant escalates an appeal from the QIC to the ALJ level or from the ALJ level to the MAC, the proceedings before the ALJ or MAC are not subject to the 90-day limit.

We believe this interpretation is not only consistent with the statute, but highlights other factors appellants will have to consider when deciding whether escalation is to their advantage. In our experience, ALJs and the MAC are able to decide cases more quickly and completely when the record below has been fully developed and the determination or decision issued below fully addresses the issues that were considered during the appeal. Because appeals that are escalated to the next level will not include a written determination or decision by the adjudicator below, the ALJ, the MAC, and the courts, as applicable, will require more time to determine what issues are properly before them and how they should be resolved.

As we discuss later in this preamble, we are proposing that CMS or its contractors may enter a case as a party at the ALJ level and be accorded the same rights as any other party to an ALJ decision. However, since we do not believe that the 90-day deadlines for the ALJ or the MAC to adjudicate appeals would apply to CMS, we have specifically noted in the regulation text that CMS would not be permitted to escalate a case, for example, from the ALJ to the MAC level, if the ALJ did not meet its adjudication deadline.

As noted above, section 1869(d)(1)(A) of the statute indicates that the 90-day deadline for an ALJ decision is premised on the existence of a QIC decision, and section 1869(d)(2)(A) specifies that the DAB has 90 days to ''conduct and conclude a review of the decision on the hearing'' by an ALJ. Neither the statute nor the legislative history provides any guidance with respect to the appropriate processing time frames for ALJ decisions on cases that have not been reconsidered by a QIC, or for DAB decisions on cases that have not been heard by an ALJ. Although the statute is silent in this respect, we recognize that appellants should not have to wait indefinitely for decisions on their appeals in these situations. We have proposed procedures that we believe will enable adjudicators to meet the statutory decision-making time frames in the vast majority of cases, thus minimizing the likelihood that an appellant would have the option of escalation. However, to the extent that such situations do arise, we believe that it may be appropriate to establish in the final rule specific decision-making time frames for both ALJ hearings and DAB reviews for those cases where there was no previous QIC reconsideration decision, or ALJ hearing decision, respectively. We encourage comments on whether the final rule should include such time frames and, if so, the most appropriate adjudication time frames for these cases.

b. Specific Provisions Affected by Escalation—From the QIC to the ALJ Level

Section 1869(c) provides that a QIC must complete its reconsideration within 30 days or 44 days if the appellant requests an extension. The statute also provides that an appellant may escalate the appeal to the ALJ level if the QIC does not complete the reconsideration within the requisite period. The statute does not specify, however, that appeals will automatically be referred from the QIC to the ALJ level once the 30 or 44-day period expires. Rather, the statute leaves it to the appellant to request escalation to the next level. The statute is silent concerning when the appellant must make this request or the precise effect the request will have on any case development or other adjudication efforts that the QIC may be conducting on the appeal when the escalation request is received.

We considered various options for effectuating this provision, including requiring that the QIC immediately cease its consideration of the appeal as soon as the request for escalation is received. As discussed above, we concluded that this option would be counterproductive for both the appellant requesting escalation and for the appeals system as a whole, including appellants whose claims remain at the QIC level and those whose appeals are already pending at the ALJ level. Specifically, because we expect that QICs will make every effort to issue determinations within the 30 or 44-day time frame, we would expect that many of the cases that are not decided by those deadlines will nonetheless be very close to completion. It would not benefit either the appellant who is requesting escalation or those appellants whose appeals are pending at the ALJ level if we require the QIC to cease deciding a case as soon as a request for escalation is received, particularly if the QIC is close to issuing a determination that will be fully favorable to the appellant.

Therefore, we are proposing that when a QIC receives a request for escalation, the QIC will defer sending the case to the ALJ level for 5 days. If possible, the QIC will complete its adjudication of the case, including issuing a written reconsideration, within the 5-day period. If the determination is fully favorable to all parties, the case will be forwarded to the initial contractor for effectuation. If not, the appellant or another party to the appeal may file a request for ALJ hearing within the 60-day period provided in these regulations. If the QIC is not able to decide the case within the 5-day period, it will notify the appellant and forward the case record to the hearing office that has jurisdiction of the case. The appeal will then be processed according to the rules described in proposed sections 405.1000 *et. seq.*

c. Specific Provisions Affected by Escalation—Escalation at the ALJ and MAC Levels

We are proposing similar procedures when an appellant requests escalation from the ALJ to the MAC level and from the MAC level to federal district court described below.

ALJ Level to the MAC (§ 405.1104)

The appellant must file the request for escalation directly with the ALJ/hearing office assigned to the appeal as well as with the MAC. (The notice that the hearing office issues acknowledging the request for hearing will provide sufficient information for the appellant to direct the escalation request to the appropriate office or ALJ.) Upon receipt of the request for escalation, the ALJ may, if feasible, issue a decision, dismissal or remand if it can be issued within 5 days of the receipt of the request for escalation. (**Note:** a request for escalation to the MAC will be deemed as a waiver of any oral hearing an appellant has requested but not yet received.) If the ALJ's action is fully favorable to all parties to the appeal, the ALJ will forward the case record to the appropriate contractor for effectuation. If the ALJ's action is not fully favorable to all parties, the appellant or another party to the appeal may file a request for MAC review within 60 days of receipt of the ALJ's action.

If the ALJ does not issue an action within the 5-day period, the case record, including the recording of the oral hearing, if any, will be sent to the MAC.

MAC to Federal District Court (§ 405.1132)

Finally, if the MAC does not issue a final action or remand the case to an ALJ for further proceedings within the 90-day adjudication period, the appellant may request that the case be escalated to federal district court if the amount in controversy is $1,000 or more. Similar to the above procedures, the MAC may, if feasible, issue a final action, if it can be issued within 5 days of the request for escalation.

d. Calculating the 90-Day Adjudication Period

Historically, Medicare appeals were conducted using the ALJ and Appeals Council procedures that were devised for appeals of Social Security claims. Those procedures do not mandate any time frames within which either an ALJ or SSA's Appeals Council must complete their actions on an appeal. However, they also provide generous time periods (or none at all) for scheduling or rescheduling hearings at the convenience of the appellant and the adjudicator, opportunities for both prehearing and posthearing conferences, and no limitations on when additional evidence may be submitted to the ALJ, as long as it is received before the decision is issued.

Congress, through BIPA, has now directed us to complete adjudication within specified time frames and, when such time frames are not met, give appellants the option to escalate their cases to the next level of appeal. To provide this level of service to all appellants, we are proposing the following changes to our appeals procedures. First, we are establishing time limits for submission of evidence. Appellants who submit evidence within these limits and comply with other deadlines described elsewhere in this document, will have the right to have their case adjudicated within the specified time period or to escalate it if the time limit is not met. Conversely, we propose to toll the 90-day adjudication period if appellants submit evidence after those specified time periods. For example, the regulations provide that an appellant must submit any additional evidence within 10 days of receiving the notice of hearing. If an appellant submits the evidence on the 20th day, the ALJ may still accept the evidence, but will have an additional 10 days to decide the case. (See § 405.1018)

We believe that this proposal is consistent with the statute and Congressional intent. Congress has clearly indicated that adjudicators must devise procedures compatible with meeting the statutory deadlines. Moreover, we do not believe that Congress meant to allow appellants to escalate appeals if it is the appellant who has delayed the administrative process. We note that such delays, in particular requests for postponement of scheduled hearings, affect the timely resolution of not only the appellant's own case, but our ability to provide timely hearings and decisions for other appellants as well. We believe that by tolling the 90-day adjudication period in those instances in which the appellant causes the delay, we will provide an incentive for more appellants to appear at scheduled hearings and otherwise comply with hearing procedures.

For the same reason, the proposed regulations contain changes to the current process that we anticipate will streamline the hearings and appeals process, thus providing quicker and more focused adjudication. For example, we are proposing to offer appellants at the ALJ level not only in-person hearings, but hearings via telephone and videoconferencing, where available. We are also restricting submission of additional evidence after an oral hearing to the following:

(1) With the permission of the ALJ, provided that the request is made before or during the hearing.

(2) On the ALJ's own motion, if he or she concludes that the evidence is necessary to resolve a material issue in the case.

We are also continuing the current requirement that the notice of hearing must identify the issues to be decided in the case. Although we are requiring appellants to file any objections to the issues within 5 days of the hearing, we encourage parties to alert ALJs as soon as possible if the notice of hearing does not accurately describe the issue to be decided or does not include an issue material to the resolution of the case (see § 405.1024). Similarly, as explained in more detail elsewhere in this preamble, we are proposing to require appellants seeking MAC review to identify those aspects of the ALJ's decision with which they disagree. (We are not proposing this requirement for beneficiaries who are proceeding pro se.) We believe that this requirement will enable the MAC to resolve requests for review more expeditiously. In addition, the MAC will issue final actions after considering the request for review, rather than first advising appellants of a proposed action and providing a comment period. We do not consider it feasible to provide both a proposed and final action within the designated time frame. In addition, because the MAC will now be conducting a de novo review, appellants are on notice that the MAC may alter the ALJ's decision even if it would have been sustained under the pre-BIPA substantial evidence standard (see § 405.1112).

3. Conduct of ALJ Hearing—General Rules (§ 405.1000)

Section 1869(b)(1)(A) of the Social Security Act as amended by BIPA provides that any individual dissatisfied with any initial determination shall be entitled to a reconsideration and, assuming the request for hearing is timely filed and the amount in controversy requirements are met, a hearing to the same extent as is provided in section 205(b) of the Act. Traditionally, the Secretary has granted individuals entitled to a 205(b) hearing an in-person hearing. In addition, current regulations allow an appellant to waive an in-person hearing and request a decision based on the written record. We would continue that policy in this proposed rule. However, given recent technological advances, we will also offer appellants an opportunity for a hearing via telephone or videoconference, as available. (Currently, videoconferencing is only available at selected hearing sites throughout the country. 66 FR 61310 (January 5, 2001)). Recent experience shows that hearings conducted via telephone and videoconferencing advantage both the adjudicator and the appellant, particularly beneficiaries who have difficulty traveling even short distances or providers and suppliers for whom a telephone hearing or a videoconference may be more convenient than a hearing scheduled at a more distant hearing office. We believe that offering these options, where available, will also enable ALJs to complete more cases within the 90-day adjudication period. It may also afford some appellants an opportunity to present their case orally who currently request on-the-record hearings because of transportation or scheduling difficulties.

4. What Actions Are Reviewable by an ALJ? (§ 405.1004)

We have interpreted the current regulations governing the Part A and Part B appeals process as affording a party the right to an ALJ hearing only if the intermediary or carrier hearing officer (CHO), as applicable, has issued a determination or decision on the merits. Consistent with this interpretation, ALJs have dismissed requests for an ALJ hearing when the contractor or CHO has dismissed a request for a reconsideration or carrier hearing.

We propose to revise this policy for appeals filed under BIPA. Specifically, we would give ALJs the authority to decide or review all final actions issued by a QIC including dismissals for untimely filing, failure to exhaust administrative remedies, or res judicata. (We expect that res judicata will most often occur when a party asks for another adjudication of a claim for the same service, that is, the same instance of receiving a service.) However, the proposed regulations also specify that if an ALJ decides that a QIC's dismissal was improper, the ALJ will remand to the QIC for a substantive decision.

5. What Authorities Are Binding on an ALJ?

In our May 12, 1997 final rule, we stated that ALJs are bound by the Medicare statute, CMS regulations, CMS Rulings and NCDs based on section 1862(a)(1) of the Act. Under BIPA, all NCDs, based on section 1862(a)(1) or other grounds, are binding on ALJs. We are revising our regulations, including those governing the expedited appeals process, accordingly.

6. Aggregating Claims To Meet the Amount in Controversy (§ 405.1006)

Prior to the enactment of section 521 of BIPA, the statute and regulations provided different amounts in controversy for Part A and Part B hearings and appeals. Under Part A, an appellant could receive a reconsideration of the initial determination regardless of the monetary value of the claim, but had to meet a $100 threshold to receive a hearing before an ALJ. Similarly, an appellant contesting an initial determination issued on a Part B claim could receive a review determination regardless of the amount in controversy. However, there was a $100 amount in controversy requirement for a Part B carrier hearing and a $500 threshold for an ALJ hearing with respect to a Part B claim determination.

The pre-BIPA aggregations provisions found at former section 1869(b)(2) directed the Secretary to devise a system for allowing appellants to combine claims to meet the amount in controversy as follows: In determining the amount in controversy, the Secretary, under regulations, shall allow two or more claims to be aggregated if the claims involve the delivery of similar or related services to the same individual or involve common issues of law and fact arising from services furnished to two or more individuals. The Secretary implemented the above provision in a final regulation published March 16, 1994. The regulation established two methods of aggregation, one for individual appellants and one for multiple appellants. Individual appellants appealing either Part A and Part B claims were allowed to aggregate two or more claims (within a specified time period), regardless of issue, to meet the jurisdictional minimums for a carrier hearing and ALJ hearing. (Prior to OBRA 1986, this method for aggregating claims had been available to appellants requesting a Part B hearing before a carrier hearing officer.) Multiple appellants, however, were allowed to aggregate their claims only under the statutory requirements, that is, if the claims involved the delivery of similar or related services to the same individual or common issues of law and fact arising from services furnished to two or more individuals.

BIPA 521 changed the amount in controversy requirements. Section 1869(b)(1)(E) provides that the amount in controversy for an ALJ hearing will be $100 for appeals of both Part A and Part B claims. In addition, the aggregation provisions have been altered as follows:

(ii) Aggregation of claims. In determining the amount in controversy, the Secretary, under regulations, shall allow two or more appeals to be aggregated if the appeals involve—

(I) the delivery of similar or related services to the same individual by one or more providers of services or suppliers, or

(II) common issues of law and fact arising from services furnished to two or more individuals by one or more providers of services or suppliers.

We are proposing to limit aggregation of claims under BIPA to those that meet the statutory requirements for aggregation, that is, those that involve the delivery of similar or related services to the same individual or common issues of law and fact. Accordingly, we would no longer allow appellants to aggregate all timely filed claims regardless of issue. We are proposing this change for several reasons. Under the current system, appellants can only appeal beyond the intermediary or carrier levels if their appeal meets the minimum amount in controversy requirements described above. With the creation of the QICs, however, appellants will have access to a review by an independent contractor regardless of a claim's monetary value. We believe that this will provide sufficient due process for those claims that are below the $100 threshold.

Moreover, BIPA has reduced the amount in controversy for a Part B ALJ hearing from $500 to $100. Our experience suggests that the majority of Part A and B appeals that are decided by the QICs will equal or exceed the $100 amount in controversy requirement. Thus, we do not believe that eliminating the more liberal rules

that individual appellants have used to aggregate claims will alter significantly an appellant's access to an ALJ hearing. We believe that continuing to apply the current aggregation rules would hinder ALJs and the MAC from meeting BIPA's 90-day deadlines for completing appeals. The current system, which allows aggregation of claims regardless of issue, has led to cumbersome and lengthy proceedings at both the ALJ and MAC levels. Adjudication is often delayed when an appellant seeks to aggregate a claim with another previously filed appeal; continuing this practice will impair our ability to meet the statutory deadline for the earlier appeal. Moreover, some of the current inefficiencies in the appeals system are caused by cases in which appellants seek to aggregate numerous claims that concern a variety of unrelated services or supplies, each of which has been denied for a different reason. Based on this experience, we believe that allowing appellants to aggregate claims regardless of issue will make it extremely difficult to provide a meaningful review of each issue within the statutory deadlines.

Therefore, we are proposing to limit aggregation for both individual and multiple appellants to the clear language of the statutory provisions. In order to allow individual beneficiaries, providers and suppliers, as well as multiple appellants to aggregate claims, we will allow appellants to aggregate claims to meet the amount in controversy if the claims involve common issues of law and fact or delivery of similar or related services, regardless of whether the services pertain to just one beneficiary or a number of beneficiaries and regardless of how many providers or suppliers provided the services. We will continue our policy, however, of restricting the claims that may be aggregated to those that are appealed within a limited period; to do otherwise would in essence extend the time to file a request for hearing beyond the 60-day time limit. We are also proposing separate rules for claims that are escalated from the QIC to the ALJ level to ensure that only appeals that clearly meet the amount in controversy requirements are escalated to the ALJ level. Finally, given the reduced amount in controversy threshold and the new adjudication deadlines, which will require adjudicators to resolve issues more quickly, we believe it is reasonable to require appellants to explain in their request for aggregation why they believe the claims involve common issues of law and fact or delivery of similar or related services.

7. When CMS or Its Contractors May Participate in an ALJ hearing (§§ 405.1010 and 405.1012)

Existing regulations do not address whether CMS and its contractors could participate in ALJ hearings. Occasions have arisen, however, in which a contractor or an ALJ has determined that an issue in a case could not be resolved without some input from CMS or the contractor. In some cases, ALJs have requested position papers, testimony, or other evidence from CMS or a contractor, but such proceedings have been cumbersome, because the regulations did not provide specific procedures for such input. After reviewing the outcome of other cases, CMS has concluded that the case might have been more appropriately resolved if CMS or the contractor had been parties to the appeal.

New section 1869(c)(3)(J) provides that the QIC will not only prepare the record of the reconsideration when a hearing before an ALJ is requested, but also will ''participate in such hearings as required by the Secretary.'' Consistent with this provision, we are proposing to revise our regulations concerning the conduct of an ALJ hearing to allow participation of a representative of CMS, or another CMS contractor, either at the request of an ALJ or upon the request of the QIC or CMS. Such participation may include filing position papers or providing testimony to clarify factual or policy issues in a case, but will not include those aspects of full party status such as the right to call witnesses or cross-examine the witnesses of another party. Because the role of a participant is non-adversarial, we would allow participation of the QIC, CMS, or CMS's contractors in cases brought by all appellants, including beneficiaries.

An ALJ will not have the authority to require CMS or a contractor to participate in a case. Nor may the ALJ draw any adverse inferences if CMS or a contractor decides not to participate. For example, an ALJ could not consider a party's allegations as accepted as true if CMS or a contractor decides not to participate and counter such allegations. We anticipate, however, that there will be other cases in which CMS or its contractor will want and need to be a full party in a case in order to ensure that the record before the ALJ is fully developed. Accordingly, we are also revising the current regulations to allow CMS or its contractor to enter an appeal at the ALJ level as a party, unless the appeal is brought by an unrepresented beneficiary. When CMS or its contractor enters the case as a party, it will have all the rights of a party, including the right to call witnesses or cross-examine the witnesses of other parties, as well as the right to seek MAC review of an adverse decision. CMS and the contractor, when acting as parties, may also submit additional evidence to the ALJ. An ALJ would not have the authority to require CMS or a contractor to enter a case as a party, nor would an ALJ be able to draw any inferences if CMS does not participate in the case. We believe that these proposed changes will enable adjudicators at the ALJ and, thereafter, the MAC level to resolve issues of fact and law more quickly and reduce the need for remands for additional development.

8. Filing Requests for ALJ Hearing and MAC Review—Time and Place (§§ 405.1014, 405.1016, 405.1106)

Section 1869(b)(1)(D)(ii) provides that ''the Secretary shall establish in regulations time limits for the filing of a request for hearing by the Secretary in accordance with provisions in sections 205 and 206.'' In addition, section 1869(d)(1)(A) provides that ''except as provided in subparagraph (B), an administrative law judge shall conduct and conclude a hearing on a decision of a qualified independent contractor under subsection (c) and render a decision on such hearing by not later than the end of the 90-day period beginning on the date a request for hearing has been timely filed.'' (Emphasis added.) Similarly, section 1869(d)(2)(A) of the Act provides that the MAC ''shall conduct and conclude a review of [an ALJ decision] and make a decision or remand the case to the administrative law judge for reconsideration by not later than the end of the 90-day period beginning on the date a request for review has been timely filed.''

Section 205 of the Act gives an appellant 60 days to request a hearing. The current regulations governing appeals of Medicare claims provide the same 60-day period for appealing Medicare cases from the contractor's determination or decision to an ALJ and, thereafter, from the ALJ level to the MAC. We are proposing to continue to require parties to file their appeals to the ALJ level and the MAC within 60 days. As discussed above, for purposes of determining an appellant's right to appeal, we will also continue to use the general principles currently found in 20 CFR 404.933 and 42 CFR 405.722. These regulations provide that an appeal is considered filed on the day it is received by a Social Security office,

CMS, including its contractors, an ALJ, or, in the case of a request for MAC review, the MAC. We will also continue to calculate the 60-day period based on the date the appeal is actually received by one of the above offices.

As noted above, ALJs and the MAC must issue their decisions no later than the end of the 90-day period beginning on the date the appeal has been timely filed. Therefore we must determine not only whether an appeal has been timely filed to establish the party requesting review's right to an ALJ hearing or MAC review, but also when the appeal is considered timely filed in order to calculate the 90-day adjudication period. Given these deadlines, we considered requiring all requests for ALJ hearing to be filed directly with the hearing office, and all requests for review to be filed directly with the MAC. This requirement would advantage most parties, since we have experienced significant delays in receiving appeals filed with Social Security and other offices. Again, we recognize that local Social Security offices provide a valuable service to many individuals who want or require assistance in filing their appeals. Similarly, providers and suppliers are accustomed to filing requests for an ALJ hearing or, more rarely, MAC review with CMS's contractors.

Therefore, as with requests for redeterminations and reconsiderations, we are proposing to allow parties to file their appeals with these offices. For purposes of establishing whether the party has filed a timely request, the appeal will be considered filed on the date it is received in one of these offices. However, for purposes of establishing the start date for the 90-day adjudication period, we will define the date that an appeal is timely filed as the date the appeal is received by the ALJ or MAC, as applicable. We believe that this policy will give the parties requesting review access to assistance if needed while not reducing the time the ALJ or MAC will have to decide the case.

In addition, both ALJs and the MAC often receive appeals that have not been filed within the 60-day limit. The current regulations allow parties to ask for an extension of time to file their appeal for ''good cause.'' The regulations further provide examples of circumstances that may establish good cause for late filing, such as a serious illness or death of an immediate family member. In our experience, some parties do not acknowledge that they have filed an appeal after the 60-day period has expired or explain why the appeal is late. In the event that the party requesting review subsequently provides information that establishes good cause for late filing, we will calculate the date the appeal is ''timely filed'' for purposes of beginning the 90-day adjudication period as the date the ALJ or MAC, as applicable, receives the good cause explanation, assuming the ALJ or MAC determines that the explanation provides good cause for filing the appeal late.

9. Adjudication Deadlines—ALJ Level (§ 405.1016)

Section 1869(d)(1)(A) provides that unless the appellant waives the statutory adjudication deadline, the ALJ ''shall conduct and conclude a hearing on a *decision* of a [QIC]'' and issue a decision within 90 days from the date a request for hearing is timely filed. (Emphasis added.) We interpret this as requiring an ALJ to decide a case within 90 days only when the QIC has issued a final action in a case. Therefore, when an appellant escalates an appeal from the QIC to the ALJ level, the proceedings before the ALJ are not subject to the 90-day limit.

We are also proposing to toll the 90-day adjudication deadline when an appellant's actions, including delays in submitting evidence or requests for postponement of a hearing, rather than the ALJ's actions, extend the length of the proceedings.

10. Remand Authority (§ 405.1034)

Currently, the regulations governing Medicare appeals do not provide clear guidance concerning if and when an ALJ may remand a case to a contractor for further proceedings. We are proposing including regulations that would require or allow ALJs to remand to the QIC under certain circumstances. First, the regulations would allow an ALJ to review whether or not the QIC erred in dismissing a request for reconsideration and to remand the case to the QIC for a reconsideration determination if the dismissal was improper. The regulations would also require an ALJ to remand a case to the QIC for a new decision if the appellant submits new evidence to the ALJ without providing a good reason for not providing it at the QIC level. (If the ALJ determines that there is good cause for submitting the evidence to the ALJ, the ALJ will include the evidence in the administrative record and decide the case on that record.) As discussed previously, we believe that this requirement will encourage appellants to resolve appeals, if possible, at earlier and less costly steps of the appeals process. Moreover, since most Part A and B appeals pertain to services that have already been provided, most medical and other records relevant to the case should be available during the initial stages in the appeals process. Requiring earlier submission of evidence will also assist ALJs and the MAC to meet their adjudication deadlines, since it will reduce time consuming development of the record. However, because we recognize that the reason for denying a claim may be different at various steps of the appeals process, we would not require an ALJ to remand a case when an appellant submits evidence relevant to an issue that is first identified in the QIC's reconsideration determination.

We would also permit an ALJ to remand the case to a QIC when the record lacks technical information material to resolution of the case that only the contractor, rather than a party, can provide. For example, it may be necessary to examine a contractor's payment history records in order to determine whether a supplier has filed a claim for durable medical equipment that has already been billed for by another supplier. Since such records would not ordinarily be in the possession of a party to the appeal, it may be necessary for the ALJ to remand the case to the QIC, if the initial contractor or the QIC has not included this information in the record submitted to the ALJ.

11. When May an ALJ Consolidate a Hearing? (§ 405.1044)

This proposed rule does not alter the ALJ's ability to consolidate a hearing. However, we have added a provision requiring an ALJ to notify CMS of his or her intent to consolidate hearings (see § 405.1044(c)). We believe that that the consolidation of hearings may affect our decision on whether to participate or invoke party status.

12. When May an ALJ Dismiss a Request for Hearing? (§ 405.1052)

CMS's current regulations do not address this issue; rather, ALJs follow the regulations at 20 CFR 404.957. These regulations were designed to resolve appeals filed by applicants for Social Security retirement and disability benefits. We are proposing new regulations that will address the specific procedural issues that arise in Medicare claims appeals.

a. Effect of the Death of the Beneficiary

The current regulations do not give specific guidance to appellants or adjudicators concerning the effect of the death of a beneficiary on an appeal. We believe that the regulations should provide notice to appellants concerning what will happen to an appeal if the

beneficiary dies either before it is filed or while it is pending. The proposed provisions would identify those circumstances in which the appeal will continue to be adjudicated on the merits versus those that will be dismissed because there is no longer an interested party who may obtain relief.

We are proposing to continue deciding appeals on the merits under the following circumstances.

The appeal involves a claim for benefits under Part A or B in which the beneficiary obtained the service at issue and the beneficiary either paid for the service or has a spouse or estate who continues to be financially liable for the service. In this circumstance, the beneficiary's spouse or estate may continue to pursue the appeal.

The appeal is filed by another party, including a provider of services or supplier, who continues to have a financial interest in the outcome of the appeal.

The appeal involved a service (such as a skilled nursing facility stay) for which payment was made under waiver of liability, but for which the determination was construed as a notice of noncoverage to deny payment to the beneficiary for subsequent dates of service.

The ALJ would dismiss, upon the beneficiary's death, other requests for hearing that do not meet the above criteria. For example, the ALJ could dismiss if the beneficiary or the beneficiary's representative filed the request for hearing but the beneficiary died before the hearing was held, and the beneficiary was not held liable for the services at issue in the QIC's reconsideration. The ALJ would not be required to inquire whether other potentially affected parties wish to continue the appeal unless they participated in the QIC review below. Similarly, a dismissal would occur if the supplier filed the request for hearing as the representative of the beneficiary, but did not have appeal rights on its own (because, for example, it did not take assignment) and the beneficiary died before the request for hearing was filed.

b. Requests for Withdrawal of a Request for Hearing

SSA's regulations at 20 CFR 404.957 now provide that an ALJ may dismiss a request for hearing if the party that requested the hearing asks to withdraw the request. The request may be submitted in writing or made orally at the hearing. Guidelines issued by SSA's Office of Hearings and Appeals further instruct ALJs that the request must indicate that the party withdrawing the request for hearing is aware of the consequences of the withdrawal. Experience shows that some appellants are in fact unaware of the consequences; for example they may equate a request for withdrawal with a request for postponement of the case. In order to avoid unnecessary remands of these cases, we are adding a requirement that the request for withdrawal must contain a clear statement that the appellant is withdrawing the appeal and does not intend to further proceed with the appeal. If the request for withdrawal is filed by an attorney, or other legal professional on behalf of a beneficiary or other appellant, the ALJ may presume that the representative has advised the appellant of the consequences of the withdrawal and dismissal. (We note that most local rules governing the professional responsibility of attorneys would require that an attorney advise a client of the effects of withdrawing an appeal.)

c. Res Judicata

SSA regulations at 20 CFR 404.957(c)(1) provide that an ALJ may dismiss a request for hearing based on the doctrine of res judicata. We are including this provision in our new regulations but clarifying that in the Medicare context the issue will most often occur when a party asks for another adjudication of a claim for the same date of service based on the same facts and evidence and the previous decision on the claim is either administratively or judicially final.

d. Abandonment

Currently, an ALJ may dismiss a request for hearing if the appellant does not have a good reason for failing to appear at a scheduled hearing. We will continue to allow ALJs to dismiss a request for hearing for this reason. In addition, if the hearing is rescheduled because the ALJ finds that the appellant had a good reason for failing to appear, the number of days that expire between the first and second scheduled hearing will not be counted toward the 90-day time limit for deciding the case.

J. Review by the Medicare Appeals Council and Judicial Review (§§ 405.1100–405.1140)

1. Introduction

The component of the DAB that decides cases brought under section 521 of BIPA is called the Medicare Appeals Council (MAC). Prior to this rulemaking, the MAC has considered requests for review of Medicare cases under the procedures used by the SSA's Appeals Council. Those regulations are found at 20 CFR 404.966 through 404.982. As with the ALJ regulations discussed above, we are now proposing to incorporate these procedures into 42 CFR of the Medicare regulations. These proposed regulations will incorporate the BIPA provisions governing MAC review and establish procedures that will meet the particular needs of the Medicare appeals process.

2. MAC Review of an ALJ's Action/De Novo Review (§ 405.1100)

Under the current regulations, the MAC may deny or dismiss a request for review, or it may grant the request for review and either issue a decision or remand the case to an ALJ. The MAC may also review an ALJ's action in order to dismiss a request for hearing for any reason for which it could have been dismissed by the ALJ. (See Social Security Ruling 95–2c, 60 FR 31753 (June 16, 1985)).

The MAC also has the authority to review an ALJ's action on its own motion, provided that it takes review of the case within 60 days after the date of the hearing decision or dismissal.

In deciding whether to grant a request for review, the MAC considers whether: (1) There appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the actions, findings or conclusions of the ALJ are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. In addition, if new and material evidence is submitted that relates to the period on or before the date of the administrative law judge hearing decision the MAC will review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record. If the MAC denies review of an ALJ's decision, the ALJ's action, not the denial of review, is the final decision of the Secretary and is reviewable in federal district court on a substantial evidence standard.

BIPA directs the MAC to apply a different standard when reviewing an ALJ's action. Section 1869(d)(2)(B) directs the MAC to conduct a de novo review of an ALJ's decision on a hearing. In addition, section 1869(d)(3)(A) allows parties to request review by the MAC if an ALJ does not issue a decision within the 90-day adjudication period ''notwithstanding any requirements for a hearing for purposes of the party's right to such a review.''

We are proposing to effectuate the MAC's new review process as follows. The MAC may no longer consider ALJ decisions under a substantial evidence standard nor may it ''deny'' review.

Rather, it will review the ALJ's decision de novo. If a case requires additional development or proceedings at the ALJ level, the MAC will remand the case to the ALJ for further action. Otherwise, the MAC will communicate its final action on the case by issuing a final decision or order that adopts, modifies or reverses the ALJ's action, as appropriate.

In addition to requiring any MAC review of an ALJ decision to be de novo, BIPA requires the MAC to complete its action on an ALJ decision within 90 days from the date the request for review is timely filed. In a previous section of this preamble, we have discussed the effect of these provisions on such questions as where and when a request for MAC review may be filed. We believe that the changes in the standard of review and the adjudication deadlines will require the following additional changes to the MAC's current procedures as well.

3. Escalation of an Appeal From the ALJ Level to the MAC (§§ 405.1104, 405.1106, and 405.1108)

Section 1869(d)(3)(A) of the Act, as amended by BIPA, provides that if an ALJ does not issue a decision within the 90-day adjudication period, ''the party requesting the hearing may request a review by [the MAC], notwithstanding any requirements for a hearing for purposes of the [appellant's] right to such review.'' As we have explained elsewhere in this preamble, the MAC's consideration of an appeal when it is escalated from the ALJ to the MAC level is not subject to the 90-day adjudication deadline. In addition, we interpret section 1869(d)(3)(A) to mean that only the person or entity who requested the ALJ hearing may escalate the appeal to the MAC if the ALJ does not meet the 90-day adjudication deadline. Where CMS has entered into the case as a party, it may not seek escalation.

Because the statute allows escalation for a MAC review ''notwithstanding any requirements for a hearing,'' the MAC is not required to hold a hearing if the case is escalated to its level. The statute does not describe the type of review that the MAC will conduct when an appeal is escalated before an ALJ action is issued, or what actions the MAC may take upon its review in such circumstances. Because it is possible that the MAC will receive cases escalated both before and after an ALJ hearing has been scheduled or conducted, we believe that the MAC will need the same options for disposing of a case that it would have if in reviewing an ALJ's decision or dismissal order. Therefore, we are proposing that when the MAC reviews a case that is escalated from the ALJ level it may issue a decision, dismiss either the request for hearing or request for review on procedural grounds, or, if the administrative record is insufficient to take any of the above actions, remand the case to the ALJ for specific development and a decision. (We will also continue to allow the MAC to hold a hearing, if warranted.)

4. Own Motion Provisions (§ 405.1110)

Under the current regulations, neither CMS nor its contractors are parties to appeals brought under 42 CFR 405, Subparts G and H. However, the regulations provide that in addition to deciding a case appealed by a beneficiary or other party, the MAC may decide on its own motion to review an ALJ's decision or dismissal anytime within 60 days after the date of the action (20 CFR 404.969). We refer to this as the MAC's own motion authority. The cases that the MAC reviews on its own motion are generally referred to it by CMS and its contractors.

We believe that the MAC's own motion authority should be revised to better accommodate the other changes to the appeals process required by BIPA. Moreover, as discussed above, CMS and its contractors, including the QICs, will now have an opportunity to participate in the hearings and appeals process either as parties or not as parties. In keeping with our proposed policy, that when CMS acts as a party it has the same rights as any other party, CMS would have the right to MAC review, using the same procedures that any other party would use. However, we recognize that the statute's adjudication deadlines could impose significant challenges to the MAC to complete all of the cases appealed to them by beneficiaries, providers, suppliers, and other affected third parties in a timely manner. Therefore, we are proposing that when CMS is not acting as a party to the case, the MAC's own motion authority would be limited as follows.

CMS and its contractors (hereafter: CMS) may refer ALJ decisions and dismissals to the MAC for own motion review when they participated (but did not act as a party) in the ALJ proceedings. When a case is referred in this circumstance, the MAC will accept the case for review if there is an error of law, an abuse of discretion, the decision is not consistent with the preponderance of the evidence or record, or there is a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS.

CMS may also refer ALJ decisions and dismissals to the MAC for own motion review when it did not participate and did not act as a party in the proceedings below. When a case is referred in this circumstance, the MAC will accept the case for review if the decision or dismissal contains a clear error of law or presents a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS.

Cases reviewed under the own motion authority would also be subject to the 90-day adjudication deadline. The deadline will begin when the MAC receives the referral from CMS or its contractors, unless the party who requested the ALJ hearing or another party to the hearing asks for an extension of time to respond to CMS's referral. The regulations will require that CMS send a copy of its own motion referral to all parties to the ALJ's action, as well as the ALJ.

5. New Requirement for Review Requests (§ 405.1112)

The current regulations do not require appellants to include in their requests for review the specific reasons that they disagree with an ALJ's decision or dismissal. As a result, many of the requests for review state only general reasons for appealing, such as ''I disagree with the ALJ's decision'' or ''The decision is not supported by the evidence and is inconsistent with the law.'' Because these appeals do not identify any specific flaw in the decision, the MAC's consideration of the case is very time and labor intensive, including examination of aspects of the decision with which the party may not actually disagree. For example, if an ALJ's decision rules unfavorably on five claims, the party may only believe that the decision is wrong with respect to one claim rather than all five. However, because the current regulations do not require the party to state the reasons for appealing all claims that it believes were incorrectly decided, the MAC is obligated to consider whether all five claims were property decided.

We believe that the MAC will not be able to conduct a de novo review of an ALJ's action within 90 days of the date the request for review is received unless parties requesting review provide more specific reasons for their disagreement with the ALJ's action. Because many beneficiaries have limited experience with the rules governing Medicare

coverage and payment policies, we do not propose requiring them to file specific exceptions with their requests for review unless they are represented by an attorney or other legal professional. Providers, suppliers, and CMS (when it has entered the case as a party) however, must not only be aware of Medicare coverage and payment policies in order to support their claims, but, by regulation, are presumed to have constructive notice of CMS notices, including manual issuances, bulletins, or other written guides and directives from Medicare contractors, as well as **Federal Register** publications containing notice of NCDs. See 42 CFR 411.406(e)(1) and (2). Therefore, we believe it is reasonable to require providers, suppliers, and CMS, as well as third-party appellants such as Medicaid State agencies, to include in their request for review the specific reasons they disagree with an ALJ's action. In addition, we believe it is appropriate to extend this requirement to requests for review filed by attorneys or other legal professionals on behalf of a beneficiary or when a provider, supplier or third party files a request for review as the beneficiary's representative.

In proposing this requirement, we wish to reassure parties that the purpose of requiring the exceptions is to enable the MAC to provide an efficient and focused review of those aspects of an ALJ's action with which the party disagrees. Because the MAC is concerned with the content rather than the form of the appeal, we would not require parties to file formal briefs or other pleadings. However, given the statutory limits, we believe that it is reasonable to require parties to state the basis for their disagreement with an ALJ's action and for the MAC to review de novo only those aspects of an ALJ's action with which the party disagrees. If a party other than an unrepresented beneficiary does not file any exceptions, the MAC will adopt the ALJ's action without comment, unless the ALJ's decision or dismissal contains on its face a clear error of law.

6. Discontinuation of Notice to Parties (§ 405.1128)

The current regulations at 20 CFR 404.973 require that when the MAC decides to review a case, it sends a notice to all parties stating the reasons for review and the issues to be considered. In the context of Social Security appeals this regulation has been interpreted as requiring SSA's Appeals Council to give appellants advance notice and opportunity to comment on any proposed action that is not fully favorable to all appellants. The MAC presently follows this regulation as well.

We do not believe, however, that it is possible or necessary to continue this practice under BIPA. When a party requests the MAC to review a case under BIPA, it is requesting the MAC to review the ALJ's action de novo; therefore, parties are on notice that the MAC's action, whether favorable or unfavorable, may differ considerably from the action being appealed. Since this regulation will also require CMS and its contractors to send a copy of own motion referrals to all parties, the parties to an own motion review will also be on notice that the MAC will be reviewing de novo those aspects of the case challenged by CMS, where CMS in not acting as a party, as applicable and will have the opportunity to file a reply with the MAC. We believe these procedures will satisfy due process while maintaining the MAC's ability to adjudicate appeals within 90 days. Therefore, the proposed regulations allow the MAC to adopt, modify, or reverse an ALJ's action without first providing notice and opportunity to comment on its proposed action (see § 405.1128).

7. Judicial Review (§§ 405.1136–405.1140)

These actions of the proposed rule consolidate and generally mirror the existing regulations with respect to judicial review, now found in 42 CFR 405.857, 20 CFR 404.983–404.984, and 20 CFR 422.210. The only substantive change is to provide that an appellant may request escalation to Federal district court if the MAC does not complete its review of an ALJ decision within the 90-day adjudication period, consistent with section 1869(d)(3)(B) of the Act.

J. Expedited Proceedings (§§ 405.1200–405.1206)

1. Overview of the Statute

Section 1869(b)(1)(F) provides for an expedited appeals process when a beneficiary receives notice from a provider of services that such provider plans to: (1) Terminate services provided to an individual and a physician certifies that failure to continue services is likely to place the beneficiary's health at risk; or (2) plans to discharge the individual from the provider of services. The statute mandates that the beneficiary who receives such notice may request an expedited determination. If he or she is dissatisfied with that determination, that beneficiary may request an expedited reconsideration determination by a QIC. Pursuant to sections 1869(c)(3)(C)(iii) and 1869(c)(3)(C)(iv), the QIC must render a decision within 72 hours unless a beneficiary requests an extension. Section 1869(c)(3)(C)(iii)(III) also mandates that a reconsideration of a discharge from a hospital be conducted in accordance with section 1154(e)(2)–(4).

Historically, Medicare beneficiaries have had a right to an expedited review by a Quality Improvement Organization (QIO, formerly a Peer Review Organization) in situations where they disagreed with a hospital's decision to discharge them. However, in the other provider settings, in order for a beneficiary to access the Medicare appeals process, the individual must: (1) Continue to receive the services up to the date in which he or she believed his or her services should be covered; (2) request the provider of such disputed services to file the claim for payment; and (3) have that claim adjudicated by the Medicare contractor, that is, have the Medicare contractor issue its initial determination. Upon receipt, a beneficiary who was dissatisfied with the contractor's determination then could access the appeals process by requesting a ''Reconsideration'' within 60 days.

Thus, the new BIPA provisions represent a significant change in the existing procedures available to beneficiaries to contest provider decisions to terminate care. Our proposals for implementing these changes are discussed below.

2. Expedited QIO Reviews (§§ 405.1200(a)–(g))

In § 405.1200(a)(1), consistent with the traditional definition of provider at section 1861 of the Act, we propose that the term ''providers'' used in §§ 405.1200 and 405.1202 applies to the following: hospitals, critical access hospitals, home health agencies (HHAs), skilled nursing facilities (SNFs), and comprehensive outpatient rehabilitation facilities (CORFs). In proposed § 405.1200(a)(2), we would establish that the scope of these provisions includes terminations of services furnished by a non-residential provider and the discharge of a beneficiary from a residential provider of services. This definition would not include reductions in an ongoing course of services.

Consistent with the statute, proposed § 405.1200(b) stipulates that in order for a beneficiary to request an expedited review: the beneficiary must have received notice that a provider intends to terminate services and a physician

must certify that termination of services is likely to place the beneficiary's health at significant risk; or the provider intends to discharge the beneficiary from a provider setting.

We reviewed current notices provided to beneficiaries upon termination of services to determine if existing notices would serve the purposes of this section. We determined that the Advance Beneficiary Notice (ABNs) would meet this need. Before a provider may charge a beneficiary for services that could be covered under Medicare but are not covered in the beneficiary's instant case, CMS regulations implementing section 1879 of the Act require that a provider issue an advance written notice to the beneficiary that the provider does not expect Medicare to pay for those services (see § 411.406). Such an advanced written notice explains that the provider does not expect that Medicare will pay and the provider's reason for that expectation. To comply with this existing section 1879 requirement, HHAs are issuing the HHABN (Home Health Advance Beneficiary Notice, form CMS–R–296); CORFs and hospices are issuing the ABN (Advance Beneficiary Notice, form CMS–R–131); and SNFs are using the SNF NONC (Skilled Nursing Facility Notice Of Non-Coverage). There is a similar notice requirement for inpatient hospitals.

We believe that these existing ABNs are the appropriate vehicles to trigger expedited determination under section 1869 of the Act, because the provider may not charge the beneficiary for services for which Medicare does not pay unless an ABN was provided in advance of furnishing those services, and because an ABN, in the case of an impending termination of provider services, must include a termination date. We will revisit the content of these existing notices to conform with the requirements of this proposed rule and submit such notices for clearance to the Office of Management and Budget through the Paperwork Reduction Act process.

We are not proposing any change in the timing of delivery of these existing notices. Although the inpatient hospital notice of noncoverage is already provided in a way that supports the unique beneficiary liability protections included in the current QIO process, the statute provides no parallel liability protections in the other provider settings. Therefore, we believe that the provision of the current advance beneficiary notices prior to termination will fulfill the intent of the statute. Note, however, that a provider's failure to issue an ABN does not eliminate a beneficiary's right to access the expedited appeals process. If, for example, a beneficiary files a request for an expedited determination following a verbal notification from a provider, the QIO must conduct its review as if a written notice had been given. In such a case, the beneficiary would not be responsible for the cost of care provided prior to the delivery of a valid advance beneficiary notice.

Section 405.1200(b)(2) provides that if a beneficiary does not file a timely request for an expedited determination, the beneficiary may not later access this expedited review process. (Note that the regulations assume that QIOs would likely conduct these determinations. We believe QIOs are the appropriate entity to conduct these expedited reviews of provider terminations, given that they already have the professional medical capabilities to review such medical necessity cases and they are located in every State.) Proposed § 405.1200(c) then establishes the procedures a beneficiary must follow in order to make a valid request for an expedited determination. In this section we give beneficiaries the option of making their request either in writing or by telephone no later than noon of the next day after receipt of the provider's notice. To be consistent with the deadline that QIOs are already familiar with, in regards to the current QIO review of inpatient hospital determinations (beneficiaries must request review of the hospital's decision no later than noon of the next working day), we have established that beneficiaries in these provider settings must request a review by noon. In order to facilitate a quick, accurate determination, we propose under § 405.1200(c) that the requesting beneficiary or representative must be available to answer questions by the QIO, upon request.

Section 405.1200(d) sets forth the procedures that the QIO must follow when it receives a beneficiary's request for an expedited review. Under this section, the QIOs must: notify the provider of the disputed services that a expedited review request has been made; request information such as medical records from the provider; examine the requested necessary medical information; solicit the views of the provider and the beneficiary; and make a decision within 72 hours after receipt of the request for the QIO expedited review and of the information requested from the provider. We would require that the provider submit the information requested by the QIO, no later than close of business on the day after the beneficiary request an expedited determination. Proposed § 405.1200(e) then sets forth the notification requirements when a QIO has made its expedited determination. We are proposing that the QIO immediately notify the beneficiary, physician and provider of its expedited determination, first by telephone and then following up with a written notice that would explain the decision and inform the beneficiary of his or her appeal rights.

Proposed § 405.1200(f) provides that the QIO's expedited determination is binding upon the beneficiary and the provider of the disputed services or stay, absent a beneficiary's request for a QIC reconsideration. If a beneficiary misses the deadline for filing a request for an expedited QIC reconsideration, the beneficiary may request a QIC reconsideration under the general QIC Reconsideration process at § 405.960 *et. seq*.

Section 405.1200(g) discusses the financial liability aspects of the QIO expedited review process. In the inpatient hospital setting, when a beneficiary files for an immediate QIO review by noon of the next working day following receipt of the notice of termination, that beneficiary is not responsible for the additional costs of his or her stay while the review takes place. (See section 1154(e) of the Act.) This financial protection does not exist under the expedited review process for other providers. However, proposed § 405.1200(g) provides that a provider cannot bill a beneficiary for the disputed stay or services until the beneficiary has received an expedited QIO determination; or if an expedited QIC reconsideration determination, if requested. In such situation, if the QIO determines that the services or stay in dispute were medically necessary, the beneficiary is not responsible for the services or stay, as stipulated by the QIO. However, if the QIO determines that the services or stay in dispute were not medically necessary, the beneficiary is responsible for services that extend beyond the appropriate covered services or stay, or as otherwise stated by the QIO.

3. Expedited QIC Reconsiderations (§ 405.1202)

Proposed § 405.1202(a) describes the appeals process for an expedited determination—the expedited QIC reconsideration. Under this section, we propose that, upon receipt of a QIO decision, if the beneficiary is dissatisfied and wants to appeal and receive a decision rendered expeditiously, that beneficiary may request an expedited QIC reconsideration. Section 405.1202(b)

provides that a beneficiary who desires an expedited QIC reconsideration must make that request no later than noon of the next calendar day following receipt of the QIO expedited determination. Consistent with the statute, this section also provides that a beneficiary or representative must be available to talk with the QIC about his or her case when the QIC calls to solicit the beneficiary's views.

Section 405.1202(c) would set forth the procedures that the QIC must follow when conducting its expedited reconsideration. The steps that the QIC must follow are identical to those followed by the QIO except as noted below. Consistent with section 1869(c)(3)(iii), we have established that the QIC render a decision within 72 hours from receipt of the request for an expedited reconsideration and the requested information. In conjunction with this time frame, we would require that if a QIC does not render its decision 72 hours from receipt of the request and information, the QIC must inform the beneficiary of his or her right to have their case escalated to an ALJ; and we set forth the procedures that the beneficiary must follow. In such case, the QIC must immediately notify the provider that such action has been taken. At this point that provider may bill the beneficiary for the services or stay in dispute.

Section 405.1202(d) proposes that the QIC issues a notice of its expedited reconsideration determination after it has notified the beneficiary, provider, and physician responsible for the beneficiary's care of its decision via telephone. The telephone notification must be followed by a written notice that includes the detailed rationale for the decision, a statement that explains the beneficiary's subsequent appeal rights (an ALJ Hearing), and the timeframe for filing for the ALJ hearing request. Section 405.1202(e) would establish that the QIC's reconsideration determination is binding in the beneficiary, subject to an ALJ hearing if the beneficiary is dissatisfied with the QIC's decision. There is no expedited ALJ Hearing. Therefore, such dissatisfied beneficiary will have to request an appeal in accordance with the normal ALJ hearing procedures.

Proposed § 405.1202(f) sets forth the coverage rules for beneficiaries during this review. The beneficiary may not be billed for the disputed services or stay until that beneficiary receives an expedited determination by the QIC. However, if the QIC does not render a decision within 72 hours of receipt of the information and the request, the provider may bill the beneficiary for the services or stay in dispute.

4. Special Rules for Inpatient Hospital Discharges (§§ 405.1204 and 405.1206)

The proposed regulations for these sections are identical to the existing inpatient hospital rules for appealing inpatient hospital determinations with one exception. Upon receipt of a QIO determination, the next level of the appeals process would now be the expedited QIC reconsideration, if the beneficiary makes a timely request for expedited reconsideration and remains in the hospital. If the beneficiary is no longer an inpatient in the hospital, or fails to make a timely request for an expedited reconsideration, but is still dissatisfied with the QIO's determination, he or she retains the right to subsequently appeal that determination under the general QIC reconsideration rules.

III. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

IV. Information Collection Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The PRA exempts the majority of the information collection activities referenced in this proposed rule. In particular, 5 CFR 1320.4 excludes collection activities during the conduct of administrative actions such as redeterminations, reconsiderations, and/or appeals. However, the information collection requirement associated with the initial request to seek a redetermination is subject to the PRA. Current supporting regulations set forth at §§ 405.711 and 405.807 outlining a request for redetermination are currently approved under the PRA. However, due to the revision/consolidation of the current redetermination regulations, we are requesting comment on the proposed requirement referenced below.

Section 405.940 Right to a Redetermination

A person or entity that is a party to an initial determination as described under § 405.920 *et seq.* and is dissatisfied with that determination may request a redetermination in accordance with § 405.942 through § 405.946.

The burden associated with this requirement is the time and effort necessary to request a redetermination that is in accordance with the requirements referenced in § 405.942 through § 405.946. Based upon current data, we estimate that contractors will process 6,800,000 requests for Part B redeterminations and 60,000 for Part A on an annual basis and that it will require an average of 15 minutes to submit a request for a total burden of 1,715,000 annual burden hours.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Attn.: John Burke, Attn: CMS–4004–P, Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS Desk Officer Attn: CMS–4004–P.

V. Regulatory Impact Analysis

A. Introduction

We have examined the impact of this rule under the criteria of Executive Order 12866 (September 1993, Regulatory Planning and Review), section 1102(b) of the Social Security Act, the Regulatory Flexibility Act (RFA), Public Law 96–354, the Unfunded Mandates Reform Act of 1995, Public Law 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 annually). Because Federal costs to implement this rule would exceed the $100 million threshold, this is a major rule. In compliance with Executive Order 12866, we have prepared the RIA below. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

The RFA requires agencies, in issuing certain proposed rules, 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 $25 million or less annually. For purposes of the RFA, all providers and suppliers affected by this regulation are considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis for a proposed rule that may, if adopted, have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act. We are uncertain how many small entities will be affected by this rule. The design and purpose of the proposed rule is to improve the accuracy and efficiency of the claims review and appeals process, we are confident that it will reduce rather than add burden on small entities. The impact on small rural hospitals is likely to be negligible or slightly positive. Therefore, we are certifying that the proposed rule will not have a significant impact on a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any proposed rule that would include any Federal mandate that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This rule would not have such an effect on State, local, or tribal governments, or on the private sector.

B. Scope of the Proposed Changes

As discussed in detail above in section II of this preamble, this proposed rule would establish new regulations concerning appeals procedures for Medicare claims determinations, consistent with section 1869 of the Act as amended by section 521 of BIPA 2000. Among the significant changes required by the BIPA amendments are:

- Establishing a uniform process for handling Medicare Part A and B appeals, including the introduction of a new level of appeal for Part A claims.
- Revising the time frames for filing a request for a Part A and Part B appeal.
- Imposing a 30-day time frame for redeterminations made by fiscal intermediaries and carriers.
- Requiring the establishment of a new appeals entity, the qualified independent contractor (QIC), to conduct ''reconsiderations'' of contractors' initial determination or redeterminations, and allowing appellants to escalate the case to an ALJ hearing, if reconsiderations are not completed within 30 days.
- Establishing a uniform amount in controversy threshold of $100 for appeals at the ALJ level.
- Imposing 90-day time limits for conducting ALJ and DAB appeals and allowing appellants to escalate a case to the next level of appeal if ALJs or the MAC do not meet their deadlines.
- Imposing ''de novo'' review when the MAC reviews an ALJ decision made after a hearing.
- Requiring that the Secretary establish a process by which an individual may obtain an expedited determination if he/she receives a notice from a provider of services that the provider plans to terminate services or discharge the individual from the provider.

The proposed rule would not establish new rules, or alter existing rules, with respect to the substantive standards for determining whether a Medicare claim is payable. Claims that enter the administrative appeals process represent an extremely small portion of the total number of claims that Medicare processes each year. In FY 2001, for example, Medicare contractors processed almost 932 million claims; of these only about 6 million were appealed. Thus, the number of Medicare claims that enter the administrative appeals system represents only about 0.6 percent of the total number of claims filed with Medicare. Moreover, the 6 million figure represents the total number of claims appealed, not the number of appellants. From our experience, the vast majority of appeal requests are filed by a relatively limited group of appellants. Therefore, the number of providers, physicians and other suppliers, as well as beneficiaries who enter the appeals process is far fewer than the 6 million claims that are appealed. Given the small percentage of claims and appellants involved in the administrative appeals process, we believe that this proposed rule would have little or no effect on most Medicare providers and suppliers. The changes set forth are even less likely to affect beneficiaries, whose appeals are estimated to constitute no more than 3 to 5 percent of total appeals. As discussed in detail below, however, for those providers, suppliers, and beneficiaries who do file appeals of Medicare claim determinations, the effects of this proposed rule should be overwhelmingly positive.

C. Anticipated Effects on Providers, Physicians and Other Suppliers, and Beneficiaries

We expect that the changes set forth in this proposed rule would produce substantial improvements in the accuracy and efficiency of the claims appeal process. For the most part, the anticipated positive impact of the proposed rule on providers, physicians and other suppliers would be similar to the anticipated effects on beneficiary appellants, although again the impact on the provider and supplier communities would be more pronounced due to their much greater likelihood to appeal a claim determination. We include a brief discussion of the anticipated impact of major changes below.

In general, we do not anticipate that the introduction of these new appeals procedures would have a substantive impact on the actual results of claims appeals. That is, there is no reason to believe that the use of QICs, or other changes required by BIPA, would result in any change in the proportion of appeals that result in favorable decisions for providers, suppliers, or beneficiaries. We do believe though that the implementation of requirements that ensure appellants of both the fairness of the decision-making process and the accuracy and consistency of the decisions reached can eventually lead to

major reductions in the need for the elevation of appeals to the slower, more costly levels of the appeals system, such as ALJ hearings and DAB or Federal court review. We welcome comments on all aspects of this impact analysis.

Most of the major changes set forth in this rule, such as the new time frames for appeals decisions, are mandated by the statute and thus not subject to the Secretary's discretion. To the extent that we have exercised discretion, such as in establishing procedures for conducting appeals, we have attempted to balance the need for accurate, expeditious appeals decisions with our responsibilities to implement these changes in a cost-effective manner.

A discussion of the anticipated impacts of key provisions follows.

1. Decision Making Time Frames and Escalation

Perhaps the most significant change set forth here is the reduction in mandatory time frames for issuing a decision on appeals at all levels. In general, this would mean faster receipt of decisions and, for favorable decisions, faster payment. For example, a provider who appealed a Part A claim determination in FY 2001 waited an average of 64 days for an intermediary to make a decision on a reconsideration request, where under the proposed rule a decision on a Part A redetermination request must be made within 30 days of receipt of the request. If the decision is favorable (that is, the appeal results in a reversal of an initial determination that a claim could not be paid), effectuation of the favorable decision would be initiated as soon as a decision is reached. Given the reduced decision-making time frames, payments would be received substantially sooner than under the current system. Similarly, the time frame for a Part B fair hearing decision would be reduced from 120 days to 30 days, with concomitant fiscal advantages to successful appellants. These benefits to appellants would extend to all levels of the Medicare administrative appeals process.

In addition to the new time frames for making decisions, the proposed rule would allow appellants the option of escalating an appeal to an ALJ if the QIC fails to make a decision timely. Escalation also would be available at the appellants' option from the ALJ level to the DAB if an ALJ fails to issue a hearing decision on a QIC decision within 90 days of a request for an appeal of a QIC reconsideration (or similarly from the DAB to Federal court). Clearly, these options would be a positive change for appellants, who have greater control of their appeals and a viable recourse during the appeals process if, during one stage of the appeals process, their appeal is not decided timely.

2. Review of Claims by a Panel of Health Care Professionals

Another important change included in this proposed rule is the requirement that a QIC panel of physicians or other qualified health care professionals conduct reconsiderations when the initial determination being appealed involved a medical necessity issue. BIPA mandates that when an initial determination involves a finding on whether an item or service is reasonable and necessary for the diagnosis or treatment of an illness or injury, a QIC's reconsideration must be based on clinical experience and medical, technical, and scientific evidence to the extent applicable. We believe that this change would give appellants more confidence that a fair decision has been reached, potentially reducing their need to pursue subsequent appeals. We believe the introduction of physicians and other health care professionals into the appeals process would produce administrative finality at an earlier level of the process and benefit both appellants and the Medicare program.

3. Decision Letters and Documentation Requirements

An important discretionary aspect of the proposed rule concerns the content of the notices sent to parties when a contractor upholds its initial determination. These requirements include a written summary of the rationale for the redetermination decision and the identification of any specific missing documentation that contributed to the decision to deny the claim in question. (Note that the statute establishes specific requirements for notices following QIC reconsiderations, but does not address the content of redetermination notices.) We believe that the proposed policies for more detailed decision notices would provide appellants with the information they need to build their case early in the appeals process. We believe the impact of this requirement would result in more accurate decisions at the QIC reconsideration level, based on all the appropriate medical information, rather than appeals often needing to be raised to an ALJ before needed documentation is produced. This will give beneficiaries, providers, and suppliers more detail about why their claim was denied and allow them to fashion their appeal accordingly.

Since the appellant would be informed about specific documentation that is necessary to make a decision, the proposed rule also requires that such identified information be submitted with the next level appeal request. If the information is not submitted to the QIC, but instead surfaces later in the appeals process, the appellant would need to demonstrate good cause why the information was not submitted to the QIC. We believe the end result of these provisions would be that appeals are resolved at the earliest possible administrative level, which is a positive result for all appellants. As discussed in detail in section II.I.10 of the preamble, ALJs would have the authority to remand cases to a QIC when available evidence is not submitted timely.

4. Party Status

In the current regulations, providers may appeal only in limited circumstances. In order to appeal in other circumstances, providers must act as an appointed representative of a beneficiary.

In the proposed rule, we would permit participating providers to appeal to the same extent as beneficiaries or suppliers who take assignment. We believe this change would have several positive impacts on appellants. For example, it would eliminate any confusion providers may have in determining whether they have standing to appeal an initial determination, and it would remove the burden for the provider of obtaining an appointment of representative from a beneficiary. This should also eliminate confusion beneficiaries had in the past about why providers have sought to represent beneficiaries.

D. Effects on the Medicare Program

In the final analysis, the primary financial impact of implementing these changes falls upon the government agencies responsible for conducting appeals, that is, CMS, SSA, and DHHS. Deciding appeals within shorter time frames and establishing new independent review entities to conduct these appeals entail significant new costs, as does the development of an appeals-specific data system to track the results of these appeals. Section 521 of BIPA not only mandated shorter decision-making time frames and other costly improvements to the already taxed Medicare appeals system, it also created additional opportunities and incentives for providers, suppliers, and beneficiaries to request appeals. Most significantly, the statute no longer provides for any minimum amount in controversy (AIC) below the ALJ level, and lowers the AIC from $500 to $100 for appealing a Part B claim determination to an ALJ. In addition, we

anticipate that the new decision-making time frames could make the appeals process more attractive to potential appellants who previously may have been dissuaded from appealing by the potential delays involved in obtaining a decision on their appeal. Thus, in order to forestall large increases in appeals volume at the higher levels of appeal, we have attempted to craft appeals rules that would ensure not only that appellants receive consistent and accurate decisions at the lowest possible appeals level, but also that appellants are made aware of the reasons for these decisions.

Finally, we note that although the impact of these changes would be positive for the provider, physician, supplier, and beneficiary communities, implementing these procedures would generate substantial costs to the Medicare program. Our most recent estimate is that the changes required at the contractor and QIC level would cost at least $100 million, with additional costs to implement the necessary changes at the ALJ and DAB appeals level.

E. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule would not have a substantial effect on State or local governments.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV, part 405 as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

1. The authority citation for part 405 continues to read as follows:

Authority: Secs. 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

2. Add a new subpart I, consisting of § 405.900 through § 405.1206, to part 405 to read as follows:

Subpart I—Determinations, Redeterminations, Reconsiderations, and Appeals Under Original Medicare (Parts A and B)

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405.906 Parties to the initial determinations, redeterminations, and reconsiderations.
405.908 Medicaid State Agencies.
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405.946 Evidence to be submitted with the redetermination request.
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405.1010 When CMS or its contractors may participate in an ALJ hearing.
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405.1030 ALJ hearing procedures—General.
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405.1036 Description of ALJ hearing process.
405.1038 Deciding a case without an oral hearing before an ALJ.
405.1040 Prehearing and posthearing conferences.
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Medicare Appeals Council Review

405.1100 Medicare Appeals Council review: General rule.
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405.1140 MAC review of ALJ decision in a case remanded by a Federal court.

Expedited Determinations and Reconsiderations

405.1200 A beneficiary's right to an expedited determination.
405.1202 Right to an expedited reconsideration by a QIC.
405.1204 Expedited appeals of inpatient hospital discharges.
405.1206 Hospital requests expedited QIO review.

Subpart I—Determinations, Redeterminations, Reconsiderations, and Appeals Under Original Medicare (Parts A and B)

§ 405.900 Basis and scope.

(a) *Statutory basis.* This subpart is based on the provisions of sections 1869(a) through (e) of the Act.

(b) *Scope.* This subpart establishes the requirements for appeals of initial determinations with respect to benefits under Part A or Part B of Medicare, including the following:

(1) The initial determination of whether an individual is entitled to benefits under Part A or Part B. (Regulations governing appeals of these initial determinations are found at 20 CFR part 404, subparts J and R).

(2) The initial determination of the amount of benefits available to an individual under Part A or Part B.

(3) Any other initial determination with respect to a claim for benefits under Part A or Part B, including an initial determination made by a qualified improvement organization under section 1154(a)(2) of the Act or by an entity under contract with the Secretary (other than a contract under section 1852 of the Act) to administer provisions of titles XVIII or XI.

§ 405.902 Definitions.

For the purposes of this subpart, the term—

ALJ stands for an Administrative Law Judge.

Appellant means the beneficiary, assignee or other person or entity that has filed an appeal concerning a particular initial determination. Designation as an appellant does not in itself convey standing to appeal the determination in question.

Assignee means a provider, physician, or other supplier who furnishes items or services to a beneficiary and who has accepted a valid assignment of appeal rights executed by the beneficiary.

Assignment of appeal rights means the transfer by the assignor of his or her right to appeal an initial determination to the assignee.

Assignor means a beneficiary whose provider of services, physician, or supplier has taken assignment of the right to appeal a claim.

Clean claim means a claim that has no defect or impropriety (including any lack of required substantiating documentation) or particular circumstance requiring special treatment that prevents payment from being made on the claim under title XVIII of the Act.

MAC stands for the Medicare Appeals Council within the Departmental Appeals Board of the Department of Health and Human Services.

Party means an individual or entity listed in § 405.906 that has standing to appeal an initial determination and/or a subsequent administrative appeal determination.

Qualified Improvement Organization (QIO) means an entity that contracts with the Secretary in accordance with sections 1152 and 1153 of the Act and 42 CFR chapter IV, subchapter F, to perform the functions described in section 1154 of the Act and 42 CFR chapter IV, subchapter F, including expedited determinations as described in § 405.1200 through § 405.1206.

Qualified Independent Contractor (QIC) means an entity that contracts with the Secretary in accordance with section 1869 of the Act to perform reconsiderations under § 405.960 through § 405.978.

Remand means to vacate a lower level appeal decision and return the case to that level for a new decision.

Vacate means to set aside a previous action.

§ 405.904 Medicare initial determinations, redeterminations and appeals: General description.

(a) *General overview.* The Medicare contractor makes an initial determination when a claim for Medicare benefits under Part A or Part B is submitted. A beneficiary who is dissatisfied with the initial determination may request, and the contractor will perform, a redetermination of the claim. Following the contractor's redetermination, the beneficiary may obtain a reconsideration from the Qualified Independent Contractor (QIC). Following the reconsideration, the beneficiary may obtain a hearing before an Administrative Law Judge (ALJ) if the amount remaining in controversy is at least $100. If the beneficiary is dissatisfied with the decision of the ALJ, he or she may request the Medicare Appeals Council (MAC) to review the case. Following the action of the MAC, the beneficiary may file suit in Federal district court if the amount remaining in controversy is at least $1,000.

(b) *Non-beneficiary appellants.* In general, the procedures described in paragraph (a) of this section are also available to an individual representing beneficiaries and to parties other than beneficiaries or their representatives, consistent with the requirements of this subpart I. However, a provider generally has the right to judicial review only as provided under section 1879(d) of the Act, that is, when a determination involves a finding that services are not covered because—

(1) They were custodial care (§ 411.15(g) of this chapter); they were not reasonable and necessary (§ 411.14(k) of this chapter); they did not qualify as covered home health services because the beneficiary was not confined to the home or did not need skilled nursing care on an intermittent basis (§ 409.42(a) and (c)(1) of this chapter); or they were hospice services provided to a non-terminally ill individual (§ 418.22 of this chapter); and

(2) Either the provider or the beneficiary, or both, knew or could reasonably have been expected to know that those services were not covered under Medicare.

§ 405.906 Parties to the initial determinations, redeterminations, and reconsiderations.

(a) The parties to the initial determination are the following individuals and entities:

(1) A beneficiary who has filed a claim for payment or has had a claim for payment filed on his or her behalf, or in the case of a deceased beneficiary, or when there is no estate, any person obligated to make or entitled to receive payment in accordance with part 424, subpart E of this chapter. However, payment by a third party payer does not entitle that entity to party status.

(2) A participating physician or other supplier who has filed a claim for items or services furnished to a beneficiary.

(3) A provider of services who has filed a claim for items or services furnished to a beneficiary.

(b) The parties to the redetermination, reconsideration, hearing, and MAC review are'

(1) The parties to the initial determination in accordance with paragraph (a) of this section;

(2) A Medicaid State Agency in accordance with § 405.908; and

(3) An assignee who has accepted an assignment of appeal rights from the beneficiary according to § 405.912.

(4) A non-participating physician or other supplier who has accepted assignment in accordance with § 424.55 of this chapter.

(5) A non-participating physician not billing on an assigned basis who, in accordance with section 1842(l) of the Act, is liable to refund monies collected for services furnished to the beneficiary because those services were denied on the basis of section 1862(a)(1) of the Act; and

(6) A non-participating supplier not billing on an assigned basis who, in accordance with sections 1834(a)(18) and 1834(j)(4) of the Act, is liable to refund monies collected for items furnished to the beneficiary.

§ 405.908 Medicaid State Agencies.

When a beneficiary is dually eligible for Medicare and Medicaid, the Medicaid State Agency may file a request for an appeal on behalf of the beneficiary. A Medicaid State Agency will only be considered a party when it files a timely redetermination request on behalf of a beneficiary in accordance with 42 CFR parts 940 through 958. If a Medicaid State Agency files a redetermination, it retains party status at the QIC, ALJ, MAC, and judicial review levels.

§ 405.910 Appointed representatives.

The requirements of this section apply for purposes of all administrative actions described in this subpart, subsequent to an initial determination.

(a) *Representative defined.* A representative means an individual authorized by a party, or under State law, to act on the party's behalf in dealing with any of the levels of the appeals process under this subpart. Representatives do not have party status and may only take action on behalf of the individual or entity they represent.

(b) *Persons authorized by a party.* A party to an initial determination, redetermination, reconsideration, or hearing may appoint another individual to act on the party's behalf in exercising the right to appeal. A representative may be any individual, or individual associated with an entity, that is competent to act on behalf of the party.

(c) *Persons unauthorized.* A party may not name as a representative an individual or entity that has been disqualified, suspended, or otherwise prohibited by law, from participating in the Medicare program.

(d) *Making out a valid appointment.* For purposes of this subpart, an appointment of representation must—

(1) Be in writing and signed by both the party and individual agreeing to the representation.

(2) Provide a statement authorizing the representative to act on behalf of the party;

(3) Include a written explanation of the purpose and scope of the representation;

(4) Contain both the party's and representative's name, phone number, and address;

(5) Identify the beneficiary's health insurance claim number;

(6) Include the representative's professional status or relationship to the party; and

(7) Be filed with the entity processing the party's appeal.

(e) *Duration of appointment.* (1) Unless revoked, an appointment is valid for the life of an individual's appeal of an initial determination.

(2) For purposes of initiation of appeals of other initial determinations, the authorization will be considered valid for 1 year from its original effectuation.

(f) *Representative fees.*

(1) *Attorneys.* No award of attorney fees may be made against the Medicare trust fund.

(2) *Providers and suppliers.* A provider or supplier that furnished items or services to a beneficiary may represent that beneficiary in an appeal under this subpart. That provider or supplier may not charge the beneficiary any fee associated with the representation. In addition, where a provider or supplier furnishes services or items to a beneficiary, the provider or supplier may not represent the beneficiary with respect to the issue described in section 1879(a)(2) of the Act (that is, whether the beneficiary or the provider or supplier, or both, knew or could reasonably have been expected to know that payment would not be made for the items or services), unless the provider or supplier waives the right to payment from the beneficiary with respect to' the services or items involved in the appeal.

(g) *Responsibilities of a representative.* (1) A representative has an affirmative duty to—

(i) Inform the party of how the duty is served;

(ii) Inform the party of the status of the appeal and the results of actions taken on behalf of the party, including, but not limited to, notification of appeal determinations, decisions, and further appeal rights;

(iii) Disclose any beneficiary financial risk and liability of a non-assigned claim;

(iv) Not act contrary to the interest of the party; and

(v) Comply with all CMS regulations, rules, and instructions.

(2) An appeal request filed by a provider or supplier acting as a representative of a beneficiary will also include a statement signed by the provider or supplier stating that no financial liability will be imposed on the beneficiary in connection with that representation.

(h) *Authority of a representative.* A representative may, on behalf of the party—

(1) Obtain information about the claim to the same extent as the party;

(2) Submit evidence;

(3) Make statements about facts and law; and

(4) Make any request, or give, or receive, any notice about the appeal proceedings.

(i) *Notice or request to a representative.* A contractor, QIC, ALJ, or the MAC will send the representative—

(i) Notice and a copy of any administrative action, determination, or decision; and

(ii) Requests for information or evidence.

(j) *Effect of notice or request to a representative.* A notice or request sent to the representative will have the same force and effect as if it had been sent to the party.

(k) *Representative payee.* An appointed representative may not serve as a representative payee unless the appointed representative has satisfied the requirements under title II of the Act.

(l) *Information available to the representative.* The appointed representative may obtain any and all information that is available to the party, applicable to the claim at issue. The representative may not disclose to any one unaffiliated with the appeals process any information about a claim without the party's written consent, except as may be required by law, ordered by a court, or other such authority.

(m) *Delegation of appointment by representative.* An appointed representative may not designate another individual to act as the representative of the party unless—

(1) The representative provides written notice to the party of the representative's intent to delegate to another individual. The notice must include—

(i) The name of the designee; and

(ii) The designee's acceptance to be obligated and comply with the requirements of authorized representation.

(2) The beneficiary accepts the designation as evidenced by a signed, written statement.

(n) *Revoking the appointment of representative.* (1) A party may revoke an appointment of representative without cause at any time.

(2) Revocation is not effective until the entity processing the appeal receives a signed, written statement from the party.

(3) The death of the party will terminate the authority of the representative. A party's death does not terminate an appeal that is in progress where another individual or entity may be entitled to receive or obligated to make payment for Medicare claims.

§ 405.912 Assignment of appeal rights.

(a) *Assignment of appeal rights defined.* Assignment of appeal rights means the transfer by a beneficiary of his or her right to appeal an initial determination to a provider or supplier.

(b) *Who may be an assignee.* A provider of service, physician, or other supplier who is not considered a party to the initial determination as defined in § 405.906 and who furnished an item or service to a beneficiary may seek assignment from the beneficiary for that item or service.

(c) *Who may not be an assignee.* An individual or entity who is not a provider of service, physician, or other supplier may not be an assignee. A provider of service, physician, or other supplier who furnishes an item or service to a beneficiary may not seek assignment for that item or service when considered a party to the initial determination as defined in § 405.906.

(d) *Requirements for a valid assignment of appeal right.* The assignment of appeal rights must—

(1) Be executed using a CMS standard form;

(2) Be in writing and signed by both the beneficiary assigning his or her appeal rights and by the assignee;

(3) Indicate the item or service for which the assignment of appeal rights is authorized;

(4) Contain a waiver of the assignee's right to collect payment from the assignor; and

(5) Be submitted at the same time the request for redetermination or appeal is filed.

(e) *Waiver of right to collect payment.* (1) The assignee must waive the right to collect payment for the item or service for which the assignment is made. If the assignment is revoked under paragraph (h)(2) of this section, then the waiver of the right to collect payment remains valid.

(2) The assignee is not prohibited from recovering payment associated with coinsurance or deductibles or when an advance beneficiary notice has been properly executed.

(f) *Duration of a valid assignment of appeal rights.* The assignment of appeal rights is valid for all administrative and judicial review associated with the item or service as indicated on the standard CMS form, unless the assignment is revoked.

(g) *Rights of the assignee.* When a valid assignment of appeal rights is executed, the assignor transfers all appeal rights to the assignee. These include, but are not limited to—

(1) Obtaining information about the claim to the same extent as the assignor;

(2) Submitting evidence;

(3) Making statements about facts or law; and

(4) Making any request, or giving, or receiving any notice about appeal proceedings.

(h) *Revocation of assignment.* When an assignment of appeal rights is revoked, the rights to appeal revert to the beneficiary. An assignment of appeal rights may be revoked in any of the following ways:

(1) In writing by the assignor.

(2) By abandonment if the assignee does not file an appeal of an unfavorable decision.

(3) By act or omission that is determined by an adjudicator to be contrary to the financial interests of the beneficiary.

Initial Determinations

§ 405.920 Initial determinations and notice of initial determination.

After a claim is filed with the appropriate contractor in the manner and form described in part 424, subpart C of this chapter, the contractor—

(a) Determines whether the items and services furnished are covered under title XVIII of the Act;

(b) Determines any amounts payable and makes payment accordingly; and

(c) Notifies the parties to the initial determination of the determination.

(1) The notice must be in writing and sent to the last known address of all parties.

(2) The notice will state the basis for the determination and inform the parties of their right to a redetermination if they are dissatisfied with the outcome of the initial determination.

§ 405.922 Time frame for processing initial determinations.

The contractor will issue initial determinations on clean claims within 30 days of receipt if they are submitted by or on behalf of the individual who received the items and/or services; otherwise, interest must be paid at the rate used for purposes of 31 U.S.C. 3902(a) (relating to interest penalties for failure to make prompt payments) for the period beginning on the day after the required payment date and ending on the date payment is made. The contractor will issue initial determinations on all other claims within 45 days of receipt.

§ 405.924 Actions that are initial determinations.

(a) *Applications and entitlement of individuals.* The SSA makes an initial determination with respect to an individual on the following:

(1) A determination with respect to entitlement to hospital insurance or supplementary medical insurance under Medicare.

(2) A disallowance of an individual's application for entitlement to hospital or supplementary medical insurance, if the individual fails to submit evidence requested by SSA to support the application. (SSA will specify in the initial determination the conditions of entitlement that the applicant failed to establish by not submitting the requested evidence).

(3) A denial of a request for withdrawal of an application for hospital or supplementary medical insurance.

(4) A denial of a request for cancellation of a ''request for withdrawal.''

(5) A determination as to whether an individual, previously determined to be entitled to hospital or supplementary medical insurance, is no longer entitled to those benefits, including a determination based on nonpayment of premiums.

(b) *Claims made by beneficiaries by or on behalf of beneficiaries.* The contractor makes an initial determination regarding claims for benefits under Medicare Part A and Part B. The contractor does not make an initial determination on requests for payment that do not meet the requirements of a claim. An initial determination for purposes of this subpart includes, but is not limited to, determinations with respect to—

(1) Whether the items and/or services furnished are covered under title XVIII of the Act;

(2) In the case of determinations on the basis of section 1879(b) or (c) of the Act, whether the beneficiary, provider, physician, or supplier who accepts assignment under § 424.55 of this chapter knew, or could reasonably have been expected to know at the time the services were furnished, that the services were not covered;

(3) In the case of determinations on the basis of section 1842(l)(1) of the Act, whether the beneficiary or physician knew, or could reasonably have been expected to know at the time the

services were furnished, that the services were not covered;

(4) Whether the deductible has been met;

(5) The computation of the coinsurance amount;

(6) The number of days used for inpatient hospital, psychiatric hospital, or post-hospital extended care;

(7) The number of home health visits used;

(8) Periods of hospice care used;

(9) Requirements for certification and plan of treatment for physician services, durable medical equipment, therapies, inpatient hospitalization, skilled nursing care, home health, hospice, and partial hospitalization services;

(10) The beginning and ending of a spell of illness, including a determination made under the presumptions established under § 409.60(c)(2) of this chapter, and as specified in § 409.60(c)(4) of this chapter;

(11) Determinations regarding the medical necessity of services, or the reasonableness or appropriateness of placement of an individual at an acute level of patient care made by the Qualified Improvement Organization (QIO) on behalf of the contractor in accordance with § 476.86(c)(1) of this chapter;

(12) Determinations regarding whether a claim was timely filed;

(13) Any other issues having a present or potential effect on the amount of benefits to be paid under Part A or Part B of Medicare, including a determination as to whether there has been an overpayment or underpayment of benefits paid under Part A or Part B, and if so, the amount thereof;

(14) Whether a waiver of adjustment or recovery under sections 1870(b) and (c) of the Act is appropriate when an overpayment of hospital insurance benefits or supplementary medical insurance benefits (including a payment under section 1814(e) of the Act) has been made with respect to an individual.

(15) Determinations that a particular claim is not payable by Medicare based upon the application of the Medicare Secondary Payer provisions of section 1862(b) of the Act.

(16) Determinations under the Medicare Secondary Payer provisions of sections 1862(b) of the Act that Medicare has a recovery claim against a provider, physician, supplier, or beneficiary with respect to services or items that have already been paid by the Medicare program except when the recovery claim against the provider, physician, or supplier is based upon its failure to file a proper claim as defined in part 411 of this chapter.

(c) *Determinations by QIOs.* An initial determination for purposes of this subpart also includes a determination made by a QIO that:

(1) A provider can terminate services provided to an individual when a physician certified that failure to continue the provision of those services is likely to place the individual's health at significant risk; or

(2) A provider can discharge an individual from the provider of services.

§ 405.926 Actions that are not initial determinations.

Actions that are not initial determinations and are not appealable under this subpart include, but are not limited to—

(a) Any determination for which CMS has sole responsibility, for example, whether an entity meets the conditions for participation in the program, whether an independent laboratory meets the conditions for coverage of services;

(b) The coinsurance amounts prescribed by regulation for outpatient services under the prospective payment system;

(c) Any issue regarding amount of program reimbursement or cost report settlement process under Part A of Medicare;

(d) Whether an individual's appeal meets the qualifications for an expedited appeal provided in § 405.990;

(e) Any determination regarding whether a Medicare overpayment claim should be compromised, or collection action terminated or suspended under the Federal Claims Collection Act of 1966;

(f) Determinations regarding the transfer or discharge of residents of skilled nursing facilities in accordance with § 483.12 of this chapter;

(g) Determinations regarding the readmission screening and annual resident review processes required by part 483, subparts C and E of this chapter;

(h) Determinations with respect to a waiver of Medicare Secondary Payer recovery under section 1862(b) of the Act, because that recovery would defeat the purposes of the Act, or would be against equity and good conscience under section 1870(c) of the Act.

(i) Determinations with respect to a waiver of interest;

(j) Determinations with respect to a finding regarding Medicare Secondary Payer applicability other than with respect to a specific claim when the initial determination on that claim for beneficiary or Medicare's recovery claim is being appealed;

(k) Determinations under the Medicare Secondary Payer provisions of section 1862(b) of the Act that Medicare has a recovery claim against a third party payer with respect to services or items that have already been paid by the Medicare program; and

(l) A contractor's, QIC's, ALJ's, or MAC's decision not to reopen an initial determination, redetermination, reconsideration hearing decision, or review decision.

(m) Determinations that CMS or its contractors may participate in or act as parties in an ALJ hearing or MAC review.

§ 405.928 Effect of the initial determination.

(a) An initial determination under § 405.924(a) involving applications and entitlement of individuals to supplementary medical insurance under Part B or hospital insurance under Part A will be binding upon the individual (or the representative of the estate of a deceased beneficiary) unless it is revised or reconsidered in accordance with 20 CFR 404.907.

(b) The initial determination under § 405.924(b) will be binding upon all parties to the initial determination unless—

(1) A redetermination is completed in accordance with § 405.940 through § 405.958; or

(2) The initial determination is revised as a result of a reopening in accordance with § 405.980.

Redeterminations

§ 405.940 Right to a redetermination.

A person or entity that is a party to an initial determination made by a contractor as described under § 405.920 through § 405.928 and is dissatisfied with that determination may request a redetermination by a contractor in accordance with § 405.940 through § 405.958, regardless of the amount in controversy.

§ 405.942 Time frame for filing a request for a redetermination.

(a) *Time frame for filing a request.* Except as provided in paragraph (b) of this section, a party to an initial determination must file a request for redetermination that meets the requirements of § 405.944 within 120 calendar days from the date the party receives the notice of the initial determination.

(1) For the purposes of this section, the date of receipt of the initial determination will be presumed to be 5 days after the date of the notice of initial determination, unless there is evidence to the contrary.

(2) The request is considered as filed on the date it is received by the contractor, SSA office, or CMS.

(b) *Extending the time frame for filing a request: General rule.* If the 120-day period in which to file a request for a redetermination has expired and a party shows good cause, the contractor may extend the time frame for filing a request for redetermination.

(1) *How to request an extension.* A party to the initial determination may file a request for an extension of time for filing the redetermination with the contractor. The request for redetermination extension must—

(i) Be in writing;

(ii) State why the request for redetermination was not filed within the required time frame; and

(iii) Meet the requirements of § 405.944.

(2) *How the contractor determines whether good cause exists.* In determining whether a party has good cause for missing a deadline to request a redetermination or reconsideration the contractor considers—

(i) What circumstances kept the party from making the request on time;

(ii) Whether the contractor's action(s) misled the party; and

(iii) Whether the party had any physical, mental, educational, or linguistic limitations, including any lack of facility with the English language, that prevented the party from filing a timely request or from understanding or knowing about the need to file a timely request for redetermination.

(3) *Examples of good cause.* Examples of circumstances when good cause may be found to exist include, but are not limited to, the following situations:

(i) The party was prevented by serious illness from contacting the contractor in person, in writing, or through a friend, relative, or other person; or

(ii) The party had a death or serious illness in his or her immediate family; or

(iii) Important records of the party were destroyed or damaged by fire or other accidental cause; or

(iv) The contractor gave the party incorrect or incomplete information about when and how to request a redetermination; or

(v) The party did not receive notice of the determination or decision; or

(vi) The party sent the request to another Government agency in good faith within the time limit, and the request did not reach the appropriate contractor until after the time period to file a redetermination expired.

§ 405.944 Place and method of filing a request for a redetermination.

(a) *Filing location.* The request for redetermination must be filed with the contractor indicated on the notice of initial determination. Appellants may also file requests for redetermination with SSA offices or CMS.

(b) *Content of redetermination request.* The request for redetermination must be in writing on a standard CMS form. A written request that is not made on a standard CMS form will be accepted if it contains the same required elements as follows:

(1) The beneficiary's name;

(2) The health insurance claim number;

(3) The specific service(s) and/or item(s) for which the redetermination is being requested and the specific date(s) of the service; and

(4) The name and signature of the party or the appointed representative of the party.

(c) *Requests for redetermination by more than one party.* If more than one party timely files a request for redetermination on the same claim, the contractor will consolidate the separate requests into one proceeding and issue one redetermination decision.

§ 405.946 Evidence to be submitted with the redetermination request.

(a) *Evidence submitted with the request.* When filing the request for redetermination, a party must explain why it disagrees with the contractor's determination and include any evidence that the party believes should be considered by the contractor in making its redetermination.

(b) *Evidence submitted after the request.* When a party submits additional evidence after filing the request for redetermination, the contractor's 30-day decision-making time frame will automatically be extended for 14 calendar days.

§ 405.948 Conduct of a redetermination.

A redetermination consists of an independent review of an initial determination. In conducting a redetermination, the contractor will review the evidence and findings upon which the initial determination was based, and any additional evidence the parties submit or the contractor obtains on its own. A redetermination must be made by an individual who was not involved in making the initial determination.

§ 405.950 Time frame for making a redetermination decision.

(a) *General rule.* The contractor will mail, or otherwise transmit, written notice of the redetermination decision or dismissal to the parties at their last known addresses within 30 calendar days of the date the contractor receives a timely filed request for redetermination.

(b) Exceptions. (1) If a timely request for redetermination is filed with an entity other than the contractor, then the 30-day decision-making time frame begins on the date that request is received by the contractor.

(2) If a contractor grants an appellant's request for an extension of the 120-day filing deadline made in accordance with § 405.942(b), the 30-day decision-making time frame begins on the date the contractor receives the late-filed request for redetermination, or the extension, whichever is later

(3) If a contractor receives from multiple parties timely requests for redetermination of a claim determination, consistent with § 405.944(c), the contractor must issue a redetermination decision or dismissal within 30 days of the latest filed request.

(4) If a party submits additional evidence after the request for redetermination has been filed, the contractor's 30-day decision-making time frame will be extended for 14 days, consistent with § 405.946(b).

§ 405.952 Withdrawal or dismissal of a request for a redetermination.

(a) *Withdrawing a request.* A party that files a request for redetermination may withdraw his or her request by filing a written and signed request for withdrawal. The request must be filed with the contractor, within 14 calendar days of the filing of the redetermination request.

(b) *Dismissing a request.* A contractor will dismiss a redetermination request, either entirely or as to any stated issue, under any of the following circumstances:

(1) When the person or entity requesting a redetermination is not a proper party under § 405.906 or does not otherwise have a right to a redetermination under section 1869(a) of the Act;

(2) When the contractor determines the party failed to make out a valid request for redetermination that substantially complies with § 405.944;

(3) When the party fails to file the redetermination request within the proper filing timeframe in accordance with § 405.942;

(4) When the party that filed the request for redetermination dies and there is no information in the record to determine whether there is another

party that may be prejudiced by the determination;

(5) When the party filing for the redetermination submits a timely written request of withdrawal with the contractor; or

(6) When the contractor has not issued an initial determination on the claim for which a redetermination is sought.

(c) *Notice of dismissal.* A contractor will mail or otherwise transmit a written notice of the dismissal of the redetermination request to the parties at their last known addresses.

(d) *Vacating a dismissal.* If good and sufficient cause is established, a contractor may vacate a dismissal of a request for redetermination within 6 months from the date of the notice of dismissal.

(e) *Effect of dismissal.* The dismissal of a request for redetermination is binding, unless it is appealed to a QIC under § 405.974(b) or vacated under paragraph (d) of this section.

§ 405.954 Redetermination decision.

Upon the basis of the evidence of record, the contractor will make a decision on the claim(s), and/or issue(s), in dispute and, issue a redetermination decision affirming or reversing, in whole or in part, the initial determination in question.

§ 405.956 Notice of a redetermination decision.

(a) *Notification to parties.* Written notice of the redetermination decision must be mailed or otherwise transmitted to all parties at their last known addresses in accordance with the timeframes established in § 405.950.

(b) *Content of the notice.* For decisions that are affirmations, in whole or in part, of the initial determination, the redetermination must be in writing and contain—

(1) A clear statement indicating the extent to which the redetermination decision is favorable or unfavorable;

(2) A summary of the facts;

(3) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case;

(4) A summary of the rationale for the redetermination decision in clear, understandable language;

(5) Notification to the parties of their right to a reconsideration and a description of the procedures that a party must follow in order to request a reconsideration, including the time frame within which a reconsideration must be requested;

(6) A statement of any specific missing documentation that must be submitted with a request for a reconsideration, if applicable;

(7) A statement that if the specific documentation indicated under paragraph (b)(6) of this section is not submitted with the request for a reconsideration, this evidence will not be considered at an ALJ hearing, unless the appellant demonstrates good cause as to why that evidence was not provided previously; and

(8) Any other requirements specified by CMS.

§ 405.958 Effect of a redetermination decision.

Once a redetermination decision is issued, it becomes part of the initial determination. The redetermination decision is final and binding upon all parties unless—

(a) A reconsideration decision is issued under a request for reconsideration in accordance with § 405.962 and § 405.964; or

(b) The redetermination decision is revised as a result of a reopening in accordance with § 405.980.

Reconsiderations

§ 405.960 Right to a reconsideration.

A person or entity that is a party to a redetermination made by a contractor as described under § 405.940 through § 405.958 and is dissatisfied with that determination may request a reconsideration by a QIC in accordance with § 405.962 through § 405.966, regardless of the amount in controversy.

§ 405.962 Time frame for filing a request for a reconsideration.

(a) *Time frame for filing a request.* Except as provided in paragraph (b) of this section, a party to a redetermination must file a request for a reconsideration that meets the requirements of § 405.964 within 180 calendar days from the date the party receives the notice of the redetermination decision.

(1) For the purposes of this section, the date of receipt of the notice of the redetermination decision will be presumed to be 5 days after the date of the notice of redetermination, unless there is evidence to the contrary.

(2) The request is considered as filed on the date it is received by the QIC, or by an SSA office, or CMS.

(b) *Extending the time for filing a request.—General rule.* If the 180-day period in which to file a request for a reconsideration has expired and a party shows good cause, the QIC may extend the time frame for filing a request for reconsideration.

(1) *How to request an extension.* A party to the redetermination may file a request for an extension of the time for filing the reconsideration with the QIC. The request for reconsideration and request for extension must—

(i) Be in writing;

(ii) State why the request for reconsideration was not filed within the required time frame; and

(iii) Meet the requirements of § 405.964.

(2) *How the QIC determines whether good cause exists.* In determining whether a party has good cause for missing a deadline to request a reconsideration, the QIC will apply the good cause provisions contained in § 405.942(b)(2) and (b)(3).

§ 405.964 Place and method of filing a request for a reconsideration.

(a) *Filing location.* The request for reconsideration must be filed with the QIC indicated on the notice of redetermination. Appellants may also file requests for reconsideration with SSA offices or CMS.

(b) *Content of reconsideration request.* The request for reconsideration must be in writing on a standard CMS form. A request that is not made on a standard CMS form will be accepted if it contains the same required elements, as follows:

(1) The beneficiary's name;

(2) Health insurance claim number;

(3) The specific service(s) and/or item(s) for which the reconsideration is being requested and the specific date(s) of service; and

(4) The name and signature of the party or the appointed representative of the party.

(c) *Requests for reconsideration by more than one party.* If more than one party timely files a request for reconsideration on the same claim, the QIC will consolidate the separate requests into one proceeding and issue one reconsideration decision.

§ 405.966 Evidence to be submitted with the reconsideration request.

(a) *Evidence submitted with the request.* When filing a request for reconsideration, a party should present evidence and allegations of fact or law related to the issue in dispute and explain why it disagrees with the redetermination decision.

(1) This evidence must include any missing documentation identified in the notice of redetermination, consistent with § 405.956(b)(6).

(2) Absent good cause, failure to submit documentation requested in the notice of the redetermination precludes consideration of that evidence at the subsequent appeal level.

(b) *Evidence submitted after the request.* When a party submits additional evidence after filing the

request for reconsideration, the QIC's 30-day decision-making time frame will automatically be extended for 14 calendar days.

§ 405.968 Conduct of a reconsideration.

(a) *General rule.* A reconsideration consists of an independent, on-the-record review of an initial determination, including the redetermination. In conducting a reconsideration, the QIC will review the evidence and findings upon which the initial determination, including the redetermination, was based, and any additional evidence the parties submit, or the QIC obtains on its own. If the initial determination involves a finding on whether an item or service is reasonable and necessary for the diagnosis or treatment of illness or injury (under section 1862(a)(1)(A) of the Act), a QIC's reconsideration must be based on the clinical experience, and medical, technical, and scientific evidence of record to the extent applicable.

(b) *Authority of the QIC.* (1) National coverage determinations (NCDs) will bind the QIC with respect to issuing reconsiderations.

(2) Local coverage determinations (LCDs) and local medical review policies (LMRPs) will not bind the QIC with respect to issuing reconsiderations.

(3) A QIC must follow LCDs, LMRPs, and CMS program guidance, such as program memoranda and manual instructions unless the appellant questions the policy and provides a reason why the policy should not be followed that the QIC finds persuasive. A QIC's decision must explain why it agrees or disagrees with the appellant's rationale for not following the policy in question.

(c) *Qualifications of the QIC's reviewers.* (1) Members of a QIC's panel who conduct reconsiderations must have sufficient training and expertise in medical science and/or legal matters.

(2) When a redetermination is made with respect to whether an item or service is reasonable and necessary for the diagnosis or treatment of an illness or injury (section 1862(a)(1)(A) of the Act), the QIC designates a panel of physicians or other appropriate health care professionals to consider the facts and circumstances of the redetermination.

(d) *Disqualification of a QIC reviewer.* No physician or health care professional employed by a QIC may review determinations regarding—

(1) Health care services furnished to a patient if the physician or health care professional was directly responsible for furnishing those services; or

(2) Health care services provided in or by an institution, organization, or agency, if the physician or health care professional or any member of the physician's family or health care professional's family has, directly, or indirectly, a significant financial interest in that institution, organization, or agency. Family means the spouse (other than a spouse who is legally separated from the physician or health care professional under a decree of divorce or separate maintenance), children (including stepchildren and legally adopted children), grandchildren, parents, and grandparents of the physician or health care professional.

§ 405.970 Time frame for making a reconsideration decision.

(a) *General rule.* Within 30 calendar days of the date the QIC receives a timely filed request for reconsideration, the QIC will mail to the parties at their last know addresses, or otherwise transmit, written notice of—

(1) The reconsideration decision;

(2) Its inability to complete its review within 30 days in accordance with paragraphs (c) through (e) of this section; or

(3) Dismissal.

(b) *Exceptions.* (1) If a timely request for reconsideration is filed with an entity other than the QIC, then the 30-day decision-making time frame begins on the date the request is received by the QIC.

(2) If a QIC grants an appellant's request for an extension of the 180-day filing deadline made in accordance with § 405.962(b), the QIC's 30-day decision-making time frame begins on the date the QIC receives the request for an extension.

(3) If a QIC receives timely requests from multiple parties for a reconsideration, consistent with § 405.964(c), the QIC must issue a reconsideration decision, dismissal, or notice that it cannot complete its review within 30 days of the latest filed request.

(4) If a party submits additional evidence after the request for reconsideration has been filed, the QIC's 30-day decision-making time frame will be extended for 14 days, consistent with § 405.966(b).

(c) *Responsibilities of the QIC.* (1) Within 30 days of receiving a request for a reconsideration, or any additional time provided for under paragraph (b) of this section, a QIC must take one of the following actions:

(i) Notify all parties of the QIC's reconsideration decision, consistent with § 405.976.

(ii) Notify all parties that it cannot complete the reconsideration within 30 days and offer the appellant the opportunity to escalate the appeal to an ALJ. The QIC continues to process the reconsideration unless it receives a written request from the appellant to escalate the case to an ALJ.

(iii) Notify all parties that it has dismissed the request for reconsideration.

(d) *Responsibilities of the appellant.* If an appellant wishes to exercise the option of escalating the case to an ALJ, the appellant must notify the QIC in writing.

(e) *Actions following appellant's notice.* (1) If the appellant fails to notify the QIC, or notifies the QIC that the appellant does not choose to escalate the case, the QIC completes its reconsideration and notifies the appellant of its action consistent with § 405.976.

(2) If the appellant notifies the QIC that the appellant wishes to escalate the case, the QIC must take one of the following actions within 5 days of receipt of the request:

(i) Complete its reconsideration and notify all parties of its decision consistent with § 405.976.

(ii) Acknowledge the escalation request in writing to all parties and forward the case file to the ALJ.

§ 405.972 Withdrawal or dismissal of a request for a reconsideration.

(a) *Withdrawing a request.* A party that files a request for reconsideration may withdraw its request by filing a written and signed request for withdrawal. The request must be filed with the QIC within 14 calendar days of the filing of the reconsideration request.

(b) *Dismissing a request.* A QIC will dismiss a reconsideration request, either entirely or as to any stated issue, under any of the following circumstances:

(1) When the person or entity requesting a reconsideration is not a proper party under § 405.906 or does not otherwise have a right to a reconsideration under section 1869(b) of the Act;

(2) When the QIC determines that the party fails to make out a valid request for reconsideration that substantially complies with § 405.964(a);

(3) When the party fails to file the reconsideration request within the proper filing time frame in accordance with § 405.970(a);

(4) When the party that filed the request for reconsideration request dies and there is no information in the record to determine whether there is another party that may be prejudiced by the reconsideration;

(5) When the party filing for the reconsideration submits a written request of withdrawal to the QIC; or

(6) When the contractor has not issued a redetermination decision on the claim for which a reconsideration is sought.

(c) *Notice of dismissal.* A contractor will mail or otherwise transmit written notice of the dismissal of the reconsideration request to the parties at their last known addresses.

(d) *Vacating a dismissal.* If good and sufficient cause is established, a QIC may vacate a dismissal of a request for reconsideration within 6 months of the date of the notice of dismissal.

(e) *Effect of dismissal.* The dismissal of a request for reconsideration is binding, unless it is appealed to an ALJ under § 405.1004 or vacated under paragraph (d) of this section.

§ 405.974 Reconsideration decision.

(a) *Reconsideration of a contractor determination.* Upon the basis of the evidence of record, the QIC shall make a decision on the claims and/or issues in dispute and issue a reconsideration decision affirming or reversing, in whole or in part, the initial determination in question.

(b) *Reconsideration of contractor's dismissal of a redetermination request.* (1) A party to a contractor's dismissal of a request for redetermination has a right to have the dismissal reviewed by a QIC, if the party files a written request for review of the dismissal with the QIC within 60 days after receipt of the contractor's notice of dismissal.

(2) If the QIC determines that the contractor's dismissal was in error, it will remand the case to the contractor for a redetermination decision.

(3) A QIC's decision with respect to a contractor's dismissal of a redetermination request is final and not appealable to an ALJ.

§ 405.976 Notice of a reconsideration decision.

(a) *Notification to parties.* Written notice of the reconsideration decision must be mailed or otherwise transmitted to all parties at their last known addresses, in accordance with the time frames established in § 405.970(a). The QIC also must promptly notify the entity responsible for payment of claims under Part A or Part B of its reconsideration decision.

(b) *Content of the notice.* The reconsideration decision must be in writing and contain—

(1) A clear statement indicating whether the reconsideration decision is favorable or unfavorable;

(2) A summary of the facts;

(3) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies, apply to the facts of the case, including the rationale for any conflict with an LCD, LMRP, or CMS program guidance;

(4) In the case of a determination on whether an item or service is reasonable or necessary for the diagnosis or treatment of an illness or injury, an explanation of the medical and scientific rationale for the decision;

(5) A clear statement of the QIC's rationale for its reconsideration decision. If the notice of redetermination indicates that specific documentation be submitted with the reconsideration request, and this documentation was not submitted with the request for reconsideration the statement must—

(i) Indicate how the missing documentation affected the reconsideration decision; and

(ii) Specify that consistent with § 405.956(b)(7), if the documentation requested in the notice of redetermination decision was not submitted with the reconsideration request, this evidence will not be considered at an ALJ hearing, or made part of the administrative record, unless the appellant demonstrates good cause as to why the documentation was not provided with the reconsideration request;

(6) Advice to the parties of their right to an ALJ hearing, including the applicable amount in controversy requirement and aggregation provision;

(7) If appropriate, advice as to the requirements for use of the expedited appeals process set forth in § 405.990;

(8) A description of the procedures that a party must follow in order to obtain an ALJ hearing or an expedited appeal, including the time frames under which a request for an ALJ hearing or expedited appeal must be filed; and

(9) Any other requirements specified by CMS.

§ 405.978 Effect of a reconsideration decision.

A reconsidered determination is final and binding on all parties, unless—

(a) An ALJ decision is issued under either a request for an ALJ hearing made in accordance with § 405.1014 or a request for an expedited appeal under § 405.990; or

(b) The reconsideration decision is revised as a result of a reopening in accordance with § 405.980.

Reopenings

§ 405.980 Reopenings of initial determinations, redeterminations, and reconsiderations, hearings and reviews.

(a) *General rules.* (1) A reopening is a remedial action taken to change a final determination or decision even though the determination or decision may have been correct based on the evidence of record. That action may be taken by—

(i) A contractor to revise the initial determination or redetermination;

(ii) A QIC to revise the reconsideration;

(iii) An ALJ to revise the hearing decision; or

(iv) The MAC to revise the review decision.

(2) A reopening of an initial determination or redetermination may be granted when the following conditions are met:

(i) When good cause is shown as defined in § 405.896; and

(ii) If the time limit to file an appeal has expired; or

(iii) If the issue does not involve a clerical error and appeal rights have been exhausted.

(3) If a contractor issues a denial because it did not receive requested documentation during medical review and the party subsequently requests a redetermination, the contractor must process the request as a reopening.

(4) Notwithstanding paragraph (a)(5) of this section, a contractor must process clerical errors as reopenings, instead of redeterminations as defined in § 405.940. For purposes of this section, ''clerical error'' includes human and mechanical errors on the part of the party or the contractor such as—

(i) Mathematical or computational mistakes; or

(ii) Inaccurate data entry.

(5) When a party has filed a request for an appeal of an initial determination, redetermination, reconsideration, or hearing, the contractor, QIC, or ALJ no longer has jurisdiction over the claim or appeal and may not reopen it.

(6) The contractor's, QIC's, ALJ's, or MAC's decision on whether to reopen is final and not subject to appeal.

(7) A Medicare secondary payer recovery claim based upon a provider's or supplier's failure to demonstrate that it filed a proper claim as defined in part 411 of this chapter is a reopening.

(b) *Time frames and requirements for reopening initial determinations and redeterminations initiated by a contractor.* A contractor may reopen and revise its initial determination or redetermination decision on its own motion—

(1) Within 1 year from the date of the initial determination or redetermination for any reason.

(2) Within 4 years from the date of its initial determination or redetermination for good cause as defined in § 405.986.

(3) Within 5 years from the date of the initial determination or redetermination on the claim if—

(i) The contractor discovers a pattern of billing errors; or

(ii) The contractor identifies an overpayment extrapolated from a statistical sample.

(4) At any time if there exists reliable evidence that an initial determination was procured by fraud or similar fault. For the purposes of this section:

(i) ''Reliable evidence'' means evidence that is relevant, credible, and material.

(ii) ''Similar fault'' means to obtain, retain, convert, seek, or receive Medicare funds to which a person knows or should reasonably be expected to know that he or she or another for whose benefit Medicare funds are obtained, retained, converted, sought, or received is not legally entitled. This includes, but is not limited to, a failure to demonstrate that it filed a proper claim as defined in part 411 of this chapter.

(c) *Time frame and requirements for reopening initial determinations and redeterminations requested by a party.* (1) A party may request that a contractor reopen its initial determination or redetermination within 1 year from the date of the initial determination or redetermination for any reason.

(2) A party may request that a contractor reopen its initial determination or redetermination within 4 years from the date of the initial determination or redetermination for good cause in accordance with § 405.986.

(d) *Time frame and requirements for reopening reconsiderations, hearing decisions and reviews initiated by a QIC, ALJ, or the MAC.* (1) A QIC may reopen its reconsideration decision on its own motion within 180 days from the date of the reconsideration decision for good cause in accordance with § 405.986.

(2) An ALJ may reopen its reconsideration decision on its own motion within 180 days from the date of the reconsideration decision for good cause in accordance with § 405.986.

(3) The MAC may reopen its review decision on its own motion within 180 days from the date of the review decision for good cause in accordance with § 405.986.

(e) *Time frames and requirements for reopening reconsiderations, hearing decisions, and reviews requested by a party.* (1) A party to a reconsideration may request that a QIC reopen its reconsideration within 180 days from the date of the reconsideration decision for good cause in accordance with § 405.986.

(2) A party to a hearing may request that an ALJ reopen its decision within 180 days from the date of the hearing decision for good cause in accordance with § 405.986.

(3) A party to a review may request that the MAC reopen its decision within 180 days from the date of the review decision for good cause in accordance with § 405.986.

§ 405.982 Notice of a revised determination or decision.

When any determination or decision is reopened and revised as provided in § 405.980, the contractor, QIC, ALJ, or the MAC must mail its revised determination or decision to the parties to that determination or decision at their last known address. The revised determination or decision must state the rationale and basis for the revision and any right to appeal.

§ 405.984 Effect of a revised determination or decision.

(a) *Initial determinations.* The revision of an initial determination will be binding upon all parties unless a party files a written request for a redetermination in accordance with § 405.942 through § 405.946.

(b) *Redeterminations.* The revision of a redetermination will be binding upon all parties unless a party files a written request for a QIC reconsideration in accordance with § 405.962 through § 405.966.

(c) *Reconsiderations.* The revision of a reconsideration decision will be binding upon all parties unless a party files a written request for an ALJ hearing in accordance with § 405.1014.

(d) *ALJ Hearing decisions.* The revision of a hearing decision will be binding upon all parties unless a party files a written request for a MAC review and the request is accepted in accordance with § 405.1110.

(e) *MAC review.* The revision of a MAC review will be binding upon all parties unless a party files an action in Federal district court.

(f) *Appeal of only the portion of the determination modified by the reopening.* Only the portion of the initial determination, redetermination, reconsideration, or hearing decision modified by the reopening may be subsequently appealed.

§ 405.986 Good cause for reopening.

(a) *Establishing good cause.* A party, contractor, QIC, ALJ, or MAC must establish good cause for a reopening. Good cause may be established when—

(1) There is new and material evidence that—

(i) Was not available or known at the time of the determination or decision; and

(ii) May result in a different conclusion; or

(2) The evidence that was considered in making the determination or decision clearly shows on its face that an obvious error existed at the time the determination or decision was made.

(b) *Change in substantive law or interpretative policy.* A contractor or QIC will not find good cause to reopen a claim or appeal if the only reason for reopening is a change resulting from a judicial decision, legal interpretation, or administrative ruling upon which the determination or decision was made.

Expedited Appeals Process

§ 405.990 Expedited appeals process.

(a) *Conditions for use of expedited appeals process (EAP).* A party may use the EAP to request court review in place of an ALJ hearing or Medicare Appeals Council (MAC) review if the following conditions are met:

(1) A QIC has made a reconsideration determination; an ALJ has made a hearing decision; or MAC review has been requested, but a final decision of the MAC has not been issued.

(2) The requestor is a party, as defined in paragraph (d) of this section.

(3) The party has filed a request for an ALJ hearing in accordance with § 405.1002, or MAC review in accordance with § 405.1102.

(4) The amount remaining in controversy is $1,000 or more.

(5) If there is more than one party to the reconsideration determination, hearing decision, or MAC review, each party concurs, in writing, with the request for the EAP.

(b) *Content of the request for EAP.* The request for the EAP must—

(1) Allege that there are no material issues of fact in dispute; and

(2) Assert that the only factor precluding a decision favorable to the requestor is a statutory provision that is unconstitutional or a regulation, national coverage determination, or a CMS Ruling that is invalid.

(c) *Place and time for requesting an EAP.* (1) *Method and place for filing request.* The requestor may include an EAP request in his or her request for an ALJ hearing or MAC review, as applicable, or, if an appeal is already

pending with an ALJ or the MAC, file a written EAP request with the hearing or MAC office where the appeal is being considered.

(2) *Time of filing request.* The party may file a request for the EAP—

(i) If the party has requested a hearing, at any time before receipt of the notice of the ALJ's decision; or

(ii) If the party has requested MAC review, at any time before receipt of notice of the MAC's decision.

(d) *Parties to the EAP.* The parties to the EAP are the persons or entities who were parties to the QIC's reconsideration determination and, if applicable, to the ALJ hearing.

(e) *Determination on request for EAP.* (1) For EAP requests initiated at the ALJ level, an ALJ determines whether all conditions of paragraphs (a) and (b) of this section are met.

(2) If a hearing decision has been issued, the MAC determines whether all conditions of paragraphs (a) and (b) of this section are met.

(f) *Certification for the EAP.* If the party meets the requirements for the EAP, the ALJ or the MAC, as appropriate, certifies in writing that—

(1) The facts involved in the claim are not in dispute;

(2) Except as indicated in paragraph (f)(3) of this section, CMS's interpretation of the law is not in dispute;

(3) The sole issue(s) in dispute is the constitutionality of a statutory provision or the validity of a regulation, CMS Ruling, or national coverage determination;

(4) Except for the provision challenged, the right(s) of the requestor is established; and

(5) The decision made by the ALJ or MAC is final for purposes of seeking judicial review.

(g) *Effect of ALJ or MAC certification.* (1) Following the issuance of the certification described in paragraph (f) of this section, the party waives completion of the remaining steps of the administrative appeals process.

(2) The 60-day period for filing a civil suit in a Federal district court begins on the date of receipt of the ALJ or MAC certification.

(h) *Effect of a request for EAP that does not result in certification.* If a request for the EAP does not meet all the conditions for use of the process, the ALJ or MAC so advises the party and treats the request as a request for hearing or MAC review, as appropriate.

§ 405.992 ALJ and MAC deference to policies not subject to the expedited appeals process.

(a) In general, an ALJ or the MAC gives deference to an LCD, LMRP, or CMS program guidance, such as program memoranda and manual instructions.

(b) A party may request that an ALJ or the MAC disregard an LCD, LMRP, or CMS program guidance. The party's request should explain why the policy should not be followed.

(c) The ALJ or MAC may disregard the policy in question if it finds the party's rationale for why the policy should not be followed to be persuasive, finds that the policy has been applied incorrectly, or finds for other reason that the policy is invalid for purposes of the party's appeal.

ALJ Hearings

§ 405.1000 Hearing before an ALJ: General rule.

If a party is dissatisfied with a QIC's reconsideration or if the adjudication period for the QIC to complete its reconsideration has elapsed, the party may request a hearing. A hearing may be conducted in-person, by videoconference, or by telephone. At the hearing the parties may submit new evidence (subject to the restrictions in § 405.1018 and § 405.1028), examine the evidence used in making the determination under review, and present and question witnesses. In some circumstances, a representative of CMS or its contractor, including the QIC, fiscal intermediary or carrier, hereafter in these regulations ''CMS or its contractor,'' may be present. See § 405.1010 and § 405.1012. The ALJ will issue a decision based on the hearing record. If all parties to the hearing waive their right to appear at the hearing in person or by telephone or videoconference, the ALJ will make a decision based on the evidence that is in the file and any new evidence that may have been submitted for consideration. If the ALJ determines that it is necessary to obtain testimony from a non-party, he or she may hold a hearing to obtain that testimony, even if all of the parties have waived the right to appear. In that event, however, the ALJ will notify the parties that he is holding the hearing in their absence.

§ 405.1002 Right to ALJ hearing.

(a) A party to a QIC reconsideration may request a hearing before an ALJ if—

(1) The party files a written request for an ALJ hearing within 60 days after receipt of the notice of the QIC's reconsideration; and

(2) The amount remaining in controversy after the QIC's reconsideration is $100 or more; or

(b) A party who files a timely appeal before a QIC and whose appeal continues to be pending before a QIC at the end of the period described in § 405.970 has a right to a hearing before an ALJ if—

(1) The party files a written request with the QIC to escalate the appeal to the ALJ level after the period described in § 405.970 has expired and the party files the request within the time frame included in § 405.970(d);

(2) The QIC does not issue a final action within 5 days of receiving the request for escalation; and

(3) The amount remaining in controversy after the redetermination was $100 or more.

§ 405.1004 Right to ALJ review of QIC dismissal.

(a) A party to a QIC's dismissal of the request for reconsideration has a right to have the dismissal reviewed by an ALJ if—

(1) The party files a written request for an ALJ review within 60 days after receipt of the notice of the QIC's dismissal; and

(2) The amount in controversy is $100 or more.

(b) If the ALJ determines that the QIC's dismissal was in error, he or she will remand the case to the QIC for a reconsideration determination.

§ 405.1006 Amount in controversy required to request an ALJ hearing and judicial review.

To be entitled to a hearing before an ALJ following a reconsideration by a QIC, the amount remaining in controversy must be $100 or more, and for judicial review, following the ALJ hearing and MAC review, the amount remaining in controversy must be $1,000 or more.

(a) The following rules describe how the amount in controversy is calculated and how individual and multiple appellants may combine claims to meet the minimum amount in controversy needed for an ALJ hearing ($100).

(b) *Calculating the amount in controversy.* (1) The amount in controversy is computed as the actual amount charged the individual for the items and services in question, less any amount for which payment has been made by the initial contractor or ordered by the QIC and less any deductible and coinsurance amounts applicable in the particular case.

(2) Notwithstanding the above, when payment is made for certain excluded services under section 1879 of the Act or § 411.400 of this chapter or the liability of the beneficiary for those services is limited under § 411.402 of this chapter, the amount in controversy is computed as the amount that would have been charged the beneficiary for

the items or services in question, less any deductible and coinsurance amounts applicable in the particular case, had those expenses not been paid under § 411.400 of this chapter or had that liability not been limited under § 411.402 of this chapter.

(c) *Aggregating claims to meet the amount in controversy*—(1) *Appealing QIC reconsideration determinations to the ALJ level.* Two or more claims may be aggregated by either an individual appellant or multiple appellants to meet the amount in controversy for an ALJ hearing if—

(i) The claims have previously been reconsidered by a QIC; and

(ii) The request for ALJ hearing lists all of the claims to be aggregated and is filed within 60 days after receipt of all of the reconsideration determinations being appealed; and

(iii) The ALJ determines that the claims the appellant(s) seeks to aggregate involve the delivery of similar or related services or common issues of law and fact. An appellant may combine Part A and Part B claims together to meet the amount in controversy requirements.

(2) *Aggregating claims that are escalated from the QIC level to the ALJ level.* Two or more claims may be aggregated by either an individual appellant or multiple appellants to meet the amount in controversy for an ALJ hearing if—

(i) The claims were pending before the QIC in conjunction with the same request for reconsideration; and

(ii) The appellant requests aggregation of the claims to the ALJ level in the same request for escalation; and

(iii) The ALJ determines that the claims the appellant(s) seeks to aggregate involve the delivery of similar or related services or common issues of law and fact. Part A and Part B claims may be combined together to meet the amount in controversy requirements.

(d) *Definitions.* For the purposes of aggregating claims to meet the amount in controversy for an ALJ hearing:

(1) ''Common issues of law and fact'' means that claims sought to be aggregated are denied or reduced for similar reasons and arise from a similar fact pattern material to the reason the claims are denied.

(2) ''Delivery of similar or related services'' means like or coordinated services or items provided to one or more beneficiaries.

(e) *Content of request for aggregation.* When an appellant(s) seeks to aggregate claims in a request for an ALJ hearing, the appellant must—

(1) Specify all of the claims the appellant(s) seeks to aggregate; and

(2) State why the appellant(s) believe that the claims involve common issues of law and fact or delivery of similar or related services.

§ 405.1008 Parties to an ALJ hearing.

(a) *Who may request a hearing.* Any party to the QIC's reconsideration may request a hearing before an ALJ. However, only the appellant (that is, the party that filed the request for reconsideration by a QIC) may request that the appeal be escalated to the ALJ level if the QIC does not complete its action within the deadline described in § 405.970.

(b) *Who are parties to the ALJ hearing.* The party who filed the request for hearing and all other parties to the QIC's reconsideration determination are parties to the ALJ hearing. In addition, a representative of CMS or its contractor may be made a party under the circumstances described in § 405.1012.

§ 405.1010 When CMS or its contractors may participate in an ALJ hearing.

An ALJ may request, but may not require, CMS or one of its contractors, to participate in any proceedings before the ALJ, including the oral hearing, if any. CMS and its contractors, including a QIC, may also elect to participate in the hearing process. Participation may include filing position papers or providing testimony to clarify factual or policy issues in a case, but does not include calling witnesses or cross-examining the witnesses of a party to the hearing.

§ 405.1012 When CMS or its contractors may be a party to a hearing.

CMS or its contractors, including a QIC, may be a party to an ALJ hearing unless the request for hearing is filed by an unrepresented beneficiary. CMS or the contractor will advise the ALJ that it intends to participate as a party no later than 10 days after receiving the notice of hearing. When CMS or its contractor participates in a hearing as a party, it may file position papers, provide testimony to clarify factual or policy issues, call witnesses or cross-examine the witnesses of other parties. CMS and the contractor, when acting as parties, may also submit additional evidence to the ALJ. The ALJ may not require CMS or a contractor to enter a case as a party.

§ 405.1014 Request for an ALJ hearing.

(a) *Content of the request.* The request for a hearing must be made in writing. The request should include all of the following—

(1) The name, address, and health insurance claim number of the beneficiary whose claim is being appealed;

(2) The name and address of the appellant, when the appellant is not the beneficiary.

(3) The name and address of any designated representative.

(4) The document control number assigned to the appeal by the QIC, if any.

(5) The dates of service.

(6) The reasons the appellant disagrees with the QIC's reconsideration or other determination being appealed.

(7) A statement of any additional evidence to be submitted and the date it will be submitted.

(b) *When and where to file.* The request for an ALJ hearing after a QIC reconsideration must be filed—

(1) Within 60 days from the date the party receives notice of the QIC's reconsideration;

(2) With the hearing office, the QIC that issued the reconsideration, CMS, or a local Social Security office. If the request for hearing is timely filed with the QIC, CMS or a Social Security office rather than the hearing office, the 90-day deadline for deciding the appeal begins on the date the request for hearing is received by the hearing office.

(c) *Filing request for escalation.* If an appellant files a request to escalate an appeal to the ALJ level because the QIC has not completed its action within the deadline described in § 405.970, the request for escalation must be filed with both the QIC and the hearing office. A case escalated from the QIC to the ALJ level is not subject to the 90-day adjudication deadline.

(d) *Extension of time to request a hearing.* If the request for hearing is not filed within 60 days of receipt of the QIC's reconsideration determination, an appellant may request an extension. The request for an extension of time must be in writing, and it must give the reasons why the request for a hearing was not filed within the stated time period. If a request for hearing is not timely filed, the 90-day adjudication period does not begin until the hearing office receives this explanation in addition to the request for hearing.

§ 405.1016 Requirement to decide appeal in 90 days.

(a) When a request for an ALJ hearing is filed after a QIC has issued a reconsideration, the ALJ must issue a decision, dismissal order, or remand to the QIC, as appropriate, no later than the end of the 90-day period beginning on the date the request for hearing has been timely filed, unless the 90-day period has been extended as provided in this subpart.

(b) The 90-day adjudication period begins on the date that a timely filed request for hearing is received by the hearing office, or, if it is not timely filed, the date that the hearing office receives a written explanation from the appellant that the ALJ accepts as a good reason for the late filing. If the written explanation is received by the hearing office after the request for hearing is received, the 90-day adjudication period begins when the written explanation is received. *See* § 405.942(b)(2).

(c) The 90-day adjudication period does not apply when an appellant requests escalation of an appeal to the ALJ level because the QIC has not issued a reconsideration determination within the period specified in § 405.970.

§ 405.1018 Submitting evidence before the ALJ hearing.

Parties must submit with the request for hearing (or within 10 days of receiving the notice of hearing) all written evidence they wish to have considered at the hearing. If an appellant submits written evidence later than 10 days after receiving the notice of hearing, the period between the time the evidence was required to have been submitted and the time received will not be counted toward the 90-day adjudication deadline. Any submission of new evidence that was not considered by the QIC during its reconsideration must be accompanied by a statement explaining why the evidence was not previously submitted to the QIC. The above requirements do not apply to oral testimony given at a hearing, including expert testimony.

§ 405.1020 Time and place for a hearing before an ALJ.

(a) The ALJ sets the time and place for the hearing, and may change the time and place, if necessary. The ALJ will send a notice of hearing to all parties and the QIC that issued the reconsideration determination advising them of the proposed time and place of the hearing. The notice of hearing will require all parties to the ALJ hearing to reply to the notice as follows:

(1) Acknowledge that the party will attend the hearing at the time and place proposed in the notice of hearing; or

(2) Object to the proposed time and place of the hearing. The party must state the reason for the objection and state the time and place he or she wants the hearing to be held. If at all possible, the request should be in writing. The ALJ will change the time or place of the hearing if the party has good cause, as determined under paragraphs (b) and (c) of this section (section 405.1052(a)(2) provides procedures the ALJ will follow when a party does not respond to a notice of hearing); or

(3) Waive the right to an oral hearing and request that the ALJ issue a decision based on the written evidence in the record. As provided in § 405.1000, if the ALJ determines that it is necessary to obtain testimony from a non-party, he or she may still hold a hearing to obtain that testimony, even if all of the parties have waived the right to appear. In those cases, the ALJ will give the parties the opportunity to appear when the testimony is given but may hold the hearing even if none of the parties decide to appear.

(b) The ALJ will find good cause for changing the time or place of the scheduled hearing and will reschedule the hearing if the information available to the ALJ supports the party's contention that—

(1) The party or his or her representative is unable to attend or to travel to the scheduled hearing because of a serious physical or mental condition, incapacitating injury, or death in the family; or

(2) Severe weather conditions make it impossible to travel to the hearing.

(c) In determining whether good cause exists in circumstances other than those set out in paragraph (b) of this section, the ALJ will consider the party's reason for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on the processing of other scheduled hearings, delays that might occur in rescheduling the hearing, and whether any prior changes were granted the party. Examples of such other circumstances, which a party might give for requesting a change in the time or place of the hearing, include, but are not limited to, the following:

(1) The party has attempted to obtain a representative but needs additional time.

(2) The party's representative was appointed within 10 days of the scheduled hearing and needs additional time to prepare for the hearing.

(3) The party's representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing.

(4) A witness who will testify to facts material to a party's case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained.

(5) Transportation is not readily available for a party to travel to the hearing.

(6) The appellant lives or has his or her principal place of business closer to another hearing site.

(7) The party is unrepresented, and is unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) that he or she has.

(d) *Effect of rescheduling hearing.* If a hearing is postponed at the request of the appellant for any of the above reasons, the time between the originally scheduled hearing date and the new hearing date will not be counted toward the 90-day adjudication deadline.

§ 405.1022 Notice of a hearing before an ALJ.

After the ALJ sets the time and place of the hearing, notice of the hearing will be mailed to the parties at their last known addresses, or given by personal service, unless the parties have indicated in writing that they do not wish to receive this notice. The notice will be mailed or served at least 20 days before the hearing. The notice of hearing will contain a statement of the specific issues to be decided and tell the parties that they may designate a person to represent them during the proceedings. The notice will also contain an explanation of the procedures for requesting a change in the time or place of the hearing, a reminder that if the appellant fails to appear at the scheduled hearing without good cause the ALJ may dismiss the hearing request, and other information about the scheduling and conduct of the hearing. If a party or his or her representative does not acknowledge receipt of the notice of hearing, the hearing office will attempt to contact the party for an explanation. If the party states that he or she did not receive the notice of hearing, an amended notice will be sent to him or her by certified mail or e-mail, if available. See § 405.1020 and § 405.1052 for the procedures we will follow in deciding whether the time or place of a scheduled hearing will be changed if a party does not respond to the notice of hearing.

§ 405.1024 Objections to the issues.

If a party objects to the issues described in the notice of hearing, he or she must notify the ALJ in writing at the earliest possible opportunity before the time set for the hearing, and no later than 5 days before the hearing. The party must state the reasons for his or her objections and send a copy of the objections to all other parties to the appeal. The ALJ will make a decision on the objections either in writing or at the hearing.

§ 405.1026 Disqualification of the ALJ.

An ALJ will not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. If a party objects to the ALJ who will conduct the hearing, the party must notify the ALJ within 10 days of the notice of hearing. The ALJ will consider the party's objections and will decide whether to proceed with the hearing or withdraw. If he or she withdraws, another ALJ will be appointed to conduct the hearing. If the ALJ does not withdraw, the party may, after the ALJ has issued an action in the case, present his or her objections to the MAC. The MAC will then consider whether the hearing decision should be revised or a new hearing held before another ALJ. If the case is escalated to the MAC after a hearing is held but before the ALJ issues a decision, the MAC will consider the reasons the party objected to the ALJ during its review of the case and, if the MAC deems it necessary, may remand the case to another ALJ for a hearing and decision.

§ 405.1028 Prehearing case review of evidence submitted to the ALJ by the appellant.

After a hearing is requested but before it is held, the ALJ will examine any new evidence submitted with the request for hearing according to § 405.1018 to determine whether the appellant had good cause for submitting the evidence for the first time at the ALJ level. If the ALJ determines that there was not good cause for submitting the evidence first at the ALJ level, and the evidence is of such probative value that it may have a material outcome on the case, the ALJ will remand the case to the QIC for a revised reconsideration. If the revised reconsideration issued on remand is not fully favorable to all parties, any party to that determination may file a new request for an ALJ hearing.

§ 405.1030 ALJ hearing procedures—General.

A hearing is open to the parties and to other persons the ALJ considers necessary and proper. At the hearing, the ALJ looks fully into the issues, questions the parties and other witnesses, and may accept documents that are material to the issues, if the ALJ determines that the party has shown good cause for not submitting the evidence within the period specified in § 405.1018 and § 405.1028. The ALJ may also stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. If the missing material is in the possession of the appellant, the ALJ will determine whether the appellant had good cause for not producing the evidence earlier. If good cause exists, the ALJ will consider the evidence in deciding the case and the 90-day adjudication period will be tolled from the date of the hearing to the date the evidence is submitted. If the ALJ determines that there was not good cause for submitting the evidence sooner, he may remand the case to the QIC, as provided in § 405.1034. The ALJ may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The ALJ may decide when the evidence will be presented and when the issues will be discussed.

§ 405.1032 Issues before an ALJ.

(a) *General.* The issues before the ALJ include all the issues brought out in the initial determination, redetermination, or reconsideration that were not decided entirely in a party's favor. (For purposes of this section, the term ''party'' does not include a representative of CMS or the QIC who may be participating in the hearing.) However, if evidence presented before the hearing causes the ALJ to question a favorable portion of the determination, he or she will notify the parties before the hearing and may consider it an issue at the hearing.

(b) *New issues*—(1) *General.* The ALJ may consider a new issue at the hearing if he or she notifies all of the parties about the new issue any time between receiving the hearing request and issuing the notice of hearing. The ALJ or any party may raise a new issue; however, the ALJ may only consider a new issue if its resolution—

(i) Will have a material impact on the claim or claims that are the subject of the request for hearing; and

(ii) Is permissible under the rules governing reopening of determinations and decisions.

(2) *Notice of a new issue.* The ALJ will notify all of the parties in the notice of hearing if he or she intends to consider a new issue.

§ 405.1034 When ALJ will remand to the QIC.

(a) The ALJ will remand a case to the QIC that issued the reconsideration in the following circumstances:

(1) The appellant submits new evidence to the ALJ that was not provided to either the contractor or the QIC during their consideration of the appeal, and the appellant does not provide a good reason for first submitting the evidence at the ALJ level. An ALJ will find good cause when the appellant submits new evidence at the ALJ level, the evidence relates to an issue that was the basis for the QIC's unfavorable reconsideration and that issue was not identified as a material issue before the QIC's determination, and the ALJ finds that the appellant had a good reason for submitting the evidence for the first time at the ALJ level, the ALJ will decide the appeal.

(2) The appellant submits new evidence to the ALJ that was not provided to either the contractor or the QIC during its consideration of the appeal, and the appellant acknowledges that he or she does not have a good reason for first submitting the evidence at the ALJ level. In this instance, the appellant may request the ALJ to remand the case to the QIC for further proceedings so that the new evidence may be considered.

(b) An ALJ may also remand a case to the QIC if the written record of the proceedings before the initial contractor or the QIC does not contain information that is essential to resolving the issues on appeal and is information that can only be provided by CMS or its contractors. Examples of that information include claim payment histories or information from the common working file concerning such issues as the number of days remaining in a benefit period.

§ 405.1036 Description of ALJ hearing process.

(a) *The right to appear and present evidence.* Any party to a hearing has the right to appear before the ALJ, either personally or by means of a designated representative, to present evidence and to state his or her position.

(b) *Waiver of the right to appear.* A party may send the ALJ a waiver or a written statement indicating that he or she does not wish to appear at the hearing. The appellant may subsequently withdraw the waiver at any time before the notice of the hearing decision is issued, provided that the appellant agrees to an extension of the 90-day adjudication period that may be necessary to schedule and hold the hearing. Other parties may withdraw the waiver up to the date of the scheduled hearing, if any. Even if all of the parties waive their right to appear at a hearing, the ALJ may require them to attend an oral hearing, if he or she believes that a personal appearance and testimony by the appellant or any other party is necessary to decide the case.

(c) *Presenting written statements and oral arguments.* A party or a person designated to act as a party's representative may appear before the ALJ to state the party's case, to present a written summary of the case, or to

enter written statements about the facts and law material to the case in the record. A copy of any written statements should be provided to the other parties to hearing, if any, at the same time they are submitted to the ALJ.

(d) *Waiver of 90-day adjudication period.* At any time during the hearing process, the appellant may waive the 90-day adjudication deadline for issuing a hearing decision.

(e) *What evidence is admissible at a hearing.* The ALJ may receive evidence at the hearing even though the evidence would not be admissible in court under the rules of evidence used by the court.

(f) *Subpoenas.* (1) When it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the ALJ within 10 days of the notice of hearing. The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) The hearing office will pay the cost of issuing the subpoena.

(4) The hearing office will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

(g) *Witnesses at a hearing.* Witnesses may appear at a hearing. They will testify under oath or affirmation, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation. The ALJ may ask the witnesses any questions material to the issues and will allow the parties or their designated representatives to do so.

§ 405.1038 Deciding a case without an oral hearing before an ALJ.

(a) *Decision wholly favorable.* If the evidence in the hearing record supports a finding in favor of all the parties on every issue, and neither the QIC nor CMS has given notice of its intention to participate in the hearing, the ALJ may issue a hearing decision without giving the parties prior notice and without holding an oral hearing. However, the notice of the decision will inform the parties that they have the right to an oral hearing and a right to examine the evidence on which the decision is based.

(b) *Parties do not wish to appear in-person.* (1) The ALJ may decide a case on the record and not conduct an oral hearing if—

(i) All the parties indicate in writing that they do not wish to appear before the ALJ at an oral hearing, including a hearing conducted by telephone or videoconferencing, if available; or

(ii) The appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear.

(2) When an oral hearing is not held, the ALJ will make a record of the evidence. The record will include the claims, written statements, certificates, reports, affidavits, and other documents that were used in making the determination under review and any additional evidence the parties to the hearing present in writing. The decision of the ALJ must be based on this record.

§ 405.1040 Prehearing and posthearing conferences.

The ALJ may decide on his or her own, or at the request of any party to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision. The ALJ will tell the parties of the time, place, and purpose of the conference at least 7 days before the conference date, unless the parties have indicated in writing that they do not wish to receive a written notice of the conference. At the conference, the ALJ may consider matters in addition to those stated in the notice of hearing, if the parties consent in writing. A record of the conference will be made. The ALJ will issue an order stating all agreements and actions resulting from the conference. If the parties do not object, the agreements and actions become part of the hearing record and are binding on all parties.

§ 405.1042 When a record of a hearing before an ALJ is made.

The ALJ will make a complete record of the hearing proceedings. The tape, other recording, or written transcript, as applicable, will be maintained in the case file, and forwarded with the file to the MAC if a request for MAC review is filed or the case is escalated from the ALJ level to the MAC. The record of the hearing will be prepared as a typed copy of the proceedings if a party seeks judicial review of the case in a Federal district court within the stated time period and all other jurisdictional criteria are met, unless the Secretary requests the court to remand the case.

§ 405.1044 Consolidated hearing before an ALJ.

(a) A consolidated hearing may be held if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ. It is within the discretion of the ALJ to grant or deny an appellant's request for consolidation. In considering an appellant's request, the ALJ may consider such factors as whether the claims at issue may be more efficiently decided if the requests for hearing are combined. In considering the appellant's request for consolidation, the ALJ will take into account the adjudication deadlines for each case and may require an appellant to waive the 90-day adjudication deadline if consolidation would otherwise prevent the ALJ from deciding all of the appeals at issue within their respective deadlines.

(b) The ALJ may also propose on his or her own motion to consolidate two or more cases in one hearing for administrative efficiency, but may not require an appellant to waive the 90-day adjudication deadline for any of the consolidated cases.

(c) Before consolidating a hearing, the ALJ must notify CMS of his or her intention to do so, and CMS may then elect to participate in the consolidated hearing, as a party, by sending written notice to the ALJ within 10 days after receipt of the ALJ's notice.

(d) If the ALJ decides to hold a consolidated hearing, he or she may make either a consolidated decision and record or a separate decision and record on each claim. The ALJ will ensure that any evidence that is common to all claims and material to the common issue to be decided is included in the consolidated record or each individual record, as applicable.

§ 405.1046 The decision of an ALJ.

(a) *General rule.* The ALJ will issue a written decision that gives the findings of fact, conclusions of law, and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise included in the record. The ALJ will mail a copy of the decision to all the parties at their last known address and to the QIC that issued the reconsideration determination.

(b) *Timing of decision.* The ALJ will issue a decision by the end of the 90-day period beginning on the date when the request for hearing is received in the hearing office, unless the 90-day period

has been extended as provided in this subpart.

(c) *Recommended decision.* An ALJ will issue a recommended decision if he or she is directed to do so in the MAC's remand order. An ALJ may not issue a recommended decision on his or her own motion. The ALJ will mail a copy of the recommended decision to all the parties at their last known address.

§ 405.1048 The effect of an ALJ's decision.

The decision of the ALJ is binding on all parties to the hearing unless—

(a) A party to the hearing requests a review of the decision by the MAC within the stated time period and the MAC either issues a final action in response to the request for review or the appeal is escalated to Federal district court under the provisions at § 405.1132;

(b) The decision is revised by an ALJ or the MAC under the procedures explained in § 405.980;

(c) The expedited appeals process is used;

(d) The ALJ's decision is a recommended decision directed to the MAC; or

(e) In a case remanded by a Federal court, the MAC assumes jurisdiction under the procedures § 405.1138.

§ 405.1050 Removal of a hearing request from an ALJ to the MAC.

If a request for hearing is pending before an ALJ, the MAC may assume responsibility for holding a hearing by requesting that the ALJ send the hearing request to it. If the MAC holds a hearing, it will conduct the hearing according to the rules for hearings before an ALJ. Notice will be mailed to all parties at their last known address informing them that the MAC has assumed responsibility for the case.

§ 405.1052 Dismissal of a request for a hearing before an ALJ.

Dismissal of request for hearings will be in accordance with the following:

(a) An ALJ will dismiss a request for a hearing under any of the following conditions:

(1) At any time before notice of the hearing decision is mailed, the party that requested the hearing asks to withdraw the request. This request may be submitted in writing to the ALJ or made orally at the hearing. The request for withdrawal must contain a clear statement that the appellant is withdrawing the request for hearing and does not intend to further proceed with the appeal. If the request for withdrawal is filed by an attorney, or other legal professional on behalf of a beneficiary or other appellant, the ALJ may presume that the representative has advised the appellant of the consequences of the withdrawal and dismissal.

(2) Neither the party that requested the hearing nor the party's representative appears at the time and place set for the hearing, if—

(i) The party was notified before the time set for the hearing that the request for hearing might be dismissed without further notice;

(ii) The party did not appear at the time and place of hearing and does not thereafter contact the hearing office and provide a good reason for not appearing;

(iii) The ALJ sends a notice to the party asking why the party did not appear; and

(iv) The party does not respond to the ALJ's notice within 10 days or does not give a good reason for the failure to appear. In determining good cause, the ALJ will consider any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language), which the party may have.

(3) The person or entity requesting a hearing has no right to it under § 405.1002.

(4) The party did not request a hearing within the stated time period and has not provided a good reason for extending the time for requesting a hearing, as provided in § 405.942(b)(2).

(5) The beneficiary whose claim is being appealed died either before the request for hearing was filed or while the request for hearing is pending and both of the following criteria apply:

(i) The request for hearing was filed by the beneficiary or the beneficiary's representative, and the beneficiary's surviving spouse or estate has no remaining financial interest in the case. In deciding this issue, the ALJ will consider whether the surviving spouse or estate remains liable for the services that were denied or a Medicare contractor held the beneficiary liable for subsequent similar services under the limitation of liability provisions based on the denial of the services at issue.

(ii) No other parties to the QIC reconsideration determination participated in the proceedings before the QIC. For purposes of applying this provision, participation means that the party either filed the request for QIC reconsideration or submitted evidence or comments to the QIC during its consideration of the case.

(6) The ALJ decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because the doctrine of *res judicata* applies in that a Medicare contractor, a QIC, an ALJ or the MAC has made a previous determination or decision under this subpart about the appellant's rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action.

(7) The appellant abandons the request for hearing. An ALJ may conclude that an appellant has abandoned a request for hearing when the hearing office attempts to schedule a hearing and is unable to locate the appellant after making reasonable efforts to do so.

(b) *Notice of dismissal.* The ALJ will mail a written notice of the dismissal of the hearing request to all parties at their last known address. The notice will state that there is a right to request that the MAC vacate the dismissal action.

§ 405.1054 Effect of dismissal of a request for a hearing before an ALJ.

The dismissal of a request for a hearing is binding, unless it is vacated by the MAC.

Medicare Appeals Council Review

§ 405.1100 Medicare Appeals Council review: General.

The party who requested an ALJ hearing (the appellant) or any other party to the hearing may request that the Medicare Appeals Council (MAC) review an ALJ's decision or dismissal. Under certain circumstances, the appellant may request that a case be escalated to the MAC for a decision even if the ALJ has not issued a decision or dismissal in his or her case. The MAC reviews an ALJ's decision *de novo.* When reviewing an ALJ's decision, the MAC issues a final action or remands a case to the ALJ within 90 days of receipt of the appellant's request for review, unless the 90-day period has been extended as provided in this subpart.

§ 405.1102 Request for MAC review when ALJ issues decision.

(a) A party to the ALJ hearing may request a MAC review if the party files a written request for a MAC review within 60 days after receipt of the ALJ's decision or dismissal. A party requesting a review may ask that the time for filing a request for MAC review be extended if—

(1) The request for an extension of time is in writing;

(2) It is filed with the MAC; and

(3) It explains why the request for review was not filed within the stated time period. If the appellant shows that he or she had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, the MAC uses the standards explained in § 405.942(b)(2).

(b) A party does not have the right to seek MAC review of an ALJ's remand to a QIC.

(c) For purposes of requesting MAC review (§ 405.1102 through § 405.1138), unless specifically excepted, the term, ''party,'' includes CMS where CMS has entered into a case as a party according to § 405.1012. The term, ''appellant,'' does not include CMS, where CMS has entered into a case as a party according to § 405.1012.

§ 405.1104 Request for MAC review when an ALJ does not issue a decision timely.

An appellant who files a timely request for hearing before an ALJ and whose appeal continues to be pending before the ALJ at the end of the 90-day adjudication period described in § 405.1016 may request a MAC review if—

(a) The appellant files a written request with the ALJ and the MAC to escalate the appeal to the MAC after the 90-day adjudication period has expired; and

(b) The ALJ does not issue a final action or remand the case to the QIC within 5 days of receiving the request for escalation.

§ 405.1106 Where a request for review or escalation may be filed.

(a) When a request for a MAC review is filed after an ALJ has issued a decision or dismissal, the request for review may be filed with the MAC, the hearing office that issued the ALJ's decision or dismissal or a Social Security office. If the request for hearing is timely filed with the hearing office or a Social Security office rather than the MAC, the MAC's 90-day period to conduct a review begins on the date the request for review is received by the MAC.

(b) If an appellant files a request to escalate an appeal to the MAC level because the ALJ has not completed his or her action on the request for hearing within the 90-day adjudication deadline, the request for escalation must be filed with both the ALJ and the MAC. Appeals that are escalated from the ALJ level to the MAC are not subject to the 90-day MAC adjudication deadline.

§ 405.1108 MAC actions when request for review or escalation is filed.

(a) When a party requests that the MAC review an ALJ's decision, the MAC will review the ALJ's decision *de novo.* The party requesting review does not have a right to a hearing before the MAC. The MAC will consider all of the evidence in the administrative record. Upon completion of its review, the MAC may adopt, modify, or reverse the ALJ's decision or remand the case to an ALJ for further proceedings.

(b) When a party requests that the MAC review an ALJ's dismissal, the MAC may deny review or remand the case to the ALJ for further proceedings.

(c) The MAC will dismiss a request for review when the party requesting review does not have a right to a review by the MAC or dismiss the request for an ALJ hearing for any reason that the ALJ could have dismissed the request for hearing.

(d) When an appellant requests escalation of a case from the ALJ level to the MAC, the MAC may take any of the following actions:

(1) Issue a decision based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ before the case was escalated.

(2) Conduct any additional proceedings, including a hearing, that the MAC determines are necessary to issue a decision.

(3) Remand the case to an ALJ for further proceedings, including a hearing.

(4) Dismiss the request for MAC review because the appellant does not have the right to escalate the appeal.

(5) Dismiss the request for ALJ hearing for any reason that the ALJ could have dismissed the request.

§ 405.1110 MAC reviews on its own motion.

(a) *General rule.* The MAC may decide on its own motion to review a decision or dismissal issued by an ALJ. CMS or its contractors may refer a case to the MAC for it to consider reviewing under this authority anytime within 60 days after the date of an ALJ's decision or dismissal.

(b) *Referral of cases.* (1) CMS or its contractors (hereafter: CMS) may refer a case to the MAC if, in their view, the decision or dismissal contains an error of law material to the outcome of the claim or presents a broad policy or procedural issue that may affect the public interest. CMS may also request that the MAC take own motion review of a case if—

(i) CMS or its contractor participated in the appeal at the ALJ level; and

(ii) In its view, the ALJ's decision or dismissal is not supported by the preponderance of evidence in the record or the ALJ abused his or her discretion.

(2) CMS's referral to the MAC will be made in writing and must be filed with the MAC no later than 60 days after the ALJ's decision or dismissal is issued. The written referral will state the reasons why CMS believes that the MAC should review the case on its own motion. CMS will send a copy of its referral to all parties to the ALJ action and to the ALJ. Parties to the ALJ's action may file exceptions to the referral by submitting written comments to the MAC within 20 days of the referral notice. Copies of any comments submitted to the MAC must be sent to CMS and all other parties to the ALJ's decision.

(c) *Standard of review*—(1) *Referral by CMS after participation at ALJ level.* If CMS or its contractor participated in an appeal at the ALJ level, the MAC will exercise its own motion authority if there is an error of law material to the outcome of the case, an abuse of discretion by the ALJ, the decision is not consistent with the preponderance of the evidence of record, or there is a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review under this standard, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS.

(2) *Referral by CMS when CMS did not participate in the ALJ proceedings or appear as a party.* The MAC will accept review if the decision or dismissal contains an error of law material to the outcome of the case or presents a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS.

(d) *MAC's action.* If the MAC decides to review a decision or dismissal on its own motion, it will mail the results of its action to all the parties to the hearing and to CMS. The MAC may adopt, modify, or reverse the decision or dismissal or may remand the case to an ALJ for further proceedings. The MAC must issue its action no later than 90 days after receipt of the CMS referral, unless the 90-day period has been extended as provided in this subpart. The MAC may not, however, issue its action before the 20-day comment period has expired, unless it determines that the agency's referral does not provide a basis for reviewing the case. If the MAC does not act within the 90-day deadline, the ALJ's decision or dismissal remains the final action in the case.

§ 405.1112 Content of request for review.

(a) The request for review should identify the parts of the ALJ action with which the party requesting review disagrees and explain why he or she believes that the ALJ's findings and conclusions are wrong. For example, if the party requesting review believes that the ALJ's action is inconsistent with a

statute, regulation, ruling, or other authority, the request for review should explain why the appellant believes the action is inconsistent with that authority.

(b) The MAC will limit its review of an ALJ's actions to those exceptions raised by the party in the request for review, unless the appellant is an unrepresented beneficiary. For purposes of this section only, we define a representative as anyone who has accepted an appointment as the beneficiary's representative, except a member of the beneficiary's family, a legal guardian, or an individual who routinely acts on behalf of the beneficiary, such as a family member or friend who has a power of attorney.

§ 405.1114 Dismissal of request for review.

The MAC will dismiss a request for review if the party requesting review did not file the request within the stated period of time and the time for filing has not been extended. The MAC will also dismiss the request for review if—

(a) The party asks to withdraw the request for review;

(b) The party does not have a right to request MAC review; or

(c) The beneficiary whose claim is being appealed died either before the request for review was filed or while the request for review is pending and both of the following criteria apply:

(1) The request for review was filed by the beneficiary or the beneficiary's representative, and the beneficiary's surviving spouse or estate has no remaining financial interest in the case, and, in considering this issue, the MAC will consider whether the surviving spouse or estate remains liable for the services that were denied or a Medicare contractor held the beneficiary liable for subsequent similar services under the limitation of liability provisions based on the denial of the services at issue.

(2) No other parties to the ALJ decision participated in the proceedings before the ALJ. For purposes of applying this provision, participation means that the party either filed the request for an ALJ hearing, submitted evidence or written statements to the ALJ, or appeared at the hearing.

§ 405.1116 Effect of dismissal of request for MAC review or request for hearing.

The dismissal of a request for MAC review or denial of a request for review of a dismissal issued by an ALJ is binding and not subject to further review. The dismissal of a request for hearing by the MAC is also binding and not subject to judicial review.

§ 405.1118 Obtaining evidence from MAC.

A party may request and receive copies or a statement of the documents or other written evidence upon which the hearing decision or dismissal was based and a copy of the transcript of oral evidence. However, the party will be asked to pay the costs of providing these copies unless there is a good reason they should not pay. If a party requests evidence from the MAC and an opportunity to comment on that evidence, the time beginning with the MAC's receipt of the request for evidence through the expiration of the comment period will not count toward the 90-day adjudication deadline.

§ 405.1120 Filing briefs with the MAC.

Upon request, the MAC will give the party requesting review, as well as all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. Any party who submits a brief or statement must send a copy to each of the other parties. Unless the party requesting review files the brief or other statement with the request for review, the time beginning with the receipt of the request to submit the brief and ending with the date the brief is received by the MAC will not count toward the 90-day adjudication deadline. The MAC may also request, but not require, CMS or its contractor to file a brief or position paper if the MAC determines that it is necessary to resolve the issues in the case.

§ 405.1122 What evidence may be submitted to the MAC.

(a) *Appeal before the MAC on request for review of ALJ's decision.* (1) If the MAC is reviewing an ALJ's decision, the MAC will limit its review of the evidence to the evidence contained in the record of the proceedings before the ALJ. However, if the hearing decision decides a new issue that the parties were not afforded an opportunity to address at the ALJ level, the MAC will consider any evidence related to that issue that is submitted with the request for review.

(2) If the MAC determines that additional evidence is needed to resolve the issues in the case and the hearing record indicates that the parties or previous decision-makers have not attempted to obtain the evidence, the MAC may remand the case to an ALJ to obtain the evidence and issue a new decision.

(b) *Appeal before MAC as a result of appellant's request for escalation.* (1) If the MAC is reviewing a case that has been escalated from the ALJ level to the MAC, the MAC will decide the case based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ before the case was escalated.

(2) If the MAC receives additional evidence with the request for escalation that is material to the question to be decided, or determines that additional evidence is needed to resolve the issues in the case, and the record provided to the MAC indicates that the parties or previous decision-makers did not attempt to obtain the evidence before escalation, the MAC may remand the case to an ALJ to consider or obtain the evidence and issue a new decision.

§ 405.1124 Oral argument.

A party may request to appear before the MAC to present oral argument. The MAC will grant a request for oral argument if it decides that the case raises an important question of law, policy, or fact that cannot be readily decided based on written submissions alone. In addition, the MAC may decide on its own that oral argument is necessary to decide the issues in the case. If the MAC decides to hear oral argument, it will tell the parties of the time and place of the oral argument at least 10 days before the scheduled date. The MAC may also request, but not require, CMS or its contractor to appear before it if the MAC determines that it would be helpful in resolving the issues in the case.

§ 405.1126 Case remanded by the MAC.

(a) *When the MAC may remand a case.* The MAC may remand a case in which additional evidence is needed or additional action by the ALJ is required. The MAC will designate in its remand order whether the ALJ will issue a final decision or a recommended decision on remand.

(b) *Action by ALJ on remand.* The ALJ will take any action that is ordered by the MAC and may take any additional action that is not inconsistent with the MAC's remand order.

(c) *Notice when case is returned with a recommended decision.* When the ALJ sends a case to the MAC with a recommended decision, a notice is mailed to the parties at their last known address. The notice tells them that the case has been sent to the MAC, explains the rules for filing briefs or other written statements with the MAC, and includes a copy of the recommended decision.

(d) *Filing briefs with the MAC when ALJ issues recommended decision.* (1) Any party to the recommended decision may file briefs or other written statements about the facts and law relevant to the case with the MAC

within 20 days of the date that the recommended decision is mailed. Any party may ask the MAC for additional time to file briefs or statements. The MAC will extend this period, as appropriate, if the party shows that they had good cause for missing the deadline.

(2) All other rules for filing briefs with and obtaining evidence from the MAC follow the procedures explained in this subpart.

(e) *Procedures before the MAC.* (1) The MAC, after receiving a recommended decision, will conduct its proceedings and issue its decision according to the procedures explained in this subpart.

(2) If the MAC believes that more evidence is required, it may again remand the case to an ALJ for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the MAC decides that it can get the additional evidence more quickly, it will take appropriate action.

§ 405.1128 Decision of the MAC.

After it has reviewed all the evidence in the administrative record and any additional evidence received, subject to the limitations on MAC consideration of additional evidence in § 405.1122, the MAC will make a decision or remand the case to an ALJ. The MAC may adopt, modify or reverse the ALJ hearing decision or recommended decision. A copy of the MAC's decision will be mailed to the parties at their last known address.

§ 405.1130 Effect of the MAC's decision.

The MAC's decision is binding on all parties unless the party files an action in Federal district court, or the decision is revised. A party may file an action in a Federal district court within 60 days after the date it receives notice of the MAC's decision.

§ 405.1132 Request for escalation to Federal court.

If the MAC does not issue a final action or remand the case to an ALJ within the 90-day adjudication period as extended as provided in this subpart, the appellant may request that the appeal be escalated to Federal district court. Upon receipt of a request for escalation, the MAC may—

(a) Issue a final action or remand the case to an ALJ, if that action is issued within 5 days of receipt of the request for escalation; or

(b) If the MAC is not able to issue a final action or remand within 5 days of receipt of the request for escalation, it will send a notice to the appellant acknowledging receipt of the request for escalation. A party may file an action in a Federal district court within 60 days after the date it receives notice of the MAC's decision.

§ 405.1134 Extension of time to file action in Federal district court.

Any party to the MAC's decision or to an expedited appeals process certification may request that the time for filing an action in a Federal district court be extended. The request must be in writing, and it must give the reasons why the action was not filed within the stated time period. The request must be filed with the MAC, or if it concerns an expedited appeals process agreement certified by an ALJ, with the ALJ. If the party shows that he or she had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 405.942(b)(2).

§ 405.1136 Judicial review.

(a) General rule. To the extent authorized by sections 1869, 1876(c)(5)(B), and 1879(d) of the Act, a party to a MAC decision, or an appellant who requests escalation to Federal district court if the MAC does not complete its review of the ALJ's decision within the 90-day adjudication period, may obtain a court review if the amount remaining in controversy is $1,000 or more. The party, including an appellant who requests escalation to Federal district court if the MAC does not complete its review of the ALJ's decision within the 90-day adjudication period, may obtain court review by filing a civil action in a district court of the United States in accordance with the provisions of section 205(g) of the Act.

(b) *Court in which to file civil action.* Any civil action described in paragraph (a) of this section must be filed in the district court of the United States for the judicial district in which the party resides or where such individual, institution, or agency has its principal place of business. If the party does not reside within any such judicial district, or if such individual, institution, or agency does not have its principal place of business within any such judicial district, the civil action must be filed in the District Court of the United States for the District of Columbia.

(c) *Time for filing civil action.* Any civil action described in paragraph (a) of this section must be filed within the time periods specified in § 405.1130, § 405.1132, or § 405.1134, as applicable. For purposes of these sections, the date of receipt of the notice of the MAC's decision or notice of the MAC's receipt of the appellant's request for escalation shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary. Where a case is certified for judicial review pursuant to the expedited appeals process in § 405.990, the civil action must be filed within 60 days after receipt of the ALJ or MAC certification, except where the time has been extended by the ALJ or MAC, as applicable, upon a showing of good cause.

(d) *Proper defendant.* Where any civil action described in paragraph (a) of this section is filed, the Secretary of HHS, shall, in his or her official capacity, be the proper defendant. Any such civil action properly filed shall survive notwithstanding any change of the person holding the office of Secretary of HHS or any vacancy in such office. If the complaint is erroneously filed against the United States or against any agency, officer, or employee of the United States other than the Secretary, the plaintiff will be notified that he has named an incorrect defendant and will be granted 60 days from the date of receipt of the notice in which to commence the action against the correct defendant, the Secretary.

(e) *Prohibition against judicial review of certain Part B regulations or instructions.* Under section 1869(e)(1) of the Act, a court may not review a regulation or instruction that relates to a method of payment under Part B if the regulation was promulgated, or the instructions issued, before January 1, 1991.

(f) *Standard of review.* Under section 205(g) of the Act, the findings of the Secretary of HHS as to any fact, if supported by substantial evidence, are conclusive. In addition, when the Secretary's decision is adverse to a party due to a party's failure to submit proof in conformity with a regulation prescribed under section 205(a) of the Act (pertaining to the type of proof a party must offer to establish entitlement to payment), the court will review only whether the proof conforms with the regulation and the validity of the regulation.

§ 405.1138 Case remanded by a Federal court.

When a Federal court remands a case to the Secretary for further consideration, the MAC, acting on behalf of the Secretary, may make a decision, or it may remand the case to an ALJ with instructions to take action and issue a decision or return the case to the MAC with a recommended decision. If the case is remanded by the MAC, the procedures explained in § 405.1140 will be followed.

§ 405.1140 MAC review of ALJ decision in a case remanded by a Federal court.

(a) *General rule.* In accordance with § 405.1138, when a case is remanded by a Federal court for further consideration, the decision of the ALJ will become the final decision of the Secretary after remand on that case unless the MAC assumes jurisdiction of the case. The MAC may assume jurisdiction based on written exceptions to the decision of the ALJ that the party files with the MAC or based on its authority under paragraph (c) of this section. The MAC will either make a new, independent decision based on the entire record that will be the final decision of the Secretary after remand, or remand the case to an ALJ for further proceedings.

(b) *A party files exceptions disagreeing with the decision of the ALJ.* (1) If a party disagrees with the decision of the ALJ, in whole or in part, he or she may file exceptions to the decision with the MAC. Exceptions may be filed by submitting a written statement to the MAC setting forth the reasons for disagreeing with the decision of the ALJ. The exceptions must be filed within 30 days of the date the party receives the decision of the ALJ or an extension of time in which to submit exceptions must be requested in writing within the 30-day period. A timely request for a 30-day extension will be granted by the MAC. A request for an extension of more than 30 days must include a statement of reasons as to why the party needs the additional time.

(2) If written exceptions are timely filed, the MAC will consider the party's reasons for disagreeing with the decision of the ALJ. If the MAC concludes that there is no reason to change the decision of the ALJ, it will issue a notice addressing the exceptions and explaining why no change in the decision of the ALJ is warranted. In this instance, the decision of the ALJ is the final decision of the Secretary after remand.

(3) When a party files written exceptions to the decision of the ALJ, the MAC may assume jurisdiction at any time, even after the 60-day time period which applies when a party does not file exceptions. If the MAC assumes jurisdiction, it will make a new, independent decision based on its consideration of the entire record adopting, modifying, or reversing the decision of the ALJ or remand the case to an ALJ for further proceedings, including a new decision. The new decision of the MAC is the final decision of the Secretary after remand.

(c) *MAC assumes jurisdiction without exceptions being filed.* Any time within 60 days after the date of the decision of the ALJ, the MAC may decide to assume jurisdiction of the case even though no written exceptions have been filed. Notice of this action will be mailed to all parties at their last known address. The parties will be provided with the opportunity to file briefs or other written statements with the MAC about the facts and law relevant to the case. After the briefs or other written statements have been received or the time allowed (usually 30 days) for submitting them has expired, the MAC will either issue a final decision of the Secretary affirming, modifying, or reversing the decision of the ALJ, or remand the case to an ALJ for further proceedings, including a new decision.

(d) *Exceptions are not filed and the MAC does not otherwise assume jurisdiction.* If no exceptions are filed and the MAC does not assume jurisdiction of the case, the decision of the ALJ becomes the final decision of the Secretary after remand.

Expedited Determinations and Reconsiderations

§ 405.1200 A beneficiary's right to an expedited determination.

(a) *Applicability.* (1) For purposes of §§ 405.1200 through 405.1206, *provider of services* is defined, in accordance with section 1861(u) of the Act, as a hospital, critical access hospital, home health agency (HHA), skilled nursing facility (SNF), hospice program, or comprehensive outpatient rehabilitation facility (CORF).

(2) *Scope.* The expedited determination and reconsideration provisions contained in §§ 405.1200 through 405.1206 apply to terminations of services furnished by a non-residential provider and the discharge of a beneficiary from a residential provider of services.

(b) *Beneficiary's right to an expedited determination by the QIO.* (1) A beneficiary who has received notice that a nonresidential provider plans to terminate their services, or that a residential provider plans to discharge the beneficiary, is entitled to an expedited determination by the QIO in the State in which the beneficiary is receiving provider services when—

(i) The beneficiary disagrees with the nonresidential provider of those services that services being furnished should be terminated and a physician who is treating the beneficiary in relation to the services the beneficiary is receiving in the provider certifies that failure to continue the provision of that service(s) may place the beneficiary's health at significant risk; or

(ii) The residential provider notifies the beneficiary of its plans to discharge the beneficiary from that provider of services.

(2) If a beneficiary does not contest the termination decision in a timely manner, that beneficiary may not later assert the expedited review process under this section.

(c) *Procedures the beneficiary must follow.* (1) A beneficiary must submit the request for an expedited determination to the QIO in the State in which the beneficiary is receiving those provider services, in writing or by telephone no later than noon of the next calendar day following receipt of the provider's notice of termination.

(2) The beneficiary or his or her representative must be prepared to answer questions and/or supply information that the QIO may request in order to conduct its review.

(d) *Procedures the QIO must follow.* (1) On the date that the QIO receives the request for an expedited determination under paragraph (c) of this section, it must immediately notify the provider of those services that a request for an expedited determination has been made.

(2) The provider of those services must supply any information the QIO requires to conduct its review and must make it available by phone or in writing, by close of business of the day after the QIO notifies the provider of the request for an expedited determination. This information includes, but is not limited to, medical records and a copy of the provider's written notice of termination if one was issued to the beneficiary.

(3) The QIO must examine the medical records that pertain to the services in dispute.

(4) The QIO must solicit the views of the beneficiary that requested the expedited determination.

(5) The QIO must provide an opportunity for the provider/practitioner to explain why the termination or discharge is appropriate.

(6) The QIO must make its determination no later than 72 hours after receipt of the request for an expedited determination and the requested information.

(e) *Notice of an expedited initial determination.* (1) The QIO must immediately notify the beneficiary, beneficiary's physician, and the provider of services, of its determination. The QIO's initial notification shall be done by telephone and subsequently with a written notice.

(2) A written notice of the expedited determination must contain the following:

(i) The basis for the determination.

(ii) A detailed rationale for the reconsidered determination.

(iii) A statement explaining the Medicare payment consequences of the determination and the beneficiary's date of liability.

(iv) A statement informing the beneficiary of his or her appeal rights including the name and phone number of the qualified independent contractor that he or she must appeal to.

(v) The time period for filing the subsequent appeal.

(f) *Effect of an expedited determination.* The expedited determination is binding upon the beneficiary and provider of those disputed services, absent reconsideration by a QIC in accordance with § 405.1202. A beneficiary who does not file a timely request for an expedited QIC reconsideration subsequently may request a QIC reconsideration under § 405.960 of this subpart, but the coverage protections described in paragraph (g) of this section would not extend through those reconsiderations.

(g) *Coverage during QIO review.* When a beneficiary files an appeal in accordance with paragraph (c) of this section, the beneficiary may not be billed for any disputed services. The QIO decision may result in beneficiary liability, however.

§ 405.1202 Right to an expedited reconsideration by a QIC.

(a) *Beneficiary's right to an expedited QIC reconsideration.* A beneficiary that has received an expedited determination from a QIO as specified in § 405.1200, and is dissatisfied with that determination, may request an expedited reconsideration by the designated QIC.

(b) *Procedures the beneficiary must follow.* (1) A beneficiary must submit the request for an expedited reconsideration to the QIC no later than noon of the next calendar day following receipt of the QIO's written determination notice. This request may be made in writing or by telephone.

(2) The beneficiary or his or her representative must be available to answer questions and/or supply information that the QIO may request to conduct its review.

(c) *Procedures the QIC must follow.* (1) On the date that the QIC receives the request for an expedited reconsideration in accordance with paragraph (b) of this section, it must immediately notify the provider of those disputed services that a request has been made. The QIC must conduct a review regardless of whether the beneficiary will be liable for the services or stay in dispute.

(2) The QIC must request and review any information that it needs to make an expedited reconsideration determination. This information includes, but is not limited to, the beneficiary's medical records.

(3) The QIO and the provider of the disputed services must supply any information that the QIC requires to conduct its review, and must make it available, by telephone or in writing, by the close of business of the day after the beneficiary received the QIO expedited determination notice.

(4) The QIC must solicit the views of the beneficiary that requested the expedited determination.

(5) The QIC must render its reconsideration determination no later than 72 hours from receipt of the request for an expedited reconsideration and the information requested to make its decision.

(6) If the QIC does not render a decision within 72 hours of receipt of the request and the information, the QIC must notify the beneficiary and inform that beneficiary of his or her right to have this case escalated to the ALJ hearing level if—

(i) The beneficiary filed a timely expedited appeal before the QIC; and

(ii) The amount remaining in controversy after the QIO determination is $100 or more.

(7) The QIC must notify the beneficiary, in writing, of the rules for escalation under § 405.1002 (Right to ALJ hearing when QIC does not issue reconsideration determination timely).

(d) *Notice of an expedited reconsideration determination.* The QIC must render its expedited reconsideration determination and notify the beneficiary, the physician of the beneficiary who requested the expedited reconsideration determination, and the provider of those services no later than 72 hours from receipt of the request for review.

(1) The QIC's initial notification shall be done by telephone and followed by a written notice.

(2) A written notice of the expedited reconsideration determination must contain the following:

(i) The basis for the reconsidered determination.

(ii) Detailed rationale for the reconsidered determination.

(iii) A statement explaining the Medicare payment consequences of the reconsidered determination and the beneficiary's date of liability.

(iv) A statement informing the beneficiary of his or her subsequent appeal rights in accordance with § 405.1000 (Right to ALJ hearing when QIC issues reconsideration determination) and the time period for filing that appeal.

(v) The amount in controversy in accordance with the rules at § 405.1004 (Amount in controversy for ALJ hearing and judicial review).

(e) *Effect of an expedited reconsideration.* The reconsidered determination is binding upon the beneficiary and provider of those disputed services and is subject to review in accordance with § 405.1000 (Right to ALJ hearing when QIC issues reconsideration determination).

(f) *Coverage during QIC review.* When a beneficiary files an appeal in accordance with paragraph (b)(1) of this section, the beneficiary may not be billed for any disputed services until a QIC reconsidered determination has been rendered. The QIC decision may result in beneficiary liability, however.

§ 405.1204 Expedited appeals of inpatient hospital discharges.

(a) *Beneficiary's right to an expedited initial determination with respect to an inpatient hospital discharge.* (1) A beneficiary who has received a notice of noncoverage may request an expedited determination by the QIO when a hospital (acting directly or through its utilization review committee) with physician concurrence, determines that inpatient care is no longer necessary. A beneficiary who requests an expedited QIO review may remain in the hospital with no additional financial liability as specified in paragraph (e)(2) of this section.

(2) A beneficiary who fails to request an expedited initial determination in accordance with paragraph (c) of this section and remains in the hospital may still request an expedited initial determination, but the financial liability rules of paragraph (e)(2) of this section do not apply.

(b) *Beneficiary's right to other review.* (1) A beneficiary who fails to request an expedited determination in accordance with paragraph (c)(1)(iii) of this section and remains in the hospital may still request an expedited review at any time during the course of his or her inpatient hospital stay. The QIO will render a decision in accordance with paragraph (d)(5)(ii) of this section and the financial liability rules of paragraph (e)(2) of this section do not apply.

(2) A beneficiary who fails to request an expedited initial determination in accordance with paragraph (c)(1)(iii) of this section, and is no longer an inpatient in the hospital, may still request QIO review within 30 calendar days after receipt of the hospital's written termination notice or at any time for good cause. The QIO will

render a decision in accordance with paragraph (d)(5)(iii) of this section and the financial liability rules of paragraph (e)(1) of this section do not apply.

(c) *Procedures the beneficiary must follow.* For the expedited appeal process, the following rules apply:

(1) The beneficiary must submit the request for an expedited determination—

(i) To the QIO that has an agreement with the hospital under part 475 of this chapter;

(ii) In writing or by telephone; and

(iii) By noon of the first working day after he or she receives written notice that the hospital has determined that the hospital stay is no longer necessary.

(2) The beneficiary (or his or her representative), upon request by the QIO, must be prepared to discuss his or her case with the QIO.

(d) *Procedures the QIO must follow.* On the date that the QIO receives the beneficiary's request:

(1) The QIO must notify the hospital that the beneficiary has filed a request for immediate review.

(2) The hospital must supply any information, including medical records, that the QIO requires to conduct its review and must make it available, by phone or in writing, by the close of business of the first full working day after the day the beneficiary receives notice of the proposed discharge.

(3) The QIO must examine the pertinent records pertaining to the services.

(4) The QIO must solicit the views of the beneficiary who requested the expedited determination.

(5)(i) The QIO must make a determination and notify the beneficiary, the hospital, and physician of its determination by close of business of the first working day after it receives all requested pertinent information.

(ii) When the beneficiary did not request an expedited initial determination in accordance with paragraph (c)(1)(iii) of this section and remains an inpatient in the hospital, the QIO will make a determination and notify the beneficiary, the hospital, and physician of its determination within 2 working days following receipt of the request and pertinent information.

(iii) When the beneficiary did not request an expedited initial determination in accordance with paragraph (c)(1)(iii) of this section and is no longer an inpatient in the hospital, the QIO will make a determination and notify the beneficiary, the hospital, and physician of its determination within 30 calendar days after receipt of the request.

(e) *Coverage during QIO expedited review.* (1) In general, if the beneficiary remains in the hospital after receiving the advanced written notice of termination, and the hospital, the physician who concurred in the hospital's determination on which the advanced written notice of termination was based, or the QIO subsequently finds that the beneficiary requires an acute level of inpatient hospital care, the beneficiary is not financially responsible for continued care until the hospital once again determines that the beneficiary no longer requires inpatient care, secures concurrence from the physician responsible for the beneficiary's care or the QIO and notifies the beneficiary.

(2) *Timely filing.* If a beneficiary files a request for an expedited determination by the QIO in accordance with paragraph (c)(1)(iii) of this section, the beneficiary is not financially responsible beneficiary for inpatient hospital services furnished before noon of the calendar day after the date the beneficiary (or his or her representative) receives a written expedited determination by the QIO.

(3) *Untimely filing.* (i) When a beneficiary does not file a request for an expedited determination by the QIO in accordance with paragraph (c)(1)(iii) of this section and remains an inpatient in the hospital, that beneficiary may be responsible for charges that extend beyond the date specified on the hospital's advance written notice of termination or as otherwise stated by the QIO.

(4) *Hospital requests expedited review.* When the hospital requests review in accordance with § 405.1206, and the QIO concurs with the hospital's decision, a hospital may not charge a beneficiary until the date specified by the QIO.

(f) *Notice of an expedited determination.* (1) When a QIO renders an expedited determination in accordance with paragraph (d)(5) of this section, it must notify the beneficiary, physician, and hospital of its decision, by telephone and in writing. The QIO's initial notification must be done telephonically and subsequently with a written notice.

(2) A written notice of the expedited initial determination must contain the following:

(i) The basis for the determination.

(ii) A detailed rationale for the determination.

(iii) A statement explaining the Medicare payment consequences of the expedited determination and date of liability, if any.

(iv) A statement informing the beneficiary of his or her appeal rights including the name and phone number of the QIC that he or she must appeal to if he or she disagrees with this decision.

(v) The time period for filing reconsideration review by the QIC.

(g) *Effect of an expedited QIO determination.* The QIO determination is binding upon the beneficiary, physician, and hospital.

(1) *When beneficiary remains in hospital.* If the beneficiary is still an inpatient in the hospital and is dissatisfied with this determination, he or she must request an appeal subject to § 405.1202.

(2) *When beneficiary is no longer an inpatient in the hospital.* If the beneficiary is no longer an inpatient in the hospital and is dissatisfied with this determination, this determination is subject to the general QIC reconsideration rules set forth in §§ 405.960 through 405.978 of this subpart.

§ 405.1206 Hospital requests expedited QIO review.

(a) If the hospital (acting directly or through its utilization review committee) believes that the beneficiary does not require further inpatient hospital care but is unable to obtain the agreement of the physician, it may request an expedited determination by the QIO.

(b) *Procedures hospital must follow.* (1) The hospital must (acting directly or through its utilization review committee) notify the beneficiary (or his or her representative) that it has requested that review.

(2) The hospital must supply any pertinent information the QIO requires to conduct its review and must make it available by phone or in writing, by close of business of the first full working day immediately following the day the hospital submits the request for review.

(c) *Procedures the QIO must follow.* (1) On the date that the QIO receives the request for review by the hospital, it must review any pertinent information submitted by the hospital.

(2) The QIO must examine the pertinent records pertaining to the services.

(3) The QIO must solicit the views of the beneficiary in question.

(4) The QIO must make a determination and notify the beneficiary, the hospital, and physician within 2 working days of either the hospital's request or receipt of any pertinent information submitted by the hospital.

(d) *Notice of an expedited determination.* (1) When a QIO renders

an expedited determination as stated in paragraph (c)(4) of this section, it must notify the beneficiary, physician, and hospital of its decision, by telephone and in writing. The QIO's initial notification must be done telephonically and subsequently with a written notice.

(2) A written notice of the expedited initial determination must contain the following:

(i) The basis for the determination.

(ii) A detailed rationale for the determination.

(iii) A statement explaining the Medicare payment consequences of the expedited determination and date of liability, if any.

(iv) A statement informing the beneficiary of his or her appeal rights including the name and phone number of the qualified independent contractor (QIC) that he or she must appeal to if that beneficiary is dissatisfied with the QIO's determination.

(v) The time period for filing the subsequent appeal.

(e) *Effect of an expedited initial determination.* The initial determination is binding upon the beneficiary, physician, and hospital.

(1) *When beneficiary remains in hospital.* If the beneficiary is still an inpatient in the hospital and is dissatisfied with this determination, he or she must request an appeal in accordance with § 405.1204 (QIC expedited reconsideration).

(2) *When beneficiary has been discharged.* When the beneficiary is no longer an inpatient in the hospital and subsequently chooses to appeal this decision, he or she must file an appeal in accordance with §§ 405.960 through 405.978.

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

Dated: September 25, 2002.

Thomas A Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: September 25, 2002.

Tommy G. Thompson,

Secretary.

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Friday,
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Part III

Department of Transportation

14 CFR Parts 255 and 399

Computer Reservations System (CRS) Regulations; Statements of General Policy; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 255 and 399

[Dockets Nos. OST–97–2881, OST–97–3014, OST–98–4775, and OST–99–5888]

RIN 2105–AC65

Computer Reservations System (CRS) Regulations; Statements of General Policy

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department's rules governing airline computer reservations systems (''CRSs'' or ''systems'') obligate the Department to revisit the need for CRS rules. The Department initiated this proceeding to examine whether its existing CRS rules were still necessary and, if so, whether they should be modified. The Department believes that it may be possible to eliminate some of the rules in ways that may promote competition in the CRS business and that rules regulating the sale of airline service over the Internet appear unnecessary. The Department thus is asking for comments on proposals to reduce its regulations in ways that could give airlines more flexibility in bargaining with the systems. The Department tentatively is proposing to maintain some but not all of the existing rules. The Department is also proposing to review its Statements of General Policy to clarify the requirements for the disclosure of service fees by travel agencies.

DATES: Comments must be submitted by January 14, 2003. Reply comments must be submitted by February 13, 2003.

ADDRESSES: To make sure your comments and related material are not entered more than once in the docket, please submit them (marked with docket numbers OST–97–2881, OST–97–3014, and OST–98–4775) by only one of the following means:

(1) By mail to the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

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FOR FURTHER INFORMATION CONTACT: Thomas Ray, Office of the General Counsel, 400 Seventh St. SW., Washington, DC 20590, (202) 366–4731.

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Glossary

ACAA Air Carrier Association of America, a low-fare airline trade association

Airline system A system owned or controlled by one or more airlines

ASTA American Society of Travel Agents

Board The Civil Aeronautics Board

Booking fees Fees paid by airlines and other travel suppliers when a travel agent makes or changes a booking in a system

CRS Computer reservations system

E-fares (or webfares) Discount fares offered by an airline usually only either on its website or on the airline's website and through one or more on-line travel agencies

IATA International Air Transport Association

ITSA Interactive Travel Services Association
National Commission National Commission to Ensure Consumer Information and Choice in the Airline Industry
Network airlines The large airlines that operate hub-and-spoke route systems
Non-airline system A system that is neither owned nor controlled by any airline
OMB Office of Management and Budget
Participate To make the services of an airline or other travel supplier available for sale through a system under a contract with that system
Parity clauses Clauses in participating airline contracts that required a participating airline to buy at least as high a level of service from the system as it did from any other system
Productivity pricing Pricing formula used in subscriber contracts that enables the subscriber to obtain lower CRS fees or other financial benefits from a system if the travel agency meets minimum monthly booking quotas established by the contract
Screen padding Excessive listings of the same flight under different airline codes
Section 411 49 U.S.C. 41712, recodifying section 411 of the Federal Aviation Act
Subscriber A travel agency that obtains CRS services under a contract with the system
System Computer reservations system

A. Introduction

The Department's existing rules governing computer reservations systems (the ''CRSs'' or ''systems'') obligate it to reexamine the need for those rules. Such a reexamination is particularly appropriate at this time due to two developments that may enable us to reduce our regulation of the CRS business. Those developments are the growing role of the Internet in airline distribution and the diminishing airline ownership of the systems.

Historically travel agencies have primarily relied on the systems to investigate what airline services are available, to make bookings, and to issue tickets (although the systems now are also commonly called global distribution systems, or GDSs, we will continue to refer to them as CRSs). Each system was originally developed by an airline for the travel agencies' use. Since travel agencies traditionally have sold most airline tickets, the airlines that controlled the systems had the incentive and ability to use them to prejudice the competitive position of non-owner airlines and to provide information to travel agents that gave an undue preference to the services operated by the owner airlines.

The Civil Aeronautics Board (''the Board'') therefore adopted rules governing the systems operated in the United States. 49 FR 32540 (August 15, 1984). After we took over the Board's responsibility for economic regulation in the airline industry, we reexamined the rules and readopted them with changes in 1992 based on the industry circumstances at that time. 14 CFR Part 255 adopted by 57 FR 43780 (September 22, 1992). Our rules contained a sunset date, originally December 31, 1997, to ensure that we would reexamine the need for the rules and their effectiveness. We are carrying out that task in this proceeding. Our staff has also been informally studying CRS issues and other developments in airline distribution, including the Internet's impact during the past few years. *See* 65 FR 45551, 45555 (July 24, 2000).

We began this proceeding by issuing an Advance Notice of Proposed Rulemaking on those issues. 62 FR 47606 (September 10, 1997). We later issued a Supplemental Advance Notice of Proposed Rulemaking asking interested persons to update their comments, to comment on the impact, if any, of the recent changes in the systems' ownership and control, and to comment on whether any of the rules should be applied to the distribution of airline services over the Internet. 65 FR 45551 (July 24, 2000). We have extended the rules' sunset date, most recently to March 31, 2003, to ensure that they would remain in effect until we complete our reexamination. 67 FR 14846 (March 28, 2002).

In this proceeding we have received comments from the four systems, most of the U.S. airlines using large jet aircraft, a number of foreign airlines, many travel agency parties, and other persons interested in the issues, including the Consumers Union and the European Union (in referring to the commenters, we will use their common names, for example, Alaska, United and American Express, rather than Alaska Airlines, United Airlines, and American Express Travel Related Services Company).

On the first major issue—whether the rules should be maintained—a number of parties, primarily smaller airlines and travel agencies, contend that the rules remain necessary to protect airline competition and consumers. These commenters disagree over which rules, if any, should be strengthened or revised.

In their written comments or in meetings with OMB, Orbitz and the major airlines—American, United, Delta, Northwest, and Continental—have contended that the rules are no longer necessary, especially with regard to those rules requiring airlines with system ownership interests to participate in all systems and prohibiting discriminatory booking fees.

The second issue—whether the rules should govern airline distribution through the Internet—generated more disagreement among the parties. A number of parties urge us to prevent on-line travel agencies from providing biased information, and many contend that rules preventing websites operated by two or more airlines from engaging in anticompetitive conduct are necessary. Other parties argue that any rules governing Internet operations would be unjustified.

After we began this proceeding, some parties asked us to resolve specific issues in separate proceedings that would be completed before we made a final decision in this rulemaking. America West Airlines filed a petition for rulemaking on booking fee issues, Docket OST–97–3014, and the Association of Retail Travel Agents filed a rulemaking petition on certain travel agency contract issues, Docket OST–98–4775. Amadeus Global Travel Distribution filed a petition asking that we interpret the existing rules as prohibiting the tying of a travel agency's access to an airline's corporate discount fares to the travel agency's choice of the CRS affiliated with that airline, Docket OST–99–5888. We have included the issues raised by these three petitions in this proceeding. The discussion in this notice also relies on the comments submitted in response to our last proposal to extend the current rules' sunset date, 67 FR 71000 (February 15, 2002), in Docket OST–2002–11577 and discusses ASTA's request in the proceeding for emergency relief on two issues, the systems' use of a pricing structure in their travel agency contracts that keeps travel agents from using the Internet for bookings and the systems' sale to airlines of detailed data on bookings made by individual travel agencies.

The creation of Orbitz, the on-line travel agency owned by the five largest U.S. airlines, generated proposals in this proceeding for rule amendments that would regulate Orbitz' operations. We also received requests to investigate Orbitz and force it and its owner airlines to abandon practices that assertedly would reduce competition in the airline

and airline distribution industries. The controversy over Orbitz led us to investigate it informally before it began operations to see whether its business plans would reduce competition in the airline and airline distribution businesses. We decided then that we did not have a basis for preventing Orbitz from launching its service or requiring it to change its business plans. *See* Letter dated April 13, 2001, from McDermott and Podberesky to Katz. We began a further investigation of Orbitz earlier this year and submitted a report to Congress on our monitoring of Orbitz thus far. The report did not reach any definitive conclusions, in part because of the continuing changes in the on-line distribution business, and in part because the Department of Justice has not concluded its own investigation into Orbitz. ''Report to Congress: Efforts to Monitor Orbitz,'' Office of Aviation & International Affairs (June 27, 2002).

In addition, Orbitz' plans for giving consumers notice of its $5 fee for buying airline tickets required us to reexamine our rules on travel agency advertisements of airfares. We allowed Orbitz to carry out its plans, subject to several conditions, but stated that we would reexamine our standards for the disclosure of such travel agency fees. Order 2001–12–7 (December 7, 2001). We are considering that issue in this proceeding.

B. Summary of Proposed Rules

In this rulemaking we must decide whether CRS practices still require regulation and, if so, which regulations are necessary, in light of the substantial changes in airline distribution and system ownership since our last reexamination of the rules. We seek comments on whether some of the rules could be eliminated or modified to create more scope for competitive market forces. We are in particular asking for comments on proposals to reduce regulations in ways that could give airlines more flexibility in bargaining with the systems. We are proposing not to adopt regulations covering the sale of airline services through the Internet.

We fully recognize the importance of the on-going changes in airline distribution, particularly the growing importance of the Internet as a vehicle for selling airline tickets. These developments may make these rules unnecessary in the future. It may be that the continuing developments in airline distribution have already given airlines additional bargaining leverage with the systems. Several airlines have argued that the elimination of our mandatory participation rule and the rule barring systems from charging airlines discriminatory fees could enable airlines to bargain for better terms for system participation. While the record appears to suggest that the systems continue to have market power, it may be that the airlines would have some ability to obtain better participation terms through bargaining. We are therefore seeking comments on proposals to eliminate the mandatory participation rule and to end the rule against discriminatory booking fees.

At this time, it seems necessary to maintain at least some rules to prevent practices by firms with apparent market power that would reduce competition and the adoption of alternatives to the systems. We are therefore seeking comment on a tentative proposal to maintain some of the CRS rules and to apply them to all systems, whether or not owned or controlled by airlines. Despite important changes in the industry, there is evidence that each of the systems continues to have market power against most airlines that could be used to distort airline competition and competition in the business of electronically providing airline information and booking capabilities to travel agents. The systems also still appear to have the ability to engage in practices that would mislead travel agents and their customers about the availability, price, and quality of airline service options.

Nevertheless, given that there may be costs associated with maintaining the rules and that the rules may not be effective enough in promoting competition to warrant these costs, we seek comment on the possible benefits versus costs of sunset in March 2003. Specific discussion about the feasibility and costs of transition associated with full and immediate sunset in March 2003 would be helpful. We also seek views on whether this potential for bias and possible prejudicial conduct are sufficient to justify maintaining rules as proposed in this notice.

As was true in our last rulemaking, we are additionally concerned about system practices that seem unreasonably to keep airlines and travel agencies from using alternatives to the systems. These kinds of practices would drive up airline costs, keep travel agencies from using the most efficient means of obtaining information and making bookings, and discourage other firms from developing new technology that could replace the systems' services. We also believe that the large airlines' access to detailed data on each travel agency's route-by-route bookings on individual airlines could reduce competition in the airline industry, particularly by prejudicing the competitive position of the low-fare new entrant airlines. We are therefore proposing rules which would prevent all such practices. In developing our proposals we sought ways to enable market forces to work more effectively in the CRS business, to avoid potentially burdensome regulations, and to allow airline distribution practices to develop in ways that may eliminate the need for the rules.

As stated above, we are convinced that continuing changes in the airline and CRS businesses will likely require another examination of the need for the rules and their effectiveness in several years, if we ultimately decide in this proceeding to readopt the rules, with or without revisions. We will monitor industry developments closely and conduct further proceedings as necessary.

In addition, it may be that the continuing developments in airline distribution have given airlines more bargaining leverage with the systems than has been thought. Several airlines have argued that the elimination of our mandatory participation rule and the rule barring systems from charging airlines discriminatory fees could enable airlines to bargain for better terms for system participation. While the record suggests that the systems may continue to have substantial market power, it may be that the airlines would have some ability to obtain better participation terms through bargaining. We are therefore seeking comments on proposals to eliminate the mandatory participation rule and to ending the rule against discriminatory booking fees.

We have tentatively determined at this time that the rules should not be extended to cover distribution practices by airlines and travel agencies on the Internet. Such regulation seems unnecessary at this time. If on-line agencies engage in deceptive practices that harm consumers, we will consider taking action under our enforcement authority. As stated above, we have been informally investigating allegations that Orbitz and its owner airlines are engaged in anticompetitive conduct and if necessary will take action against them under our enforcement authority.

The findings and conclusions set forth in this notice are tentative. We have not made a final decision on any of the proposals, including the question of whether CRS regulations remain necessary. We ask the parties to submit comments that thoroughly discuss the factual and policy issues raised by our proposals. As to all proposals the parties should provide detailed information on whether the rule would be necessary

and beneficial and estimates quantifying its likely benefits and costs.

Comments will be due sixty days after publication of this notice, and reply comments will be due thirty days thereafter. After considering the comments, we will issue a final rule.

C. Procedural Issues

As we have done in all of our CRS rulemakings, we are following the notice-and-comment procedures established by the Administrative Procedure Act for informal rulemakings. 57 FR 43792; 62 FR 59799–59800. These informal rulemaking procedures will give the parties a fair opportunity to present their evidence and policy and legal arguments and will enable us to resolve the issues rationally and efficiently.

We have largely based our proposals on the comments and the published sources cited in this notice. We have also relied on our informal investigations of airline distribution and the CRS business, as we planned to do. *See* 65 FR 45555. This notice reflects the staff's findings in its informal studies to the extent that we are using them. The parties now have the opportunity to comment on those findings as well as present any factual information and analysis of their own.

Some parties have filed motions for leave to file their comments or reply comments. We will grant all such motions.

As noted above, several parties have urged us to resolve some CRS issues before our completion of this proceeding. We have determined that it would be more efficient for us to consider all issues in this proceeding rather than decide issues piecemeal.

During the period since we issued our supplemental advance notice of proposed rulemaking, Department officials and members of the staff have met with a number of parties—Orbitz, Sabre and Travelocity, Expedia, Amadeus, Southwest, the Interactive Travel Services Association (''ITSA''), ASTA, and American Express—on the competitive and fairness questions presented by Orbitz that we have been informally investigating. These discussions focused on our informal investigation but also touched on issues involved in this proceeding. Before we issued the supplemental advance notice, Department officials and staff members met with ITSA, which asserted that the airlines were discriminating against on-line travel agencies. ITSA presented a written document on these issues, which it had filed in another docket, OST–97–3713, and Department officials agreed to have the document treated as a comment in this proceeding and to consider here the concerns expressed by ITSA.

Department officials and staff members also held discussions with other interested parties on airline distribution and CRS issues, including issues related to this rulemaking.

The staff met with the Air Carrier Association of America (''ACAA'') and several of its member airlines to discuss their concerns with the systems' sale of marketing and booking data, which the larger airlines allegedly use to deter travel agencies from booking customers on low-fare airline competitors. The ACAA group was particularly concerned with the availability of data on bookings made by individual travel agencies. The ACAA group contended that airlines do not need the marketing and booking data for route planning purposes and legitimate marketing needs in domestic markets, since their own booking data and data available from the Department provide adequate information for those purposes. The ACAA members assert that large airlines to use the domestic data to find out which travel agencies are selling significant amounts of travel on smaller airlines and that they put pressure on those agencies to discourage them from booking those airlines. The ACAA representatives viewed the marketing and booking data as probably useful for planning international routes and marketing strategies, since comparable information may not be readily available from other sources. They suggested that the rules be amended to allow systems to sell data only on airlines willing to have their data be made available for this purpose.

Staff members have also met with Lawton Roberts of Uniglobe Country Place Travel, a travel agency, to discuss the widespread concern among travel agencies about the airlines' refusal to allow all travel agencies to sell fares offered by airline websites and Orbitz.

While our draft notice of proposed rulemaking was under consideration by the Office of Management and Budget (''OMB'') pursuant to Executive Order 12866, Sabre, Cendant (Galileo), Worldspan, Amadeus, Orbitz, American, United, and Continental, among others, asked to meet with that agency. OMB met or held conference calls with the named parties. While we did not attend those meetings, OMB provided to us the written material presented at these meetings for inclusion in the docket for this proceeding. We are inviting commenters to address several of the ideas presented by the parties at those meetings.

D. Background

1. The CRS Business

Four systems are operating in the United States: Sabre, originally developed by American; Galileo, the product of a merger between United's Apollo system and a European system; Worldspan, the product of a merger between the PARS system owned by Northwest and TWA and Delta's DATAS II system; and Amadeus, a European firm that entered the United States by buying Continental's System One CRS. In 1999 the number of travel agency locations in the United States using each system was as follows: Sabre, 14, 961; Galileo, 11,840; Worldspan, 8,300; and Amadeus, 6,168. On a worldwide basis in 2001, Sabre was the largest, with about 65,000 locations, while Amadeus had 57,000, Galileo 45,000, and Worldspan 20,000. *Travel Distribution Report* (February 25, 2002) at 26; *Travel Distribution Report* (January 11, 2001) at 4. These figures do not precisely reflect market share, however, because one system may obtain substantially more bookings from its locations than other systems obtain from theirs. Sabre, for example, has claimed that it has a 48 percent share of CRS bookings in North America. *Travel Distribution Report* (May 31, 2001) at 2.

The systems have provided tremendous benefits for airlines, travel agencies, and consumers due to their efficiency. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* (1999) at 126. *See also* 57 FR 43781. Among other things, when an airline participating in a system enters a new city, the travel agents in that city that use that system will immediately learn of the airline's new service whenever they are checking service options for customers planning to travel on the route.

The practices followed by these systems have been important to airline competition and consumer welfare because of the travel agencies' dominant role in airline distribution and their reliance on CRSs to meet their customers' needs for advice and bookings. In 1999 travel agencies sold almost three-quarters of all airline tickets. Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 17. Almost every travel agent uses a system to investigate airline service options and make bookings for the agency's customers (a travel agency using a system is called a ''subscriber''). One survey reported that travel agencies made 93 percent of their domestic airline bookings and 81 percent of their international airline bookings through a

system in 1999. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 133. Travel agencies also use the systems to carry out back office functions like bookkeeping and recordkeeping. Both ''brick and mortar'' and on-line travel agencies depend on the systems, although Orbitz is planning to create direct connections between itself and many of its airline participants.

Travel agents have relied so much on the systems because they efficiently provide comprehensive information and booking capabilities on airlines and other travel suppliers. A CRS presents displays that integrate almost all services offered in a market. Each system shows the schedules and fares offered by airlines in each market that are available for sale through travel agents using that system and whether seats are available on specific flights at specific fares. A travel agent can compare the schedules and fares offered by different airlines and determine which would best meet a customer's needs. The agent can reserve a seat and issue a paper ticket or an E-ticket. While the systems formerly offered almost complete information on airline services, airlines now offer some low fares through their websites (and some on-line travel agencies) that they do not sell through any system. Airline transportation is the most important service sold through a system, but the systems also provide information and booking capabilities for rental cars, hotels, and other travel services. Travel agents usually access a system through computer terminals linked with the system's database.

Each system provides information and booking capabilities on the airlines and other travel suppliers that ''participate'' in the system, that is, agree to make their services saleable through the system. The system obtains its availability information from the airlines' internal reservations systems, and it makes bookings in those systems, which are used by the airlines' own reservations agents and other staff members. Airlines typically either operate their internal systems themselves or arrange for another firm, often one of the systems, to operate it under contract.

Participation requires the airline to pay fees for each booking transaction (the fees paid by participating airlines and other travel suppliers are usually called ''booking fees''). Airlines can participate at different levels. At higher levels the information provided travel agencies will be more timely and so more reliable, and travel agents can carry out tasks like reserving specific seats for their customers. An airline participating at a higher level of participation must pay higher booking fees. 62 FR 59784, 59785 (November 5, 1997).

In 2000 the average airline booking fee for the highest level of system service, the level used by the network airlines, was $3.54 per segment. Testimony of Inspector General Kenneth Mead before the Senate Commerce Committee, July 20, 2000, at 17. Sabre estimates that the network airlines' total booking fee costs equal about two percent of the revenue obtained through CRS bookings. Sabre Supp. Reply Comments at 36. Northwest has estimated that its booking fee costs in 2000 equaled 2.1 percent of its system passenger revenues. *Travel Distribution Report* (June 14, 2001) at 4. The systems usually increase their booking fees annually; Sabre, for example, raised its fees by about nine percent in 2001 and three percent in 2002. *Travel Distribution Report* (January 11, 2001) at 6; *Travel Distribution Report* (December 13, 2001) at 1.

The systems display information on computer screens. Since each screen can display only a limited number of flights, a system must use criteria for ranking the available flights. Display position is important, since travel agents are more likely to book the flights that are displayed first. 61 FR 42208, 42209 (August 14, 1996). The number of flight options available in most markets also requires the systems to edit their displays, since many options will be unattractive to travelers (Los Angeles-San Francisco travelers, for example, will not choose connecting services over Denver or Salt Lake City). Systems display airline services in several different ways. The display traditionally used by travel agencies ranks flights in a market on the basis of the criteria developed by the system and shows whether seats are available on the listed flights. Some systems have ranked flights in this type of display by listing all nonstop flights first, then listing one-stop flights and other direct flights, and ending with connecting services. Others have ranked flights on the basis of relative quality, such as each flight's elapsed time or its displacement time (the time difference between the departure time requested by the traveler and the time of each flight). 61 FR 42210–42211.

Every system also has a display that ranks flights on the basis of price, with the lowest being listed first. Travel agents commonly use that display for customers whose major concern is finding the cheapest fare.

Corporate travel departments and consumers, not just travel agents, use the systems. A corporate travel department, which books travel for its company's employees, benefits from the systems' efficiencies and information. Corporate users can access a system through the Internet or by Intranet. *See, e.g.*, Sabre Comments at 4. Consumers using an on-line travel agency to obtain schedule and fare information and make bookings are indirectly accessing one of the systems; Travelocity uses Sabre as its booking engine, while Expedia uses Worldspan, for example.

The fees charged airlines were not effectively disciplined by competition and may have exceeded system costs by a significant amount. 56 FR 12586, 12595 (March 26, 1991).

In past years the fees paid by airlines and other travel suppliers accounted for about ninety percent of total system revenues, while the fees paid by travel agencies made up only ten percent of the total. 62 FR 59784, 59788 (November 5, 1997); Sabre Holdings 10–K reports for the years 1999 and 2000. The CRS business has economies of scale, so a system's profitability increases when travel agents use it for more bookings. *Study of Airline Computer Reservation Systems,* U.S. Dept. of Transportation (May 1988) at 24–25.

The systems have been able to maintain high booking fees, because most airlines have concluded that participation in each system is necessary. The systems accordingly have had little need to compete for airline participants. Almost every U.S. airline, including most of the low-fare airlines, participates in each of the systems.

Although four systems operate in the United States, each travel agency office has typically relied either exclusively or predominantly on one system. A 1996 survey reported that less than four percent of travel agency offices had more than one system. ASTA Comments at 19. Other commenters allege that few travel agency offices use more than one system. Alaska Supp. Reply at 6; Southwest Supp. Reply at 16. While the services offered by each system are comparable, using multiple systems could improve a travel agency's ability to serve its customers. Travel agents then could acquire more accurate and complete information on available airline flights, and the agencies' ability to use multiple systems would encourage the systems to compete more on the quality and range of their services. 57 FR 43797. Offsetting that factor, a travel agency's use of multiple systems can create some inefficiencies,

due to additional training needs and potential difficulties in keeping track of customer records. 56 FR 12607. Each system also offers inducements to travel agency customers to make most or all of their bookings on that system.

Travel agencies, unlike airlines, can usually choose which system to use. The systems' competition for travel agency customers has caused them to continuously improve the range and quality of services offered travel agencies. In addition, many large travel agencies obtain CRS services at little or no cost. Sabre has stated that competition among the systems for travel agency customers ''is particularly intense'' and that some systems ''aggressively pay economic incentives to travel agencies to obtain business.'' In addition, ''certain [Sabre] service contracts with significant subscribers contain booking fee productivity clauses and other provisions which allow subscribers to receive cash payments, and/or various amounts of additional equipment and other services from [Sabre] at no cost.'' Sabre Holdings 10–K Report for FiscalYear 2000 at 24, 37. Galileo has similarly stated that competition for travel agency customers is intense, that fees are often waived for travel agency customers, and that some obtain incentive payments. Galileo International 10–K Report for Fiscal Year 2000 at 5, 17. AAA and Apollo reportedly signed a five-year term contract that assumed that all AAA member clubs would use Apollo as their only system; AAA expected to earn $75 million from Apollo under the contract. *Travel Weekly* (September 25, 1997) at 46.

A system is willing to pay bonuses to capture a large agency's business in the expectation that it will capture all or almost all of the agency's business for a period of several years and thereby obtain a large and steady stream of airline booking fees. The large agencies have become more dependent on such payments due to the airlines' commission cuts. Sabre Holdings 10–K Report for Fiscal Year 2001 at 31. On the other hand, smaller travel agencies complain that they are overcharged for system services and forced to accept unreasonable contract terms. *See, e.g.*, ASTA Comments at 2–3, 10; ARTA Comments at 4–8; ARTA Emergency Petition. Furthermore, travel agencies located in cities dominated by one airline may feel compelled to use a system affiliated with that airline. These agencies depend on obtaining marketing benefits and access to corporate discount fares from the dominant airline to meet the needs and preferences of their customers. Large Agency Coalition Comments at 9–10.

2. The Travel Agency Distribution System

In the past the systems have been important because most airlines have depended on travel agencies for their distribution. Travel agencies have acted as agents for virtually all airlines and generally held themselves out to the public as sources of impartial advice on airline services and other travel services. 56 FR 12587. The travel agency system has traditionally provided an efficient means of distribution for most airlines. 57 FR 43782. As noted, in 1999 almost three-quarters of all airline tickets were sold by travel agencies, while only one-fourth of all bookings were made directly with an airline. Bear, Stearns & Co., ''Point, Click, Trip'' at 17. Even many low-fare airlines, the airlines that have tried hardest to distribute their tickets directly to consumers, have relied on travel agencies for a large share of their bookings. In the fourth quarter of 2001, AirTran, for example, obtained 33 percent of its bookings from travel agencies using a system. AirTran 10–K Report for fiscal year 2001 at 8.

Travel agencies historically derived most of their revenue from the commissions paid by airlines and other travel suppliers. Due to the airlines' reductions in commissions in recent years, travel agencies began charging fees to their customers. Almost ninety percent of all travel agencies charge some fees. *Travel Distribution Report* (May 31, 2001); *Travel Weekly* (February 25, 2002) at 27. The fees average $13.21 per ticket. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002).

Travel agencies do not operate as franchisees of one or a few airlines. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* at 125. Individual airlines, however, encourage travel agencies to sell their services rather than their competitors' services. An airline will often offer travel agencies override commissions, a type of incentive commission, that give a travel agency a larger commission on all of its bookings on the airline if the airline's share of the agency's total bookings (or total bookings in specific markets) exceeds a specified percentage, which is often related to the airline's share of all travel agency bookings in the agency's area. Since override commissions enable the agency to obtain a higher commission rate on all its bookings with an airline, the airline dominating a metropolitan area can use override commissions more effectively than can its competitors. Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, U.S. Department of Transportation, *Airline Marketing Practices* (February 1990) at 28.

Beginning in March 2002, the major airlines stopped paying base commissions to travel agencies in the United States and switched entirely to the use of incentive commissions. The incentive commission programs developed by these airlines, and the lack of any alternative pay from those carriers, will likely strengthen the travel agencies' interest in meeting the performance standards set by the airlines.

As discussed below in connection with proposals to bar travel agencies from creating biased CRS displays, some industry commentators and the Department's Inspector General have expressed a concern that override commissions can induce travel agencies to recommend airline services that will increase their commission payments rather than the services that best meet the needs of their customers. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999). The airlines' efforts to encourage travel agencies to give each airline a larger share of their business affect our analysis of several issues, including the systems' sale of marketing and booking data, but we are not addressing the override commission issue in this proceeding.

Not all travel agencies obtain override commission arrangements. In other respects as well, airlines have traditionally not treated all travel agencies the same since deregulation. A travel agency with a preferred supplier relationship with an airline can obtain marketing benefits, such as the ability to waive advance purchase restrictions and to book important clients on oversold flights, that are not available to other agencies. *Airline Marketing Practices* at 26.

3. International CRS Operations

Although U.S. airlines developed the first systems, the CRS business soon became international. European airlines, for example, created Amadeus, and Galileo is the product of the merger between United's Apollo system and the Galileo system developed by several European airlines. Sabre and Worldspan have no foreign airline owners but both compete for travel agency customers overseas.

The importance of CRS operations overseas has led other governmental entities like the European Union and Canada to adopt rules regulating the CRS business. *See, e.g.*, European Commission Comments. A number of the parties in this proceeding, primarily the European Union and several foreign airlines, have urged us to harmonize our rules with the rules applicable in the European Union.

CRS operations abroad concern the United States, since foreign systems and their owners could engage in practices that would prejudice the competitive position of U.S. airlines in international markets or the ability of U.S. systems to obtain travel agency customers in foreign countries. The United States accordingly has entered into a number of international air services agreements that require each party to ensure that the systems operating in its country and their owners do not subject airlines and systems from the other country to discriminatory treatment.

In addition, the United States has taken action in some cases to ensure that U.S. systems are not denied access to foreign markets by discriminatory conduct by foreign airlines and other travel suppliers that own or market a competing system. *See, e.g.*, Orders 88–7–11 (July 8, 1988) (American complaint against British Airways) and 90–6–21 (June 8, 1990) (American complaint against Iberia).

Congress has stated its interest in preventing discriminatory practices by systems and affiliated airlines that would distort international competition. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181 (April 5, 2000), includes a provision, section 741, that expanded our authority under 49 U.S.C. 41310 to take countermeasures against an unjustifiably discriminatory or anticompetitive practice against a U.S. CRS or the imposition of unjustifiable restrictions on access by a U.S. system to a foreign market.

4. Our Readoption of CRS Rules

The CRS rules adopted by the Civil Aeronautics Board (''the Board'') in 1984 included an expiration date to ensure that we would reexamine the rules after they had been in force for several years. We conducted such a reexamination and, on the basis of the systems' continuing ownership by airlines and the airlines' continuing reliance on travel agencies for distribution, determined in 1992 that CRS rules remained necessary to safeguard airline competition and to help ensure that consumers did not receive inaccurate or misleading information on airline services. We based our decision on the systems' control by airlines and airline affiliates, which could still use their control of the systems to prejudice airline competition if there were no rules. 57 FR 43783–43787, 43794. We reasoned as well that airlines had no practical ability to induce travel agencies to use systems charging lower fees, and we noted that travel agencies did not choose systems on the basis of their treatment of airlines. 57 FR 43831; 56 FR 12586, 12594–12595.

Our revised rules governed the operations of systems owned or marketed by an airline or airline affiliate insofar as the system was providing services to travel agencies. In adopting these rules, we relied on our authority under section 411 of the Federal Aviation Act, later recodified as 49 U.S.C. 41712, to prohibit unfair and deceptive practices and unfair methods of competition in air transportation and the sale of air transportation (we will refer to the statue by its traditional name, section 411). 57 FR 43789–43791.

One of the principal provisions that we readopted barred each system from using carrier identity as a factor for editing and ranking services. We did not, however, prescribe a display algorithm (the set of criteria for constructing displays), so each system was free to choose its own criteria for editing and ranking airline services. Secondly, the rules prohibited systems from charging discriminatory booking fees but did not set limits on the level of fees. Thirdly, each system had to make available to any participating airline the booking and marketing data generated by it from bookings for domestic travel made through the system. Finally, the rules proscribed certain types of restrictive contract provisions that unreasonably limited the travel agencies' ability to switch systems or use more than one system. For example, the rules limited the maximum length of subscriber contracts.

We modified the rules in several respects to strengthen them. Among other things, our revised rules required each system to provide non-owner airlines with information and booking capabilities as accurate and reliable as those provided the owner airline. We gave each travel agency the right to use its own equipment in conjunction with a system and to access other systems and databases from the same terminals used to access its primary system, unless the agency used terminals provided by that system; we adopted this rule in part to spur the development of alternative ways of providing airline information and booking capabilities to travel agencies. We also required each airline with a significant CRS ownership interest to participate in other systems at as high a level of functionality as it does in its own system, if the terms for participation are commercially reasonable (this is the mandatory participation rule). We sought to prevent U.S. airlines from attempting to discourage travel agencies from choosing a competing system by limiting their participation in systems owned by other airlines.

We hoped that our revisions would enable airlines to develop alternative means of access to travel agencies and thereby begin to bring market forces to bear on the systems' terms for airline participation. We avoided rules that involved detailed management of system operations. 57 FR 43781.

We later adopted two additional rules to prevent system practices that distorted competition in the airline and CRS businesses. One rule prohibited systems from enforcing ''parity clauses'' against airlines that did not own or market a competing system. 62 FR 59784 (November 5, 1997). The parity clauses imposed by most systems on airline participants required each airline to buy at least as high a level of service from the system as it did from any other system. The parity clauses made it unnecessary for systems to compete for airline participation at higher levels of service. While almost all airlines must participate in each system for economic reasons, many airlines do not need to participate at the more expensive higher levels.

The second rule strengthened the rules prohibiting display bias by requiring each system (i) to offer at least one display that does not give on-line connections a preference over interline connections and (ii) to either list one-stop and other direct flights before connecting services or use elapsed time as a significant factor in selecting flight options from the database. 62 FR 63837 (December 3, 1997). We acted in large part because of concerns that United had caused Galileo to create displays that prejudiced United's competitors. 62 FR 63840–63841.

5. Major Developments Since the Last Overall Rulemaking

As we stated in our supplemental advance notice of proposed rulemaking, our decision in this proceeding must take into account two major developments in the CRS business and airline distribution that have occurred in recent years, the airlines' shrinking ownership of the systems and the

growth of Internet usage. 65 FR 45556–45557.

As noted above, when we last reexamined the rules, one or more airlines or airline affiliates owned each of the systems. That is no longer true, although the systems without airline ownership still have ties to their former owners.

Sabre, the largest system, which American developed, is now a publicly-owned company. Most of Galileo's airline owners sold their stock to the public by the end of 2000, although United continued to own eighteen percent of Galileo's stock, Swissair eight percent, and five other airlines 1.5 percent. Galileo Supp. Comments at 2. Cendant, a firm that owns Avis and several hotel franchises, bought Galileo in exchange for stock and cash in early October 2001. United received Cendant stock in exchange for its Galileo stock but has sold all of those shares. United April 19, 2002, and February 1, 2002, Press Releases.

Amadeus, a European system, entered the U.S. market by acquiring System One, the system owned by Continental. Continental thereafter sold its Amadeus shares. Amadeus is now controlled by three foreign airlines, Lufthansa, Air France, and Iberia. The public, however, now holds a significant portion of Amadeus' stock.

Worldspan is still owned entirely by airlines and airline affiliates. Its U.S. airline owners are Delta, Northwest, and American, since American acquired TWA's Worldspan stock when it bought TWA's assets.

Although some systems are no longer owned by airlines, every system still has marketing ties with one or more airlines. American and Southwest market Sabre, and United provides some marketing support for Galileo. Amadeus Supp. Comments at 4–5. Since our rules by their terms apply to systems owned or marketed by airlines, 14 CFR 255.2, Sabre and Galileo as well as Amadeus and Worldspan are subject to the rules.

The other major development is the growing use of the Internet for airline distribution. The Internet has given airlines and other travel suppliers new ways to obtain bookings and inform consumers of their services and to do so at significantly lower cost. *See, e.g.*, Statement of A. Bradley Mims, Deputy Assistant Secretary for Aviation and International Affairs, U.S. Department of Transportation, before the Senate Commerce Committee (July 20, 2000); General Accounting Office, ''Effects of Changes in How Airline Tickets Are Sold'' (July 1999) at 13. A consulting firm estimated that Internet bookings would account for fourteen percent of all airline revenues in calendar year 2001. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001).

Most U.S. airlines have websites, and many offer special discount fares (E-fares or webfares) and other benefits to travelers who book seats through the airline's website instead of another distribution channel. For most airlines, their own individual websites have become their cheapest available distribution channel. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 17–18.

While airlines initially offered their E-fares exclusively through their own websites, Delta allows travel agents to book its E-fares through its website for travel agencies, although such bookings are non-commissionable. *Travel Distribution Report* (March 22, 2001) at 9; Delta Comments on Proposed Extension at 6–7. Other airlines have also created websites where travel agents may book their discount fares. Many airlines have agreed to give Orbitz the ability to sell their E-fares in exchange for a rebate of part of the CRS booking fees paid on all of the airline's bookings made through Orbitz.

Travel agents can book Internet fares for their customers even if they are not offered through the system used by the travel agency or an airline website dedicated to travel agents. Some do so. ''Travel agents charting other routes to profit,'' *Philadelphia Inquirer* (March 27, 2002). When travel agents book such fares through an airline website created for consumers or Orbitz, they usually receive no commission and earn no credits towards the minimum monthly booking quota set by the systems' subscriber contracts that use productivity pricing. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002). In addition, searching several websites for E-fares is less efficient for travel agents, complicates a travel agency's task of preparing reports for corporate customers, and makes it harder for corporate travel managers to manage travel programs. Susan Parr Travel Comments; NBTA Comments on Proposed Extension at 2. Several firms and the systems themselves are developing software that will enable travel agents to quickly search for fares on multiple websites and systems, however. ''Fare game: ''Beat the agent''', Travel Weekly (March 4, 2002) at 6. Orbitz'' agreement with Aqua should enable travel agents to use a program allowing them to simultaneously see the display of fares offered by a system and the fares available through Orbitz, including E-fares. May 16, 2002, Orbitz press release.

The share of airline bookings produced by airline websites has been growing rapidly. Delta's on-line revenues in the March 2002 quarter were 64 percent higher than in the March 2001 quarter, and Delta expected to obtain fifteen percent of its tickets from its own website in 2002. Delta April 24, 2002, Press Release. The percentage of Alaska's bookings obtained from its website grew from 10 percent in 2000 to 16 percent in 2001. Alaska 10–K Report for the year 2001. Continental reportedly expects forty to fifty percent of its bookings to come from Internet sites, including its own, Orbitz, and Hotwire, by 2005 or 2006. *Travel Distribution Report* (June 14, 2001) at 4. Most of the network airlines, however, have been obtaining a smaller share of their bookings from their websites. Thus, while consumer use of American's website is growing rapidly, the website produced only an estimated three percent of the airline's revenues in the first quarter of 2001. *Aviation Daily* (July 2, 2001).

Some low-fare airlines already obtain a large share of their bookings from their websites. JetBlue obtained 44 percent of its sales from its website in 2001. JetBlue Registration Statement on Form S–1 (filed April 10, 2002) at 41–42. Southwest's website produced forty percent of the airline's revenues in 2001. Southwest Airlines 10–K Report for the year 2001. AirTran was obtaining over half of its bookings through the Internet by the end of 2001. January 29, 2002, AirTran Press Release. Frontier obtained 28 percent of its bookings in the quarter ended December 31, 2001, from its website, and Internet bookings from all sources made up 39 percent of its revenue in that quarter (the comparable figures for the December 31, 2000 quarter were six percent and fifteen percent). February 5, 2002, Frontier Press Release. The two major European low-fare airlines obtain a much larger share of their total sales from on-line bookings. Ryanair obtained 91 percent of its bookings from its website in January 2002, while EasyJet sells tickets only through its own reservations center and website, not through travel agencies. Ryanair February 4, 2002, Press Release; ''About Our Fares'' at *www.easyjet.com.*

Airlines have created Internet sites for use by travel agencies and corporate customers as well. Delta has websites for travel agencies and corporate customers. Employees of businesses that have corporate sales agreements with Delta can book the negotiated discount

fares through that website, and corporate travel managers can track the bookings made through the website. *Aviation Daily* (July 2, 2001).

Internet bookings made directly with an airline are less costly. Delta recently stated that the cost of bookings made through its own website is only one-fourth the cost of bookings made through a travel agency using a system. Statement of Scott Yohe before the National Commission to Ensure Consumer Information and Choice in the Airline Industry (the ''National Commission'') at 11. Similarly, according to a 1999 study, each booking made through traditional travel agencies cost America West $23, a booking made through an electronic travel agency cost $20, a booking made through the airline's reservations agents cost $13, and a booking made through the airline's website cost $6. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 17. Southwest states that a booking costs Southwest $10 when made through a travel agency, $5 when made through a Southwest reservations agent, and $1 when made through Southwest's website. Southwest Supp. Reply at 20.

Airlines have taken other steps to reduce their costs. Airlines encourage passengers to use E-tickets—electronic tickets—instead of paper tickets since E-tickets involve no printing costs and lower handling and processing costs than paper tickets, which are negotiable documents. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 8. Beginning in 1995 airlines also cut the travel agencies' base commissions several times, which led to a decline in the number of travel agencies; forced travel agencies to focus on other travel activities, such as cruise bookings, which are more remunerative; and caused most travel agencies to charge consumers fees for their services. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 6, 9–11. In March 2002 the major airlines eliminated base commissions entirely and began paying travel agencies only incentive commissions.

These developments have significantly reduced airline costs. Delta has stated that its customers' use of the Internet saved Delta $45 million in commissions and booking fees in 2000, when thirteen percent of its tickets were sold through the Internet. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001). Similarly, while Alaska's passenger revenue increased by 6.9 percent from the first quarter of 2000 to the first quarter of 2001, its commission expense increased by only 1.9 percent since a smaller share of its bookings were being made by travel agents, 61.6 percent in the first quarter of 2001 compared to 65.9 percent in the first quarter of 2000. Alaska 10–Q Report for the quarter ended March 31, 2001. The GAO has estimated that the cuts in commissions lowered airline commission costs by about $4 billion between 1995 and 1998. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 6–8.

Travel agencies also now provide information and make bookings over the Internet. Many traditional travel agencies— ''brick and mortar'' agencies—have established websites for use by consumers. Other firms started business as on-line agencies. The two largest on-line travel agencies are Travelocity, owned by Sabre, and Expedia, developed by Microsoft. In addition to selling airline tickets as agents for the airlines, some on-line agencies also buy blocks of airline seats and hotel rooms at negotiated prices substantially below the supplier's published rates. Bear, Stearns, ''Point, Click, Trip,'' at 48, 49.

In addition, five major airlines—United, American, Delta, Northwest, and Continental—created Orbitz to compete in the on-line agency business. Orbitz is initially using Worldspan as its booking engine but will create direct links with many of the airlines participating in Orbitz. ''Et tu, Orbitz?'' *Travel Weekly* (March 4, 2002) at 6; Orbitz Supp. Comments at 35. Orbitz is offering airlines rebates on their booking fees if they agree, among other things, to give Orbitz access to all of their publicly-available fares, including their Internet fares. Orbitz Supp. Reply at 24–25. Orbitz'' plans for gaining access to these fares, which airlines initially at least did not allow other travel agencies to sell, and Orbitz'' control by five major airlines have generated substantial controversy.

If an airline refuses to allow Orbitz to sell all of its publicly-available fares, consumers can still book the airline if the airline participates in Worldspan, but the airline will not get a rebate on the CRS fees. Orbitz is unable to make bookings on those airlines, such as Southwest, that neither participate in Worldspan nor provide fare and availability information and booking capabilities to Orbitz through another channel.

Orbitz is currently operating as an on-line travel agency. Orbitz could make its services available to travel agencies for use in making airline bookings. Since it charges participating airlines a fee for such bookings, it would become a system subject to all of the rules applicable to the existing four systems if it offered its services to travel agencies. As noted, under Orbitz'' agreement with Aqua, the latter firm will develop a program that would enable travel agencies to access Orbitz'' displays and booking capabilities.

Other firms selling travel on-line have created new marketing strategies. Priceline operates a site that allows consumers to ''name their own price'' for airline seats; a consumer using Priceline, however, only learns which airline is operating the service and the routing and departure time for the trip after the consumer makes a bid and the bid is accepted by Priceline. While giving consumers an opportunity to bid on a ticket price, Priceline only sells seats obtained through negotiated deals with airlines and other suppliers. Airlines use Priceline for selling distressed inventory. Bear, Stearns, ''Point, Click, Trip,'' at 53–55. Several major airlines have created another website, Hotwire, which offers a service like Priceline. Unlike Priceline, Hotwire tells the consumer what the fare will be for the trip before the customer decides whether to buy the ticket; like Priceline, Hotwire does not disclose the name of the airline, the routing, and the departure time until the consumer accepts Hotwire's offered fare. In 2001 Priceline and other opaque sites accounted for about two percent of all airline bookings. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001).

While the growing use of the Internet and other changes in distribution practices will likely make it harder for some ''brick-and-mortar'' travel agencies to remain in business, the travel agency industry will not disappear. A Sabre official has predicted that travel agencies will account for 65 percent of all airline bookings in 2005 (45 percent by traditional travel agencies and 20 percent by travel agency websites). ''Sabre: Agents could retain 65% of air sales by 2005,'' *Travel Weekly* (April 3, 2000) at 10.

Travel agents provide services that benefit many consumers. Many travelers value the personal service provided by travel agents and their expertise with complex itineraries. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001). A large proportion of the agencies' customers will probably continue to rely on ''brick-and-mortar'' agencies because they wish to have personal contact with a travel agent and will not use an Internet site for buying tickets. Bear, Stearns, ''Point, Click, Trip,'' at 17. Many consumers also prefer using a travel agency website

rather than an airline website since they believe that they are likely to get a better price from a travel agency website. April 17, 2000, PhoCusWright Press Release. In the past the GAO found that consumers were more likely to obtain the lowest available fare from a travel agent than from other sources of airline information. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 13. And travel agents can offer expert advice not easily available elsewhere (and use the Internet to reach customers interested in taking advantage of an agency's special expertise). *See, e.g.*, Travel Distribution Report (March 11, 2002) at 39.

While the recent continuing changes in airline distribution have provided substantial benefits for airlines (and consumers, when airlines pass on their cost savings), they may not have eliminated the need for CRS regulation, as we discuss next.

E. Considerations That Support Maintaining CRS Rules

In considering whether to readopt the rules with modifications, we must determine the extent to which our past findings remain valid, that is, whether the systems still have the power to distort airline competition and provide inaccurate or misleading information to consumers, and whether a system owned or controlled by an airline will have an incentive to use that power if not blocked by rules. The airlines' growing use of the Internet for distribution and the changes in the systems' ownership require us to reassess the validity of these past findings. We invite the parties to comment on possible alternatives that could reduce the extent of regulation and lead to a phase-out of the rules, as discussed below. In particular, we are proposing to end the mandatory participation rule and to end the ban against discriminatory booking fees. These changes could enable airlines to negotiate for better terms for CRS participation.

When we last reexamined the rules, we thought that a system could prejudice the competitive position of disfavored airlines by biasing its displays so that their flights were omitted or displayed only after the flights of favored airlines, charging some airlines substantially higher fees than those paid by their competitors, or imposing participation terms that disadvantage some airlines, for example. We also found that, without rules, the systems and their owners would be likely to engage in practices meant to distort competition in the CRS business and to prevent airlines from using alternative electronic means of providing information and booking capabilities to travel agencies. We ask the parties to address the current validity of those concerns, particularly in view of the on-going developments in airline distribution.

When we reexamined the rules ten years ago, all of the systems were owned and controlled by one or more airlines or airline affiliates, and we relied on that fact in concluding that the CRS rules should be readopted. Since two of the systems are no longer owned and controlled by airlines, we have considered whether our rules should govern the practices of such a system (we will refer to systems that are not owned and controlled by airlines as ''non-airline systems'' and systems owned or controlled by airlines as ''airline systems''). We tentatively believe that non-airline systems may have market power over airlines and that rules preventing those systems as well as airline systems from engaging in anticompetitive or deceptive practices may be necessary. We ask the parties to comment on whether a non-airline system, despite the lack of airline control, might use its power to distort airline competition or mislead consumers and engage in practices that would unreasonably restrict the ability of airlines and travel agencies to use alternatives to the systems, thereby increasing airline costs (and thus the fares paid by consumers), if we do not regulate such systems.

In addition, the systems' willingness to sell data on the bookings made by individual travel agencies on each airline on a route-by-route basis and flight-by-flight basis, and to do so almost as soon as bookings are made, may give a large airline that dominates a metropolitan area power to take actions undermining the ability of competing airlines, particularly low-fare airlines, to continue serving that area. Among other things, the large airlines may use the data to pressure travel agencies in such a metropolitan area to stop booking travelers with competing airlines. Tentatively, therefore, we are proposing restrictions on the data that airlines may obtain from the systems.

1. Overview

Computer reservations system practices originally presented regulatory concerns because of the potential for consumer injury. *See* 49 FR 32540 (August 15, 1984). After reexamining the need for CRS rules in our last major rulemaking, we decided that the rules remained necessary in view of the systems' ownership by airlines and the structure of airline distribution at that time. At that time, we determined that market forces did not discipline the systems' price and terms for the services offered participating airlines. The systems' practices were not affected by market forces because the systems did not need to compete for airline participants. Airlines relied on travel agents for the great majority of their revenues, travel agencies used systems to make almost all of their airline bookings, and almost all travel agencies relied entirely or predominantly on one system to learn what airline services were available and to make bookings for their customers. 57 FR 43783–43784. Travel agents relied on the systems because they efficiently provide comprehensive information and booking capabilities on participating airlines and other travel suppliers. A CRS presented displays that integrate all participating airline services offered in a market. Each system showed the schedules and fares offered by those airlines in each market and whether seats were available on specific flights at specific fares. A travel agent could compare the schedules and fares offered by different airlines and determine which would best meet a customer's needs. 57 FR 43782; 56 FR 12587.

If an airline failed to participate in one system, the travel agents using that system could neither book its services readily nor find its services in the system's displays. The airline as a result would lose a substantial portion of its bookings from those travel agents.

The economics of the airline industry are such that the addition or loss of a few passengers on a flight will determine whether the flight is profitable. The importance of marginal revenues in the airline business means that airlines cannot afford to lose access to any significant distribution channel. 57 FR 43780, 43783 (September 22, 1992). As one industry economist, Daniel Kasper, stated, Orbitz Supp. Reply, Daniel Kasper Statement at 7:

> Airlines utilize many different distribution channels for the simple reason that they must do so in order to ensure that their products are easily accessible to the broadest possible array of prospective travelers. * * * Because attracting incremental passengers is critically important to an airline's profitability, each airline strives to match or surpass the visibility to purchasers enjoyed by its rivals. That is, airlines must compete for ''shelf space'' in any channel where consumers prefer to shop.

Cf. Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 24–25.

Virtually every airline therefore was compelled to participate in each of the four systems operating in the United

States. The Justice Department thus stated in an earlier rulemaking, quoted at 62 FR 59789,

> Each CRS provides access to a large, discrete group of travel agents, and unless a carrier is willing to forego access to those travel agents, it must participate in every CRS. Thus, from an airline's perspective, each CRS constitutes a separate market and each system possesses market power over any carrier that wants travel agents subscribing to that CRS to sell its airline tickets.

As a result, the systems did not need to compete for airline participants. They could therefore impose costly and burdensome requirements on participating airlines. As American has stated, ''This market structure allows CRSs to charge exorbitant fees to airlines.'' Statement of George Nicoud before the National Commission at 7.

When we most recently reviewed the rules, we found that, while the roles of the travel agents and the systems in airline distribution gave each of the systems market power, the systems also engaged in practices that buttressed their market power by reducing the ability of airlines and travel agencies to use alternative electronic means for the tasks of communicating information and making bookings. Until we revised our rules, the systems refused to allow travel agencies to buy third-party hardware and software, and each system refused to allow travel agencies to use the system equipment to access alternative databases and systems. Each system's contracts with travel agencies generally imposed substantial penalties on travel agencies that did not use that system for a major share of its bookings. The systems additionally required travel agencies to accept five-year contracts. 56 FR 12605, 12621.

It is important to note that substantial changes in the airline distribution business have occurred since our last overall reexamination of the CRS business. The Internet is an increasingly important means of airline distribution, and a number of airlines are obtaining a growing share of their total bookings from their own websites. The airlines' ability to sell tickets through their own websites gives them an inexpensive and efficient alternative to the travel agency system (and to their own reservations agents) and a way to bypass the systems for a significant number of bookings. In addition, two of the four systems operating in the United States are no longer owned by airlines. These developments present the question of whether CRS rules remain necessary.

According to a number of commenters, CRS rules may continue to be necessary to prevent system practices that could prejudice airline competition, although consumer use of the Internet and other on-going changes in airline distribution may in the future eliminate the need for most or all of the rules. In addition, the systems may continue to engage in practices that deter airlines and travel agencies from using alternative electronic means for providing information and making bookings. The changes in airline distribution and system ownership thus far may not have substantially eroded the systems' market power or the rationale for our adoption of rules. In considering whether rules remain necessary, we must also bear in mind that the air services agreements between the United States and many foreign countries obligate the United States to ensure that foreign airlines are not subject to unreasonably discriminatory treatment in the systems operating in this country and that those systems do not bias their displays of international services.

We recognize, however, that on-going developments in the airline distribution and CRS businesses are making participation in each system less necessary than before. In time these and other developments may clearly eliminate the need for many or all of our rules and may already have made some of the rules unnecessary. If we readopt rules governing the CRS business, we will monitor those developments to see whether the rules can be eliminated in whole or in part.

The following discussion analyzes the potential basis for some continued CRS regulation: we first discuss the impact of the Internet, then discuss whether the systems may continue to have market power against most airlines, consider whether the systems (whether or not owned by airlines) would use that power to distort airline competition and harm consumers if the rules were not readopted, discuss whether airlines have any bargaining leverage against the systems, and end by discussing other possible measures that may preclude anti-competitive conduct.

2. The Impact of the Internet on the Systems' Role in Airline Distribution

Despite the high cost of distribution through CRSs, most airlines continue to sell their services through them because they are still the best way to get inventory on travel agent desktops, a distribution channel that is still very important. Airlines ''also value the GDSs' ability to reach corporate accounts as well as more remote markets, from Alabama to Zimbabwe.'' Forrester Research, ''Travel: Direct Connect Isn't Enough'' (October 2001) at 5–6. The Internet has not changed these two sales objectives. As discussed below, the Internet may have increased the systems' importance for most airlines to date. Many airlines said in a recent survey that they ''would not even consider cutting the cord.'' ''Travel: Direct Connect Isn't Enough'' at 5–6.

Although the Internet has the potential to introduce more competition with CRS-type services in the future by using new and cheaper technologies to replicate some CRS functions, many believe that in some ways the Internet thus far may have reinforced the power of the CRSs. Indeed, travel became the most successful high-priced product sold over the Internet because the CRSs provided a readily available, consolidated, and integrated electronic source of price and inventory information that could be easily linked to web-based customer user interfaces. Like the customers of traditional travel agents, on-line consumers seek the integrated comparison-shopping and booking functionality that only a CRS can provide. All of the major online travel agencies use a CRS for their booking functionality, and many also use CRSs to search flights and fares for customer displays. Because the CRSs enable online consumers to comparison shop and make bookings for a full range of travel services, CRS performance, both collectively and individually, is even more critical to an airline's success than in the past. Worldspan, for example, serves nearly 20,000 travel agencies and processes more than 50 percent of all online travel agency bookings. Statement of Paul J. Blackney, President and CEO, Worldspan, Testimony before the National Commission June 26, 2002.

PhoCusWright, an Internet research firm, reports that the Internet represented 14 percent of all airline sales for U.S. airlines in 2001, up from 8 percent in 2000, excluding sales made through corporate on-line systems. Airline websites now represent 58 percent of airlines' total Internet sales, while the remaining 42 percent of Internet sales are now made through on-line travel agencies. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright, Inc. (May 2002) at 1–2. Thus, in 2001, 42 percent of all U.S. airline Internet sales were made through CRSs. As bookings through on-line agencies grow, bookings made through CRSs will also continue to grow, as long as on-line agencies, like their traditional counterparts, remain dependent on CRSs. Airline website sales were up 50 percent in 2001 compared to 2000, but on-line agency sales also grew rapidly, up 40 percent. *Id.* at 1.

Forrester Research, an Internet research firm, reports that, before the advent of the Internet, about eighty percent of an airline's business came via travel agencies using CRSs, with the remainder coming from direct sales via airline reservation centers or ticket offices. Since 1995, airline websites like delta.com have helped airlines raise their direct sales and cut CRS sales to 70 percent of passenger revenues. Forrester Research, ''Travel: Direct Connect Isn't Enough'' (October 2001) at 5–6. Northwest Airlines reports that it obtains ''nearly 70% of its revenue from traditional travel agents, and nearly 10% from third party travel agents like Travelocity, Expedia, and Orbitz.'' Testimony of Al Lenza, National Commission (June 12, 2002) at 5. Thus, nearly 80 percent of Northwest's total bookings were made through a CRS.

While the Internet and other new technologies have the potential for reducing airline dependence on CRSs, that development is at an early stage. Airlines have achieved some success in increasing direct sales through better use of the Internet, but an airline's ability to reduce its dependence on a CRS still largely depends on its ability to encourage more customers to book directly with it. More generally, an airline's ability to encourage direct bookings through its own website is limited to the subset of air travel consumers who have readily available Internet access and are willing to send credit card information over the Internet. According to a recent Department of Commerce report, 143 million Americans, or about 54 percent of the population, were using the Internet. Among those using the Internet, only 39 percent are making purchases online. ''A Nation Online: How Americans Are Expanding Their Use of the Internet,'' U.S. Department of Commerce (February 2002) at 1, 2. While Internet usage is expected to continue to grow rapidly as is consumer confidence in using it to make purchases, a substantial portion of the U.S. population still does not use the Internet at all. Thus, despite the Internet, an airline cannot encourage these users to make bookings on its website rather than through a traditional travel agent (using a CRS).

Since many consumers still prefer to use on-line and traditional travel agencies, airlines and other travel suppliers also seek to reduce their dependence on CRSs further by expanding direct sales into ''direct connection'' where travel agencies and corporate accounts directly access each airline's host central reservations system. In short, travel agents would access an airline's inventory via an enhanced version of each airline's agents-only website. Forrester Research: ''Travel: Direct Connect Isn't Enough'' (October 2001) at 8. But direct connect is only a first step in transforming CRS-based travel distribution. Forrester Research notes that limited interconnectivity and resistance among high-value travel agents who have significant influence over corporate travel and complex leisure travel are likely to limit the degree to which airline dependence on CRSs can be reduced. Ultimately, most industry observers believe that integrated direct connect is the form of direct connection that has the most promise of reducing airline dependence on CRSs because it would allow travel agents to integrate an airline booking with separately made hotel or car rental reservations and facilitate the integration of various travel elements in a single itinerary in much the same way as the CRSs currently do. *Id.* at 10. Orbitz plans to inaugurate direct connections with several carriers this year. Although this will further reduce those airlines' dependence on the systems, the process will take some time, and substantial additional industry initiatives will be required to reach the scale and scope necessary to have a significant impact on the current CRS-dependent travel distribution model. Orbitz's direct connection program may prompt other on-line agencies to launch similar initiatives in an effort to reduce airline distribution costs in order to gain access to webfare inventory.

Integrated direct connect solutions are extremely complex and require substantial investment by airlines and other travel suppliers. Integrated direct connect on a substantial scale is unlikely for the next several years because an alternative to IBM's transaction processing facility (TPF), the primary high-volume transaction messaging platform, must be developed and is not expected until at least 2004. *Id.* at 13. Because of the significant financial investments involved, some airlines, particularly smaller airlines, may choose not to direct connect at all. Even after integrated direct connect is developed, however, most observers see a continuing need for CRSs to complete complicated transactions, particularly interline transactions and transactions involving smaller carriers and foreign carriers that have not invested in integrated direct connect. Indeed, Forrester Research estimates that full industry-wide implementation of integrated technologies will not be complete until 2008 or beyond. *Id.* at 14.

The fact that major CRS companies have acquired control of on-line agencies could maintain their market power. Sabre recently reacquired complete ownership of Travelocity, and Cendant/Galileo owns Trip.com and Cheaptickets.com. The systems could use these integrated businesses to thwart the introduction of alternative technologies that could perform core CRS functions at a lower cost and thereby provide more competition for CRS services. ''Report to Congress: Efforts to Monitor Orbitz'' at 19. These on-line travel agencies are captive to their CRS hosts—a relationship which mirrors the central problem in the traditional travel agency marketplace where travel agents are bound to systems by five year contracts. On-line and ''brick-and-mortar'' travel agents alike have high switching costs.

In sum, it appears possible that several industry characteristics that led to the regulation of the CRSs may continue to exist, notwithstanding Internet-based technologies and innovation. First, most airlines cannot avoid participating in CRSs by creating a new system. Even with new technologies, the fixed investments of time and money to replicate the systems' integrated complexity are prohibitive. Second, because a substantial number of airline Internet sales are made through the CRSs, the Internet has not mitigated the risk that the systems (whether or not owned by airlines) may use that power to distort airline competition. Third, although airlines have increased direct sales through their own websites, the Internet may not yet have given airlines substantial bargaining leverage against the systems. Fourth, on-line and ''brick-and-mortar'' travel agencies alike appear to be both dependent on and locked into long-term relationships with their CRS providers due to very high switching costs.

3. The Potential Existence of System Market Power

As explained next, the developments in airline distribution may not have eroded the systems' market power as to airlines: travel agents sell most airline tickets, travel agents usually use a system to investigate airline service options and to make bookings, and each travel agency office relies entirely or predominantly on one system. Each of the on-line travel agencies also uses a system for making bookings, and almost all rely on a system for obtaining fare and schedule information as well.

Our tentative belief that the systems continue to have market power is consistent with the comments of a

number of airlines. While Northwest supports ending the rules, Northwest also asserts:

> Sales to consumers made over the Internet, via both airline websites and online agents, have provided significant new competition to CRSs, but each CRS typically remains the only means by which to reach the travel agents who use that system. Each CRS therefore continues to have significant market power based on the travel agents to which it has exclusive access.

Northwest Comments on Proposed Extension at 5.

(a) The Airlines' Dependence on Travel Agents

The travel agency network traditionally provided an efficient means of distribution for most airlines, and airlines derived most of their revenue from sales made by travel agents. 57 FR 43782. Despite the changes in airline distribution, travel agents continue to sell the majority of tickets for most airlines. In 2000, travel agencies sold over $76 billion worth of air travel. Statement of William A. Maloney before the National Commission at 9. In 1999 travel agencies sold almost three-quarters of all airline tickets. Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 17. Recent remarks from American Airlines indicate that travel agencies account for 70 percent of that carrier's bookings today. Statement of George A. Nicoud III before the National Commission at 3. Northwest states that 70 percent of its revenue comes from bookings made through ''traditional'' travel agents with another 10 percent being derived from sales through ''third party travel agents like Travelocity, Expedia, and Orbitz.'' Statement of Al Lenza before National Commission at 5.

Travel agents seem likely to maintain their predominant role in airline distribution despite the growing use of the Internet and other changes in distribution practices. ''Brick-and-mortar'' travel agents provide expertise and services that many consumers find valuable, as explained in our earlier discussion of the impact of the Internet.

A large portion of consumers buying tickets through the Internet also use on-line travel agencies, not airline websites, for their ticket purchases. In 2001, U.S. airlines sold $11.8 billion worth of tickets through the Internet. Online travel agencies accounted for $4.9 billion, or 42 percent, of those online sales. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright Snapshot, May 2002 (2–3).

Travel agents therefore should remain an important part of the airline distribution system. A Sabre official has predicted that travel agencies will account for 65 percent of all airline bookings in 2005 (45 percent by traditional travel agencies and 20 percent by travel agency websites). ''Sabre: Agents could retain 65% of air sales by 2005,'' *Travel Weekly* (April 3, 2000) at 10.

We recognize that some airlines, especially the low-fare airlines and several other airlines that are not among the largest airlines, have been successful in encouraging a growing number of customers to buy tickets through their own websites, as discussed above. As we noted, for example, Alaska obtained sixteen percent of its total bookings from its website in 2001, Southwest's website produced forty percent of the airline's revenues in 2001, and Frontier obtained 28 percent of its bookings in the quarter ended December 31, 2001, from its website.

A few of the largest airlines have succeeded in obtaining a significant number of bookings through the Internet. Delta expected to obtain fifteen percent of its tickets from its own website in 2002. Delta April 24, 2002, Press Release. Delta, however, still derives 47 percent of its tickets and 64 percent of its revenues from traditional travel agents. Statement of Scott Yohe before the National Commission at 8. And most of the network airlines have been obtaining a smaller share of their bookings from their websites. The websites of American and United each produce only five percent of the airline's revenues. ''Executive Flight: The Age of 'Wal-Mart' Airlines Crunches the Biggest Carriers,'' *Wall Street Journal* (June 18, 2002). United has stated that it still derives more than seventy percent of its revenues from travel agency bookings. June 26, 2002, United Press Release.

The Internet does not seem to have markedly undermined each system's market power. Indeed, in some ways the Internet may have reinforced the systems' power. First, as noted above, many Internet bookings are made through on-line travel agencies (42 percent of all on-line bookings in 2001), and those agencies rely on the systems (Orbitz is a partial exception, since it does not use a system to obtain fare and schedule information). Worldspan alone processes more than half of all online agency bookings made today. Statement of Paul J. Blackney before the National Commission at 3.

Second, individual airline websites are unlikely to replace travel agencies as the dominant form of airline distribution for several reasons. As shown, travel agents offer expertise and personal services that many travellers consider invaluable. Those travellers will not be likely to switch to airline websites for their bookings. Many consumers may continue to be unwilling to use the Internet to buy airline tickets, which can be relatively expensive and can require the consumer to choose among a variety of routings and fare options subject to different conditions and restrictions. In addition, while the Internet provides extensive information and buying facilities for consumers, many travel websites do not present this information in a manner that readily enables consumers to obtain a complete or largely complete list of travel options and to compare the suppliers' different prices and service features. Each system has provided efficiency benefits to travel agents and more recently consumers because it displays flight and fare information for all airlines serving a city-pair market that participate in the system. Consumers can access a fairly complete display of airline services through the Internet by logging onto a website that uses a system (or, like Orbitz, that has supplemented a system's information with information obtained through other sources). If a consumer instead views a travel supplier's website, he or she will likely see only the services offered by that airline and any airlines with which it has alliances. In contrast, a travel agent can give a customer advice on most of the available service options in a market, primarily because the integrated displays offered by each system will list the services and most fares offered by every airline participating in a system.

Airlines, moreover, have little ability to encourage most consumers to shift their bookings from travel agents to their own websites. Several have used offers of additional discounts and frequent flyer mile bonuses to increase the number of travellers using websites, but many travellers would presumably continue to use travel agents unless the discounts and bonus offers became so large that they cancelled out the airline's cost savings otherwise achievable from its website.

The existence of one distribution channel that is attractive to a significant and growing number of travellers does not make that channel competitive with another channel that a larger if shrinking share of travellers finds preferable. With a very few exceptions, any airline that uses only one channel will not obtain the business of those travellers that prefer the other channel. Similarly, while the airlines were able in the 1980's to sell a substantial number of tickets through their own

reservations centers, they depended on the travel agency system for the sale of most of their tickets.

We recognize that Southwest has never participated in any system except Sabre and participates even in Sabre at a limited level. While Southwest has thrived without significant system participation, its success does not indicate that other airlines can succeed while avoiding participation in the systems. Southwest has an unusual business plan. Southwest, for example, focuses on operating frequent point-to-point service in dense markets, does not have a hub-and-spoke route system, and has a relatively simple fare structure. Transportation Research Board, *Entry and Competition* at 49–50. Southwest has well-established brand recognition and buys relatively large amounts of advertising. While JetBlue has also prospered thus far while obtaining only a small share of its total revenues from travel agents, its experience similarly does not demonstrate that other airlines can forgo reliance on the travel agency distribution system. Most of the other low-fare airlines, like AirTran and Frontier, have concluded that participation in each system is necessary. 62 FR 47608; Frontier Comments at 4. In the fourth quarter of 2001, AirTran, for example, obtained 33 percent of its bookings from travel agencies using a system. AirTran 10–K Report for fiscal year 2001 at 8. The systems' apparent market power over most of the airlines exists because those airlines do not operate like Southwest or JetBlue, and we have no evidence that other carriers could feasibly adopt Southwest's marketing strategy without incurring substantial costs.

(b) The Travel Agents' Dependence on the Systems

Almost every travel agent has used a system to investigate airline service options and make bookings for the agency's customers (each on-line travel agency, moreover, also uses a system, as noted above). One survey reported that travel agencies made 93 percent of their domestic airline bookings and 81 percent of their international airline bookings through a system in 1999. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 133.

The extensive reliance on the systems by on-line and ''brick-and-mortar'' travel agencies has stemmed both from the efficiency benefits provided by the systems and from the systems' contractual practices designed to deter travel agents from using alternatives to the systems. Each system offers an integrated display of airline services that enables a travel agent to quickly see the services and fares offered by every airline in a market (except for the few airlines that do not participate in the system) and to book any of those airlines. If a travel agent did not use a system, the agent would have to search a variety of sources to learn what services were available, which would necessarily be more time-consuming and inefficient. Since travel agents typically work under significant time pressure, they have an incentive to use one system, rather than multiple sources of information. Previously, the widespread use of display bias arose from the travel agents' same desire to take as little time as possible acting on customer requests. *See, e.g.*, Mark Pestronk, ''Change to GDS 'model' not likely,'' *Travel Weekly* (July 15, 2002).

Travel agency business practices provide an additional incentive for travel agents to use a system for as many airline bookings as possible. The travel agency back-office systems used for accounting, billing, and record-keeping functions are tied to transactions made through the agency's system. Travel agencies are therefore reluctant to make transactions outside of the system because those transactions will not be automatically entered in most travel agency back-office systems.

As a result, searching several websites for E-fares is less efficient for travel agents, complicates a travel agency's task of preparing reports for corporate customers, and makes it harder for corporate travel managers to manage travel programs. Susan Parr Travel Comments; NBTA Comments on Proposed Extension at 2. Thus, while many travel agents have Internet access and could book airline seats over the web, either through an individual airline site or another travel agency site, it appears they use the Internet for making a relatively small portion of their airline bookings. They have used the Internet primarily for booking hotels, tours, and railroad services. *See Travel Distribution Report* (October 18, 2001) at 1. Travel agents nonetheless are increasingly using the Internet for bookings. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002).

The systems' contract practices, however, also discourage most travel agencies from using more than one system. The systems' productivity pricing structures seem to deter travel agents from using the Internet. When travel agents book E-fares through the Internet, for example, they run the risk of failing to satisfy the minimum monthly booking quota set by the productivity pricing provisions. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002); All About Travel Supp. Comments. The potential loss of the lower CRS rates may deter travel agents from booking E-fares when doing so would be in the best interests of their customers. ASTA thus alleges that productivity pricing clauses ''have served mainly as a deterrent to the agency's looking to non-CRS sources, such as the Internet, to make bookings that more nearly conform to their clients' needs.'' ASTA Comments on Proposed Extension at 3.

Our existing rules have furthered several of the developments that may be reducing the systems' market power. Before we revised the rules, for example, the systems generally denied subscribers the ability to use third-party equipment. 56 FR 12605. Our revised rules gave travel agencies the right to use their own equipment. Travel agencies have been taking advantage of that rule, for in 1999 thirty-six percent of all travel agencies used their own terminals. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 131, 132, 133.

As noted, travel agency offices have typically relied entirely or predominantly on just one system for these tasks. While the services offered by each system are comparable, using multiple systems could improve a travel agency's ability to serve its customers. Travel agents then could acquire more accurate and complete information on available airline flights, and the agencies' ability to use multiple systems would encourage the systems to compete more on the quality and range of their services. 57 FR 43797. Offsetting that factor, a travel agency's use of multiple systems can create some inefficiencies, due to additional training needs and potential difficulties in keeping track of customer records. 56 FR 12607. Each system also offers large financial inducements to most travel agency customers to make most or all of their bookings on that system. Since the large majority of travel agencies therefore depend on one system, almost all airlines must participate in each system in order to make its services readily saleable by the travel agencies using that system. Delta Comments at 5; American Supp. Comments at 5; Continental Supp. Comments at 5; Midwest Express Supp. Comments at 3–4.

Customer demands may push travel agencies into using additional sources of information like the Internet. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002). Airlines generally offer many of their lowest fares only on

their own websites and, for airlines that are Orbitz ''charter associates,'' on Orbitz. Airlines generally do not make these webfares (or E-fares) available for sale through any of the systems used by travel agents. Some airlines like Delta allow travel agents to book these fares on their websites created for travel agency use. Travel agents could also book such fares through Orbitz. Booking an E-fare (or any fare) through an airline website or Orbitz or another on-line travel agency is now an inefficient process for travel agents, as discussed above. Several firms are developing software that will enable travel agents to quickly search for fares on multiple websites and systems, however. ''Fare game: 'Beat the agent''', *Travel Weekly* (March 4, 2002) at 6. By agreement with Orbitz, Aqua will also develop a program allowing travel agents to simultaneously see the display of fares offered by a system and the fares offered through Orbitz, including the E-fares sold through Orbitz that airlines do not sell through the systems used by travel agencies. May 16, 2002, Orbitz Press Release.

When travel agents can easily and efficiently access websites that provide information and booking capabilities, they will be more likely to use such alternatives to the systems. A substantial use of such alternatives would reduce each system's market power, since an airline would not necessarily lose a substantial amount of revenue if it ended its participation in one of the systems. The travel agents using that system would have alternative means for obtaining the airline's fare and schedule information and for booking the airline. The programs under development by independent firms will not necessarily achieve that result, however. The developers are focusing on giving travel agents easy access to E-fares. E-fares, however, make up a relatively small share of all airline bookings. PhoCus Wright reports that such fares constitute less than 2 percent of an airline's total ticket sales. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright Snapshot, May 2002(3). If the programs do not give travel agents quick access to other fares, or if travel agents only use the programs to investigate whether E-fares are available, they would not cause a substantial shift of bookings away from the systems.

The systems themselves are also responding to travel agency demands for easy access to webfares. Certain systems are developing programs that would enable travel agents to sell webfares without leaving the system. Galileo Press Release dated May 23, 2002. Sabre recently signed an agreement with FareChase, a web automation technology provider, that enables travel agencies using Sabre and subscribing to its eVoya product to have the option of using a FareChase program that searches multiple airline websites for webfares and presents a display of the results alongside fares available for booking through the system. FareChase Press Release April 29, 2002, and FareChase Information Page at Sabre website. These developments will both increase the efficiency and quality of service provided by travel agents but at the same time make it less necessary for them to use alternatives to the system to research and, in some cases, book, airline services. The systems' attempts to provide mechanisms for travel agencies to more easily access webfares may serve to increase agency dependence on the systems and further reduce the incentive for travel agents to use alternative electronic means of obtaining information and making bookings. Such a development could inhibit the introduction of more competition to the systems in the airline distribution arena.

(c) The Airlines' Apparent Lack of Bargaining Leverage Against the Systems

Because most airlines have relied on travel agencies to sell most of their tickets, and because travel agencies have typically relied on one system to learn what airline services are available, airlines (with a few exceptions) generally have not been able to afford not to participate in each of the systems. As discussed, an airline's withdrawal from one system would likely substantially reduce its bookings from travel agents using that system. As a result, airlines have not had significant bargaining leverage against the systems, because the systems have not needed to compete for airline participants.

Despite the advent of the Internet, travel suppliers in general, and most of the airline industry in particular, may continue to depend substantially on the systems to distribute their products. Midwest Express, for example, states that in the first half of 2000, 26 percent of its total bookings came through Sabre, 18 percent through Galileo, and 14 percent through Worldspan. Midwest Express Supp. Comments at Exhibit 1. According to a survey conducted by Forrester Research, 59 percent of travel industry supplier respondents indicate that ''more than half of their revenue still comes through a GDS.'' In 2001, travel industry wide, 55 percent of revenues came through a system while 45 percent resulted from direct sales. However, among airline industry survey respondents only, 70 percent of revenues flowed through a system while only 30 percent were attributable to direct sales. Forrester Research: ''Travel: Direct Connect Isn't Enough'' October 2001, at 3, 6. Thus, the airline industry remains more dependent than its travel industry counterparts on travel agency sales made through the systems.

In 2000, bookings fees accounted for 82 percent of system revenues. The captivity of the airline industry in particular to the systems is again illustrated by the fact 87 percent of total system travel booking fee revenues were generated by airline reservations. Forrester Research: ''Travel: Direct Connect Isn't Enough'' October 2001 at 14.

Some parties have argued that the rules, such as the mandatory participation rule, enable the systems to impose unreasonable terms for airline participation because they require the major airlines to participate in each system. As discussed below, we are considering whether the mandatory participation rule may limit the airlines' negotiating power. When we readopted the rules, we found that the airlines' economic needs compelled almost all of them to participate in each system. If airlines had been able to avoid participating in systems whose terms were unreasonable or unduly expensive, we would have allowed the rules to expire. A number of smaller airlines are not subject to the mandatory participation rule, since they have held no ownership interest in any system, yet most participate in each of the systems, as discussed above. However, since several airlines have presented a persuasive argument that they could obtain better terms for participation if we eliminated the mandatory participation rule, we are proposing to do so. If these airline assertions are correct, ending that rule could expose the systems to new competitive discipline.

The systems, however, in the absence of any rules might impose requirements on participating airlines that would further limit the airlines' ability to choose whether to participate in a system and at what level. After our last major rulemaking, for example, we determined that we should prohibit the systems from enforcing ''parity clauses'' against airlines that did not own or market a competing system. 62 FR 59784 (November 5, 1997). The parity clauses imposed by most systems on airline participants required each airline to buy at least as high a level of service from the system as it did from any other system. The parity clauses made it

unnecessary for systems to compete for airline participation at higher levels of service (while almost all airlines must participate in each system for economic reasons, many airlines do not need to participate at the more expensive higher levels). As we explained then, ''[P]arity clauses cause airlines either to buy more CRS services than they wish to buy from some systems or to stop buying services from other systems that they would like to buy, which creates economic inefficiencies and injures airline competition.'' 62 FR 59784.

If an airline could create its own system, it could obtain some bargaining leverage. In the past we have found that doing so would probably not be feasible. Developing the hardware and software required for a new system would likely be prohibitively expensive. The economies of scale in the CRS business would prevent a new system from operating profitably unless it obtained a substantial number of subscribers. But a new system would encounter great difficulty in obtaining an adequate subscriber base, since virtually all travel agencies already have agreed to use one of the existing systems under long-term contracts that normally will deter the agency from using another system for a significant number of bookings while they remain in effect. *Airline Marketing Practices* at 49–50; 57 FR 43784.

The Internet has likely made it easier to create a competing service that would provide airline information and booking capabilities for travel agents and consumers. Since any such service could be accessed through the Internet, a firm entering the business would not need to create communications links with the users of its service. Any such firm, however, would still incur substantial programming and equipment costs in creating an information and booking service and establishing the computing facilities necessary to handle all requests for information and bookings.

The five largest airlines, of course, may be establishing such a service through Orbitz, though Orbitz was originally developed as an on-line travel agency to be used by consumers. The costs of Orbitz'' development demonstrate the great expense of an on-line agency using alternative technologies that would replicate some system functions. As of March 31, 2002, Orbitz' owners had invested $205 million, Orbitz had incurred losses of $153 million, and Orbitz expected to continue incurring operating losses for some time. Amended Registration Statement at 9, 26. By agreement with Orbitz, as noted, Aqua will develop a program that will enable travel agents using a system to simultaneously see and book the airline services available on Orbitz.

Orbitz' entry into the on-line reservations business does not necessarily suggest that entry would be feasible for other firms. Commentators have stated that the on-line travel agency business is likely to be dominated by Orbitz and the two larger on-line travel agencies, Travelocity and Expedia. Further large-scale entry into that business seems unlikely. Orbitz, moreover, was helped by the business and financial resources of its five owners, and its most-favored-nation clause with those airlines and the other charter associate airlines has probably been necessary to its ability to become the third-largest on-line travel agency. ''Report to Congress: Efforts to Monitor Orbitz,'' Office of Aviation & International Affairs (June 27, 2002), at 18–19.

If airlines could practicably persuade travel agencies to use one system rather than another, airlines would have some bargaining leverage against the systems. Airlines could then shift business to systems offering better terms for airline participants and away from systems offering poorer terms. The airlines, however, have not been able to do that thus far. Since travel agencies do not pay booking fees, they have no direct incentive to use the system charging the lowest fees. Airlines have had no effective incentives that they can offer travel agencies to encourage the use of one system rather than another. Most travel agencies have multi-year contracts to use one system. These contracts typically include financial terms that encourage each travel agency to use one system for all or almost all of its airline bookings and deter the agency from using the Internet to book airlines directly.

The growing importance for many travellers of webfares, however, could give airlines some bargaining leverage. Airlines might obtain leverage by selectively giving systems access to their webfares (and perhaps corporate discount fares) according to the relative attractiveness of each system's prices and service quality.

In some cases large airlines can compel travel agencies (and corporate travel departments) to switch from one system to another. Airlines that dominate an area's airline markets, like Delta at Atlanta and American in southern Florida, can achieve this result by denying the disfavored system the ability to sell their corporate discount fares. Dominant airlines have that ability because travel agencies in the area cannot easily succeed without the ability to sell the corporate discount fares demanded by many business travellers. We have not seen evidence, however, that those airlines (or other airlines) have used their leverage in local airline markets as a tool to obtain better terms for participation from one of the systems, and airlines have such leverage only in areas where they account for the largest share of service.

In a more general sense, United's apparent inability thus far to obtain better terms from any system, even though it is no longer subject to the mandatory participation clause, raises the question of whether the largest airlines have bargaining power against the systems. United's sale of its ownership interest in Galileo freed it from the requirements of the mandatory participation rule. Our past experience suggests that airlines might not have much leverage against the systems, given their dependence on travel agency distribution and the travel agents' reliance on the systems, if the rules were eliminated. It is not clear that the on-going developments in airline distribution have proceeded far enough to give the airlines significant bargaining leverage against the systems. Many airlines, however, have become less dependent on the systems, and the systems have become more dependent on the airlines' willingness to provide complete access to their fares, as shown by the systems' efforts to obtain webfares for sale through the CRSs.

The major airlines may obtain such leverage if Aqua succeeds in obtaining a large number of travel agency subscribers to its service giving travel agents ready access to Orbitz' displays. A major airline's lack of participation in a system then might not lead to a substantial loss in bookings from the travel agents using that system if its schedules and fares are displayed in Orbitz. An Orbitz owner (or other major airline) conceivably might then begin denying complete information on its fares and services to one or all of the existing systems (or lower its participation level) until that system agreed to lower the airline's booking fees and improved its other terms for participation. A system might be more likely to give such an airline lower fees if it were not required by our rules to do the same for all participating airlines. A system might have incentives to offer better terms to a major airline, since such an airline's withdrawal from the system would make the system markedly less attractive to travel agencies. A system's inability to offer complete information and full functionality on an airline frequently booked by travel agents in one region

could undermine the system's ability to obtain subscribers in that area.

None of Orbitz' owner airlines (or any other airline) has said that it intends to bargain with systems by threatening to deny them access to its fares and services. If they did so, they might be able to obtain better terms for participation. That would lower their costs and improve the efficiency of their distribution. Such a result, however, may not benefit competition overall. Any improvement in terms likely would not be shared with smaller airlines, which also depend on travel agents and the systems for distribution. Some on-line travel agencies have alleged that some Orbitz owners have been willing to give them access to E-fares only if the agency ends all efforts to promote the services of competitors in certain markets.

Nonetheless, while in the past some airlines that have had an ownership or marketing relationship with one system may have limited their participation in competing systems in order to create a marketing advantage for their affiliated system, airlines could legitimately limit their participation in a system on the ground that the system's services are unsatisfactory in some respects or are too expensive. We adopted the rule barring parity clauses for this reason, subject to an exception for airlines owning or marketing a system. We also found that airlines seemed to possess some limited ability to obtain better terms, for they could choose not to participate in the more expensive levels of service offered by a system. The parity clause rulemaking itself resulted from Alaska's efforts to downgrade its participation in Sabre. Given the assertions of some airlines that they could obtain better terms by bargaining with the systems if they were not subject to the mandatory participation requirement, we are proposing not to readopt that rule. Eliminating that rule and the rule barring discriminatory fees could serve as an experiment to determine whether airlines can obtain lower fees and better service from the systems and whether the resultant benefits would be offset by the kind of practices that originally caused us to adopt the mandatory participation rule.

4. The Costs Imposed by System Practices

Because market forces in the past have not disciplined the systems' prices and terms for services provided airline participants, it appears that the systems have been able to impose, and have imposed, costly and burdensome requirements on airline participants. It appears that the fees charged airlines have not been effectively disciplined by competition and may well exceed system costs by a significant amount. 56 FR 12586, 12595 (March 26, 1991). In past years the fees paid by airlines and other travel suppliers accounted for about ninety percent of total system revenues, while the fees paid by travel agencies made up only ten percent of the total. 62 FR 59784, 59788 (November 5, 1997); Sabre Holdings 10–K reports for the years 1999 and 2000. Delta's CRS booking fee expenses exceeded $350 million in 2001. Statement of Scott Yohe before the National Commission at 9. Northwest estimates that it will pay over $200 million in booking fees in 2002 despite reduced traffic levels. Statement of Al Lenza before the National Commission at 3.

The systems' market power enabled them to drive up airline costs in other ways as well. The systems' practice of charging airlines for passive bookings was one example (passive bookings are bookings made by a travel agent through a system that do not involve sending a message to the airline's internal reservations system). Travel agents often make passive bookings in order to serve their customers, but such transactions usually do not directly benefit the airlines. The systems nonetheless charged booking fees for passive transactions. In addition, the record suggests that some travel agents may have used the passive booking capability for unnecessary transactions in order to meet the minimum booking quota established by the systems' productivity pricing formulas. The annual fee liability for passive bookings and other bookings considered unnecessary by participating airlines amounted to $5 million to $10 million for some airlines, and such bookings accounted for eight to ten percent of their total fees. Aloha December 23, 1997 Supp. Comments at 2; Alitalia Comments at 4; Qantas Comments at 4. Systems stopped charging participating airlines for passive bookings after we began this proceeding, but their action does not necessarily indicate that participating airlines have any leverage over the price charged for CRS services. Furthermore, the systems that stopped charging for passive bookings raised other fees and appeared to have incurred no reduction in their overall revenues.

In addition, three of the systems adopted and enforced parity clauses against airlines. A system's parity clause required a participating airline to buy at least as high a level of service from that system as the airline bought from any other system, whether or not the airline considered the price and quality of the system's higher level of functionality to be reasonable. Alaska and Midwest Express estimated that Sabre's plan to enforce its parity clause against them would increase their CRS costs by about ten percent. 61 FR 42201.

Finally, Galileo revised its display algorithm several years ago to benefit United by diverting bookings away from some of United's competitors. Galileo's revised display algorithm may have reduced Alaska's annual revenues by $15 million and Midwest Express' annual revenues by several million dollars. Galileo's algorithm often gave United's services a better display position than services offered by competing airlines that better met the needs of travel agency customers, and it was significantly less efficient for travel agents who wished to find the best service for their customers. 61 FR 42212–42213.

The higher costs that may be attributable to system practices (and different distribution costs generally) can make a significant difference in an airline's ability to compete. American states that, due to the differing levels with which it and Southwest rely on travel agents and, by extension, on the systems for distribution, American pays $3 in booking fees per passenger boarded while it estimates that Southwest pays less than 50 cents. Statement of George Nicoud before the National Commission at 4.

5. The Potential for Anti-Competitive Conduct

The sale of air transportation through all four of the systems operating in the United States has been subject to regulation since the Board originally adopted CRS rules. Our rules now cover systems owned or marketed by an airline or airline affiliate. Several airlines own Worldspan and Amadeus, and Sabre and Galileo are each marketed by its principal former airline owner. Ten years ago, when each system was controlled by one or more airlines or airline affiliates, we concluded that the systems' conduct before the rules took effect demonstrated the need for rules to prevent system practices that would deceive consumers and their travel agents and prejudice airline competition.

Two of the systems now have no significant airline ownership, though both are marketed by airlines, and the other two are owned by several airlines rather than being controlled by a single airline. One or more of the systems may cease to be owned or marketed by any airline. We believe, however, that, if the systems continue to have market power,

there might be a significant risk that systems would use their market power to distort airline competition, whether or not they are owned or marketed by airlines. Northwest has thus predicted:

> To the extent that any CRS has market power over the distribution of air travel, the CRS will have incentives to exercise that power, with negative consequences for airlines, travel agents, and consumers.

Northwest Comments on Proposed Extension at 5

First, experience has shown that a substantial risk exists that a system with substantial airline ownership would engage in conduct that would violate section 411 but for our rules. Galileo revised its display of airline services within North America in a way that gave United a substantial competitive advantage over airlines like Alaska that operated many single-plane flights and relied less on hub-and-spoke operations. Galileo created displays designed to promote United's interests even though they made it harder for travel agents to serve their customers. 61 FR 42208, 42212–42213 (August 14, 1996).

While the two larger systems, Sabre and Galileo, no longer have significant airline ownership, each continues to rely on its former major airline owner for marketing support. American markets Sabre, and United markets Galileo (Southwest is also marketing Sabre). Amadeus Supp. Comments at 4–5. The systems' retention of the marketing relationships is consistent with our conclusion that a system without any airline ties could not easily compete in the CRS business. *See also* ''Editorial: Three fateful mistakes crippled Galileo,'' *Travel Distribution Reports* (June 28, 2001). Sabre and Galileo have other contractual relationships with American and United, respectively. Galileo hosts United's internal reservations system and provides other technological services. Amadeus Supp. Comments at 4–5. Sabre provides information technology services to American, and American provides management services to Sabre. Sabre Holdings 10–K Report for the Year 2000 at 16. The two systems also depend on their former owners for a substantial share of their total revenue. In 2000 Galileo obtained twelve percent of its total revenue from United. Galileo International 10–K Report for Fiscal Year 2000 at 10. In 1999 Sabre obtained twenty-four percent of its revenues from American. Amadeus Supp. Comments at 4.

It appears that, in the past, systems and their airline affiliates have taken steps to prejudice each other's competitors. Some of those airlines have taken actions that seem likely to injure their own marketing position in an apparent effort to strengthen the marketing position of the affiliated system. According to System One, American, Northwest, and TWA delayed their introduction of E-ticketing in Amadeus in order to benefit their affiliated system. United allegedly denied travel agents using one of Galileo's competitors the ability to reliably grant frequent flyer upgrade requests. System One Comments; System One Reply Comments.

Airlines with only a marketing relationship with a system have similarly made it more difficult for travel agents using another system to obtain complete information and make bookings, thus encouraging the agencies to choose the system marketed by the airline. For example, Amadeus asserts that American has continued to deny travel agents using systems other than Sabre access to some of its discount fares even though American has spun off all of its Sabre stock. Amadeus Supp. Reply at 22.

This apparent willingness of airlines to engage in practices likely to harm the sale of their tickets in order to promote the marketing efforts of an affiliated system indicates the strength of the continuing ties between each system and its owners (or former owners). Even if no airline had a tie with a system, a system might still engage in conduct that would prejudice airline competition and make it difficult for consumers to obtain unbiased or complete information, as Northwest has asserted. One commenter alleges that one system relegated a rental car company to a poor display position because competing rental car companies bought a preferential display position, a move that caused the disfavored car rental company to lose many bookings. Marshall A. Fein Supp. Comments. Whether in fact non-airline systems are likely to engage in conduct that could distort airline competition will be the basis of our decision on whether the rules should treat non-airline systems the same as airline systems.

We note, however, that our rules cover only the sale of airline services through the systems. We do not regulate the systems' treatment of the display and sale of other travel services, such as hotels and rental cars. We invite the parties to present evidence on the systems' participation terms for the suppliers of other travel services. Such evidence would help us determine whether there is still a need for rules governing the systems' treatment of participating airlines.

6. Potential Anti-Competitive Practices in an Unregulated Environment

The original rules focused on regulations that would either prevent display bias or keep the systems' airline owners from using their control of the systems to prejudice the competitive position of rival airlines. While these issues were crucial in our last rulemaking, we also worked on developing rules that would allow market forces to discipline system practices to some extent. We therefore adopted rules giving subscribers the right to use third-party hardware and software and to access any system or airline information source from equipment that was not owned by the system. We additionally prohibited certain types of subscriber contract terms that unreasonably denied travel agencies the ability to use alternative systems or databases. More recently we found it necessary to bar systems from enforcing airline parity clauses.

Every system seems to continue to engage in subscriber contract practices that keep airlines and travel agencies from using alternatives to the systems and thereby entrench each system's market power. The likely result is higher airline costs and thus higher fares for consumers. A number of the parties assert that our rulemaking should focus on these types of contractual provisions. Delta, for example, had contended that our primary objective ''should be to increase competition among CRS vendors for information services and booking fees by eliminating contract and other CRS vendor-created barriers that prevent or limit travel agents from using multiple CRS databases and Internet connections to competitive sources of travel information.'' Delta Comments at 2. Similarly, Alaska states, ''[O]ne critical objective * * * should be the elimination of the incentives and disincentives that lock travel agents into a particular CRS and discourage agents' use of alternative means of communicating with participating carriers.'' Alaska Comments at 7.

Finally, airlines affiliated with a system may engage in conduct that may restrict competition and that would not be outweighed by consumer benefits. As discussed below, they have in the past denied competing systems full access to their fares and withheld some types of functionality in order to give a competitive advantage to their affiliated system. While some argue that the mandatory participation rule inhibits competition between the systems by requiring owner airlines to participate in all systems at the same level as in

their affiliated systems, this potential disadvantage may be outweighed by the rule's potentially positive impact in fostering effective competition between smaller carriers and the major carriers.

F. The Department's Authority Under Section 411 To Adopt CRS Rules

As discussed, our authority under section 411 of the Federal Aviation Act, recodified as 49 U.S.C. 41712, has provided the basis for our rules governing CRS operations. Section 411 authorizes us to prohibit unfair and deceptive practices and unfair methods of competition by airlines and ticket agents in air transportation and the sale of air transportation. Section 411 states, ''[T]he Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.'' If the Secretary ''finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.''

Thus, to readopt rules governing system operations, we must find that rules are necessary to prevent conduct that would constitute unfair or deceptive practices or unfair methods of competition in violation of section 411. A deceptive practice is one that will tend to deceive a significant number of consumers. *United Air Lines*, 766 F.2d 1107, 1113 (7th Cir. 1985). An unfair method of competition is a practice that violates antitrust laws or antitrust principles. We may therefore prohibit some airline conduct permitted by the antitrust laws. *See, e.g.*, *Pan American World Airways* v. *United States*, 371 U.S. 296, 306–308 (1963); *United Air Lines*, 766 F.2d at 1114.

Section 411, of course, does not give us unlimited authority to regulate the practices of airlines and ticket agents. Airline deregulation has made the airlines generally free to determine how to distribute and sell their services, including sales through travel agencies. The antitrust laws similarly allow individual firms to choose how to distribute their products and services as long as they do not violate one of the provisions of those laws. 65 FR 45554, citing *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (en banc); and *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981).

While section 411 also authorizes us to prohibit unfair practices as well as deceptive practices and unfair methods of competition, we have followed the principle that a practice is ''unfair'' if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits. *Complaint of Ass'n of Discount Travel Brokers*, Order 92–5–60 (May 29, 1992) at 12, citing *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). *See also American Financial Services* v. *FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985). We have relied primarily on our authority to prohibit deceptive practices and unfair methods of competition as the basis for our proposed rules.

Maintaining CRS rules would comply with our duty under 49 U.S.C. 40105(b)(1)(A) to exercise our authority consistently with the United States' obligations under international agreements. The United States has a number of international air services agreements that require it to ensure that U.S. systems do not subject foreign airlines to discriminatory treatment.

The public policy provisions of our governing statute, moreover, would support the readoption of CRS rules to the extent that they remain necessary to prevent practices that would unreasonably reduce competition. Congress has stated that we must consider the following matters, among others, to be in the public interest: (i) The prevention of predatory or anticompetitive practices in the airline industry, (ii) the prevention of unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would allow an airline unreasonably to increase fares, reduce service, or exclude competition, and (iii) the encouragement of entry by new and existing air carriers. 49 U.S.C. 40101(a)(9), (10), (13).

1. Our Authority To Regulate Non-Airline Systems as Ticket Agents

We have in the past regulated airline systems by making the airlines that own or market a system responsible for ensuring the system's compliance with our rules. That approach made sense, because each system was originally created by an airline, was owned by an airline or airline affiliate, and was marketed by one or more airlines. The change in ownership of Sabre and Galileo, which are no longer owned and controlled by any airline, requires us to reexamine our authority to regulate the systems under section 411. We have tentatively concluded that section 411 empowers us to regulate such systems if necessary to prevent unfair and deceptive practices and unfair methods of competition. We may regulate a firm under section 411 if it is an air carrier or a ticket agent. It appears that a non-airline system (as well as an airline system) is a ticket agent.

We are addressing this question despite the suggestions from several parties that we need not decide here whether we may regulate non-airline systems. First, resolving the issue in this proceeding rather than in a future separate proceeding should be more efficient. Secondly, resolving the issue here would remove any ambiguity about our jurisdiction. After American spun off its remaining Sabre stock, Sabre informally began taking the position that it was no longer subject to our rules since it was no longer owned or controlled by an airline, *see* Orbitz Supp. Reply at 2, notwithstanding the express language in the rules making them applicable to any system marketed by an airline. While Sabre later changed its position, Sabre Supp. Comments at 8, its initial conduct suggests that it believed that we may not regulate a system that is not owned by an airline, even if an airline markets the system. United, moreover, contends that a marketing relationship cannot justify subjecting a non-airline system to the rules. United Supp. Comments at 18, n. 20.

We have therefore determined that we should resolve the question of whether section 411 authorizes us to regulate a non-airline system. We may do so if a system is a ticket agent. By statute a ticket agent is a person ''that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.'' 49 U.S.C. 40102(a)(40). Travel agencies are clearly ticket agents, but the statute does not confine the category of ticket agents to travel agents alone. In our view a system's functions bring it within the definition of ticket agent, since each system ''offers for sale'' and ''holds itself out as * * * arranging'' air transportation.

A system operates a central computer that collects information on airline schedules and fares and the availability of seats, arranges that information under its own editing and ranking criteria in displays that are provided to travel agents, and provides a booking capability enabling travel agents to make airline reservations for their customers. The systems carry out these functions under contracts with the airlines, which pay the systems for providing the information and booking capabilities to travel agencies and other system users.

By listing airline services in its display and enabling travel agents to book those services, each system is offering air transportation for sale. The system, moreover, is an active participant in any sales transaction, not just a transmitter of messages between travel agent and airline. Systems, for example, may require an airline to accept any booking made by a travel agent using the system. *See* America West Petition at 23, n.12. This requirement indicates that systems view themselves as responsible for the booking transaction itself, not just for providing a communications link.

Because each system does more than just transmit messages between airlines and travel agents, a system is quite different from a straight communications link, the analogy cited by United for its argument that a system cannot be considered a ticket agent. United Comments at 13. When a consumer uses the telephone to buy goods and services, for example, the telephone line links the consumer with the firm selling the product or service, and the consumer conducts the transaction directly with the retailer. In contrast, a travel agent using a system to make a booking communicates exclusively with the system, not the airline, unless the travel agent uses a direct access feature that enables travel agents to obtain information and make bookings directly with an airline's internal reservations system. Even then much of the communication will be with the system. Furthermore, telephone companies do not choose which data will be sent to the listener. The systems, in contrast, edit their displays of airline services. In fact they must edit and rearrange the schedule and fare data obtained by them for their integrated displays of airline services, since the raw information they obtain directly or indirectly from airlines is not in a form that would be useful to travel agents.

The systems also provide other functions to travel agents that enable them to serve their customers when buying airline tickets. The systems' passive booking functionality makes it possible for travel agents to print itineraries for customers participating in a group booking and to issue tickets for customers who earlier reserved their seat directly with the airline. These functions confirm the systems' status as active participants in the sale of air transportation.

We know of no judicial or agency decisions construing the term ''ticket agent'' in a manner which would preclude treating a system as a ticket agent. When we and the Board determined that the CRS rules should not cover systems not owned or marketed by an airline, neither we nor the Board concluded that our authority under section 411 would not permit us to regulate the practices of a non-airline system. 49 FR 32548; 57 FR 43794.

In addition, we have some power to bar airlines and travel agencies from doing business with systems that do not comply with at least some of the standards set by our rules. Regulating the systems' contractual relationships with airlines and travel agencies could enable us to prohibit some potentially prejudicial practices. We could, for example, bar airlines from purchasing favorable bias in system displays or from acquiring the systems' marketing and booking data. We are proposing some such rules in this proceeding. In other respects, however, regulating CRS practices by regulating airline conduct may not be entirely workable under the terms of section 411. The section authorizes us to adopt rules when necessary to prevent unlawful conduct by an airline or ticket agent, not by a party doing business with an airline or ticket agent. Barring an airline or travel agency from doing business with a system that does not follow the rules' standards would seem to require findings that the airline or travel agency would otherwise be engaged in a deceptive practice or unfair method of competition. Whether such findings could be made as to all of the practices covered by our proposed rules is uncertain.

It appears that rules governing non-airline systems may be necessary due to the potential risk for unfair and deceptive practices and unfair methods of competition. It also appears that extending the rules to such systems may not significantly interfere with their ability to compete and innovate. First, all of the systems are currently bound by the rules, which govern systems owned or marketed by an airline. And, as Galileo has stated, the systems have learned to live with the rules. Galileo Comments at 10–11. Whether or not we maintain our rules, the systems will remain subject to rules in Canada and Europe that are comparable in most respects to our current rules. Secondly, the on-going changes in airline distribution may ultimately make most or all of our rules unnecessary, particularly if the development of alternatives means for accessing travel agencies creates effective competition for the systems.

Furthermore, requiring the airline systems to comply with the rules while allowing the non-airline systems to operate without restriction would create competitive disadvantages for the airline systems. Gaileo Supp. Comments at 10–12. The adoption of rules governing non-airline systems would equalize the treatment of all systems, whether or not they have significant airline ownership, and be consistent with the United States' obligations under its bilateral air services agreements. Of course, we ask the parties to address whether we should adopt rules governing non-airline systems, if we find a need for continued CRS regulation, and whether section 411 would authorize our doing so.

2. Antitrust Principles Relevant to System Practices

This section explains our tentative belief that the practices that would be regulated by our proposed rules would violate section 411. It appears that they would either reduce competition in the airline and airline distribution industries and be analogous to antitrust law violations, or would cause consumers and their travel agents to receive biased or inaccurate information on airline services. We believe that the systems can engage in such practices because each system still seems to have market power over airlines. Market forces therefore have not disciplined the price and terms of services offered airlines by the systems. In particular, the systems appear to be charging booking fees that seem to exceed the fees that would be charged in a competitive industry. The record also shows that the systems have engaged in other practices that their customer airlines would likely not accept if the industry were competitive, such as imposing charges for booking fee bills and fees for passive booking transactions that allegedly provide no benefit for the airlines.

In *Eastman Kodak Co.* v. *Image Technical Services*, 504 U.S. 451 (1992), the Supreme Court explained that market power is the power ''to force a purchaser to do something that he would not do in a competitive market,'' 504 U.S. at 464, quoting *Jefferson Parish Hospital* v. *Hyde,* 466 U.S. 2, 14 (1984), and ''the ability of a single seller to raise price and restrict output.'' 504 U.S. at 464, quoting Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969). The Court's definition of market power appears to fit each system's relationship with the airlines, since the systems appear to have been able to impose high fees and unattractive terms for participation on airlines. In *Eastman Kodak* the Court also noted that market power is usually inferred from the seller's possession of ''a predominant share of the market.''

504 U.S. at 464. Insofar as electronic access to travel agency subscribers is concerned, it appears that each system effectively holds such a predominant market share, as explained above.

We believe that the actions that would be covered by our proposed rules may violate section 411 whether done by airline or non-airline systems. In our last rulemaking, we did not examine whether a non-airline system's operations could harm competition in the airline and airline distribution businesses. At that time, no non-airline systems existed, and we doubted that any non-airline system could operate successfully. We suggested that there should be no need to regulate a non-airline system since, without airline control, such a system would lack incentives to engage in conduct that would distort airline competition. We did not wish to apply the rules to a non-airline system when there appeared to be only a theoretical possibility that such a firm might operate. 57 FR 43794. In light of developments over the past several years, however, as explained above, we now believe that there are reasons to consider applying the rules to non-airline systems as well as airline systems. It is possible that a system that had no ownership or marketing ties with an airline might engage in conduct that would prejudice airline competition and make it difficult for consumers to obtain unbiased or complete information. *See* Northwest Comments on Proposed Extension at 6; Marshall A. Fein Supp. Comments.

Given the systems' market power over airlines, we concluded in our last reexamination of the rules that the practices addressed by those rules constituted unfair methods of competition. Those practices are analogous to conduct prohibited by the antitrust laws: A firm's refusal to allow competitors to obtain access to an essential facility on reasonable terms, and monopoly leveraging (the use of market power in one line of business to obtain unfair competitive advantages in a second line of business). These antitrust analogies were applicable because each of the systems was controlled by airlines that competed with other airlines whose ability to market their services depended on their ability to participate in the systems on reasonable terms. 57 FR 43789–43791.

The Seventh Circuit affirmed the Board's rules, which were based on very similar findings. *United Air Lines* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985). The Court stated that the Board's finding that some of the systems had substantial market power was sufficient to authorize the Board's regulation of CRS practices: That finding ''would bring their competitive practices within the broad reach of section 411,'' for the Board ''can forbid anticompetitive practices before they become serious enough to violate the Sherman Act.'' The court reasoned that the types of conduct prohibited by the Board on antitrust grounds—price discrimination and denying a competitor access to an essential facility on equal terms—were ''traditional methods of illegal monopolization'' that the Board could prohibit, even though no system had a monopoly under Sherman Act standards. *United Air Lines*, 766 F.2d at 1114.

The antitrust principles underlying our proposed rules include the essential facility and monopoly leveraging doctrines that we relied upon in our earlier rulemakings. In addition, some of our proposed rules derive support from other antitrust principles.

First, we have been concerned by system practices that prevent travel agencies and airlines from bypassing a travel agency's principal system and that thereby entrench each system's existing market power over the airlines. That concern led us ten years ago to adopt the rule giving travel agencies the right to use third-party hardware and software and to access any system or database from the agency's computer terminals, unless the system owned that equipment. Several current system practices that seem problematic to us give systems the ability to obtain all or most of a travel agency's bookings. These practices appear to violate the principle that a firm that dominates a market may not engage in conduct that is designed primarily to maintain or increase its dominance.

The Sherman Act allows a dominant firm to increase its market share by being more efficient or offering better products or services. *See, e.g.*, *Foremost Pro Color* v. *Eastman Kodak Co.*, 703 F.2d 534, 544–546 (9th Cir. 1983). The antitrust laws prohibit dominant firms, however, from using exclusivity agreements when they significantly limit opportunities for other firms to remain in or enter the market by foreclosing ''a substantial share of the relevant market.'' *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 328 (1961).

A monopolist generally may not engage in conduct that is economically rational if it eliminates competition. *See, e.g.*, *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The principle that a dominant firm may not engage in conduct designed to prevent competition will be applicable to both airline and non-airline systems.

Other practices by systems and the airlines owning or marketing a system may be contrary to the antitrust laws' prohibition against tying clauses. We prohibited airline parity clauses because they resembled tying arrangements prohibited by the antitrust laws, and our rules prohibit each system from requiring airlines to buy unrelated services from the system as a condition for participation. 49 FR 32554–32555; 49 FR 11656, 11664; 62 FR 59795–59796. A tying arrangement—a seller's agreement to sell one product only on condition that the buyer purchase a second product from the seller (or promise not to buy the product from another seller)—is a violation of the Sherman Act if the seller has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. *Eastman Kodak Co.* v. *Image Technical Services, supra*, 504 U.S. at 461–462. Tying arrangements are objectionable because they force buyers to accept conditions that they would not accept in a competitive market. *See, e.g.*, *Jefferson Parish Hospital*, 466 U.S. at 12–15. As the Court has explained, ''[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'' When a seller imposes a tying arrangement on a buyer, ''competition on the merits in the market for the tied item is restrained * * *'' *Jefferson Parish Hospital*, 466 U.S. at 12. A tying arrangement can cause consumers to pay higher prices, a result contrary to the goals of the antitrust laws. *Eastman Kodak Co.*, 504 U.S. at 478. We based our prohibition of the enforcement of the systems' parity clauses on findings that those contract provisions had the harmful effects of tying provisions—they limited competition between the systems, and they increased the prices paid by the systems' customers. 62 FR 59795.

Some types of conduct by airline systems may violate the monopoly leveraging principle: a firm may not illegitimately use its monopoly power in one industry to acquire an unfair competitive advantage in a second industry. Two courts have accepted this principle as a basis for finding a Sherman Act violation. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *Kerasotes Michigan Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988). The

monopoly leveraging theory is also consistent with the Supreme Court's reasoning in *United States* v. *Griffith*, 334 U.S. 100 (1948). We recognize that other courts have argued that monopoly leveraging is unlawful under the antitrust laws only where the conduct otherwise violates that statute. *See* 57 FR 43790–43791. Monopoly leveraging nonetheless should be a valid basis for finding that a firm has engaged in an unfair method of competition under section 411, since we may prohibit conduct that does not violate the antitrust laws.

In addition, our proposed rules would keep airline systems from engaging in actions that may be proscribed by the essential facility doctrine. That doctrine requires a firm that controls a facility essential for competition to give its competitors access to the facility on reasonable terms. The firm will violate section 2 of the Sherman Act if it denies access (or imposes unreasonable conditions on access). A facility is essential if it cannot be feasibly duplicated by a competitor and if the competitor's inability to use it will severely handicap its ability to compete. 61 FR 42203, citing *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); and *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990). In our last major rulemaking we determined that each of the systems is comparable to an essential facility and must therefore offer airlines access to its services on reasonable terms. 57 FR 43790. This was an alternative ground for our prohibition of airline parity clauses and our requirements that the systems' terms for airline participation must be non-discriminatory. 62 FR 59796.

Several of these principles are equally applicable to the non-airline system practices regulated by our rules. For example, the essential facility doctrine is applicable when a firm that does not own an essential facility is able to deny reasonable access to its competitors by agreement with the facility's owner. *See, e.g.*, *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). In addition, the Federal Trade Commission has held that its authority to prohibit unfair methods of competition in other industries under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which is analogous to section 411, authorizes it to prohibit practices by a monopolist in one industry that unreasonably restrict or distort competition in a second industry, even if the monopolist does not participate in the second industry.

In *LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966), the Fifth Circuit affirmed such an FTC order. The FTC had held that a monopolist manufacturer of shrimp peeling machinery had engaged in an unfair method of competition by charging shrimp canners in the Pacific Northwest prices twice as high as those charged Gulf Coast shrimp canners. The manufacturer charged different prices largely because the machinery produced greater cost savings for the Pacific Northwest canners. The Fifth Circuit affirmed the order on the ground that the FTC could bar a monopolist from charging discriminatory prices that affected competition in a second industry. *LaPeyre* thus held that ''a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market,'' *Fulton* v. *Hecht*, 580 F.2d 1243, 1249, n. 2 (5th Cir. 1978).

The Second Circuit, however, has taken a somewhat narrower view of the FTC's authority. That court held that the FTC could not regulate the conduct of a firm with monopoly power in one industry in order to promote competition in a second industry unless the monopolist either competes in the second industry as well or intends to restrain competition in the second market or acts coercively. *Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920, 927–928 (2nd Cir. 1980). The Court therefore reversed an FTC order requiring the Official Airline Guide, the publisher of the standard sourcebook for information on airline schedules, to improve its listings of commuter airline flights so that commuter airlines would be better able to compete with the jet airlines. The Court reasoned that allowing the FTC to generally regulate a monopolist's conduct insofar as it affected competition in an industry in which the monopolist did not compete would give the agency too much control over businesses. 630 F.2d at 927. The FTC, however, has stated that the Second Circuit's decision was ''erroneous'', although the Commission apparently has not since issued a decision holding that a monopolist committed an unfair method of competition due to its business practices with customers in an industry where the monopolist did not operate. *See* Earl Kintner & William Kratzke, VII *Federal Antitrust Law* (1988) at 54–55.

The Second Circuit's opinion suggests that the FTC could regulate a monopolist's conduct in one industry in order to prevent that firm from carrying out intent to restrain competition in a second industry or from acting coercively. 630 F.2d at 927–928. The rules we are proposing to adopt as to non-airline systems (and airline systems) are intended to prevent systems from trying to reduce competition in the airline industry and from engaging in coercive conduct.

We thus have tentatively concluded that there is a legal basis for our proposed rules regulating system practices in established antitrust principles and that the rules would be within our authority under section 411 to prohibit unfair methods of competition.

3. Antitrust Principles Relevant to Airline Practices

We also propose to expand the rules governing the practices of airlines affiliated with a system or using system services. We are proposing to restrict the airlines' ability to obtain some types of marketing and booking information, since we believe that the detailed information now being provided by the systems likely reduces fare competition and enables airlines dominating metropolitan area markets to pressure travel agencies into diverting sales from competing airlines. While we are tentatively proposing to eliminate the mandatory participation rule, we request that parties comment on whether we should maintain or strengthen that rule.

Such airline practices may violate antitrust principles, if the airlines do not have legitimate business reasons for their conduct and the market structure and other factors would cause the practices to significantly reduce competition. An airline's refusal to give travel agencies access to its corporate discount fares unless they use the system affiliated with that airline could be analogous to unlawful tying.

Other possible airline practices that would be covered by our proposed rules appear to be contrary to antitrust principles because they involve the use of an airline's dominant position in some local markets either to maintain or increase that dominance or to distort competition in the area's CRS market. Airlines can obtain a dominant position in some metropolitan area airline markets due to the hub-and-spoke system used by all network airlines. The airline that has a hub at a city usually has a dominant share of the city's airline market. This dominance results in large part from the competitive advantages given it by operating a hub—it serves more cities from the hub, and it offers more frequent service on most of its routes at the hub. Airlines capitalize on the advantages of having a large market share by offering frequent flyer programs and travel agency override commission programs that will be more attractive to travellers and travel agencies, respectively. General

Accounting Office, ''Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets'' (October 1996) at 14–19; Findings and Conclusions on the Economic, Policy, and Legal Issues, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry* (January 17, 2001) at 23–24.

The hubbing airline's dominance of the local airline market, however, also enables it to force travel agencies to comply with its wishes. Travel agents in that city will book their customers most often with that airline, and their ability to obtain marketing benefits from that airline, such as the ability to book important customers on oversold flights and to sell its corporate discount fares, may make or break their business. *Cf. Airline Marketing Practices* at 25. As a result, travel agencies cannot easily resist demands by the dominant airline that they stop booking customers with competing airlines or that they use the system affiliated with that airline. *See* Large Agencies Coalition Comments at 9.

An airline's abuse of a dominant position in local airline markets to increase or continue that position would violate the principle that firms with market power may not engage in transactions designed only or primarily to protect such power. When such an airline engages in conduct designed to compel travel agencies to use its affiliated system, it is leveraging its market power in one industry to increase its market share in another industry. Monopoly leveraging is contrary to antitrust principles for purposes of section 411.

4. The Continuation of Rules on Display Bias

Insofar as we have based our rules against display bias on our authority to prohibit unfair and deceptive practices, our authority to readopt those rules is clear. The types of display bias barred by the rules are deceptive practices that would tend to deceive a significant number of consumers. The Seventh Circuit held on review of the Board's rules that the Board's findings sufficed to bring the adoption of the rules prohibiting display bias within the Board's authority under section 411. *United Air Lines,* 766 F.2d at 1113.

Since we believe that the non-airline systems are ''ticket agents'' within the meaning of section 411, we may require them to comply with the rules barring display bias.

G. Considerations Favoring Fewer Regulations

Some parties have argued that we should consider terminating or phasing out the rules instead of strengthening them. They have questioned the effectiveness of the current CRS rules, most recently in their comments on our proposal to extend the rules for another year. They argue that the continuing growth in on-line distribution of tickets is favorably changing the competitive structure of airline distribution in ways that could make the termination or phasing out of the rules viable. They argue at a minimum that we must carefully analyze the changing structure before we strengthen or perpetuate the existing rules.

Several parties, particularly United, have asserted that the changes in the systems' ownership and the Internet's growing role in airline distribution have made the rules obsolete. We based the current rules on each system's ownership by airlines, but the two largest systems now have no significant airline ownership, and the two smaller systems each have several airline owners. According to these parties, the existing rules may actually cause rather than prevent anti-competitive behavior. They assert, for example, that the dominant systems seem to have decided that coverage of the rules enhances their market power rather than limits it. They argue that the allegedly obsolete rules actually impose substantial hidden costs, citing the systems' sharply escalating booking fees, which they attribute to the current rules that insulate the systems from competition. Since airlines must do business with all of the systems, the latter have no incentive to reform their business practices or lower their prices. Meanwhile, the airlines have no leverage to obtain better terms and conditions through negotiations with the systems. Our rules allegedly inhibit negotiations between the systems and participating airlines over fees and participation levels.

We have set forth our tentative views on these issues elsewhere in this notice. We presently believe that the airlines' inability to obtain better terms from the systems has largely been the result of the systems' market power, not a product of our rules. Nonetheless, we are specifically requesting comment on alternative proposals that would promote competition in the CRS business. The assertions made by United and other airlines about the impact of the mandatory participation rule and the rule prohibiting discriminatory booking fees may be correct. We are therefore proposing to end those rules, as discussed below.

There may be other options that would move in the direction of less regulation of the traditional systems during a period in which we would expect growing competition in the on-line market to improve the overall competitive potential of the airline distribution system. Proposed options have included a suspension option and a phase out of the rules that would be completed when on-line sales constitute a large enough share of the total market.

For example, Worldspan and Delta's comments on our proposed extension of the rules' sunset date suggested that we should suspend the rules for two years as an experiment to see what rules are actually necessary in light of the current operation of the airline and airline distribution industries.

More recently, Continental has suggested that the rules should be phased out with a transitional period beginning immediately and lasting until the systems account for less than forty percent of airline ticket sales. During the transitional period, we should retain only the basic CRS provisions such as the rules on the display of information designed to ensure that an unbiased display remains available to travel agents.

Our current proposals would modify rather than eliminate the rules, however, we acknowledge the possibility that sunset of the rules or more flexible CRS rules might create more effective competition in the CRS sector in relation to growing competition on the Internet. We have tried to take such factors into account in shaping our specific rule proposals, as discussed below. However, we invite comment on all of these proposals aimed at determining how we can make these proposals most effective. For example, as noted above, we are proposing more flexible provisions in areas such as mandatory participation and constraints on fees that could encourage more effective negotiations between participating airlines and the systems.

This leads to one of the more significant generic issues in this proceeding. In the face of largely unregulated Internet competition, one question that arises is whether we should affirmatively consider a package of participation requirements and alternative pricing approaches (booking fees and contract arrangements affecting travel agencies) geared to making the overall distribution network (including the traditional regulated CRS sector) maximally ''incentive compatible'' with growing competition from diverse

marketing arrangements burgeoning in the on-line distribution sector.

If we find appropriate and workable approaches in the context of this proceeding, we will carefully evaluate them. This evaluation will also shape our final proposals for the continuing review of CRS issues over the next several years.

H. The Specific Rule Proposals

While we are looking at a range of options, such as allowing the rules to expire or phasing them out, we are also proposing specific rules in the event that we determine that CRS regulation remains necessary for an additional period. The rules being proposed by us are intended to prevent deceptive practices that could mislead consumers and unfair methods of competition that would reduce competition in the airline and CRS businesses and increase airline costs. If we conclude that rules are necessary, we will prefer to adopt rules that will help enable market forces to discipline the systems' terms for airline participation to the maximum extent possible, as we stated when we began this rulemaking. 62 FR 47609. The development of system competition for airline customers would lessen the need for detailed regulation by us. Enabling market forces to operate effectively in the CRS business, combined with on-going developments in airline distribution, may eventually eliminate the need for most or all CRS rules. For the most part our proposed rules are intended to create more competition in the CRS and airline businesses.

We are not trying to adopt rules that would address all potential problems. Any such comprehensive and detailed set of regulations would necessarily impose significant burdens on the systems, and creating rules designed to eliminate all risk of possible illegal conduct would likely interfere with legitimate business practices. As to each issue we therefore are considering the likelihood and seriousness of the harm that could result in the absence of regulation, along with the benefits and costs likely to result from the adoption of a rule.

Developing rules sometimes requires us to choose among goals that cannot easily be reconciled. Rules proposed to solve one problem may worsen another problem. For example, increased competition between the systems for travel agency customers would be desirable, and a number of parties, particularly the travel agency groups, have proposed rule changes that would give travel agencies more leeway to switch systems and use multiple systems. However, increasing the systems' competition for travel agency customers could drive up the systems' marketing expenses and thus lead to higher fees for their captive customers, the airlines.

We will discuss the major rule proposals in the following order: (i) The scope of the rules, (ii) the use of third-party hardware and software by travel agencies and their ability to use one terminal to access several systems and databases, (iii) mandatory participation, (iv) display bias, (v) booking fees, (vi) booking and marketing information, (vii) travel agency contracts, (viii) Internet regulation, and (ix) international issues.

We will discuss only the more significant issues raised by the comments and our proposed rules. Where we are proposing to readopt existing rules, we will rely on the findings and analysis in our last review of the rules unless we have updated or modified them in this notice.

1. The Scope of the Rules

The current rules cover systems owned or marketed by airlines that are used by travel agencies to obtain information, make bookings, and issue tickets for passenger air transportation. The rules do not cover computer systems that provide some but not all of these functions, systems that are not owned or marketed by an airline or airline affiliate, and system services that are not used by travel agencies (for example, services used by corporate travel departments and consumers accessing a system through the Internet). The rules also do not cover the operations of traditional travel agencies or on-line travel agencies. The description of the rules' applicability is set forth in section 255.2, and the definition of ''system'' is in section 255.3.

The major issue on the rules coverage is whether the rules should govern non-airline systems. We are proposing to apply the rules to both airline and non-airline systems, as discussed above.

Many parties have urged us to expand the scope of the rules in other respects. We discuss one such request—the proposal that the rules cover at least some of the practices of Internet sites where consumers can obtain information and make bookings on airlines—below in our discussion of Internet rule proposals.

A number of parties contend that the rules should cover the relationships between the systems and corporate users, primarily corporate travel departments. Their major concern is the tying by an airline of access to its corporate discount fares with the use of the system affiliated with that airline. The parties have an opportunity to comment on whether this kind of tying and similar system practices should be considered unfair methods of competition, as discussed below in our discussion of the mandatory participation requirements.

Our current rules do not expressly regulate the terms for airline participation when someone other than a travel agent uses a system. As a result, a system could believe, for example, that it could charge discriminatory booking fees for bookings made by someone other than a travel agent. Given the systems' apparent market power, each system could also impose unreasonable terms for airline participation for non-travel agency sales. The record does not indicate that the systems have imposed prices and terms for system participation in such circumstances that would be contrary to the rules' requirements for travel agency sales. We therefore are not proposing any rule on this issue.

Amtrak and various bus companies contend that the rules should require an improved display of train and bus services. Amtrak wants the systems to be required to list high-speed rail service together with airline flights, while Greyhound and the Airport Ground Transportation Association urge us to require systems to display bus services operated to airports. IATA counters that such expanded displays of non-airline services could impose substantial costs on the airlines, due to the existing coding system's limited capacity to handle a wide variety of non-airline services. We cannot grant the requests to mandate better displays of train and bus services. Our jurisdiction under section 411 is limited to the marketing of air transportation. 56 FR 12604; 57 FR at 43797.

2. Definitions

Our major proposal for revising the rules' definitions involves changes to the definition of ''system''. First, as discussed above, we propose to include non-airline systems within the scope of the rules. Doing so will require changing the definition of a system by omitting the requirement that the system be offered by an airline or its affiliate.

Secondly, we want to ensure that information and booking services accessed by travel agencies over the Internet are not treated as systems subject to the rules, when they do not present a potential for anticompetitive conduct and deceptive conduct. Our goal is to facilitate the development of alternatives to the systems for both travel agencies and airlines and thereby

reduce the systems' market power and potentially eliminate or reduce the need to regulate them. The Internet can provide alternatives to the systems for travel agents willing to use them. Individual airlines like Delta have set up websites for travel agent use. A number of travel agents use sites primarily created for consumer use, like Orbitz, to obtain information and make bookings. In addition, firms are developing software products that allow travel agents to search multiple websites and make bookings. *See, e.g.*, ''Fare game: 'Beat the Agent,' '' *Travel Weekly* (March 4, 2002) at 6. We doubt that such sites should be covered by our rules when used as alternatives to one of the existing systems, either on a transaction-by-transaction basis or on a short-term basis. Defining a ''system'' as an information and booking tool used by subscribers under a long-term contract might exclude such services, but other changes could more effectively exclude such services while continuing to cover CRS services that should be covered. We ask the parties to comment on how best to exclude Internet sites from the scope of our rules, when their use should not require regulation.

Since we would keep the condition that the system charge airlines for bookings made through its service, the definition would not cover direct connection services offered by individual airlines and other firms that do not charge booking fees. This proposal and the previous proposal thus would exempt firms from being covered as a system if they do not charge booking fees or if they provide services to travel agencies only under short-term contracts or on a transaction-by-transaction basis.

In addition, under the current rules a computer reservations system is not subject to the rules unless it provides airline information and a booking and ticketing capability. We assumed that travel agencies would not choose a system that was unable to perform all of these three functions. 57 FR 43794. Since then the airlines have developed E-ticketing, and most passengers no longer use paper tickets. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 8; March 7, 2002, Press Releases by American and United. Given the growth of E-ticketing, the ability to issue tickets may no longer be a crucial function needed by travel agencies. We therefore propose to redefine the systems subject to the rules as computer reservations systems that provide airline information and a booking capability. A firm that only provides information on airline services, whether electronically or otherwise, will continue to be outside our rules.

The rules currently define a ''system owner'' as an airline that owns at least five percent of a system's equity, in order to implement the rule requiring each airline with a significant ownership interest in one system to participate in competing systems at the same level at which it participates in its own system and certain similar rules regulating relations between such an airline and travel agency subscribers. While we are proposing to eliminate the mandatory participation rule, the rules impose other obligations on system owners. If we did extend the mandatory participation rule to airlines that market a system, whether or not they have any ownership interest, as has been urged by some commenters, the rule presumably should also cover airlines with any ownership interest in one system. At the same time we doubt that the rules should cover an airline that indirectly holds a small ownership interest in a system because it holds a non-controlling amount of stock in a public company that owns a system. We ask the parties for suggestions on whether and how we should redefine system owner.

We also ask the parties whether we should change the definition of ''subscriber,'' now described as a ticket agent that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system. Because many travel agencies obtain incentive commissions from one or more airlines, they may favor the airlines likely to pay them a higher commission. We recognize, however, that virtually all, if not all, travel agencies currently hold themselves out as impartial sources of information for consumers. Since we would like the rules to be consistent with industry developments, we invite the parties to comment on whether the definition should be changed by striking the word ''neutral.''

Finally, while we are not proposing to base the coverage of the rules on whether a system is owned or marketed by an airline, several of our proposed rules would impose obligations on airlines that market a system (or limit the rights given airlines if they market a system). We are not proposing to define the kind of marketing relationship that would make these provisions applicable. We invite the parties to comment on whether a tighter definition should be used.

3. Third-Party Hardware and Software

When we last reexamined the rules, travel agencies normally used equipment provided by a system, and with rare exceptions no system allowed subscribers to use its equipment to access other systems or other databases providing airline information and booking capabilities. If a travel agency wanted to access another system, it would have to acquire a separate set of computer terminals. That was sufficiently cumbersome and expensive that few agencies took the trouble to do so. 56 FR 12607; 57 FR 43796–43797.

To enable travel agencies to use several systems and have direct links with internal airline reservations systems and other databases, we adopted a rule, section 255.9, that allows travel agencies to obtain their own equipment for CRS access and to access any system or database with airline information from the terminals used by an agency, unless a system owns the equipment. The rule additionally allows travel agencies to use third-party hardware and software in conjunction with system services, except as necessary to protect a system's integrity. Several airlines had stated that they would create direct links between their internal reservations systems and travel agency computer terminals. That would give airlines some opportunity to bypass CRSs and perhaps the ability to decline to participate in every system unless the terms for participation were reasonable. 57 FR 43797.

In proposing the rule, we expected that it would benefit competition in several respects:

> This proposal, if effective, could be the least regulatory means of alleviating the continuing competitive problems created by the systems. Giving agencies the ability to switch easily among systems using the same terminal would encourage vendors to compete on improving the functionality and information of each system in order to encourage subscribers to make greater use of it. It could also enable participating carriers to gain some bargaining power over booking fees by enabling them to encourage agencies to use a system with the lowest booking fees. If so, that would limit booking fees, which are otherwise unrestrained by market forces.

56 FR 12607.

We further noted that giving travel agencies the right to use third-party hardware and software and to use the same terminal to access different systems and databases would be consistent with the trends in other computer service industries, for networking was becoming increasingly important and common. Our proposal was also consistent with the Federal Communications Commission's decisions on telephone access, for the FCC had held that telephone companies could not arbitrarily restrict their

customers from connecting third-party equipment with the telephone system. 56 FR 12605.

The rule has had some impact. In 1999 thirty-six percent of all travel agencies used their own terminals, and twenty-eight percent of all agencies used third-party software as a front-end for a system. About thirty percent of all travel agents used a system to access the Internet, whereas only three percent could do so in 1997. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 131, 132, 133. The rule nonetheless has been less beneficial than expected. Few travel agencies use more than one system, few seem to bypass the systems by using the Internet for a significant number of airline bookings, and airlines have found it impracticable to establish direct links with individual travel agencies.

Technical problems do not block travel agents from accessing different systems and databases from one terminal. Both United and Galileo point out that travel agencies can obtain software enabling them to access multiple systems and databases. Galileo Supp. Comments at 7, n.6; United Supp. Reply at 23. Travel agencies nonetheless rarely make use of this capability. Legitimate business reasons in part explain the agencies' continuing reliance on one system and failure to seek information and make bookings with multiple systems and databases. Before the Internet, creating a direct link between an agency and an airline was relatively expensive. In addition, using multiple systems and databases could increase an agency's training costs and make keeping track of records more difficult. 56 FR 12607.

Notwithstanding the foregoing considerations, we presently believe that the systems' contract practices may be the major reason for the travel agencies' failure to use multiple systems and databases. Our rule allows each system to keep subscribers from using computer terminals owned by the system to access competing systems and databases. The systems have discouraged travel agencies from buying their own equipment by offering them equipment in conjunction with CRS services on very attractive terms. The systems allegedly offer travel agencies a package of system services and equipment at a price barely above the price of system services without equipment. This makes it too costly for agencies to acquire their own equipment. Large Agency Coalition Comments at 3–4; Midwest Agents Selling Travel Comments at 2; Delta Comments at 10. As a result, travel agencies typically have not bought their own equipment. The agencies then cannot take advantage of our rule giving them the right to access multiple systems and databases from equipment owned by any entity other than the system itself.

The systems could, of course, allow subscribers to use system-owned equipment to access other systems and databases, but they apparently rarely grant such permission. Delta Comments at 8–10; Alaska Comments at 10–11. The systems also may have restricted subscriber access to the Internet from system-owned equipment. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 140.

Each system additionally has offered financial incentives to its subscribers that encouraged each to make all or most of its bookings on that system. The most common such incentive is productivity pricing. A productivity pricing structure gives travel agencies large discounts from the standard charges for system services and equipment if the travel agency meets a specified minimum booking level for each terminal. The booking quota is high enough so that the agency as a practical matter cannot afford to make substantial use of another system or database for its bookings. Alaska alleges that the systems' use of productivity pricing (and their restrictions on travel agency use of system-owned equipment) made it difficult for Alaska to establish direct links between its internal reservations system and selected major travel agencies. Alaska Comments at 4–5. ASTA contends that productivity pricing keeps travel agents from using the Internet to book fares lower than those sold through a system. ASTA Comments on Proposed Extension at 3.

As a result of these system practices, few travel agencies have accessed multiple systems and databases from the computer terminals in their offices for airline bookings. *See, e.g.*, Delta Comments at 10. The continuing prevalence and impact of such restrictions is unclear, since travel agents are increasingly using the Internet for airline bookings. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002).

Because the rule's exception for system-owned equipment may have effectively annulled it, a number of parties urge us to revise the rule to allow agencies to access any system or database from equipment owned by the system as well as equipment not owned by the system. These parties include Delta, U.S. Airways, America West, Alaska, Midwest Express, Qantas, Varig, the Asia Pacific airline group, ASTA, and Amtrak.

Worldspan would not oppose this revision as long as the rule stated that any equipment or software connected with the system must be compatible with the system.

Sabre and Galileo oppose any change in this rule. They argue that travel agencies have the option of buying their own equipment if they want to access other databases and that changing the rule would override the system's rights as the owner of the equipment. Sabre also asserts that changing the rule would destroy the economics of the business, since the system could no longer expect to obtain the booking fees generated by the travel agency. Sabre Reply at 36.

We are proposing to readopt the existing rule with one change, the elimination of the provision that allows a system to block travel agencies from using equipment owned by the system to access other systems and databases. We believe that our findings on the potential competitive benefits of such a rule remain valid. Enabling travel agencies to access different systems and databases and travel suppliers from one computer would encourage competition between the systems and between the systems and alternative electronic sources of information and transaction capabilities for travel agencies. That in turn would apply some competitive discipline to booking fee levels. Experience seems to show that making such a rule effective will require both eliminating the exception for system-owned equipment and restricting the use of productivity pricing and other contract provisions that cause travel agencies to use one system for all or most of their bookings (our tentative findings on productivity pricing and related issues are discussed below in connection with the other subscriber contract issues).

These findings are consistent with the recommendations of several parties. Delta's initial comments thus asserted that our primary objective ''should be to increase competition among CRS vendors for information services and booking fees by eliminating contract and other CRS vendor-created barriers that prevent or limit travel agents from using multiple CRS databases and Internet connections to competitive sources of travel information.'' Delta Comments at 2. Similarly, Alaska states, ''[O]ne critical objective * * * should be the elimination of the incentives and disincentives that lock travel agents into a particular CRS and discourage agents' use of alternative means of communicating with participating carriers.'' Alaska Comments at 7.

Enabling other firms to compete with the systems for a share of each travel agency's business, moreover, would encourage technological innovation. A firm that can develop superior technology should have a competitive advantage in obtaining travel agency customers. This may not occur as long as the systems' contract provisions and restrictions on the use of equipment block travel agencies from choosing a service that better meets their needs. Several firms are already developing more efficient programs that travel agencies can use for searching several systems and websites for information and making bookings in the location with the best fare and service. ''Fare game: ''Beat the agent' '', *Travel Weekly* (March 4, 2002) at 6.

Moreover, as explained below in our discussion of the airline proposals for rules requiring CRS fees to be reasonable or cost-related, the most practicable and desirable solution for the airlines' complaints about CRS practices is to foster alternatives that airlines can use if the terms for system participation are unacceptable and that airlines can encourage travel agencies to use.

In the last rulemaking, we decided to allow each system to limit the use of its own equipment on the basis that the system providing the equipment should be able to control its property and obtain some compensation for its use. 57 FR 43800. After reexamining the issue, we think that eliminating the exception for system-owned equipment would not treat systems unfairly when they choose to provide equipment. Systems can provide services to travel agencies without providing the equipment, since travel agencies can obtain equipment elsewhere. More importantly, we would not be restricting the systems' ability to charge travel agencies for the use of their equipment. We would only be preventing them from unreasonably restricting the equipment's use.

We believe that the restrictions tend to maintain the systems' ability to obtain monopoly rents from airlines. It appears that the trend in the business world and in the regulatory arena has been to eliminate restrictions that limit access to computer terminals and telephone equipment. Our proposed rule would duplicate the practices already followed in several foreign countries at the time of our last rulemaking. 56 FR 12607; 57 FR 43799.

The record suggests, moreover, that the systems have offered travel agencies equipment at little or no cost, which enables the systems to prevent travel agencies accepting those offers from accessing competing systems and databases from one computer terminal. The systems have done so, notwithstanding our intent that travel agencies be able to use more than one system and that no system should be entitled to obtain all or most of its subscribers' bookings during the terms of their CRS contracts. *See, e.g.*, 57 FR 43827–43828. For this reason we cannot accept Sabre's objection to the proposed rule. Sabre asserts that the systems would likely become unwilling to provide equipment and that the proposal would undermine the systems' assumption that the equipment supplied by a system to a travel agency will generate booking fee income. Sabre Reply at 36. Sabre's position is contrary to our long-standing policy that a subscriber should be free to use multiple systems and databases and that a system therefore should not be entitled to obtain—or expect to obtain—most or all of a subscriber's bookings.

To provide travel agencies some additional assurance that they may use third-party hardware and software we invite comment on additional provisions that would prohibit systems from discriminating against subscribers for using a back-office system in conjunction with bookings outside the system and from charging disproportionately high fees for system services to subscribers that do not use equipment provided by a system. The latter provision would not affect the systems' pricing of equipment. These proposals would add some specificity to the existing rule that bars systems from directly or indirectly prohibiting or restricting subscribers from using third-party hardware and software or using the same equipment for accessing one system and other systems or databases.

4. Contract Clauses Restricting Airline Choices on System Usage

As discussed above, we seek to enable airlines to use alternatives to the systems so that market forces may discipline the prices and terms offered airlines for CRS services. To achieve this goal, airlines must be able to choose whether they will participate in a system and at what level, and to encourage travel agencies to obtain information and make bookings in ways that would bypass the systems. We therefore adopted a rule prohibiting the systems from enforcing parity clauses except as to airlines that owned or marketed a competing system. The parity clauses imposed by most systems required each participating airline to buy at least as high a level of service from the system as it did from any other system (for example, Sabre's parity clause required any airline participating in any competing system at the full availability level to participate in Sabre at that level or a higher level). We prohibited the enforcement of parity clauses because they made it unnecessary for systems to compete for airline participation at higher levels of service (while almost all airlines must participate in each system, as discussed, many airlines do not need to participate at the higher levels, which are more expensive). As we additionally explained, ''[P]arity clauses cause airlines either to buy more CRS services than they wish to buy from some systems or to stop buying services from other systems that they would like to buy, which creates economic inefficiencies and injures airline competition.'' 62 FR 59784.

We recognized, however, that an airline affiliated with one CRS as an owner or marketer might participate in competing systems at a level lower than its level of participation in its own system in order to induce travel agencies in regions where it is the dominant airline to choose its affiliated system rather than a competing system. We therefore allowed a system to enforce parity clauses against airlines that owned or marketed a competing system. A system could not enforce a parity clause, however, until it had given us and the airline fourteen days advance notice of its intent to do so. 62 FR 59797–59799.

None of the parties has asked us to reexamine the rule prohibiting the enforcement of parity clauses, subject to the exception for airlines marketing or owning a system, so we propose to readopt the rule. Our proposal to end the mandatory participation requirement, if adopted, may require that the parity clause rule be changed to eliminate that exception.

Sabre, however, raises two related issues regarding system contract practices that appear to limit airline choices on system participation (a third issue, the tying of participation in the system's services provided to travel agencies with participation in websites using the system, is examined below with the other Internet issues). Sabre states that its contract with participating airlines prohibits them from discriminating against travel agencies using Sabre. If broadly interpreted, the clause arguably could keep airlines from taking steps to encourage travel agencies to use an alternative system that might be more efficient or less costly for the airline. Sabre's contracts also give it the right to limit a participating airline's ability to withhold fares from Sabre; Sabre alleges, for example, that the

contract gives it the right to demand that airlines make their E-fares available through Sabre although Sabre ''has chosen not to do so at this time.'' Sabre Reply at 10.

If Sabre's contracts are typical, the systems may be imposing contract terms on airlines that unreasonably restrict airline choices on how to distribute their services. Such contract clauses could keep an airline from pursuing the most efficient and least costly distribution channels. Airlines should be free to choose to offer E-fares only through their own websites, without being obligated by system contracts to make them available through other distribution channels. This kind of contract clause would frustrate our efforts to allow airlines to create ways of bypassing the systems when doing so is more cost-effective and likely to establish competitive discipline for the systems' prices and terms for participation.

In addition, a participating airline should have some ability if practicable to persuade travel agencies to use a system or similar electronic service that provides better service or charges lower fees. Insofar as Sabre's contract would bar this, it would keep an airline from taking steps to reduce its CRS expenses. It would also be directly contrary to our conclusion in the parity clause rulemaking that airlines should normally be free to choose the quantity and quality of service bought from their suppliers. 62 FR 59784–59785, 59792.

We therefore request comment on a rule proposal that would prohibit a system (i) from barring an airline from ''discriminating'' against the travel agencies using the system, at least if the alleged discrimination results because the system has higher booking fees and poorer service than other systems, and (ii) from requiring any airline as a condition for participation to provide that system with fares that the airline has chosen not to sell through travel agencies or the systems. This proposal should be consistent with our rule prohibiting parity clauses, section 255.6(e).

Parties should comment on whether the rule should create an exception for airlines that own or market a competing system.

We ask the parties to provide additional information on the systems' current practices and on the benefits and harm that could result from such a rule and suggestions on how to implement a rule allowing airlines to favor users of one system over another.

5. The Mandatory Participation Rule

Our mandatory participation rule, section 255.7, requires each airline with an ownership interest of five percent or more in a system (a ''system owner'') to participate in competing systems at the same level at which it participates in its own system, if the other systems' terms for participation at that level are commercially reasonable. We adopted the rule because some U.S. airlines with an ownership interest in one system limited their participation in competing systems in order to encourage travel agencies in their hub cities to use their own system. Some airlines also denied complete information on their fares and services to competing systems. 56 FR 12608; 57 FR 43800. U.S. systems have encountered similar conduct internationally by foreign travel suppliers that own or market a competing system. 62 FR 59797.

The U.S. airlines now covered by the rule are American, Delta, and Northwest; the rule also applies to Amadeus' European airline owners. As a result of Cendant's acquisition of Galileo and United's sale of its Cendant shares, United is no longer subject to the mandatory participation rule. American, moreover, reportedly plans to sell its Worldspan stock, which it acquired as part of its acquisition of TWA's assets. Although United and potentially American are no longer system owners for purposes of our mandatory participation rule, each continues to market the system that it formerly owned, and Southwest also markets Sabre.

The mandatory participation rule has generated substantial controversy in this proceeding in three respects: (i) Several airlines and Orbitz claim that the rule is counterproductive, since it allegedly enables systems to dictate terms for airline participation; (ii) some airlines and systems insist that the rule should be maintained and extended to airlines that market a system, not just airlines with a significant ownership interest; and (iii) some airlines, systems, and travel agencies contend that the rule must prohibit each system owner from denying access to its corporate discount fares to travel agencies that do not use its system. We will discuss each of these three issues in this section.

(a) Ending the Mandatory Participation Requirement

The larger airlines urge us to abolish or cut back the rule. American, United, and Delta contend that the rule should be eliminated. Northwest asserts that only a basic level of participation should be required of airlines with system ownership interests. United and Delta claim that the systems use the rule to force airlines with an ownership interest in another system to participate in all enhancements, whether or not they benefit the airline. United further claims that abolishing the rule would give large airlines some leverage over the systems, since an airline could refuse to participate in a system (or all of its features) unless the system offered attractive terms for participation. According to United, the airlines' ability to negotiate over the terms for participation would allegedly create competitive discipline for the systems.

Galileo, Worldspan, Amadeus, System One, and America West initially argued that we should maintain the rule. Several of them cite cases where an airline that owns or markets a system allegedly has unreasonably limited its participation in competing systems in order to encourage travel agencies to choose its affiliated system, notwithstanding the rule. For example, System One, which markets Amadeus, alleges that airlines associated with Sabre and Worldspan have denied certain types of transactional capability to Amadeus in order to handicap Amadeus' ability to obtain travel agency subscribers. System One Comments at 5–10. Worldspan has since advised OMB that it believes that the mandatory participation rule should be eliminated.

We are proposing to end the requirement that airlines affiliated with a system must participate in competing systems at the same level that they participate in their own system as long as the terms are commercially reasonable. We believe that ending the requirement may be beneficial, but we invite the parties to discuss further whether the requirement should be maintained.

We adopted the current rule due to our experience that airlines owning or marketing a system have at times limited their participation in competing systems (or denied complete fare and schedule information to competing systems) in order to compel travel agencies in areas dominated by such airlines to choose systems affiliated with those airlines. 56 FR 12608; 61 FR 42206. The rule was also consistent with our decisions finding that a foreign airline had engaged in unfair discriminatory conduct by refusing to participate fully in a U.S. system that was competing with a system owned or marketed by the foreign airline. 57 FR 43800. In addition, the United States' aviation agreements with a number of foreign countries similarly require airline participation in competing systems.

Nonetheless, the mandatory participation rule may unduly limit the ability of individual airlines to bargain for better terms with the systems. If so, as asserted by several of the airline commenters, ending the requirement could enable market forces to discipline the systems' terms for airline participation to a greater extent than now. While the systems then seemed to have substantial market power, we concluded when we adopted our rule prohibiting parity clauses that airlines had some ability to choose which levels of participation should be purchased. For that reason, we barred the systems from enforcing parity clauses against airlines that did not own or market a system. The large airlines opposing the requirement contend that they could negotiate with other systems for better terms if the rule did not force them to participate at a specified level. Delta claims, for example, that it obtained better terms for some system features before our rule took effect. Delta Comments at 22.

The airlines' potential ability to limit their purchase of system services should enable them to demand better terms in return for participating in higher levels of service. Any additional market discipline would provide significant public benefits by cutting the cost of airline distribution. Further, ending a rule limiting the ability of airlines to choose which services they will buy would be consistent with our overall goal of creating more choices for airlines. Given our past findings on the systems' market power, however, we ask the parties to comment on whether and how this proposal would lead to lower fees and better terms for airlines participating in a system.

We recognize that airlines affiliated with a system have at times limited their participation in competing systems in an effort to prejudice their ability to compete for travel agency subscribers. Indeed, a number of the commenters complain that airlines owning or marketing a system continue to engage in practices that seem to be designed only to create a competitive advantage for their affiliated system. However, in this proceeding we are focusing on proposals that would benefit consumers by promoting airline competition. In the past, when one or more airlines owned each system, competition between the systems had a substantial impact on airline competition. Most of the systems have weaker ties with their former owners, and the more equal functionality offered each participating airline by each system has lessened the impact of competition between systems on competition between airlines. The airlines currently subject to the rule also own a share in Orbitz, and their Orbitz ownership interests may deter them from making marketing decisions on the basis of their ties with one of the systems. Ending the mandatory participation rule may provide a test of the airlines' ability to negotiate better terms for system participation. American submitted to OMB a report by the Association of European Airlines that analyzes in detail the potential advantages and disadvantages of such a change.

In any event, the potential benefits obtainable from ending the rule, according to the proposal's proponents, would outweigh any adverse impact on competition between the systems. The travel agencies' increasing ability to use alternatives to a system may also reduce the anti-competitive effects produced when an airline reduces its participation in competing systems in order to create a competitive advantage for its affiliated system. In addition, even without a rule, section 411 might bar airlines from using their dominance of local airline markets and ability to restrict their participation in unaffiliated systems as a way to compel travel agencies to subscribe to the airlines' affiliated system. The parties should discuss the potential benefits and harms for the travelling public from our proposal to end the mandatory participation rule. They should also address the implications of such a change for the United States' compliance with its international obligations.

We are proposing to eliminate the mandatory participation rule, but a possible alternative would be a readoption or extension of the rule if commenters can show that doing so would provide significant benefits. We are uncertain whether the airlines seeking the rule's end would have much bargaining leverage if we terminated the rule. There may also be some continuing validity to our historical concern that airlines affiliated with a system may limit their participation in competing systems or withhold information from those systems in order to distort CRS competition. Commenters that believe so should present information supporting such a position and address whether and how such conduct could affect airline competition and consumers.

The existing rule requires each airline with a significant ownership interest to participate in competing systems at the same level at which it participates in its affiliated system, if the competing systems' terms for participation are commercially reasonable. We invite parties to comment on an alternative rule that should be less burdensome, if we determine that airlines owning or marketing a system should have some obligation to participate in competing systems. Instead of requiring airlines affiliated with one system to participate in competing systems, such a rule would prohibit airlines from declining to participate in competing systems due to an intent to distort competition in the CRS business. The rule could create a presumption that an airline's refusal to participate at an equivalent level in competing systems was designed to restrict competition, if the systems' terms for participation were commercially reasonable. The basis for the presumption would be the airlines' usual interest in making their services available through all significant distribution channels. Such a rule would allow an airline to show that legitimate business reasons made it unwilling to participate at an equivalent level in the competing systems.

This should provide airlines that own (or market) a system greater flexibility in choosing which services to use in competing systems. On the other hand, as we reasoned in our last reexamination of the rules, such a requirement would require us to resolve potentially difficult issues of intent. 57 FR 43801. The potential advantages of this rule over the existing rule may outweigh this disadvantage, however.

Delta asserts that the rule forces it to participate in features even when their performance and quality do not live up to the system's initial claims. Delta Comments at 22. We believe that an airline covered by the existing mandatory participation rule would not be required to participate in a competing system's enhancement if the same enhancement offered by the airline's own system provides better service at the same price. Our rule requires participation only if the terms are commercially reasonable.

While we are proposing to end the mandatory participation rule, some of the arguments made against it seem unpersuasive. United claims, for example, that the rule causes the systems to match each other's fees. United Comments at 23. The systems, however, were matching each other's fees before we adopted the rule in 1992. *Airline Marketing Practices* at 56–57.

United further asserts that we have no jurisdiction or responsibility for promoting competition in the CRS industry. United Supp. Reply at 30, n. 41. United's argument wrongly assumes that systems are not ticket agents within our jurisdiction under section 411. In addition, airline efforts to distort competition between the systems may

help preserve the systems' market power in a manner contrary to antitrust principles. By limiting the travel agencies' ability to choose between systems, they may increase airline distribution costs and travel agency costs. *Cf.* 62 FR 59794. As noted above, however, our focus is on airline competition, and CRS competition now may have less of an impact on airline competition than when we last reexamined the rules.

(b) Extending the Rule

We are proposing to end the mandatory participation requirement. However, parties may comment on whether the requirement, if readopted, should be broadened. As noted, the mandatory participation rule currently covers only airlines with a significant equity interest in a system. American will not be covered if it sells its Worldspan stock, and United is no longer covered. American, United, and Southwest each market a system in the United States, even though they have no ownership interest.

Galileo, Worldspan, Amadeus, Northwest, Continental, and America West have argued that the mandatory participation rule, if kept, should cover airlines marketing a system. Sabre, American, and Southwest oppose any such broadening of the rule.

Parties should comment on whether the mandatory participation rule should cover airlines that market a system, if we determine to readopt the requirement at the conclusion of this proceeding. Such an airline may have incentives to limit its participation in competing systems in order to undermine their ability to compete for travel agency customers, as shown by experience. That may distort competition in the CRS business.

We would, of course, prefer not to interfere with the contracts between systems and marketing airlines, but it is possible that doing so may be necessary to prevent discrimination against some systems designed to give an affiliated system a competitive edge. In addition, we doubt that we could maintain a mandatory participation requirement for airlines with a CRS ownership interest when airlines marketing a system remain free of any such requirement.

A related issue concerns the refusal by some airlines affiliated with a system to give travel agencies (and corporate travel departments) access to their corporate discount fares unless the agency (or corporate travel department) uses the airline's affiliated system. Balboa Travel Management, a San Diego travel agency, states that it lost a potential corporate customer because the airline booked most often by the corporation warned that its discount fares would not be available through the system used by Balboa. Balboa Travel Management Supp. Comments at 1. System One cites cases where American and Delta offered corporate discount fares only if booked through Sabre and Worldspan, respectively, and Galileo describes similar conduct by Northwest and American. System One Comments at 3–4; Galileo Supp. Comments at 12 and Exhibit B. *See also* AAA Comments at 2; American Express Comments at 2; Large Agency Coalition Comments at 7; Midwest Agents Selling Travel Comments at 4.

An airline's denial of access to corporate discount fares to travel agencies that do not use its affiliated system is an effective competitive weapon against rival systems. Amadeus Supp. Comments at 32–34; November 10, 1998, Amadeus Supp. Comments; Continental Response to Amadeus Petition at 3–4.

The existing rules require each airline with a significant CRS ownership interest to make all of its fares and services that are ''commonly available to subscribers to its own system'' available to competing systems. Section 255.7(b). We did not require system owners to provide all information on their services, since some information, such as information on frequent flyer programs, was traditionally shared only with the airline's own system. We declined to adopt a general prohibition against a system owner's tying of access to special discount fares with the use of the owner's system. We stated, however, that an airline would violate its obligation to provide access to its commonly-available fares to users of all systems if it ''widely offers a discount fare to businesses on the condition that they use its CRS for booking the fare.'' 57 FR 43801.

Some airlines treat their corporate discount fares as fares that are not generally available and so are not subject to the rule. Amadeus filed a petition (Docket OST–99–5888) asking us to declare that the current rules prohibit an airline owning a system from refusing to provide its corporate discount fares to competing systems or, in the alternative, to amend the rules to prohibit the tying of access to the fares with the use of the airline's system.

Galileo (if the mandatory participation rule is kept), Amadeus, System One, Continental, America West, ASTA, AAA, American Express, and the Large Agency Coalition contend that we should prohibit an airline's tying of access to its corporate discount fares with a travel agency's use of the airline's CRS. United, Northwest, and the Asia Pacific airline group oppose any prohibition of such tying.

While we are proposing to eliminate the mandatory participation rule, parties should comment on whether the rule should be kept and, if so, should require airlines affiliated with a system to provide corporate discount fares to competing systems.

6. Rules Barring Display Bias

(a) Background

Our rules prohibit systems from biasing their displays but do not prescribe how a system must display airline services. Section 255.4. As explained above, the systems must determine which flights will be listed in the display of services provided travel agents and the order in which the flights are listed. The rules define display bias as using carrier identity in selecting flights from the database and ordering the listing of flights in the display. Galileo, for example, may not give United's flights a preference just because they are operated by United. Other provisions additionally limit the potential for bias. Each system must, for example, apply its editing and ranking criteria consistently to all markets. It must select connecting points (and double connect points) for constructing connecting flights for each city pair on the basis of criteria that are applied consistently to all airlines and all markets. Participating airlines can designate five points to be used as connecting points in a market. Each system must follow the same standards of care and timeliness for loading information on participating airlines and information on airlines owning the system.

Each participating airline must ensure that it provides complete and accurate information to each system in a form that will enable the systems to display flights in accordance with our rules on display bias. Section 255.4(f).

In our last overall rulemaking we found that display bias would mislead travel agents and their customers. It would also keep non-owner airlines from being able to compete on the basis of the price and quality of their service, since it would shift significant amounts of revenue to the airline benefited by the bias. 57 FR 43786.

When we strengthened our display bias rules in 1997, we noted that a Galileo display, created to prejudice some of United's competitors, might be reducing Alaska's annual revenues by as much as $15 million and Midwest Express' annual revenues by several million dollars. Galileo's display, while

ostensibly neutral, often and unreasonably gave the flights of United, one of Galileo's owners, a better display position than flights offered by competitors that better met the needs of travellers and travel agents. 61 FR 42212–42213.

Bias could be effective for several reasons. Travel agents tend to book the first flight displayed by a system. Their customers depend on them to extract information from the system display, which consumers do not view themselves. Travel agents generally work under time pressure that often keeps them from taking the trouble to overcome display bias by searching several display screens. The systems also hid the extent of their bias. Furthermore, the systems' contracts with travel agencies limited each agency's ability to offset one system's bias by switching systems or using multiple systems. As a result, consumers were often unable to obtain accurate and complete information on schedules and fares from travel agents relying on a system for their information. 57 FR 43785–43786.

Since the rules do not generally prescribe what criteria must be used for editing and ranking flights, Sabre, for example, could choose criteria for editing and ranking flights that give American's flights a better position due to the characteristics of American's service. *See* 56 FR 12611.

The rules also do not regulate the displays created by travel agencies for their travel agents and thus do not prohibit agencies from biasing those displays. We determined in our last overall rulemaking that such a rule was unnecessary because competition between travel agencies appeared likely to deter them from offering customers misleading or incomplete advice on airline service options. 57 FR 43809.

No party is arguing that we should end the rules against display bias if we conclude that the systems still require some regulation. The rules generally seem to work well, and no party is urging us to drastically revise them. Worldspan, however, told OMB that it sees no need for rules regulating system displays. Several other parties contend that the rules require strengthening. Sabre asserts that we should bar ''screen padding,'' multiple listings of the same flights under different airline codes. The European Union and the European Civil Aviation Conference urge us to conform our rules on display bias with the European rules, at least by specifying in several respects how flights must be ranked. Frontier urges us to prohibit systems from giving connections between code-share partners a preference over interline connections. American and America West seek a rule requiring change-of-gauge flights to be displayed as connecting flights. Air France and Lufthansa contend that systems should be required to use elapsed time as a factor in ranking airline services. Galileo, Amadeus, Delta, Continental, and America West oppose proposals for a rule requiring display criteria to be based on consumer preferences.

In addition, we will also address an issue raised in an enforcement proceeding instituted against American and Sabre in Docket OST–95–430. The case resulted from American's distribution to some Sabre subscribers of software that would rearrange the displays of airline services in favor of American. The program enabled the travel agency to create various displays, including one that would show only American flights.

The major issues requiring discussion are whether we should continue to prohibit bias and whether we should prohibit the systems from screen-padding, prohibit airlines from providing travel agencies with programs that would bias the displays, and prohibit travel agencies from biasing the displays used by their employee travel agents.

(b) Maintaining the Prohibition against Display Bias

We believe there may be a significant risk that systems, whether or not owned by an airline, would engage in display bias if not prohibited from doing so. Some commenters have suggested that airlines could obtain preferential treatment from a system by paying it to discriminate against competitors. Northwest Comments on Proposed Extension at 7; Alaska Supp. Comments at 3–4; ASTA Comments at 8–9; *see also* Marshall A. Fein Supp. Comments (description of one system's bias against a disfavored car rental company).

In our last overall rulemaking we considered in detail whether display bias provided countervailing consumer and competitive benefits and concluded that it did not. 57 FR 43785–43787. We tentatively believe that reasoning remains valid, and we accordingly propose to readopt the prohibition against display bias. Nevertheless, we will consider carefully comments that oppose the readoption of this prohibition.

In that connection, we are not proposing to adopt the suggestions from the European Union and the European Civil Aviation Conference that we make our rules more like theirs, in particular, that we require nonstop flights to be listed first and that other flights be ranked on the basis of elapsed time. We continue to believe that we should not direct how systems must edit and rank airline service options. We do not believe that there is a single best algorithm for displaying airline services (an algorithm is the set of rules for constructing a display). 56 FR 12609. We note as well that the systems have typically offered users several displays of airline services. *See, e.g.*, 61 FR 42210. Travel agents and consumers should benefit from the ability to choose between different displays. We invite comments, however, on whether there is greater merit in those proposals than we discern.

We have adopted a policy statement requiring airlines and travel agents to give adequate notice when flights involve change-of-gauge service. 14 CFR Part 258. We are not proposing additional restrictions on the display of such service.

(c) Screen Padding

The schedule displays offered by the systems, like the Official Airline Guide's schedule listings, identify airline services with two-character codes (the codes for United and Frontier, for example, are UA and F9). When airlines code-share, their nonstop and connecting flights are listed under each partner's code, not just under the code of the airline operating the flight. The Board endorsed code-sharing by prohibiting systems from discriminating against an airline because it was using its code on a flight operated by another airline, 14 CFR Part 256 (the Board acted because United's Apollo system threatened to exclude airlines operating under another airline's code). 49 FR 12675 (March 30, 1984). We have found that code sharing usually benefits consumers by creating more integrated services. 57 FR 43805.

If a system chose to list connecting flights operated under a code-share agreement under all possible combinations of codes, a single connection could occupy a number of lines in the display. A system would, for example, list a Northwest flight connecting with a KLM flight four times: as a Northwest to Northwest connection, a KLM to KLM connection, a Northwest to KLM connection, and a KLM to Northwest connection. If a system listed flights operated under a code-sharing arrangement under all possible combinations, a few such flights would take up substantial space on the display and often move flights with the next highest display ranking into a later screen.

Our rules allow systems to limit the number of listings given code-share services, as long as the service is listed at least once under each partner's code. A system thus would comply with our rules if it listed the Northwest and KLM connecting services as a Northwest to Northwest connection and a KLM to KLM connection. Our rules do not bar a system from displaying all of the possible code combinations for such a flight.

Sabre, American, Amadeus, Continental, Frontier, and Air France contend that the rules should limit the number of times that a code-share flight is displayed. The parties disagree over what the best solution would be, however.

We tentatively believe that limiting the number of times that code-share services are displayed might be beneficial. When code-share services occupy much of the display, travel agents will have more difficulty in finding alternative flights that their customers may prefer, and the airlines competing with the code-sharing airlines will obtain fewer bookings than they would otherwise. The multiple listing of the same connecting service under different codes can push the flights offered by competitors to later screens. This may increase the bookings made on the code-share flights, even in cases where the code-share relationship involves no improvement in service. *See, e.g.*, American Comments at 12–14.

On the other hand, airlines engaged in code-sharing understandably expect their services to be listed under each partner's code. Code-sharing is a significant feature of the international alliances that we have found provide significant consumer benefits. International agreements also provide bilateral rights to offer code-share services.

The European Union's CRS rules allow a code-share flight to be displayed no more than twice, even if the codes of three or more airlines are used on the flight. All four of the systems follow the European rule within the European Union, and some do so as well in other countries. Northwest Reply at 6–7.

American proposes a rule requiring that all airline codes displayed for a flight be displayed in one listing, as is the case for flights operated under one airline code. American Comments at 12–14. Amadeus suggests that we adopt the European rule. Amadeus Reply at 37. Continental suggests that we instead allow one listing of an international nonstop flight or set of connections for each code-share partner. Continental Reply at 15–16.

We will consider all of these options further, after reviewing comments received in this proceeding. We note, however, that Continental asserts that American's proposal is not technically feasible. Continental Reply at 15. Amadeus alleges that our adoption of the European rule would harmonize our regulations with theirs to some extent. Amadeus Reply at 37. It would also reduce the systems' programming expenses. On the other hand, as Continental points out, the European rule could keep the codes of some code-sharing partners from being displayed on a flight. Continental Reply at 16.

Since code-sharing usually benefits consumers, we are not proposing to ban systems from giving any preference to connections between flights operated by two airlines under a common code over interline connections. We are therefore denying Frontier's request for such a rule. Frontier Comments at 4–7. Consumers using code-share connections typically obtain smoother service than they would by using interline connections. 57 FR 43805. We already require systems to offer a display that does not give on-line connections a preference over interline connections, in part due to Frontier's earlier dissatisfaction with code-sharing. 62 FR 63843–63844. We presently are not aware of a substantial reason justifying further regulation on that issue.

(d) Biasing Software Provided by Airlines

As noted above, the Enforcement Office filed a complaint against American and Sabre based on American's distribution to some travel agencies using Sabre of a program that enabled them to bias their displays in favor of American. *American Airlines and Sabre Travel Information Network Enforcement Proceeding,* Docket OST–95–430. The software enabled travel agencies to create several different displays, including one that would show only American flights. At that time American controlled Sabre. In a ruling on cross-motions for summary judgment, an Administrative Law Judge held that American had not violated our rules or section 411. He suggested that we might wish to reexamine the issue.

We have not issued a final decision on the petitions for review filed by the Enforcement Office and Northwest, and those proceedings remain open. If possible, the development of a general rule in this proceeding may be more effective than addressing the issue in the context of the American case.

We prohibit the systems from biasing their displays because bias causes consumer harm and hinders rival airlines from competing on the basis of fares and service quality. In our view, there is little difference between the bias incorporated in system displays and software distributed by the owner airline that enables travel agencies to create displays biased in favor of that airline. The travel agency owner in theory can choose whether or not to use the program offered by an airline, but the relationship between the travel agency and the airline, which is likely to be the airline most important to the agency and its customers, makes it doubtful that the agency's choice will be entirely voluntary. In the last rulemaking, we prohibited the systems from offering secondary displays biased in favor of the owner airline, even though the travel agency could choose between using the biased secondary display and the neutral display required by the rules. 56 FR 12611.

As a result, even though we do not presently plan to prohibit travel agencies from creating biased displays on their own initiative, we are proposing to prohibit any airline from providing software to agencies that would bias the display in favor of that airline. While the major threat might arise from one of the major airlines that owns or markets a system and is likely to dominate a travel agency's regional airline market, we have not yet heard a persuasive reason why any airline should be able to distribute software that enables the agency to bias the displays. This proposal, moreover, would be consistent with our proposal to bar airlines from buying bias from a system. Airline-created screen bias can be just as deceptive to consumers and harmful to airline competition whether it is built in to a system's display or created by software distributed by the airline.

(e) Travel Agency Displays

Our rules do not regulate the displays made by travel agencies. Travel agencies can use the data provided by a system to create their own displays ordered according to criteria chosen by them without violating the rules, including displays biased in favor of an agency's preferred airlines. We refused in our last major rulemaking to bar travel agencies from creating biased displays on the grounds that the agencies' competition for customers would deter them from giving misleading or inaccurate information and that there was no evidence that travel agencies often provided misleading advice. 57 FR 43809.

The Consumers Union asks us to prohibit the use of biased displays by

travel agencies but does not cite evidence that such displays exist and cause consumer harm. Consumer Union Supp. Comments at 6, 15. Lufthansa alleges that travel agencies commonly negotiate preferred supplier arrangements with some airlines and then use in-house software to bias the displays in favor of those airlines. Lufthansa Supp. Comments at 3. Midwest Express claims that American Express provides biased displays to its travel agents that downgrade the flights offered by Midwest Express and other airlines that are not among American Express' preferred airlines and that American Express will not book a non-preferred airline unless the customer specifically asks to fly on that airline. Midwest Express Comments at 26.

After considering the issues, we are not at this time proposing any rule regulating travel agency displays (or, as discussed below, any rule regulating the displays offered by on-line travel agencies). We are well aware that individual airlines try to encourage travel agencies to give them a larger share of their bookings, usually by offering an override commission program that enables the agency to obtain higher commissions if the airline's share of the agency's bookings exceeds a specified percentage. The major airlines' elimination of base commissions will make incentive commissions more important to travel agencies. Nonetheless, despite the airlines' efforts, and the interests of travel agencies in obtaining override commissions, we presently are not aware of a compelling need to regulate travel agency displays. The travel agency business is intensely competitive. Travel agencies that provide poor or misleading advice to their travellers will lose customers. The competitive pressures on travel agencies should offset incentives to give customers misleading advice. As one travel agency states, ''Travel agencies are in the business of building a base of repeat customers—and that requires looking after the best interests of those customers.'' Balboa Travel Management Supp. Comments at 3. The risk of incurring consumer ill-will and lost revenues should keep travel agencies from giving consumers bad information. To the extent that travel agencies bias their displays, they presumably do so to implement their preferred carrier agreements. 57 FR 43809. While those agreements typically benefit travel agencies by enabling them to obtain override commissions, they may also enable the agency to provide better service on the preferred airlines for their customers. In some such cases displays that give preferred airlines a better display position may also benefit the agency's customers.

The Department's Inspector General conducted a study of travel agency override commissions. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999). Although the report expressed a concern that travel agencies may recommend airline services that will increase their commission payments rather than the services that best meet the needs of their customers, it found no proof that override commissions had caused travel agencies to offer misleading or incomplete advice. *Id.* at 10.

7. Equal Functionality

A number of parties in our last overall rulemaking had complained that each system's architecture was biased in favor of the owner airline in various respects. The availability information provided on the owner airline was likely to be more up-to-date and accurate, each system's functionality for obtaining information and making bookings worked more easily and reliably when they involved the owner airline, and each system had default features that encouraged travel agents to book the owner airline. We were unwilling to adopt the more costly proposals for ending architectural bias, but the significance of the problem caused us to adopt rules requiring systems to provide more equal functionality to all airlines participating at the same level. We required equal access to enhancements and equal treatment on the loading of information, and we barred systems from using default features that favored the airline owning the system. 57 FR 43810–43816.

These rules appear to have been quite effective, for we have received no further complaints that a system is allegedly architecturally biased in favor of its owner airlines. Amadeus supports the retention of these rules, Amadeus Comments at 28–29, and no one contends that they are unduly burdensome or unnecessary. We therefore propose to readopt these rules without change.

8. Booking Fees

The booking fees charged airlines for CRS participation have long been a source of airline complaints. In its rulemaking the Board recognized that discriminatory and excessive fees could prejudice airline competition. The Board accordingly adopted a rule prohibiting each system from charging unreasonably discriminatory booking fees, section 255.6(a). The Board declined to regulate the level of booking fees. 49 FR 11664; 49 FR 32552. In our last major rulemaking we readopted the rule prohibiting discriminatory fees and required systems to provide sufficient supporting information on their booking fee bills so that airlines could audit the bills' accuracy. Like the Board, we did not adopt a rule limiting the level of booking fees, for none of the proposed rules regulating fee levels appeared to be practicable. 57 FR 43816–43818.

We found in earlier proceedings that the price and terms for the systems' services provided airlines have not been significantly disciplined by competition. In contrast, competition disciplines the fees paid by subscribers, so the systems obtain the great majority of their revenues from the fees paid by airlines and other travel supplier participants. Since the systems have not needed to compete for airline participants, their booking fees likely exceed their costs of providing CRS services to airlines. 56 FR 12595–12596.

Many airlines view excessive booking fees as the most important unresolved problem that we should address, both because the fees are so high and because airlines are charged fees for allegedly illegitimate and valueless transactions. Several airlines—US Airways, Alaska, Frontier, Varig, KLM, and America West—urge us to adopt a rule requiring fees to be reasonably related to costs. Midwest Express argues that we must limit fee levels in some way. America West has filed a petition asking us to roll back the systems' recent fee increases and to block them from increasing fees by more than half of the overall rate of inflation.

All four of the systems—Sabre, Galileo, Amadeus, and Worldspan—oppose limits on booking fees.

In their comments United and KLM suggested that market forces would discipline fees if we weakened the rule barring discriminatory fees and, as discussed above, the mandatory participation requirement for system owners. American agrees that eliminating the mandatory participation rule would help discipline fees. Worldspan argued to OMB that the rules regulating fees prevent systems from responding to market demands. America West, however, contends that eliminating the prohibition against discriminatory fees would help only the large airlines with bargaining leverage.

We agree that high booking fees may be imposing burdensome costs on airlines and, if so, higher fares for consumers. As discussed below, however, we presently are unsure

whether the various rules proposed for limiting booking fees would be practicable. Rather than focus on proposals that would regulate the level of booking fees, we would prefer to develop rules that would give airlines some opportunity to bypass the systems or to avoid participation in one or more of them or that may give airlines some bargaining flexibility. We are focusing on the latter type of proposals in this proceeding, such as rules giving travel agencies a greater ability to access alternative systems and databases, including the airlines' internal reservations systems.

We will first discuss our proposal to eliminate the prohibition against discriminatory fees. We will then discuss the proposals to limit booking fees: Proposals requiring booking fees to be reasonable or related to costs and that future fee increases be limited by the overall rate of inflation. We will consider any other proposals to limit booking fees that would be effective and practicable. This section ends with a discussion of proposals for excluding certain types of transactions from booking fee liability.

(a) Ending the Prohibition against Discriminatory Booking Fees

The rule prohibiting discriminatory booking fees has kept airlines owning systems from imposing higher booking fees on their competitors than on non-competitors. 49 FR 11651.

United and KLM urged us to terminate the rule barring discriminatory fees. United Comments at 25–26. American, Worldspan, and Orbitz argued to OMB that the prohibition against discriminatory fees should be ended.

United contends that airlines like itself would have some bargaining leverage with the systems on fees. United Comments at 24–26. We wish to consider this issue further, just as we are proposing to end the mandatory participation requirement for airlines with a significant CRS ownership interest. Ending the rule barring discriminatory booking fees in conjunction with eliminating the mandatory participation rule should give some airlines like United some flexibility in negotiating for better terms from the systems. If otherwise warranted by the features of the market, systems could respond to airline demands for lower fees or better service.

In most unregulated industries a firm is free to demand better terms from its suppliers, even if its competitors cannot successfully obtain the same terms. The rule barring discriminatory fees may limit the ability of individual airlines to negotiate for better terms. If so, that would limit the operation of market forces in the CRS business. We are therefore proposing to eliminate the prohibition against discriminatory fees. We note as well that Worldspan has told OMB that the existing rule may interfere with Worldspan's ability to develop a new pricing model for its services and keeps systems from offering lower prices to more efficient, lower-cost new-entrant airlines.

As with our proposal to end the mandatory participation requirement, commenters opposing the continuation of the rule should address how ending the prohibition would provide public benefits and would not injure airline competition. A supplier's agreement to charge one firm prices that are lower than those charged the firm's competitors does not normally constitute a violation of antitrust principles, but commenters should discuss whether the characteristics of the airline industry may undermine the validity of that rule. Commenters should address whether the elimination or weakening of the bar against discriminatory booking fees would create a risk of anti-competitive conduct. Commenters should also discuss whether such a change in the rules would be consistent with the United States' obligations to prevent discriminatory conduct against foreign airlines by systems operating in the United States.

An alternative rule proposed by American to OMB and by the Justice Department would bar all booking fees. Such a ''zero fee'' rule would effectively require the systems to obtain their revenues from fees paid by travel agencies. As shown, the systems compete for travel agency subscribers but have not competed for airline participants, since most airlines have been compelled by their marketing needs to participate in each system, even if the terms for participation are unattractive and non-negotiable. Because travel agencies can choose between systems, the systems would compete on price. A zero fee rule thus would cause the price for CRS services to be set by competitive market forces. Such a rule, however, could be disruptive, since the systems now obtain the great majority of their revenues from airlines, not from travel agencies. In addition, a zero fee rule would enable airlines to obtain CRS services without payment, except insofar as they increased travel agency compensation to offset the agencies' increased expenses.

(b) Proposals Requiring Reasonable Fees, Fees Based on Costs, or Fees Limited by Overall Inflation Rates

A number of airlines seek rules that would limit booking fees by requiring them to be reasonable or related to costs, or by barring fee increases exceeding the overall rate of inflation. We have tentatively determined not to propose such a rule, since we are not yet persuaded that any of these proposals would be practicable.

We assume, for purposes of this discussion, that the systems' booking fees exceed their costs of providing services to airlines by a significant margin. We have seen no indication that market forces discipline the price or terms for CRS services provided airlines. Nonetheless, a rule requiring fees to be reasonable or related to costs would be so difficult to administer that it would be impracticable, and it would have other undesirable effects.

We would not adopt a rule requiring fees to be reasonable or related to costs unless we were prepared to enforce it. If we did not enforce it, the systems probably would continue their current booking fee practices. A rule regulating booking fee levels would not lead to lower fees unless we held proceedings to determine whether the existing fees complied with the rule. Determining whether a system's fees were reasonable or based on costs would presumably require a hearing before an administrative law judge, the procedure typically followed by other agencies with ratemaking authority. Such a proceeding would be time-consuming. Since each system has different costs and fee structures, a separate proceeding would be required for each system. Moreover, the systems offer a number of different levels of participation and features, each of which has its own price. This variety of service levels and features would make a CRS rate case even more complex.

In addition, determining whether a system's fees were reasonable or related to its costs would present very difficult questions on the allocation of system costs. A system has at least three kinds of users—the airline or airlines using the system as an internal reservations system, participating airlines and other travel suppliers, and travel agencies and other persons who obtain information and make bookings through the system. Allocating costs among these types of users would be almost impossible. Furthermore, since the economies of scale in the CRS business mean that the smaller systems have the highest costs, rates set by us would allow the smaller systems to charge higher fees than the

largest systems, an anomalous result. For these reasons, when we considered proposals to require reasonable fees or fees based on costs before, we concluded that any such rule would be impracticable. 57 FR 43817–43818; 56 FR 12617–12618.

A rule requiring reasonable fees or cost-based fees would effectively require us to engage in public-utility-type ratemaking. Public-utility ratemaking is disadvantageous because it does not encourage regulated firms to operate efficiently and is burdensome for them and their customers. It also encourages them to pad their costs and investment base. 57 FR 43817; 56 FR 12617.

In an effort to avoid the difficulties presented by rules requiring reasonable or cost-based fees, America West has proposed a rule limiting increases in booking fees after 1997 to half of the overall inflation rate. America West Reply at 25–26. We doubt that we could impose such a restriction on the systems. We have made no finding that each system's booking fees exceed the system's costs of providing services to airlines. We agree that the decline in many computer-related costs suggests that the systems' costs of serving the airlines could be increasing at a rate lower than the general inflation rate. We have no proof, however, that that is true. *See* Worldspan Answer to Am. West Motion to Expedite at 3–4. In these circumstances, the record in this proceeding seems inadequate for imposing limits on booking fees of the kind sought by America West. A rule limiting fee increases to half of the rate of inflation could also be difficult to administer, since systems could create new features and services subject to new fee levels that would not be covered by the rule.

For similar reasons, we are not planning to propose a rule that would require systems to unbundle different services and features, as suggested by Alaska. Alaska complained that the systems bundle services together in a way that forces airlines to pay higher fees. The systems allegedly deny E-ticketing capability to airlines unless they participate at a premium level of service, which forces them to buy services they do not want in order to obtain E-ticketing. Alaska Comments at 17. Determining which services and features could or could not be bundled would involve many of the same difficulties as a rule requiring reasonable or cost-based fees. We are therefore not accepting Alaska's proposal on this issue.

Thus, we are unwilling to regulate the level of booking fees, in large part due to the practical problems that would result from a requirement of reasonable or cost-based fees. We think that the better solution for supracompetitive booking fees would be rules that would enable airlines and other firms to bypass the systems and thereby end the systems' control of the electronic communications between each travel agency and the airlines. While these rules would not lead to any immediate reduction in booking fees, they would likely lead to lower fees over time.

(c) Excluding Transactions From Booking Fee Liability

The rules allow each system to establish its own fee structure as long as its fees are non-discriminatory. Most of the systems charge airlines fees for several types of transactions besides bookings, such as changes to bookings and cancellations of bookings. In our last overall rulemaking we concluded that we would not bar systems from imposing charges for transactions besides bookings. 56 FR at 12619; 57 FR 43818. A fee structure based on charges for different types of transactions could well be economically rational.

When we began this rulemaking, many of the airline parties complained that they had to pay fees for passive bookings that allegedly did not benefit them and that were fraudulently used by some travel agencies to meet their productivity pricing quotas. Passive bookings are bookings made by a travel agent through a system that do not involve sending a message to the airline's internal reservations system. Travel agents often make passive bookings in order to serve their customers. For example, a travel agent will make a passive booking to issue a ticket for customers who made a booking directly with an airline. Travel agents also use the passive booking functionality to serve passengers booked as a group. ASTA Comments at 25–26; Galileo Comments at 31–32. The systems have developed functions that enable travel agents to perform many of these tasks without making a passive booking, *see, e.g.*, Amadeus Reply at 32–33, but travel agents can choose to continue using the passive booking function rather than one of these new features. TWA Reply at 4–5.

While travel agencies assert that passive transactions are required for legitimate business reasons, a number of airlines allege that some travel agencies (but not most) use the passive booking capability to make fraudulent transactions that increase the airlines' booking fee expenses. These travel agencies allegedly are usually trying to meet their minimum booking quotas under their productivity pricing agreements and thereby avoid having to pay the non-discounted charges that they would otherwise owe to the system. Fees for passive bookings allegedly make up a significant proportion of airline booking fee expenses. Aloha and Qantas assert that non-ticketed passive bookings and other allegedly illegitimate or unnecessary bookings accounted for eight to ten percent of their total bookings. Aloha Comments at 2–3; Qantas Comments at 4. Alitalia asserts that eleven percent of its bookings consisted of passive bookings. Alitalia Comments at 4. Amadeus states that a European study indicated that passive bookings constituted 17 percent of Galileo's total bookings and 42 percent of Sabre's total bookings (but a much lower percentage of Amadeus' bookings). Amadeus Comments at 33.

The record demonstrates that some travel agents sometimes rely on the passive booking function to satisfy their productivity pricing formulas, not just to implement transactions necessary for serving their customers. One travel agency stated that her agency's contract with a system ''provides us with that [passive segment] capability so that we can meet the productivity requirements of the [subscriber] contract.'' Travel Agents International Comment, cited by, *e.g.*, Alaska Comments at 8. When American Trans Air tried to debit travel agencies for unacceptable bookings, including most passive bookings, travel agencies told it ''that they believed that they were absolutely entitled to make non-productive CRS bookings in order to reach their productivity goals.'' American Trans Air Comments at 5. *See also* Varig Reply at 24, n.45. A travel agency group stated, ''[T]here are some unnecessary transactions being created by travel agencies merely to meet productivity-based contracts, which is not ethically right.'' Midwest Agents Selling Travel Comments at 3.

In the initial round of comments in this rulemaking, airlines proposed two rules that would reduce or eliminate the fee liability generated by passive bookings: a rule barring systems from charging booking fees for passive bookings unless they resulted in the issuance of a ticket or actual travel and a rule allowing each airline to deny travel agencies the ability to make passive bookings on itself. A large number of airlines, including Delta, Alaska, American Trans Air, U.S. Airways, Midwest Express, America West, Frontier, British Airways, Lufthansa, Qantas, Varig, and the Asia Pacific airline group, sought rules proscribing fees for all passive transactions or allowing fees only for

passive transactions that resulted in actual travel. As an alternative, several airlines, including Lufthansa, Qantas, and America West, suggested that each participating airline should have the right to deny system users the ability to make passive bookings on its flights.

Other parties opposed these suggestions. Sabre argued that the systems incur costs from passive bookings and that airlines themselves should discipline travel agents who commit booking abuses. Amadeus contended that the systems are solving passive booking problems; some systems, for example, have stopped charging fees for such transactions. United asserted that a rule limiting fees for passive bookings would accomplish little, since the systems would likely increase other fees to offset the lost revenues. The Large Agency Coalition would support a prohibition against charging booking fees for passive bookings but contends that airlines should not be able to keep system users from making passive bookings. ASTA also opposes proposals that would deny travel agents the ability to use the passive booking function.

The initial round of comments provided a basis for proposing rules on this issue. However, changes made by the systems as a result of the controversy over passive bookings may have made the issue moot. Midwest Express, which had supported the proposals to limit fees for passive bookings, states that the systems' changes have ended the need for a rule. Midwest Express Supp. Comments at 2. At least two of the systems, Worldspan and Galileo, have stopped charging fees for non-ticketed passive segments. ASTA Response to America West Petition at 2–3. Although America West initially filed a petition seeking a rule limiting fees for passive bookings, its responses to our supplemental advance notice of proposed rulemaking did not mention the issue.

The issue of booking fees for passive bookings thus may not need to be addressed in this rulemaking now (productivity pricing, on the other hand, seems to require regulatory action, as discussed below). If a rule were necessary, we would likely request comments on the complaining airlines' rule proposals. Since passive bookings primarily benefit travel agents, not airlines, charging airlines fees for such transactions seems unfair. More importantly, however, the systems' productivity pricing fee structures encouraged a small number of travel agencies to abuse the passive booking function in order to meet the minimum monthly booking quotas established by their CRS contracts. Since the systems have chosen to base their subscriber contracts on a pricing structure that encourages fraudulent transactions, they should bear any costs created by travel agent abuse of that function. Alternatively, the airlines should be able to deny travel agencies the ability to make passive bookings.

We understand the systems' arguments that travel agents operate as agents of the airlines and that the airlines should discipline their own agents if they engage in abusive transactions. Galileo Comments at 34–40; Amadeus Comments at 34–35. We are not convinced, however, that that would justify allowing the systems to continue charges for passive bookings when their subscriber contracts encourage travel agencies to make excessive passive bookings. The airlines claim that they cannot effectively discipline individual travel agencies, in part due to their number, and in part because some are non-IATA agents who have no formal contractual relationship with the airline. Delta Comments at 33; TWA Comments at 14; Alaska Comments at 25; Qantas Comments at 19. Their inability to do so may additionally result in part from a reluctance to antagonize the firms that they rely upon to distribute their services. America West Petition at 23–25. However, while the airlines' argument does not seem compelling, the systems' choice of a pricing structure that encourages more transactions appears to be the source of the problem. In addition, the systems have refused to allow airlines to deny travel agencies the ability to make passive bookings. If travel agencies are operating as the airlines' agents, however, it appears that each airline should have the right to determine the type of transactions in which they may engage.

We recognize that the passive booking functionality enables travel agencies to better serve their customers. We would be reluctant to create rules that could end system functionality needed by travel agencies. On the other hand, an airline participating in a system should have some control over the services for which it will pay. Any further proceeding on this issue would take into account the travel agencies' needs and possible alternative remedies that would avoid denying them access to important functionality.

United has argued that restricting or prohibiting fees for some types of transactions will not benefit the airlines, since the systems will only increase other airline fees to make up for the lost revenues. United Reply at 17. United's argument has some force. Some systems apparently did increase other airline fees when they stopped charging fees for non-ticketed passive bookings. America West Reply at 17–18. Nonetheless, since fees for passive bookings impose some costs on airlines that appear to be unjustifiable, a rule would likely be appropriate if systems were charging airlines for non-ticketed passive bookings and using pricing structures that encouraged some travel agents to misuse the passive booking function.

(d) Booking Fee Bills

We adopted a rule requiring systems to provide participating airlines with detailed billing information that would enable the airlines to audit the accuracy of their bills. We allowed systems to charge airlines for providing the detailed information on magnetic media. 57 FR at 43818–43819.

Some participating airlines, however, remain dissatisfied with the billing procedures and the adequacy of the information supporting the systems' bills. Qantas thus contends that airlines should not have to pay for the information needed to audit fee bills. Qantas Comments at 20. Continental and Lanyon, a firm that conducts audits for airlines, argue that the bills should include some additional information, such as a statement of which bookings were made over the Internet. Continental Comments at 24; Lanyon Reply at 9.

We are reluctant at this time to propose changes to the rule, since these proposals have not been supported by a significant number of other parties. Qantas admits that the amount of the fees ''is not substantial in comparison to total monthly booking fees,'' but asks us to bar fees for billing data on the ground that requiring customers to pay for billing data is ''highly inequitable.'' Qantas Comments at 20. The rule sought by Qantas would not provide substantial benefits for participating airlines and could easily be cancelled out by booking fee increases. Similarly, Continental and Lanyon have not shown that the additional information sought by them would be essential for an airline's auditing of the bills.

9. Marketing and Booking Data

The data that can be derived from the bookings made through each system are invaluable for marketing purposes, since the system can tell how many bookings are being made by individual travel agencies on individual flights operated by an airline in each of its markets. Delta thus can see, for example, how many passengers are being booked by each Atlanta travel agency on each flight operated by its rival at that hub,

AirTran, and in which fare category, and will often obtain this information before the agency customers even begin their trip.

Our rule, section 255.10, currently requires each system to make available marketing and booking data that it chooses to generate from bookings made by system users. A system could choose to generate no data. The rule does not bar systems from providing data to anyone outside the airline industry. The rule blocks systems from providing data to any foreign airline that owns or controls a system in a foreign country, if that system does not provide comparable data to U.S. airlines. The rule further prohibits airlines receiving data derived from international bookings from giving anyone access to the data, except to the extent that an airline uses an outside firm to process the data, unless the system provides access to other persons. Each system could sell the data to anyone it pleased under any terms if our rules did not exist.

As a result of the rule, each system allows participating airlines to buy detailed booking and marketing data generated from its bookings (the data are often called MIDT, Marketing Information Data Tapes). Each system's data show how many bookings are made by each travel agency using that system on each airline in individual markets, the fare basis used for each booking, and the flight booked by each passenger. *See, e.g.*, Aloha *et al.* Comments at 3–4. The data tapes usually do not include the passenger's name. Galileo Supp. Reply at 9, n. 14; Sabre Supp. Reply at 42. *But see* Aloha *et al.* Reply at 3. Sabre states that its tapes do not identify corporate purchasers. Sabre Supp. Reply at 43. The systems make the data available almost on a realtime basis.

Airlines use the data for marketing research and route development purposes and to make decisions on pricing and revenue management. They also can use the data to implement their override commission and corporate discount fare programs, which typically require travel agencies and corporate customers to give an airline a certain share of their total business in order to receive the additional commissions or discount fares. While most airlines purchasing the data are the largest airlines, some smaller airlines like Alaska also buy the data. Galileo states that about forty-five airlines buy its data tapes. Galileo Supp. Reply at 11. The systems generate significant revenues from selling the data.

A number of parties are requesting us to change the rule on marketing and booking data. ACAA, a trade association that represents low-fare airlines, demands that the Department bar the systems from making the data available to airlines without the consent of the airline booked by the travel agency.

ASTA, ARTA, AAA, American Express and the Large Agency Coalition contend that systems should be prohibited from releasing the data to any airline. The Large Agency Coalition seeks a ban on the release of the data since airlines use it for implementing their override commission programs. The National Business Travel Association contends that the rule reduces a customer's bargaining leverage, since the data enable an airline to know all about the firm's travel patterns.

Several smaller airlines complain that the costs of purchasing and processing the data are so high that they cannot afford to buy the data. America West, Midwest Express, Aloha, Virgin Atlantic, Varig, and the Asia Pacific airline group contend that we should limit the fees charged for the data. Midwest Express estimated the annual cost of buying and processing the data from the four systems at $1.5 million. Midwest Express Comments at 28.

Several parties contend that airlines use the data to ''poach'' customers already booked on another airline. Midwest Express makes such a complaint, Midwest Express Comments at 29, as do ASTA and NBTA. ASTA Comments on Proposed Extension at 4.

On the other hand, Sabre, American, Galileo, United, U.S. Airways, Amadeus, Worldspan, Delta, Northwest, America West, and British Airways urge us to maintain the rule. The systems assert that they should be entitled to continue selling the data, since they have invested substantial sums in compiling the information and obtain significant revenues from selling the data. The systems also note that they now sell the data in smaller packages to make the data affordable for smaller airlines. *See, e.g.*, Galileo Supp. Reply at 10. The large airlines assert that access to the data is pro-competitive, because it enables airlines to learn where they need to offer more attractive fares and services. Delta Supp. Comments at 33–34. *See also* Aloha *et al.* Comments. The large airlines have also made large investments in developing the ability to process the data.

The Department's Inspector General has also expressed an interest in the issue. His report on override commissions recommended that travel agencies be required to advise customers of their override commission arrangements. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999) at 4. Rather than propose such a rule, we stated that we would consider ending the airlines' access to the booking and marketing data used to implement override commission programs. June 25, 1999, Letter from A. Bradley Mims to Lawrence H. Weintrob.

Our rule on marketing and booking data has thus generated two issues: whether the systems' fees for the data should be limited, and whether the type of data released by the systems should be restricted.

On the fee issue, we are unwilling to propose a rule regulating the systems' charges for the data tapes. Regulating prices would be contrary to our goal of limiting our involvement in this area except on issues when there is a clear need for rules. The systems obviously have an incentive to provide data in ways that would invite more airlines to buy the tapes. The systems seem to be reshaping the nature of the data tapes to increase their sales, as shown by their efforts to provide data in smaller packages that will be attractive to smaller airlines that do not have worldwide operations. Sabre Reply at 30; Galileo Supp. Reply at 10.

However, we believe that we should restrict the type of data being sold by the systems. As discussed below, the availability of the detailed data now being sold appears to undermine airline competition, at least in domestic markets. We recognize that airlines can and often do use the data for legitimate purposes and that markets usually operate better when firms have more information. Nonetheless the record indicates that the availability of the data has adversely affected airline competition and interfered with the travel agencies' ability to book the services that best meet their customers' needs.

Commenters have shown that airlines use the data to coerce travel agencies into reducing or ending their bookings on competing airlines, and the airlines' access to the data likely limits competition in other respects. The data tapes tell the dominant airline which travel agencies have been selling tickets on competing airlines and so enable it to target travel agencies booking customers with rival airlines. Woodside Supp. Comments at 9. The Savannah Airport Commission thus states,

> [S]ince the dominant area carrier has access to your travel records and bookings (via the CRS) that air carrier can and does penalize the agency for booking travel on rival carriers. The carrier may deny this practice, but it is happening and will

continue to happen until some type of safeguards can be implemented.

See also Mon Valley Travel Comments. American Express similarly pointed out that an airline's access to the data can reduce competition:

> An airline can thus obtain up to the minute analysis of competitors' sales, market share and customer information, even on a pre-flight basis. A carrier, so disposed, is able to use this real time (and advance) data for predatory pricing, blocking new entrants from the marketplace, signaling and other anticompetitive activity. What began as a tool to promote competition has become a weapon to eliminate it.

Letter from American Express dated April 12, 2000.

Officials from Legend, the start-up airline based at Dallas' Love Field, informed our staff that American was able to use the data to target travel agencies selling tickets on Legend and thereby undermine Legend's ability to obtain travel agency bookings. *See also* Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999) at 7 (example of new airline losing bookings after large airlines had advised travel agencies against booking that airline).

A hubbing airline's dominance of the local airline market may give it power to force travel agencies to comply with its wishes. Travel agents in that city may book their customers most often with that airline, and their ability to obtain marketing benefits from that airline, such as the ability to book important customers on oversold flights and to sell its corporate discount fares, may determine whether or not their business will be successful. Large Agency Coalition Comments at 9; Continental Reply to Amadeus Petition at 3–4; *cf. Airline Marketing Practices* at 24–26. As a result, travel agencies have been unable to easily resist demands by the dominant airline that they stop booking customers with competing airlines. The larger airlines should henceforth have a greater ability to influence travel agencies, since the agencies' only compensation from those airlines will take the form of incentive commissions due to the airlines' elimination of base commissions. *See also* ASTA Comments on Proposed Extension at 2.

The Transportation Research Board expressed concern that the large airlines' access to data on bookings made by travel agencies enabled them to influence agency bookings in ways that could not be matched by smaller airlines. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* at 129.

The National Business Travel Association similarly complains that the airlines' access to detailed fare information undermines the ability of airline customers to obtain lower fares:

> In the current aviation market, corporations deal with overpriced airfares and single airline dominated markets. The current CRS regulation opens the door for carriers to eliminate the one bargaining tool that corporations still own, and that is data—travel patterns, including destinations, flight numbers, airline flown and class of service.

NBTA Supp. Comments.

Under general economic theory, moreover, the airlines' ability to obtain detailed realtime data on their competitors' sales and fares would not promote competition. In a somewhat different context, the question of the competitive impact of Orbitz and its most-favored-nation clause, Professor Alfred Kahn explained why keeping fares and sales secret from competitors can further competition in the airline industry:

> [T]here is the familiar fact that in an oligopolistic industry, the negotiation of special, preferably secret deals with large buyers or distributors in a position to threaten to supply their own needs or take their business elsewhere is a particularly effective form of competition, reflecting an exercise of countervailing power on the buying side of the market, in an oligopoly whose members will typically be reluctant to cut prices openly and across the board; and that the prohibition of any such special deals or a requirement of their full disclosure and equal availability, in advance, to all comers, will discourage it.

Statement of Alfred Kahn at 20, attached to American Antitrust Institute Supp. Comments.

Markets do not always function better when participants have more information. One group of competitors violated the antitrust laws by informally agreeing to exchange information on the prices charged specific customers, since the effect was to stabilize prices. *United States* v. *Container Corp.,* 393 U.S. 333 (1969). The Board concluded that a requirement that cargo rate changes be filed in advance inhibited price competition. *See National Small Shipments Traffic Conference* v. *CAB,* 618 F.2d 819, 829–830 (D.C. Cir. 1980). And in other circumstances airlines have used data on each other's fares as a vehicle to reduce competition. *United States* v. *Airline Tariff Publishing Co.,* 836 F. Supp. 9 (D.D.C. 1993); and 59 FR 15225 (March 31, 1994) (Justice Department suit on airlines' use of fare information to negotiate fares).

As discussed, the network airlines' dominance at their hubs enables them to pressure travel agencies into reducing or stopping their bookings on competing airlines. Another feature of the airline industry makes it all the more important to block the systems' sale of the data tapes insofar as the data can be used against competing airlines. The competitive advantages created by a hub airline's more comprehensive route network and more frequent flights make it difficult for other airlines to compete at that airline's hub, unless they are serving the city from their own hubs. We have found in the past that airlines will be reluctant to enter another airline's hub. The only airlines likely to do so are the new entrant low-fare airlines, since their low fares can offset the service advantages offered by the hubbing airline. Findings and Conclusions on the Economic, Policy, and Legal Issues, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry* (January 17, 2001) at 22–26, 29. Since competing with the incumbent airline will be tough at best for the entrant, we think it is important that the entrant not suffer the further disadvantage of having the incumbent airline know in advance how many seats are being sold on each of its flights by individual travel agencies. Ensuring vigorous airline competition in domestic markets mandates giving low-fare airlines an opportunity to compete. They will not have such an opportunity if the dominant airlines in their markets can track their travel agency sales in great detail on a realtime basis and use that information to undermine their ability to sell tickets.

To protect competition from the possible misuse of the data tapes by dominant airlines, the type of data sold by the systems should be limited to information which would serve legitimate marketing needs. We appreciate the potential value of the marketing and booking data for legitimate marketing purposes. *See, e.g.*, Aloha *et al.* Comments at 4–6. Our goal is to allow the systems to sell as much data as possible while minimizing the potential harm to airline competition and to enable travel agencies to protect potentially proprietary business data. However, at least in domestic markets, an airline's knowledge of its own bookings should suffice to tell it whether its marketing initiatives are successful (or whether new initiatives should be tried). The availability of much other domestic data from other sources also makes the CRS data less necessary for marketing purposes.

In considering whether to restrict the sale of data, we recognize that the airlines purchasing the data have made significant investments in developing

the ability to process and analyze the marketing and booking information, that the systems have made significant investments of their own, and that the systems would lose large amounts of revenue if they were barred from selling any data.

Limiting the availability of data generated from system bookings would also make it harder for airlines to implement override commission programs based on the airline's relative share of overall travel agency bookings (or bookings for specific route or markets). Large Agency Coalition Reply at 9. We are not finding that override commission programs are anticompetitive. Firms commonly may reward distributors for producing higher sales. We believe, however, that airlines use override commission programs to take advantage of a dominant position in local airline markets to deter travel agencies in those areas from booking competitors. *See also* General Accounting Office, ''Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets'' (October 1996) at 15–18. While we are primarily basing our proposed restrictions on the availability of the marketing and booking data on other competitive grounds, the proposed changes could additionally promote competition by weakening the ability of the largest airlines to use incentive commission programs that leverage an existing dominant market share to obtain a larger market share.

The potential use of the data by dominant airlines to deter travel agency bookings on competitors has become more problematic due to the airlines' elimination of base commissions, a development that will make travel agencies more dependent on incentive commissions. When a travel agency's only airline compensation depends on its ability to meet marketing targets set by the airline, the travel agency may consider itself unable to book customers on other airlines that offer comparable or better fares and service. NBTA Second Comments on Proposed Extension; ASTA Comments on Proposed Extension.

We therefore wish to consider several proposals that would restrict the type of data sold to the airlines and thereby achieve our goals. These possible restrictions could prevent most potential competitive abuses while enabling the systems to sell, and airlines to buy, much of the data now being sold. The following are the major proposals we ask the parties to address:

- A ban on the release of data on bookings made by individual travel agencies. The systems could then sell aggregate data for specified geographic areas or markets that would show sales by airline for each route but would not reveal how many tickets were sold on any airline by any individual travel agency. Such a restriction would seem to satisfy the travel agencies' interest in protecting their business data and should prevent larger airlines from using the data to coerce travel agencies into ending their bookings on competitors. Each airline would, of course, know how many bookings it received from each travel agency on a route-by-route basis. This proposed restriction would only deny airlines access to data on bookings made on competing airlines by individual travel agencies. Such a rule would be consistent with Sabre's recently-announced plans to sell each individual travel agency data on its own bookings and the aggregate data on the bookings made by its peers, but not data for individual competitor agencies. *Travel Distribution Report* (May 20, 2002) at 75.
- A ban on the release of data on bookings for airlines that have not consented to the release of data on their bookings. Any such restriction presumably would allow each airline to obtain marketing and booking data from a system only if it had consented to the system's release of data derived from its bookings to other airlines willing to purchase the data. This kind of restriction would protect airlines that did not wish their competitors to know how successful their marketing efforts were with individual travel agencies.

We will, of course, consider other possible restrictions proposed by commenters as supplements or alternatives to these two. Another possible rule would bar the release of data until some period of time had elapsed after the booking, so that no airline could immediately learn from the data how many bookings on its competitors were being made by each travel agency. The delay in the data's availability might prevent misuse while not denying airlines access to the same range of data now being offered by the systems. We could also bar the release of information that would enable anyone to identify the passenger or business buying the ticket. Such a requirement would both protect the privacy interests of the travel agency customers and promote competition.

The complaints about the potential abuse of the airlines' access to data focus on the impact of the use of the data on domestic markets. We will consider limiting any restrictions to data generated from bookings for domestic travel. The airlines serving international markets are generally large airlines, not new entrants. Although travel agencies presumably object to the release of any data, whether for international or domestic travel, the only airlines that have complained that the availability of marketing and booking data has led to abuses are the smaller U.S. airlines. In addition, we believe that airlines can obtain industry data on bookings for domestic travel from other sources, such as our O&D reports, while few if any sources may exist for comparable data on bookings for international travel.

To decide whether restrictions on the availability of the marketing and booking data should be adopted, we request additional information on the costs and benefits of each of the possible alternatives. We ask the parties to provide more detailed information on, among other things, the ways in which the airlines that buy the systems' data tapes are now using the data and the availability of comparable information from other sources.

We note as well that the Board originally required each system to make its data available to all airlines, if it chose to make the data available at all, on the ground that the Board could not practicably keep the owner airline from gaining access to the data. 49 FR 11658. The Board's concern should now be less valid, since two of the systems are no longer controlled by airlines and the other two each have several airline owners.

We propose to impose the restrictions by barring airlines from buying or otherwise obtaining the data, since our authority to bar systems from selling the data is unclear. Section 411 should allow us to prohibit airlines from buying the detailed realtime data now sold by the systems, since dominant airlines can and do use the data to pressure travel agencies into stopping bookings on competing airlines.

10. Travel Agency Contracts

(a) Background

Practices that limit competition between the systems have been a concern because they have affected airline competition. The Board thus included provisions designed to prevent anticompetitive practices affecting competition between the systems in its original CRS rules on two rationales: (i) An airline would be handicapped in entering new markets if its affiliated system could not obtain travel agency customers in the region, and (ii) practices that restrict competition between systems entrench the systems' existing market power and keep airlines

from finding alternative ways of conducting the functions provided by the systems. 49 FR 1664–11665. The Board therefore sought to ensure that travel agencies had a reasonable opportunity to switch systems or use multiple systems. The Board's rules accordingly prohibited certain types of travel agency contract clauses that would unreasonably restrict a travel agency's ability to use alternative systems, such as clauses requiring an agency to use an airline's system for all of its bookings on that airline or denying a travel agency commissions for bookings on an airline if not made through the airline's own system.

When we reexamined the rules, we readopted and modestly strengthened the Board's provisions. Our rules allow systems to offer travel agencies a contract with a five-year term as long as they also offer contracts with a term of no more than three years. The rules bar systems from imposing minimum use clauses (clauses stating that an agency's failure to make a certain number of bookings per month per terminal will constitute a breach of contract). On the other hand, we allowed systems to continue offering five-year contracts, and we did not prohibit productivity pricing. We additionally did not bar the tying of access to an airline's marketing benefits to the travel agency's use of the system affiliated with that airline. 57 FR 43822–43828, discussing section 255.8.

(b) Recent Subscriber Contract Practices

As discussed above, the systems compete vigorously for travel agency subscribers. Many travel agencies, unlike airlines, can choose between systems, and the systems' competition for travel agency customers usually disciplines the price and quality of services offered travel agencies. A number of travel agencies in fact obtain system services without charge or even receive cash bonuses for choosing one system rather than another. Many travel agencies, of course, do not get incentive payments; profit margins in the travel agency business have traditionally been thin; and many travel agencies believe that the systems' fees and contractual requirements threaten the agencies' ability to operate profitably. In addition, travel agencies in a city dominated by an airline that owns or markets a system may feel compelled to use that airline's affiliated system, especially when the airline denies access to its corporate discount fares and marketing benefits to travel agencies using a competing system. *Airline Marketing Practices* at 24–26; Large Agency Coalition Comments at 9–10.

Despite the systems' competition for travel agency customers, each system's subscriber contracts typically contain provisions deterring its subscribers from using another system or an alternative electronic means of obtaining airline information and making bookings. The systems continue to use contract terms that limit the travel agencies' ability to switch systems or use multiple systems. Although our rules currently require systems to offer agencies a three-year contract as well as a five-year contract, systems have generally made the terms of the shorter contract so unattractive that most travel agencies have chosen the five-year contract. ASTA Comments at 10–12; Delta Comments at 16–17. In addition, as discussed above, productivity pricing deters travel agencies from using multiple systems or direct connections with an airline's internal reservations system.

Furthermore, when a travel agency terminates its CRS contract before the end of the contract's term, the system will commonly demand that its damages include the booking fees that the system would have obtained if the travel agency had continued using the system during the remainder of the life of the contract. Delta Comments at 18–20; ASTA Comments at 24–25. Some systems impose other financial penalties that deter agencies from switching to another system. AAA Comments at 3–4. Systems have demanded such damages even though we stated in our last rulemaking that our rules assuring travel agencies the ability to use more than one system prevented a system from reasonably expecting a travel agency to use its system for all or most of its bookings during the contract term. 57 FR 43827–43828.

The damages claimed by the systems are commonly so large that they deter travel agencies from terminating a contract before the end of its term. Delta Comments at 19.

Most travel agencies have had contracts that contain these kinds of restrictions. A 1996 survey by the American Society of Travel Agents indicates that 83 percent of all travel agency contracts had a five-year term and that 86 percent of all contracts used productivity pricing. ASTA Comments at 10, 12. The systems, however, have recently begun offering the smaller travel agencies the option of choosing contracts that do not have minimum booking requirements and have shorter terms. *Travel Distribution Report* (April 8, 2002) at 2.

The contractual provisions raise competitive issues, even though the travel agencies have accepted the contracts containing such provisions. The provisions limit competition, maintain the systems' market power, and keep airlines from bypassing the systems in communicating electronically with travel agencies. They also inhibit innovation, by discouraging firms from developing new services and products that travel agents could use as alternatives to the systems.

(c) The Parties' Positions

Many of the parties seek rules that would further prevent systems from imposing allegedly unfair or anticompetitive contract terms on travel agencies. ASTA and Northwest urge the Department to reduce the maximum length of subscriber contracts and to prohibit systems from collecting certain types of damages—lost booking fees—if an agency ends its contract before the contract's expiration date. Amadeus asserts that the maximum length of a subscriber contract should be one year, and Delta suggests that the Department adopt the European rule, which allows travel agencies to cancel an agreement on three months notice at any time after the agreement has been in effect for a year. ASTA seeks a rule requiring systems to offer contracts with one-year, two-year, and three-year terms and barring any contracts with a term longer than three years. The maximum length of subscriber contracts must be shortened, according to ASTA, because agencies need greater flexibility so they can adjust to the rapid changes in distribution, such as the growth of the Internet. ARTA asserts that the rules should reduce the maximum length of subscriber contracts, and AAA wants limits placed on the damages recoverable by a system if an agency breaches its contract. America West thinks that the maximum term of travel agency contracts should be three years, since a shorter maximum term would assertedly cause the systems to increase their booking fees.

Sabre, Galileo, and the Large Agency Coalition contend that no changes should be made in the subscriber contract rules.

After United imposed a cap on commissions for international tickets sold by travel agents, ARTA filed an emergency petition asking us to consider its proposal that travel agencies be given the right to renegotiate their contracts if the airline owning the system used by the agency changes its business practices in ways that make it difficult for the agencies to satisfy their CRS contract obligations. Docket OST 98–4775. Worldspan and Amadeus have opposed ARTA's proposal.

ASTA's response to our proposal to extend the sunset date for the current

rules asked us to immediately end the systems' productivity pricing provisions that allegedly penalize travel agencies for making bookings on the Internet, even when the airlines offer lower fares through websites than they offer through the systems used by travel agents.

(d) Our Overall Concerns and Policy Approach

In determining which rules, if any, should be adopted, our primary goal will be to prevent practices in the CRS business that would substantially reduce competition in the airline and airline distribution businesses, particularly practices that deny travel agencies and airlines the ability to use alternatives to a travel agency's principal system. To achieve this goal we are proposing to revise the rules regulating the systems' relationships with subscribers.

Our proposed revisions should both protect competition in the airline and airline distribution businesses and protect travel agencies against system contract terms that many regard as unfair and unreasonable. We are not, however, proposing now to accept all of the travel agency parties' proposals for new rules. The subscriber contract issues concern the travel agency parties, because the systems' contract terms affect the profitability of each agency and its ability to serve its customers. We recognize that travel agents provide the public with valuable information and strengthen the ability of airlines to compete on the basis of service and fares. System practices have a significant impact on the travel agencies' costs and their ability to stay in business. Our task in this proceeding, however, is not to develop regulations that will shape the travel distribution system. Congress has deregulated the airline industry. Congress has given us the authority to prohibit unfair methods of competition in the airline industry and the marketing of airline services. That authority, as shown, allows us to prohibit practices that violate the antitrust laws or antitrust principles but does not generally empower us to proscribe business practices because they seem unfair. 57 FR 43828. *Cf. E.I. Du Pont de Nemours & Co.* v. *FTC*, 729 F.2d 128 (2nd Cir. 1984). As a result, in considering proposals to readopt or change the subscriber contract rules—as well as most of the other rules—we are focusing on whether the practices at issue seem to violate antitrust principles.

In addition, we must consider whether proposed rules could be practicably enforced. In the past the systems' incentives to restrict travel agency choice and usage of multiple systems have been great enough that the systems would seek to evade any rules limiting their contract practices and could often do so. 57 FR 43825. We do not wish to adopt rules that could be routinely evaded.

The systems continue to use contract terms that limit the ability of most travel agencies to use multiple systems and other means of obtaining airline information and booking airline seats. We believe that these considerations support the readoption of the rules on the relationships between systems and subscribers. The existing rules prohibit such practices as minimum use clauses, parity clauses, and contracts with a term of more than five years.

Since we last reexamined the rules, moreover, several of the large airlines that own or market a system have been increasingly using their clout as the dominant airline in a metropolitan area to compel travel agencies in that area to use their affiliated system. These airlines, for example, deny travel agencies using a competing system the ability to book corporate discount fares. The largest travel agencies argued in our last overall rulemaking that they should be given the right to exempt themselves from our rules on subscriber contracts. *See* 57 FR 43824. It is telling that these travel agencies now contend that rules are needed to protect them against airline abuses of market power. American Express Comments; AAA Supp. Comments.

We wish to consider the various proposals for shortening the maximum length of subscriber contracts. We are proposing to readopt the other existing rules on the systems' relationships with subscribers. We therefore propose to continue the prohibitions against roll-over clauses and minimum use requirements.

Resolving which subscriber contract rules should be adopted will require more detailed information on the current relationships between travel agencies and the systems and on the systems' business practices. The commenters should address how our proposed rules and those advanced by parties will affect system and travel agency operations. In the past each travel agency office normally relied entirely or predominantly on one system. We ask the parties how much this is still true. Although a growing number of travel agencies have three-year contracts, the record suggests that a large majority of agencies have five-year contracts and that the systems discourage travel agencies from choosing a three-year contract. We would like the parties to provide current data on this matter.

Some parties have suggested that the typical five-year contract term and the accompanying provisions requiring the subscriber to pay damages if the contract is terminated early do not keep travel agencies from switching systems before the end of the five-year term. Other commenters disagee. We ask the commenters to provide information on this issue.

While we believe that rules governing subscriber contracts appear necessary to promote competition between the systems and between the systems and firms offering comparable services, one of the bases for our existing rules on system-subscriber relationships and their effectiveness may have disappeared due to the changes in the systems' ownership. We adopted the rules in part to promote airline competition by making it easier for airlines that owned a system to obtain a significant number of subscribers for that system in markets that the airline wished to enter. We believed that an airline would be reluctant to enter new cities if its affiliated system could not increase the number of subscribers there. 57 FR 43824. Two of the systems no longer have airline owners, and the systems provide all participating airlines with more equal functionality and reliability of information. These ownership changes seem to have made it less necessary for an airline entering a new market to obtain subscribers for its system as a basis for effective competition in the airline market.

(e) Shortening the Maximum Term of Travel Agency Contracts

The current rules fix the maximum term of a subscriber contract at five years but require systems to offer travel agencies a three-year contract if they offer a five-year contract. Section 255.8(a). In our last overall rulemaking, we did not adopt rule proposals that would have shortened the maximum length for subscriber contracts.

Most agencies have chosen five-year contracts, primarily because the systems offer more attractive pricing on those contracts than they do on three-year contracts. In addition, systems often require a travel agency to sign a new contract whenever it adds terminals, which means that travel agencies can operate under a series of long-term contracts that never expire at the same time.

The parties disagree over whether and how our rule should be changed. We are presently considering the following proposals on this issue: readopting our current rule, fixing the maximum term

at three years, and adopting the European Union rule. We will choose the option that best satisfies the legitimate business needs of the systems and travel agencies while preventing efforts to deny travel agencies the ability at reasonable intervals to switch systems. Commenters who support or oppose each proposal should provide a detailed analysis showing the benefits and costs likely to result from that proposal.

No clear answer exists on whether we should shorten the maximum permissible length of subscriber contracts, for longer-term contracts offer advantages and disadvantages. On the one hand, long-term contracts can harm travel agencies. If an agency becomes dissatisfied with a system's service, it cannot immediately switch to another system. Long-term contracts also handicap travel agencies if the airline sponsoring a system stops hubbing at a subscriber's city, or if a different airline affiliated with a CRS starts a hub in the agency's city, since agencies prefer to use the system owned by an airline with a substantial market presence. Long-term contracts can provide economic benefits ''as an efficient means for the parties to reduce uncertainty and spread risks'' and to reduce ''contract negotiation costs.'' 56 FR 12622. In the past, however, travel agencies have not enjoyed the benefit of stability in price and service. 57 FR 43824; ARTA Comments at 7. Systems seem to use long-term contracts, moreover, to block entry by competitors. 56 FR 12622.

A five-year contract for CRS services additionally may be unduly long due to the rapid changes in technology. Travel agencies should not be locked into a long-term contract with one system if other systems or alternative services would meet the agencies' needs more effectively and less expensively.

On the other hand, long-term contracts do reduce the parties' negotiations expenses. Sabre Reply at 40. Systems will be more likely to give travel agencies free equipment and services and other bonuses for signing a new contract if the contract will obligate the travel agency to use the system for a significant length of time. Large Agency Coalition Reply at 8. Maintaining the systems' willingness to provide such benefits, however, is not necessarily a proper public policy goal, for the systems offset the cost of those benefits by charging their captive customers, the airlines, supracompetitive booking fees.

In determining whether to revise our rules, we would like to take into consideration the industry's experience with the European Union's rule on subscriber contracts. That rule allows each subscriber to terminate its CRS contract without penalty on a few months notice after the contract has been in force for at least one year. The parties commenting on our subscriber contract proposals should discuss how effective the European rule has been and how it has affected the travel agencies' ability to switch systems, the systems' ability to operate profitably, and the level of booking fees charged airlines.

We must balance potentially conflicting goals in this area. Enabling travel agencies to use multiple systems and databases and to switch systems promotes competition. When travel agencies can choose among suppliers, they are likely to obtain better prices and service. As shown, however, the systems already compete for travel agency customers. As a result, proposals to give agencies greater freedom to switch systems or use multiple systems have a potential downside—if the systems compete more for travel agency customers, they will offer travel agencies larger bonuses and other benefits than they do now. The systems will attempt to offset the higher costs of marketing their services to travel agencies by charging higher fees to airlines, since they will still have market power over airlines. *Cf.* 56 FR 12629. While in the last rulemaking we found that our revised rules would not likely lead to higher booking fees, 57 FR 43825, we now believe that the additional proposals may do so, especially given the systems' aggressive competition for travel agency customers. *See also* Delta Comments at 5–6; KLM Comments at 12.

We are unwilling to consider ARTA's proposal that a travel agency have the right to terminate its contract for system services when an airline affiliated with the system materially changes the agency's business conditions, for example, by cutting the agency's commission rates. Despite the ties between the systems and their current or former airline owners, the systems and airlines operate independently in most respects. The systems are not responsible for airline decisions on commission levels and should not lose their contract rights because one or more airlines have changed their distribution practices. Travel agencies should seek contract terms giving them some protection if airline decisions on commission levels or other events require them to change the size and scope of their operations.

(f) Contract Clauses Fixing Damages

The systems' travel agency contracts usually impose liquidated damages obligations on any travel agency that terminates the contract before the end of its term. These provisions have been controversial, because they deter travel agencies from switching systems and make the travel agency liable for the booking fees lost by the system when the agency no longer uses it. On the other hand, systems understandably wish to include contract provisions for enforcing travel agency agreements to use a system for the specified term. *See, e.g.*, Sabre Reply at 45–46. Systems do not always rely on liquidated damages clauses to achieve this result. The contracts used by one system make the agency's cost of terminating the contract the same no matter how many months remain before the contract's expiration, AAA Comments at 3–4, whereas the agency's cost for an early termination would decline over the term of the contract if the system were relying on a contractual damages provision to deter breaches.

Several parties have asked us to prohibit contract clauses that allegedly create an excessive liability for damages if the subscriber terminates the contract before the end of its term.

We are proposing a rule limiting a subscriber's damages obligations if it terminates its CRS contract before the end of its term. Our proposed rules are intended to give travel agencies a real ability to use more than one system and to use electronic means for bypassing the systems. We are thereby building on the policy followed by us in our last rulemaking. 57 FR 43827–43828. A system accordingly could not reasonably expect a subscriber to use that system for all or most of its bookings during the term of the contract. We therefore propose to bar systems from demanding liquidated damages that would reflect booking fees allegedly lost by the system due to the subscriber's use of a different system. This limitation on one type of damages should be consistent with a potential decision to allow contracts that may last several years. We are aware that systems may use other contract provisions to enforce a subscriber's contractual obligation to purchase system services over a period of several years, but we wish to eliminate a type of damage clause that seems designed to compel an agency to rely primarily on one system for its bookings.

(g) Travel Agency Equipment Additions

If a travel agency is obtaining CRS services under an existing contract and wishes to obtain additional terminals from the system, the system will commonly require the agency to sign a new contract for the new equipment. As

a result, travel agencies using system-owned equipment often operate under a series of long-term contracts that never expire at the same time. This could undermine our rules limiting the maximum term of travel agency contracts.

Worldspan and the Large Agency Coalition ask us to end this practice. The Large Agency Coalition suggests that we adopt a rule requiring that new equipment be covered by the same term as the agency's existing contract. Worldspan Comments at 10; Large Agency Coalition Reply at 4. Sabre opposes rules in this area. Sabre Reply at 42–43.

We considered similar requests in the last major CRS rulemaking. At that time we decided that a rule barring systems from requiring a new contract as a condition of providing additional equipment would not be economically rational. If a travel agency requested additional equipment near the end of the contract term, the system might refuse to provide the equipment. Alternatively, the system could impose a high price for providing the additional terminals. In addition, we thought that such a rule would likely be difficult to enforce. 57 FR 43825–43826.

We will reconsider our earlier analysis in this proceeding. The parties should discuss whether a system's insistence on obtaining a new multi-year contract for additional equipment significantly interferes with the travel agencies' ability to switch systems or use multiple systems. However, since our rules give a travel agency the right to buy its equipment, the commenters should also discuss whether an agency's ability to purchase additional equipment itself rather than accept the system's proposal, when it knows that doing so will extend the life of the agency's contractual obligations to the system, makes a rule on this issue unnecessary.

11. Productivity Pricing

To reduce the systems' market power over airlines we wish to consider propoals that may better enable travel agencies and airlines to use alternatives to the systems. As long as the systems have market power, they will continue to charge supracompetitive booking fees that necessarily increase airline costs and the fares paid by passengers. We therefore wish to keep the systems from using contractual practices that deny travel agencies a reasonable opportunity to switch systems or use multiple systems and databases. Accordingly, we presently propose to restrict or potentially prohibit ''productivity pricing.'' Doing so is consistent with our existing general rule, section 255.8(b), which states, ''No system may directly or indirectly impede a subscriber from obtaining or using any other system.''

The productivity pricing structure gives a travel agency large discounts from the ''standard'' charges for system services and equipment if the agency meets a specified minimum booking level for each terminal (Midwest Express included an example of such a contract as Exhibit 9 to its comments). Large Agency Coalition Comments at 6. The systems fund the bonuses paid subscribers with the profits they obtain from supracompetitive booking fees. Those profits enable them to offer travel agencies inducements to make most or almost all of their bookings through the agency's principal system. Systems originally used productivity pricing formulas when subscribers used equipment provided by the system. 57 FR 43826–43827. We believe, however, that the systems' subscriber contracts have often included productivity pricing provisions, or very similar provisions, even if the travel agency will use third party equipment. The systems, however, have recently begun offering the smaller travel agencies, but not larger travel agencies, the option of choosing contracts imposing no minimum booking requirements. *Travel Distribution Report* (April 8, 2002) at 2.

Productivity pricing has been widespread. A 1996 survey by the American Society of Travel Agents indicated that 86 percent of travel agency contracts used productivity pricing. ASTA Comments at 12. By 2001, however, a smaller share—66 percent—of new CRS contracts used productivity pricing. *Travel Distribution Report* (October 18, 2001) at 1.

Productivity pricing on its face operates as a way of rewarding travel agencies that make greater use of the equipment provided by a system. In practice, however, as explained below, it operates as the equivalent of the minimum use clauses that we prohibited when we last reexamined our rules. The minimum use clauses had treated a travel agency's failure to meet its minimum booking quota as a breach of contract. In that rulemaking we reasoned that minimum use clauses seemed ''designed to protect the [system's] subscriber base from competition rather than to ensure that the [system] receives adequate compensation for the services and equipment provided the subscriber.'' 57 FR 43826. While most of the parties commenting on the issue supported our proposal to bar minimum use clauses, those parties supported productivity pricing, which assertedly served legitimate goals and did not deter travel agencies from using multiple systems. We then reasoned that productivity pricing ''encourages the agency to make more efficient use of its CRS equipment (and to avoid obtaining more equipment than reasonably needed for its business).'' We accordingly did not proscribe productivity pricing. 57 FR 43826–43827.

The industry's experience with the systems' use of productivity pricing since that rulemaking has caused us to reexamine that reasoning. It now appears that the systems have not been using productivity pricing to encourage more efficient use of their equipment. They have instead apparently been using it to encourage travel agencies to use one system for all or almost all of their bookings. As discussed above, systems have used productivity pricing or equivalent pricing formulas even when the travel agency is not using equipment owned by the system.

We believe that productivity pricing may unreasonably restrict travel agency use of multiple systems and databases since the systems use it as they once used minimum use clauses. They set the booking quota high enough that the agency as a practical matter cannot afford to make substantial use of another system or database. As alleged by one travel agency group, all four systems ''have instituted de facto minimum use clauses by making the cost of non-use so prohibitive that the agency cannot possibly afford to switch systems or add a second system in mid-contract.'' Large Agency Coalition Comments at 6.

We would not be concerned with productivity pricing and similar contract terms in subscriber contracts if the only parties affected by these terms were the systems and travel agency subscribers. Productivity pricing, however, may harm consumers both directly and indirectly. It may keep travel agents from booking the best fares for their customers, and it increases airline costs by preventing airlines from using alternative electronic means of communicating with travel agencies.

Productivity pricing may keep travel agents from serving their customers properly by deterring travel agents from using the Internet to book E-fares, which are normally not available through the systems used by travel agents. When travel agents book E-fares through the Internet, they run the risk of failing to satisfy the minimum monthly booking quota set by the productivity pricing provisions. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002); All

About Travel Supp. Comments. The potential loss of the lower CRS rates may well deter travel agents from booking E-fares when doing so would be in the best interests of their customers. ASTA thus alleges that productivity pricing clauses ''have served mainly as a deterrent to the agency's looking to non-CRS sources, such as the Internet, to make bookings that more nearly conform to their clients' needs.'' ASTA Comments on Proposed Extension at 3.

Insofar as the terms deter travel agencies from using alternative means for obtaining airline information and booking airline seats, they affect the airlines, which lose opportunities to encourage travel agencies to bypass a system by, for example, making bookings directly with airlines through airline websites over the Internet or by a direct link to an airline's internal reservations system. Market forces have not disciplined the price and terms of services offered airlines by the systems, primarily because most airlines have had no readily available alternative means of electronically providing information and booking capabilities to travel agents. An airline could create direct links between individual travel agencies and its internal reservations system, but the cost of doing so apparently has made this an unattractive alternative in most cases. The Internet, however, has made direct bookings much less costly, since a travel agent with Internet access can book seats through airline websites or the special websites created by some airlines for travel agency use. Productivity pricing appears to deter travel agents from using such options for bypassing the systems and so would undermine the policies followed by us in past CRS rulemakings. *See* 56 FR 12622; 57 FR 43823, 43826.

Our present belief that productivity pricing clauses reduce competition for the systems is consistent with the parties' comments. Alaska thus states that productivity pricing prevented Alaska from getting travel agencies to use an alternative to the systems, Alaska Comments at 9–10:

> [P]roductivity pricing provisions have a strong tendency to lock travel agents into the use of a single CRS and to inhibit their use of alternative channels, including other CRSs and direct links to carriers. Alaska's own attempt to establish direct computer links with major agencies in the Pacific Northwest demonstrated that travel agents were extremely loathe to use those links because they would not receive additional productivity credits from their principal CRS and would therefore pay more to (or receive less from) their CRS vendor each month.

Several airlines have made proposals that would bar or restrict productivity pricing. Delta, Aloha, Alaska, American Trans Air, and Qantas contend that we should prohibit it. Continental suggests that we should bar cash payments and bonuses that exceed the cost of the equipment covered by the productivity pricing agreement. Continental Comments at 24–25.

Sabre, Worldspan, and Galileo, on the other hand, oppose any prohibition of productivity pricing. The Large Agency Coalition proposes that productivity pricing be barred only insofar as travel agencies must pay penalties for failing to meet their booking quota.

We ask the parties to comment on proposals that will prohibit or limit the use of productivity pricing. Since the systems are apparently using productivity pricing as a means to keep travel agencies from using a second system or another alternative to the system initially chosen, productivity pricing would operate as an unreasonable restriction on competition. In particular, it would protect each system's market power.

Productivity pricing would enable the travel agency to obtain credit if it efficiently uses the equipment provided by the system. Continental has therefore proposed that we allow systems to offer travel agencies discounts equal to the cost of the equipment if they meet a monthly booking quota. We will consider that proposal, since we prefer to limit contract terms only when necessary to keep the systems from unreasonably restricting competition. Such a proposal would enable travel agencies to obtain equipment at discounted prices while not encouraging them to use one system for all or almost all of their bookings.

Productivity pricing in the traditional sense was tied to the agency's use of equipment provided by a system and so technically may not exist as to subscribers using their own equipment. Travel agencies using their own equipment often operate under comparable contractual provisions rewarding them if they make the majority of their bookings on their primary system. Varig Comments at 7–9. The systems could develop other ways to give travel agencies financial incentives to make all or almost all of its bookings through one system, and one system has advised us that some other systems are doing so.

Therefore, our current proposal covers more than productivity pricing. Providing financial incentives to travel agencies to use one system for all or most of its bookings would appear to frustrate our goal of giving travel agencies more leeway to use multiple systems and databases, including the Internet.

12. The Tying of Marketing Benefits With System Subscriptions

Airlines that have CRS ownership interests or a marketing relationship sometimes tie a travel agency's access to override commissions and marketing benefits, such as the ability to waive advance-purchase restrictions on discount fares, with the agency's choice of the system owned by the airline. Our rules prohibit the tying of override commissions with the agency's use of the airline's system, section 255.8(d). In our last proceeding we did not extend this rule to marketing benefits, even though that would promote competition on the merits, since we doubted that a broader rule would be enforceable. 57 FR 43828.

Sabre, System One, Continental, America West, and the Large Agency Coalition contend that the Department should prohibit the tying of the travel agency's use of an airline's system with the agency's ability to obtain marketing benefits. These parties have cited cases where an airline affiliated with a system took such action. Sabre Comments at 33–34; Galileo Comments, Exhibit B.

Delta opposes any such rule, largely on the ground that any prohibition could not be practicably enforced. United contends that the Department should eliminate all rules limiting an airline's ability to tie commissions and benefits with the use of its system. United Comments at 27–29.

We are concerned about the use of an airline's dominant position in a local airline market to distort CRS competition in the same area. For that reason we are requesting comments on whether we should ban airlines from denying travel agencies access to their corporate discount fares when the agency does not use the system affiliated with the airline offering the fare. We think, as we did during our last overall rulemaking, that this practice unreasonably restricts competition in the CRS business. However, we continue to be concerned that a rule proscribing such tying could not be effectively enforced. Some commenters state that the current rule prohibiting the tying of commissions with use of a particular system has been ineffective, since the airlines owning or marketing a system often violate the rule. Sabre Comments at 33; Large Agency Coalition Comments at 7, n.2.

We wish to explore whether an effective rule prohibiting tying practices would be possible. As Sabre pointed out, Canada's rules had addressed the

issue of the tying of marketing benefits by requiring each airline affiliated with a system to tell travel agencies that their commissions are not tied to their use of a particular system and to annually certify that the airline had not tied the agency's commissions to its use of the system affiliated with the airline. Sabre Comments at 33 and Attachment I. *See also* Large Agency Coalition Reply at 3.

We ask the parties to comment on whether the Canadian rule was effective and whether it (or other proposals) would make a prohibition against tying effective.

United's claim that a firm should be free to encourage businesses to buy products and services from a company that it owns is usually true. The cited principle is invalid when, as can happen in the airline industry, a firm with market power compels businesses to become customers of its affiliated company when they would rather buy the goods or services from independent companies.

United has also suggested that an airline that owns or markets a system should be able to offer a travel agency higher commissions or other benefits if the agency agrees to use a system that charges airlines lower fees or provides better service. United Reply at 17. The parties should comment on whether any rule should contain an exception allowing an airline to do that and whether an exception of that kind could be written that would not encourage airlines affiliated with a system to use their dominance in regional airline markets as a means of compelling travel agencies in those areas to choose their affiliated system.

13. Regulation of the Internet-Based Airline Distribution Systems

In our last review of the CRS rules, we considered only the need for the rules adopted by the Board and other proposed rules that would govern CRS operations and the systems' relationships with the airlines and travel agencies. At that time, ''brick-and-mortar'' travel agencies sold about eighty percent of all airline tickets, and consumers bought most of the remainder directly from the airlines. Few travellers bought tickets on-line. 57 FR 43794–43795. Since then the Internet has become a significant avenue of airline distribution. Many consumers research airline services and buy tickets on the Internet, either directly from an airline or through one of the on-line travel agencies or a website operated by one of the ''brick-and-mortar'' travel agencies, like American Express. As discussed above, some U.S. airlines already obtain more than thirty percent of their bookings from the Internet, and over ten percent of all airline tickets are now bought on-line.

Our rules cover system operations insofar as the systems are providing travel agencies with information and booking capabilities on airline services but do not cover travel agency operations, either on-line or ''brick-and-mortar,'' or sales made directly by a system to consumers. Given the growing importance of the Internet's role in airline distribution, and the possible analogies between Internet practices and the system practices that have been examined in past CRS rulemakings, we stated that we would consider in this rulemaking whether some of the CRS rules (or similar rules) should be applied to websites used by consumers for buying tickets. 65 FR 45557.

Insofar as this proceeding is concerned, the Internet's role in airline distribution presents several major issues. Various parties have asked us to consider the following:

- Whether rules are necessary to prevent consumers from being harmed by websites offering potentially inaccurate or biased information.
- Whether we should adopt rules governing websites like Orbitz and Hotwire that are owned by several airlines.
- Whether on-line travel agencies should be entitled to protection from allegedly discriminatory treatment on such matters as commission rates.
- Whether we should require airlines to allow all travel agencies to sell the discount fares offered on airline websites.
- Whether we should bar systems from requiring airlines to make their services saleable by all system users selling tickets over the Internet.

On the other hand, few parties seek rules regulating individual airline websites.

After considering the parties' arguments, we have tentatively determined that we need not now propose rules that would substantially regulate the Internet's use in airline distribution, as explained below. We appreciate the importance of preventing deceptive practices and anticompetitive conduct that could cause serious harm to consumers and airline competition. However, rather than propose rules on the basis of a relatively short experience, we prefer to see how the Internet's use in airline distribution develops and whether its evolving use threatens airline competition and consumer access to accurate and complete information on airline services. Our experience with the Internet thus far does not confirm that broad regulations are necessary.

We intend to continue watching the Internet distribution practices of airlines and on-line travel agencies and will take action if that becomes necessary. Even if our rules do not specifically regulate on-line displays, on-line travel agencies must comply with section 411, which prohibits unfair and deceptive practices, and our rules, which require travel agencies to provide accurate information on airline services. 14 C.F.R. 399.80. We are ready to take enforcement action against any travel agency (or airline) that provides deceptive information on airline services, and we have done so in several cases. *See, e.g.*, Orders 2001–5–32 (May 30, 2001) and 2001–6–3 (June 7, 2001).

We invite commenters who disagree with our tentative proposal on this issue to present their proposals with information and analysis showing that they would provide public benefits without harming competition or the development of new on-line marketing approaches.

We will, however, propose a policy statement on one Internet-related issue here, the requirements for disclosure of travel agency service fees. Orbitz' decision to charge consumers a fee for making a booking through its website has raised the question of how such a travel agency fee should be displayed in light of our longstanding policy that any fare advertisement must state the full amount that a consumer must pay for the air transportation.

(a) Regulation of Internet Displays of Airline Services

Some parties have expressed a concern that on-line travel agencies may bias their displays in favor of preferred airlines if we do not adopt rules prohibiting them from doing so. Assertedly some on-line travel agencies may find it profitable to sell display bias to individual airlines with the result that the Internet sites will mislead the consumers using them. *See, e.g.*, American Comments at 11.

As a result of this concern, as well as related concerns that on-line travel agencies may operate in other ways that would prejudice airline competition and mislead consumers, a number of parties are urging us to regulate Internet operations in some respects. These parties include Sabre, American, Worldspan, Amadeus, Continental, Alaska, America West, Midwest Express, the European Union and the European Civil Aviation Conference, Qantas, the Asia Pacific Airline Group, ASTA, ARTA, and the Consumers Union. The Consumers Union submitted

a survey of on-line agency websites that it believes indicates that such websites provide incomplete and misleading information. Sabre and others also contend that airlines controlling websites can use them to distort competition. Alaska and others assert that the rules should prevent unfair practices that would allow one firm to dominate travel distribution on the Internet. Some systems contend that they will be competitively handicapped if their operations are subject to the Department's rules while Internet firms are not regulated.

Galileo, United, Delta, Continental, British Airways, Microsoft, Preview Travel, Biztravel.Com., and OAG Worldwide oppose including Internet sites within the scope of the CRS rules. They generally claim that there is no need to regulate Internet sites and no evidence of harm thus far.

American and Northwest contend that websites should be regulated only to the extent of requiring them to give notice of any bias. U.S. Airways and America West suggest that our rules require disclosure if an on-line agency omits some airlines from displays as may happen, for example, if those airlines do not participate in the system used by the on-line agency.

Expedia contends that only websites owned by airlines require regulation, for independent websites have neither the incentive nor the ability to reduce airline competition. Orbitz and OAG Worldwide allege that consumers will avoid biased sites, so no rules are needed. In arguing that rules are unnecessary, Delta and others assert that Northwest was able to compel Lowestfare.com to change practices that allegedly discriminated against Northwest and other non-favored airlines.

Amadeus, in contrast, asserts that consumers are ill-equipped to detect bias and that they could not practicably avoid biased sites if all sites were biased.

Orbitz' entry into the on-line travel agency business has affected the positions taken by some of the parties. In particular, several of the airlines owning Orbitz initially argued that rules were necessary to prevent on-line travel agencies from biasing their displays. After they created Orbitz, they reversed their position and now argue that we should not adopt such rules. *See* Sabre Supp. Reply at 15–18.

After considering the parties' arguments on this issue, we are tentatively proposing not to adopt regulations governing on-line displays of airline services, as stated above. Many of the parties have recommended different treatment for the two major types of websites offering airline tickets: airline sites and on-line travel agencies. While many of the parties urge us to adopt rules regulating the displays offered by on-line travel agencies, few parties seek rules regulating the displays offered by airline websites.

As to airline website displays, most of the commenters agree that consumers do not expect an airline to offer unbiased information on its own website. Consumers instead assume that such a website will favor the airline's own services. While some parties contend that we should regulate any website operated by an individual airline if it enables consumers to book flights on other airlines, we disagree. We are not now willing to extend the reach of our rules against display bias to sites operated by individual airlines, no matter what travel services may be purchased through the site. Consumers cannot reasonably expect to obtain unbiased information from an airline website, since the airline will understandably seek to promote its own services and those of any allied airlines.

The controversy over the regulation of Internet displays of airline services thus essentially involves the question of whether we should regulate the displays offered by on-line travel agencies. We have decided against proposing rules governing on-line travel agency displays at this time for several reasons.

First, we are declining to regulate the displays created by ''brick-and-mortar'' travel agencies. One rationale for that decision—the travel agencies' interest in keeping customers satisfied—applies to the on-line travel agencies. A consumer dissatisfied with the service offered by one on-line agency can easily switch to another on-line agency. On-line travel agencies should have an additional incentive to avoid biasing their displays since newspapers and magazines conduct surveys of the different websites and report on which site offers the best fares and the best service. *See, e.g.*, ''Orbitz Takes Off, in the Spotlight,'' *New York Times* (June 17, 2001), travel section at 13. An on-line travel agency that biased its displays would likely fare poorly in such surveys. These factors should keep on-line agencies from biasing their displays even though some have agreements with individual airlines giving them incentives to increase an airline's share of the agency's total bookings.

Furthermore, we have not yet seen sufficient evidence to conclude that bias is a serious problem at on-line travel agency websites. Although the Consumers Union submitted a study indicating that on-line agencies often failed to provide the best available fare, a result that it believes suggests the displays may be biased, it concedes that these results do not prove that bias exists. Consumers Union Supp. Comments at 4–6. The on-line agencies, of course, deny they bias their displays, Travelocity Supp. Reply at 14–18; January 17, 2001, Letter from Mark Britton, General Counsel for Expedia. *See also* ''Travel Web Sites Say Airline Deals Don't Affect Searches,'' *Washington Post* (April 3, 2002). No airline has alleged that bias by on-line travel agencies is currently a common problem. Midwest Express, however, asserts that Expedia's displays are unreasonable, since Midwest Express' nonstop service in one market is listed well below the connecting services offered by other airlines. Midwest Express Supp. Comments at 11–14. Expedia has denied this. It contends that its displays rely in part on fare levels in ranking flights and that Midwest Express' tendency to charge higher fares assertedly causes the airline's flights to receive a lower display position.

Parties have cited Northwest's dispute with LowestFare.com on both sides of this issue. Amadeus notes that Northwest considered LowestFare.com's displays biased. Amadeus Supp. Reply at 14–15. Delta, on the other hand, contends that Northwest was able to force LowestFare.com to change its display practices, thereby showing that regulatory intervention is unnecessary. Delta Supp. Reply at 14–15. We believe that Northwest's experience suggests that regulatory intervention is not critical at this time, since Northwest was able to get LowestFare.com to change its display practices.

Furthermore, if some on-line travel agencies present biased information or offer displays that are otherwise inadequate, consumers can easily protect themselves by searching several websites before choosing a flight, and they usually do so. Travelocity Supp. Reply at 5–6. One study indicates that over sixty percent of leisure passengers who buy tickets on-line visit at least two sites before making a purchase and that nearly forty-five percent visit four or more sites. Orbitz Supp. Reply at 5. *See also* Sabre Supp. Reply at 24. Thus many consumers appear to be willing to take time to search for the best option and will be less likely to choose the first option shown on a display (or rely on just one source of information).

We are unconvinced by arguments that regulations are needed because consumers are less experienced than travel agents in searching for airline services and so can be misled more

easily by an on-line travel agency. Consumers have less experience, but they are more likely to take additional time to research the available airline service options. Although an individual on-line travel agency that wished to deceive consumers could do so with respect to those consumers who do not search multiple sites, most consumers search at least two websites before booking a fare.

A rule requiring on-line travel agencies to follow the rules applicable to the CRS displays provided travel agencies, moreover, could be harmful by discouraging new methods of offering airline tickets on-line. Priceline and Hotwire, for example, have created innovative methods for selling discounted tickets to travellers. Other firms may create other new techniques for providing airline information and tickets. A rule prescribing the displays to be used by on-line travel agencies could discourage such innovation.

Furthermore, some parties define bias in a relatively broad fashion that would call for our review of display practices other than the editing and ranking of flight options. Some parties assert, for example, that posting banner advertisements or giving any preference to one airline is bias, even if the site clearly gives consumers the option of choosing to book other airlines instead of the preferred airline. Orbitz Supp. Reply at 14–15. We do not regard such practices as bias. Travelocity Supp. Comments at 18–19.

Some commenters nonetheless contend that our decision to prohibit systems from biasing the displays provided travel agents supports the prohibition of bias in on-line travel agency websites. *See, e.g.*, Travelocity Supp. Comments at 17. We disagree. In our view, the displays offered consumers by on-line travel agencies and the displays offered travel agencies by systems are not analogous. Substantial differences exist between travel agent use of CRS displays and consumer use of websites. We prohibit the systems from biasing the displays offered travel agents because travel agents are often under time pressures that keep them from searching for the best possible service and make them more likely book one of the first flights listed even if other flights would better meet a customer's needs. Travel agents, moreover, do not usually access more than one system when investigating airline service options. In addition, the customer never sees the CRS display and must rely on the travel agent's expertise and diligence. In contrast, as shown, consumers using the Internet can and do easily look at alternative websites before choosing a flight. Thus many consumers take time to search for the best option and will be less likely to choose the first option shown on a display (or rely on just one source of information).

To obtain comprehensive on-line information on airline services, consumers should search several sites, even if all are unbiased, since no site will offer complete information on available airline services. Individual on-line travel agencies have been negotiating special deals with airlines and offering those fares to travellers visiting their websites. Bear, Stearns, ''Point, Click, Trip,'' at 48, 49. Any such fare would be available only from the on-line travel agency that obtained the special deal. Thus consumers cannot expect to obtain reasonably complete information on available fares by viewing only one on-line travel agency website. And surveys of on-line travel agencies show that different agencies often show somewhat different fares. *See*, *e.g.*, ''Orbitz Takes Off, in the Spotlight,'' *New York Times* (June 17, 2001), travel section at 13.

On-line agencies are additionally unable to enable consumers to book every airline. For example, consumers can buy Southwest tickets on-line only at Southwest's website. Southwest's refusal to participate in any system at a high enough level creates the risk of errors in bookings by consumers, and Southwest has refused to guarantee that it will provide seats to consumers affected by such booking errors. Southwest has therefore refused to allow on-line agencies to sell its tickets. ''Southwest stops selling tickets in Travelocity.com,'' *Travel Distribution Reports* (March 8, 2001). Consumers now are normally able to obtain information on the airlines' discount E-fares only by viewing the website of each airline or Orbitz, to the extent that airlines have agreed to make their E-fares available through Orbitz (whether Orbitz should have preferential access to such fares is an issue discussed below).

The on-line travel distribution business thus has so far developed in a way that does not enable consumers to obtain comprehensive information from a single website. Applying display bias rules to on-line travel agencies would not change this.

We do not intend to foreclose further discussion of this issue, and will consider all proposals for rules governing Internet displays of airline services. However, to justify the adoption of such rules, we would need evidence that they were necessary to protect consumers, and would not impose undue burdens on the firms being regulated. One possibility would be a requirement that each on-line travel agency provide information on which airlines are or are not saleable through its website and the criteria used in editing and ranking the airline services displayed in response to a consumer's request. Alternatively, commenters may submit proposals that would set out general principles for on-line displays without prescribing in detail how displays must be constructed. Parties suggesting rules in this area should address the issue of why on-line agencies may require regulation when we have not generally regulated ''brick-and-mortar'' agencies. Examples of any analogous regulation of Internet services might also prove helpful.

(b) The Airlines' Differing Treatment of Travel Agencies

The airlines do not treat all on-line travel agencies the same and do not treat them the same as ''brick-and-mortar'' travel agencies (nor do they treat all ''brick-and-mortar'' travel agencies the same). For example, airlines were generally paying lower commissions for on-line bookings than they do for bookings made at ''brick-and-mortar'' travel agencies, and at least four airlines—Continental, Northwest, KLM, and Southwest—stopped paying commissions for on-line bookings well before they eliminated base commissions for ''brick-and-mortar'' travel agencies. In addition, most U.S. airlines have agreed with Orbitz that Orbitz may sell their E-fares even though airlines generally have not allowed other travel agencies (on-line or off-line) to sell their E-fares through the systems used by travel agents. Some airlines negotiate special fares with individual on-line travel agencies that other on-line travel agencies cannot sell.

''Brick-and-mortar'' travel agencies can book E-fares for their customers only by going to an airline website or Orbitz, and they are unlikely to receive a commission for any such booking. Searching for fares and booking tickets outside the travel agent's system is more inefficient, as explained above. The travel agency also earns no credits under a productivity pricing clause when it makes bookings through the Internet rather than its system.

Travelocity and Expedia generally do not have access to the E-fares available on airline websites and Orbitz, except to the extent that individual airlines have agreed to make such fares available to them.

The Interactive Travel Services Association, the on-line travel agencies' trade association, urges us to adopt rules

that would stop the airlines from discriminating against on-line travel agencies. ARTA, American Express, and RADIUS, formerly called Woodside Travel, a large travel agency, contend that we should stop airlines from making discount fares available only through an airline website. The National Business Travel Association contends that we should require airlines to make their E-fares available through all distribution channels. Amadeus asserts that an airline should be required to make available to every website all of the fare information provided by that airline to any website with which it is affiliated. Other parties contend that we should block the airlines from giving special treatment to Orbitz. A large number of travel agencies request a rule requiring airlines to allow them to sell the discount fares sold on airline websites and Orbitz, since they allegedly cannot compete when travellers can routinely obtain lower fares from other distribution channels.

United, Northwest, Southwest, America West, and other airlines argue that airlines should be able to offer discount fares through their websites without making them available through other distribution channels. They assert that only the low distribution costs incurred when travellers book seats through airline websites make it possible for the airlines to offer their E-fare discounts.

We are not inclined to propose, on the basis of current information, a requirement that airlines treat all types of travel agencies the same, to treat on-line travel agencies the same as off-line travel agencies, or to give all travel agencies access to fares that the airline has chosen to sell through limited channels. We recognize the danger that airlines affiliated with one on-line travel agency may seek to use any market power they have in airline markets to distort competition in the airline distribution business, but we currently believe that the enforcement process, not the adoption of general rules, would be the most effective method for addressing such conduct that involves unfair methods of competition.

Travel agencies offer services valued by many travellers, and they often find better fares than travellers can obtain from airlines or Internet sites. Nonetheless, given our limited role in regulating the airline and airline distribution industries, we presently doubt that we could require airlines to offer their most attractive fares to all distribution channels. As discussed above, in this proceeding we are primarily relying on our authority under section 411 to prohibit unfair methods of competition. Unfair methods of competition, as shown, are practices that violate the antitrust laws or antitrust principles. The antitrust laws generally allow individual firms to choose how to distribute their products and services. The Robinson-Patman Act, 15 U.S.C. 13, restricts a seller's ability to offer lower prices to some buyers than to others without justification, but it does not cover the sale of services. It appears that an airline's decision to provide higher commissions or better treatment to one type of distribution channel (or to some but not all firms within the same channel) would not ordinarily conflict with antitrust principles.

Requiring airlines to treat all travel agencies the same also seems contrary to the industry's established distribution practices. Individual airlines have always given some types of travel agencies benefits not given others, and have given different distribution channels different terms for selling tickets. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 15; *Airline Marketing Practices* at 25, 26; American Supp. Reply at 25–26. Airlines have varied their terms for the sale of their tickets on the basis of such factors as the relative cost and effectiveness of using different firms and distribution channels. The systems similarly offer different travel agencies different terms depending on such factors as the agency's location and probable volume of business. Individual on-line travel agencies have negotiated special arrangements with individual airlines and other travel suppliers. Travel agencies may also give their best customers offers not made available to other customers. *See, e.g.*, American Reply at 7.

The systems, travel agencies, and software firms are developing programs that will enable travel agents to easily access airline E-fares. *See*, *e.g.*, *Travel Distribution Report* (May 6, 2002) at 66, 68; *Travel Weekly* (April 29, 2002) at 61; *Travel Weekly* (May 27, 2002) at 1. Orbitz, as noted above, has also arranged for the development of such a program. These efforts should reduce the need for any Government intervention.

Congress, however, also determined that the issue of travel agency access to Internet fares and related travel agency issues should be studied by a commission, the National Commission to Ensure Consumer Information and Choice in the Airline Industry. The commission is due to submit its report on these issues to the President and Congress by November 16, 2002.

(c) Regulation of Joint Airline Websites

To a great extent, of course, the parties' concern with the airlines' different treatment of different agencies is attributable to Orbitz, the on-line travel agency owned by five major airlines, and Orbitz' ability to sell many discount fares that are not available for sale through other travel agencies. A number of parties broadly assert that any site owned by two or more airlines, such as Orbitz and Hotwire, may well be operated in a manner which will reduce competition and lead to consumers receiving biased or inaccurate information. *See*, *e.g.*, Expedia Supp. Comments at 11–12; Travelocity Supp. Comments at 10–11; Southwest Supp. Reply.

We are not proposing rules on the conduct of joint airline websites at this time. The only jointly-managed airline websites are Orbitz and Hotwire, except to the extent that the partners in airline alliances may have created joint websites (the parties seeking rules covering jointly-operated websites have not asserted that websites operated by alliance partners inherently require regulation). We do not know whether more such websites will be created and, if so, how they would operate. In the present circumstances, we believe the enforcement process would be the best means for addressing any problems with deceptive practices and unfair methods of competition created by such a site. An enforcement proceeding could effectively take into account the characteristics of an individual website while a rule might be unable to do so, especially when any rules would necessarily be based on predictions about how such a website would operate.

Insofar as this issue involves concerns presented by Orbitz' business plan and strategy, we have been addressing those concerns through our informal examination of Orbitz. We have been investigating Orbitz' operations to see whether it may be engaged in deceptive practices or unfair methods of competition. One subject of that investigation has been whether Orbitz has been given unfair preferential access to the airlines' discount fares, especially their E-fares. We have submitted a progress report to Congress on that investigation. ''Report to Congress: Efforts to Monitor Orbitz'. We have not reached any definitive conclusions on whether Orbitz, operations may violate antitrust principles, in part because of the continuing changes in the on-line distribution business, and in part because the Justice Department has not concluded its own antitrust

investigation into Orbitz. We are continuing to monitor Orbitz' operations. If Orbitz or its owner airlines engage in unlawful conduct, we can and will use our authority to end any unlawful practices. *See*, *e.g.*, April 13, 2001, Letter from Susan McDermott and Samuel Podberesky to Jeffrey Katz, at 6.

In addition, Orbitz and any other website operated jointly by two or more airlines are subject to the antitrust laws and section 411, which authorizes us to prohibit conduct that violates antitrust principles or the antitrust laws. The antitrust laws themselves prohibit competing firms from operating a joint venture in ways that unreasonably restrict competition. Any restrictions on the participating firms' conduct must be reasonably necessary for the accomplishment of the joint venture's legitimate goals, and conditions on access to the joint venture, or denials of access, are subject to the rule of reason or, if the joint venture has market power, can be unlawful *per se*. *See*, *e.g.*, *Northwest Wholesale Stationers* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980). Firms cannot agree among themselves to boycott a firm competing with one or more of them. *Toys ''R'' Us* v. *FTC*, 221 F. 3d 928, 934–936 (7th Cir. 2000). We will apply these principles if necessary through enforcement action taken under section 411.

A number of parties contend that we must at least require airlines to enable other travel agencies, both on-line and off-line, to sell the E-fares that they are authorizing Orbitz to sell. They claim that the inability of other travel agencies to sell the low fares available to Orbitz will undermine their competitive position. *See*, *e.g.*, the comments filed by several Uniglobe agencies.

We are reluctant to adopt a regulation that would require airlines to give other travel agencies the ability to sell their E-fares if they allow Orbitz to sell them. As explained above, section 411 does not empower us to dictate to the airlines how they will distribute their tickets, unless they are engaged in practices that violate the antitrust laws or antitrust principles. An airline's decision to make E-fares available to Orbitz but not other on-line travel agencies would not necessarily violate the antitrust laws or antitrust principles, just as, for example, an airline's decision to give special deals to one of the largest on-line travel agencies, Travelocity or Expedia, but not other travel agencies would not necessarily violate section 411. ''Brick-and-mortar'' agencies, moreover, can book E-fares through an airline website or, in many cases, Orbitz, though other on-line travel agencies cannot.

We recognize that the Department's Inspector General has also suggested requiring airlines to provide their E-fares to other on-line travel agencies if the agencies agree to the same terms as Orbitz, that is, promise each airline to rebate a portion of the CRS fees for all bookings on that airline made through the on-line agency. Testimony of Inspector General Kenneth Mead before the Senate Commerce Committee, July 20, 2000, at 22–23. However, we are not presently proposing to impose such a requirement in this rulemaking. Despite its attractive features, his recommendation would require us to dictate how the airlines would treat different distribution channels, a kind of intervention that would usually be outside our authority under section 411.

While we are not proposing now to adopt a rule on this issue, we recognize that Orbitz' ability to sell E-fares that other on-line travel agencies cannot sell does raise legitimate concerns. Our investigation of Orbitz is therefore examining, among other things, whether Orbitz' access to the airlines' E-fares violates antitrust principles and thus constitutes an unfair method of competition. As indicated, if Orbitz and any airlines are engaging in conduct contrary to antitrust principles, we have the power to address those violations in enforcement proceedings.

The commenters seeking a rule requiring at least Orbitz' owner airlines to make their E-fares available to other on-line travel agencies rely on an analogy with our mandatory participation rule for airlines with an ownership interest in a system. *See*, *e.g.*, Amadeus Supp. Comments at 23–28; Travelocity Supp. Comments at 21–22. These situations do not appear to us to be analogous. We adopted the mandatory participation rule due to our experience with cases where U.S. and foreign airlines that owned or marketed a system restricted their participation in competing systems in order to give their affiliated system a competitive advantage. 56 FR 12608. In the case of Orbitz, our initial investigation indicated that airlines were providing Orbitz with access to their E-fares in exchange for booking fee rebates not provided by other on-line travel agencies. Orbitz itself had an interest in obtaining access to the E-fares because of its need for a marketing advantage that might offset the strengths of the existing on-line travel agencies. April 13, 2001, Letter from Susan McDermott and Samuel Podberesky to Jeffrey Katz. As a result, there may have been legitimate business reasons for the arrangement between Orbitz and the airline charter associates whereby Orbitz has gained access to the airlines' E-fares. In contrast, the refusals by airlines affiliated with one system to participate in competing systems at an equivalent level appeared to reflect a goal of restricting rather than promoting competition. Our continuing examination of Orbitz will include the issue of whether the airlines' decisions restricting access to their E-fares may be unlawful.

14. Prohibit Tying of Internet Participation

Orbitz presents the question of whether in some circumstances the major airlines would violate antitrust principles if each decides to allow only its preferred distribution channel to sell its best fares. Each system's arrangements for providing service to participating airlines raise a similar question, whether a distribution firm with market power may deny airlines the ability to choose which of the firm's customers may sell the airlines' tickets. The systems' practices present this issue, for their participating airline contracts typically require the airline to allow its services to be booked by every user of the system, including both on-line and off-line travel agencies. Some airlines cite as well Sabre's insistence that participating airlines sell their services through Travelocity, the on-line travel agency controlled by Sabre.

We wish to consider whether participating airlines should have a greater ability to choose which websites may sell their services, a change sought by a number of participating airlines. They assert that an airline should be able to choose which on-line sites can sell its services. Delta Comments 28–30; United Reply at 11–15; Continental Supp. Comments at 16–17; Midwest Express Supp. Comments at 23–27.

Each system currently requires each airline or other travel supplier to participate in the system on a worldwide basis—the airline or travel supplier must agree that its services will be saleable through the system by anybody using the system, whether the user is an accredited travel agency, a non-accredited travel agency, a corporate travel department, an on-line computer service, or a consumer accessing the system through a website operated by a traditional travel agency or an on-line agency. Airlines may have little ability to keep system users from being able to sell their tickets. TWA Comments at 14.

Delta, Northwest, U.S. Airways, Continental, Alaska, America West, Midwest Express, Air France, the Asia Pacific airline group, KLM, Lufthansa, Qantas, and Varig assert that the rules should prohibit systems from tying access to traditional travel agency subscribers with access to Internet sites. A ban on such tying would allegedly enable airlines to decide whether such access was attractive, and they could conceivably bargain over the fees and terms on which such participation was offered. Many airlines also initially claimed that giving consumers access to a booking capability over the Internet and on-line computer services has increased the number of fraudulent bookings.

Sabre, Preview Travel, and Biztravel.Com. contend that we should not prohibit such tying.

In this proceeding we will consider a proposal that would prohibit such tying. In general, an airline should be able to determine how its services should be distributed and which firms should be able to sell its tickets. The rule proposed by the airline parties would be consistent with our decision to prohibit parity clauses, except as to airlines that owned or marketed a system, since parity clauses unreasonably restricted the ability of participating airlines to choose the level of service they would buy from each system. A rule barring tying could enable market forces to discipline the systems' terms for participation in the services they offer to on-line travel agencies and other Internet users, since airlines might be able to decline participation if the terms were unreasonable.

We therefore ask the parties to comment further on whether we should prohibit the tying of participation in a system's ''brick-and-mortar'' travel agency services with participation in its services to on-line travel agencies and other Internet sites selling airline tickets. In theory the proposal could help enable market forces to discipline the terms for airline participation in the systems, a desirable goal.

The present record contains comments indicating that the rule may not be essential. Northwest was able to stop LowestFare.com from selling its tickets when Northwest concluded that LowestFare.com's website did not fairly present Northwest's fares. Delta Supp. Reply at 13–15. Southwest, as noted, is keeping on-line agencies that use Sabre from selling tickets on Southwest. In addition, the airlines initially claimed that the proposed prohibition was needed due to the alleged need to prevent abusive bookings by some consumers. That concern appears to be moot. Sabre Supp. Comments at 26.

Moreover, it is possible that such a rule could lead to anticompetitive results if misused by airlines with ties to other systems or on-line travel distributors. Some airlines, such as Orbitz'' owners, might decline to participate in the services offered Internet users by some systems in order to promote the competitive position of an affiliated system or on-line travel agency. The risk of similar types of conduct led us to adopt the mandatory participation rule and to allow systems to enforce parity clauses against airlines that owned or marketed a competing system. We are, of course, proposing to eliminate the mandatory participation rule, which suggests that the policies underlying that rule might not justify making exceptions in any rule barring the tying of participation in websites with participation in travel agency services. We ask the parties to comment on whether a rule prohibiting the tying of participation in travel agency services with participation in services for all website customers of a system should include an exception for airlines owning or marketing a competing website (other than an airline's own website).

We also determined in our last overall rulemaking that system contracts requiring airlines to participate in a system on a worldwide basis were not unlawful. 57 FR 43819. We reasoned that such contract provisions might avoid disputes over a foreign airline's refusal to participate in a U.S. system in countries where that airline preferred to support the marketing efforts of an affiliated system. We conditioned our acceptance of such contract clauses on the system's compliance with the principles requiring unbiased displays and prohibiting discriminatory treatment of participating airlines, to the extent that U.S. and foreign rules do not regulate the system's operations.

To enable us to decide whether we should prohibit tying, we ask the parties to comment on whether a prohibition against tying would be technologically feasible. We also ask the parties to comment on an individual airline's ability, if any, to block any Internet site or a ''brick-and-mortar'' travel agency from selling its tickets, including whether the systems' contracts with participating airlines bar airlines from taking such action against a firm using the system and whether a travel agency can evade an airline's termination of the agency's authority to sell the airline's tickets. The parties should comment on whether the result would be different from their ability to terminate ''brick-and-mortar'' agencies and, if different, the basis for the distinction sought by these airlines. We also invite the parties to raise any other issues relevant to our decision on this issue.

15. Harmonization With Foreign Rules

The European Union, Canada, Australia, and other foreign countries have adopted their own CRS rules. In many respects, our rules are similar to the European and Canadian rules. For example, all of the rules prohibit display bias, though there are differences on the precise terms of the prohibition, and all bar systems from discriminating unreasonably between airline participants. However, there are also significant differences between our rules and those adopted, for example, by the European Union. The European rules, for example, require booking fees to be related to system costs and prescribe a display algorithm.

The European Union, ECAC, and several foreign airlines ask us to harmonize our rules with the European rules.

We recognize that a greater similarity between our rules and the European rules would provide benefits, especially by avoiding the need for the systems to follow potentially different business practices in different jurisdictions.

We are unable, however, to make our rules substantially identical to the European rules. Congress has not given us open-ended authority to regulate the CRS business. Any rules adopted by us must be within our authority under section 411 to prohibit unfair and deceptive practices and unfair methods of competition by airlines and ticket agents. Our statute imposes procedural requirements on our enforcement of rules that may not apply in Europe. We must also follow Congressional and Executive mandates that we carefully consider the costs and benefits of our proposed rules.

We wish to prevent conflicts with the rules of the European Union and other foreign governments, to use their rules as possible models for our rule revisions and to review their experience with those rules, and to give careful consideration to the comments submitted by foreign airlines and governments.

16. Retaliation Against Discrimination by Foreign Airlines and Systems

In the past, as discussed above, we have seen cases where a foreign airline limited its participation in a U.S. system (or imposed restrictions on travel agencies using a U.S. system in its homeland) to deter travel agencies in its homeland from choosing a U.S. system instead of the system owned or

marketed by the foreign airline. In a few cases of such apparent discriminatory conduct, we proposed countermeasures to encourage the foreign airline to end its discriminatory conduct. We acted under the International Air Transportation Fair Competitive Practices Act, recodified as 49 U.S.C. 41310, which has authorized us to impose countermeasures when a foreign airline or other firm engages in discriminatory conduct against a U.S. airline. To further deter discriminatory treatment, our rules authorize a system to engage in discriminatory conduct against a foreign airline that operates a foreign system, if that system subjects a U.S. airline to discriminatory treatment and the system has given us and the foreign airline fourteen days advance notice of its plan to take countermeasures. Section 255.11(b).

As noted, Congress amended 49 U.S.C. 41310 to give us broader authority to take countermeasures against an unjustifiably discriminatory or anticompetitive practice against a U.S. CRS or the imposition of unjustifiable restrictions on access by a U.S. system to a foreign market. This broadens the statute by authorizing us to take action when a U.S. system is subject to discriminatory conduct by a foreign firm.

Sabre asked us to strengthen the rules by imposing an obligation on ourselves to impose mandatory sanctions if, at the end of an enforcement proceeding, we determined that a foreign system or foreign airline affiliated with a system had engaged in unjust discrimination against a U.S. system. Sabre Comments at 35–37.

We are not proposing to adopt Sabre's requested rule. If we determine that a foreign airline has engaged in unlawful conduct, we will continue to take appropriate action when a U.S. airline or system is subject to discriminatory treatment by a foreign firm designed to prejudice the U.S. firm's ability to compete, whether or not we adopt Sabre's proposed rule.

17. Enforcement Mechanisms

A person who believes that our rules are being violated may seek enforcement of the rules by filing a third-party enforcement complaint under 14 CFR Part 302, Subpart D. We may also initiate enforcement action when we have reason to believe that the rules are being violated. Any enforcement proceeding resulting in a Department decision would usually require a hearing before an administrative law judge. Parties may not use the courts to enforce our rules, although a court would follow our rules when applicable in contract cases and other proceedings involving a system.

In our last rulemaking, we considered proposals to provide additional avenues for enforcement, including arbitration and requiring the systems' contracts with airlines and travel agencies to incorporate many rule provisions. We ultimately decided that these proposals were unnecessary or not likely to be beneficial overall. 57 FR 43829.

A number of commenters complain in this proceeding that the rules' enforcement has not been effective. They assert that private parties have little ability to enforce the rules if we do not. Since the courts generally will not hear private suits to enforce the rules, a firm injured by a rule violation can only obtain relief if we take enforcement action against the offender. Airlines and travel agencies have allegedly had little success defending their rights in private lawsuits. Airline participants have complained in particular that they are unable to obtain refunds from the systems for booking fees charged for allegedly improper or abusive transactions by travel agents. *See, e.g.*, Alaska Comments at 21–23; Aloha Comments at 9–10. The courts have also held that suits brought by travel agencies or airlines against a system under state law are generally preempted by federal statute. While parties may enforce their state law contract rights, they may not enforce non-contractual rights created by state law. *See, e.g.*, Amadeus Petition at 8–9.

Continental, Northwest, Aloha, Alaska, American Trans Air, ARTA, the Large Agency Coalition, and, as to fee disputes, Qantas contend that we should develop better enforcement procedures, for example, by giving parties the right to obtain arbitration of disputes. Northwest and Continental suggest that we should impose a ninety-day deadline for our action on petitions to change the CRS rules or enforcement complaints involving violations of those rules.

Sabre, American, Galileo, and Amadeus oppose any change in enforcement mechanisms.

We are not planning to propose the rules suggested by commenters for better enforcement of the rules. We retain discretion to pursue an enforcement policy that is appropriate in individual circumstances. We note that our Enforcement Office has added a significant number of attorneys and other staff members, and it will be prepared to vigorously pursue act on complaints of violations of the CRS rules and section 411 in the future.

We also do not appear to have the authority to require arbitration of disputes over compliance with the rules. A statute cited by United, 5 U.S.C. 572(a) and 575(a), seems to prohibit agencies from requiring parties to resolve disputes through arbitration unless all of the parties consent.

We fully recognize the importance of enforcing our CRS rules, and intend to do so vigorously in the future. We will consider suggestions by the parties for additional enforcement mechanisms that may be within our authority.

18. Sunset Date for the Rules

Our rules have a sunset date, originally December 31, 1997, to ensure that we would reexamine the need for the rules and their effectiveness. Section 255.12. We have not been able to complete our reexamination of the rules by the original sunset date and so have extended the rules to ensure that they would remain in effect while we conducted our reexamination. *See* 67 FR 7100 (February 15, 2002).

Many of the parties urge us to establish a new sunset date, although they disagree over what the new date should be.

We have tentatively decided not to propose a new sunset date for the rules at this time. Current options under consideration are to sunset the rules in March 20003, to establish a new sunset date, or to reexamine the rules when industry developments warrant doing so. We recognize that developments such as the recent changes in the systems' ownership and the rapid growth in the Internet's use for airline distribution may well require a reexamination of need for and effectiveness of the rules within a few years. As noted earlier, these changes and other changes in airline distribution may even eliminate the need for some or most of the CRS rules. We can also amend the rules in part if necessary, as we did after we completed our last major CRS rulemaking.

We concur with the view that further consideration of the generic alternatives to traditional CRS regulation discussed above and the on-going developments in airline distribution may warrant a review of the effectiveness of our traditional CRS regulation after the completion of this proceeding. We will be consulting with other agencies, including the Department of Justice and OMB, on how best to accomplish such a review. We actively encourage comments from the public on the scope of such a review and its timing.

19. Effective Date of the Rules

Normally new rules take effect thirty days after their publication. Some commenters, however, may contend that

one or more provisions of our proposed CRS rules should take effect on a delayed schedule due to the expense or difficulty of compliance within thirty days of the rules' publication date. Commenters who believe that additional time would be needed for compliance with a proposal should so state in their comments and explain why. We are willing to consider proposals to phase in some rules, since several of our proposals may change the systems' expectations on the likely profitability of some of their subscriber contract practices, for example.

20. Proposed Revisions to the Department's Policy on Fare Advertising

Section 411 prohibits unfair or deceptive practices in the sale of air transportation. To provide guidance on the meaning of this statutory prohibition, we have published a policy statement on fare advertisements, 14 CFR 399.84, that states that we will consider an advertisement by an airline or travel agency to be an unfair or deceptive practice if it states a price that is not the complete price that must be paid by the traveler for the air transportation.

As we have interpreted the policy statement, section 399.84 requires an airline or travel agency to include in any advertised or quoted fare any charge imposed by the airline, such as a fuel surcharge, and most governmental charges. *See, e.g.*, Orders 2001–12–1 (December 3, 2001) and 2001–5–32 (May 30, 2001) (consent orders based on failure to include fuel surcharges in fare amounts). The governmental charges that may be omitted from the fare amount are charges like passenger facilities charges and departure taxes that are not ad valorem in nature and are imposed on a per-passenger basis. Any advertisement must clearly specify such government charges so that the consumer can calculate the total amount to be paid for the transportation.

We are proposing two amendments to this policy statement. The first revision would make it clear that each system has an obligation to ensure that its displays of fare information follow section 399.84's standards. Our second proposed revision would clarify the policy statement to allow travel agents to state service fees separately from the price of the air transportation, if they comply with conditions ensuring that their customers will understand their obligation to pay a fee for the travel agency service and will know the total price for the transportation, including any travel agency service fee. Any fare quotation must continue to include all charges attributable to the air transportation, including any airline fuel surcharges. Our proposals reflect the development of Internet booking sites created for consumer use.

(a) Accurate Display of Fare Information

Our first proposed revision will make it clear that the policy statement covers the systems as well as airlines and travel agencies. We wish to extend the policy statement's reach to ensure that the fare displays often used by travel agents accurately set forth the total fare being charged by each airline.

Travel agents often use system displays that rank airline flights by fares, beginning with the flight with the lowest fare. The fares listed in these displays have sometimes omitted government taxes and fees, passenger facility charges imposed by airports, and surcharges imposed by the airlines, such as fuel surcharges. Obviously a fare display that does not include items such as fuel surcharges would mislead consumers, since the display would suggest that some airlines are offering lower fares than other airlines when in fact the former may be offering higher fares. The displays thus deceive consumers and distort competition as well. Order 2002–3–12 (March 15, 2002) at 7.

Our policy statement on fare advertisements expressly covers airlines and travel agents but by its terms may not apply to the systems' display of airline fares. We therefore propose to require the systems to include all charges in their displays of airline fares. Participating airlines, of course, have an obligation to provide information on their schedules and fares in a manner that enables the systems to comply with our rules on displays and the airlines' obligations under section 399.84

(b) Travel Agency Service Fees

Our second proposal would modify the policy statement to set forth standards for the travel agencies' disclosure of their own service fees to their customers. We have applied the policy statement on fare advertising to prevent the separate listing of surcharges which confuse consumers, preclude them from making accurate fare comparisons before making ticket purchase decisions, and, arguably, constitute a form of bait-and-switch marketing tactics. The Enforcement Office has traditionally interpreted the policy statement as barring the separate listing of a travel agency's service fee and instead requiring the agency to include the fee in the fare amount quoted the customer.

Our examination of the policy statement's application is appropriate given overall trends in the travel distribution business. Section 399.84 requires that an airline or agent of an airline must state the entire price that the customer must pay the agent or airline for air transportation. In recent years, as airlines have cut travel agent commissions, travel agencies have moved to a greater reliance on charging their customers fees for their services and expertise. There is also a trend toward more widespread use of Internet travel agencies. Like their off-line counterparts, some on-line agents have also begun charging service fees. Thus travel agency fees are far more prevalent today than they were when the Board adopted section 399.84 in 1984. We should therefore reevaluate our interpretation of what constitutes the ''price for such air transportation'' in light of these changes.

We recently addressed the policy statement's application to a travel agency service fee, because Orbitz wished to list its recently-adopted service fee separately from the fare amount in its initial display of available airfares. We granted Orbitz a conditional exemption from the policy statement so that its initial display of available fares need not include Orbitz' planned $5 service fee. Our exemption order, Order 2001–12–7 (December 7, 2001), allows Orbitz to omit the fee from its first quotation of fares but requires Orbitz to include the amount of the fee whenever it presents an itinerary that can be purchased. The order imposed several other conditions on the exemption, including a requirement that Orbitz place a notice advising consumers of the fee just above its display of possible itineraries. The Enforcement Office thereafter stated that it would apply the Orbitz exemption order's standards to all Internet agencies. Order 2002–3–12 at 1, citing Notice of the Office of Aviation Enforcement and Proceedings (December 19, 2001).

Our exemption order stated that we would further consider what disclosures should be required for travel agency fees in a rulemaking. We are now asking all interested persons to comment on our proposal to amend the policy statement to require all travel agencies as an initial matter to state the fare and any travel agency fee separately, subject to certain conditions designed to protect consumers.

Under our proposal, both on-line and off-line agents must fully disclose to the consumer the fare, the agency service fee, and the total price—and do so in a way that is useful and practical to the consumer—early in the transaction process. We tentatively conclude that consumers would benefit by requiring

separate listings of the amount of service fees being charged by all sellers of air transportation, as long as standards are in place to protect consumers from potential deception. We therefore propose to define the ''price for such air transportation'' in 14 CFR 399.84 to include all taxes, government and airport fees (including PFCs), and all other charges which in economic terms constitute a direct cost of the air transportation itself (including, but not limited to, fuel, security, and insurance charges). These charges, by definition and in practice, are unavoidable and the same no matter where the consumer actually purchases the ticket. We propose, however, to continue allowing the separate listing of certain governmental fees.

We propose that the dollar amounts of fees levied by and for services provided by a travel agency or travel distribution organization must be listed separately from the total cost of the air transportation (as defined above). Our proposal includes conditions to protect consumers. First, the consumer must be provided with a total cost of the entire air ticket transaction. Furthermore, the separate agency service fees themselves may not be *ad valorem* in nature, since percentages are difficult for consumers to calculate and would seriously hinder price comparisons. In addition, we are imposing a limit on service fee amounts to ensure that they are not used merely to make the advertised fare seem lower. Service fees (including dollar amounts) must be prominently disclosed and be placed proximate to the advertised fare wherever they appear and service fees must be included in the total price displayed or quoted before the customer decides whether to purchase the ticket.

Our proposal is consistent with the policy statement's purpose and the Orbitz exemption order. Service fees are distinguishable from the component costs of air transportation itself, including such fees as fuel and security surcharges that must be paid by travellers, no matter where they buy their tickets. We have repeatedly made it clear that such direct air transportation costs must be included in the fare quoted and that a change in that policy would not be appropriate or beneficial. A travel agency service fee, however, represents the cost of a separate service in a separate market. The consumer does not have the option of buying the ticket without the fuel surcharge, taxes, or the government security fee. The consumer does have the option of buying the ticket without the agency service fee (or with a different agency service fee) by making the purchase through a different channel. Consumers need this information to make informed choices both in the airfare market and in the agency service fee market.

Our proposal should benefit consumers, since every travel agency, off-line or on-line, will be giving a consumer notice of the amount required by the airline for the purchase of a ticket and the amount of any travel agency service fee; the consumer will understand that he or she can book a seat for less money by buying the ticket directly from the airline or from another agency that charges no service fee. As we observed when we granted the exemption to Orbitz, consumers would likely benefit if a travel agency quoted the fare separately from any travel agency service fee. Order 2001–12–7 at 4.

Competition among airlines as well as among travel distribution outlets is clearly in the interest of consumers. Separate disclosure of travel agency fees from the direct cost of the air transportation—which usually does not vary depending on the outlet through which the consumer actually purchases an airline ticket—would arguably foster competition among airlines and among travel distribution firms by providing more transparent information to consumers.

Our proposal also agrees with a recommendation made by *Consumer Reports,* which questioned the practice of travel agencies including their service fees in fare quotations. ''Is your travel agency playing 'fare' '', *Consumer Reports Travel Letter* (June 2001). *Consumer Reports* contends that the separate disclosure of both the service fee and the fare is preferable to combining the two.

We think our clarification should govern service fees charged by ''brick-and-mortar'' travel agencies as well. Many of those agencies are now charging service fees. Our proposal would require them to state orally their service fees and the airfare and the total amount for the fare and fees. This should enable on-line and off-line travel agencies to operate under comparable rules, as requested by RADIUS, a large travel agency, in comments that it filed in the Orbitz exemption order docket.

We ask the parties to comment on an alternative proposal as well: a policy allowing travel agencies to choose between listing their fees separately and including the fees in the price quoted for air transportation.

Regulatory Process Matters

Regulatory Assessment and Unfunded Mandates Reform Act Assessment

1. Unfunded Mandates Reform Act Assessment

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually.

The legal authority for the proposed rule is provided by 49 U.S.C. 41712, which authorizes the Department to prohibit unfair or deceptive practices and unfair methods of competition in air transportation or the sale of air transportation. The Department is authorized by 49 U.S.C. 40113(a) to implement that authority by adopting rules defining and prohibiting unfair or deceptive practices and unfair methods of competition.

The proposed rule would not result in expenditures by State, local, or tribal governments because no such government operates a system or airline subject to the proposed regulation. The proposed rule may cost the private sector more than $100 million in the first year of effectiveness due to the need for systems, airlines, and potentially travel agencies to modify their operations to conform to the rule. The Regulatory Assessment below provides detailed discussion of the costs and benefits for the proposed rule. The Regulatory Assessment also presents alternatives to the proposed rule.

2. Introduction to Regulatory Assessment

Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), defines a significant regulatory action as one that is likely to result in a rule that may 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. Regulatory actions are also considered significant if they are likely to create a serious inconsistency or interfere with the actions taken or planned by another agency or if they materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of the recipients of such programs.

The Department's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) outline similar definitions and requirements with the goal of simplifying and improving the quality of the Department's regulatory process.

The Department has determined that these proposed regulations are an economically significant regulatory action under the Executive Order and the Department's Regulatory Policies and Procedures, since the proposed rules could conceivably have an annual impact on the economy of $100 million or more and because of the amount of public interest they are likely to generate. This rule proposal has been reviewed by the Office of Management and Budget under the Executive Order.

This preliminary regulatory impact assessment seeks to assess the potential economic and competitive consequences of our proposed rules on computer reservations systems, airlines, and travel agencies and to evaluate the benefits to the industry and the travelling public.

As background, the Civil Aeronautics Board adopted rules to govern airline-owned CRSs that became effective on November 14, 1984. The Board's rules barred systems from biasing their primary displays, charging airlines discriminatory booking fees, using subscriber contracts with a term of more than five years, and imposing certain types of contract restrictions on travel agencies that denied them a reasonable opportunity to use multiple systems or switch systems. The Board rules also required each system to make available to any participating airline on non-discriminatory terms any data that the system chose to generate from the bookings for domestic travel made through the system.

After the Board's sunset on December 31, 1984, we assumed the Board's responsibilities for airline regulation, including its regulation of CRSs. We subsequently conducted a study of the CRS business, a study of airline marketing practices, and a rulemaking proceeding to reexamine the rules to see whether they remained necessary and were effective. We issued a final rule on September 22, 1992, that maintained the Board's rules and strengthened them in some respects. We decided the rules were necessary to preserve airline competition and to prevent consumers from receiving incomplete and biased information on airline services.

Among other things, our revised rules require each system to provide non-owner airlines with information and booking capabilities as accurate and reliable as those provided the owner airline. We gave each travel agency the right to use its own equipment in conjunction with a system and to access other systems and databases from the same terminals used to access its primary system, unless the agency uses terminals provided by that system. Our current rules also require each airline with a significant CRS ownership interest to participate in other systems at as high a level of functionality as it does in its own system, if the terms for participation are commercially reasonable; impose requirements ensuring that the functionality provided for participating airlines was generally equivalent to the functionality provided the owner airline; and strengthen the rules on subscriber contracts.

In two later proceedings, we amended the rules to strengthen the rules against display bias and to prohibit systems from enforcing parity clauses against airlines that do not own or market a competing system (a parity clause requires the airline to participate in the system at at least as high a level as it did in any other system).

The rules govern systems that are owned or marketed by one or more airlines. All four systems now operating in the United States have been owned or marketed by one or more airlines since the Board originally adopted the rules (the only independent system was acquired by one of the airline systems before we conducted our last overall rulemaking). The systems accordingly have had to operate in compliance with the rules' requirements for some time.

This notice of proposed rulemaking proposes to adopt the current rules with several changes designed to strengthen them. In discussing the benefits and costs of our proposed rule changes, we will generally focus on the competitive aspects of issues that our proposed rule changes are intended to address. Ideally, in a perfectly competitive marketplace, the various components of the airline distribution network would reflect a balance of market power to the extent that no individual component could exert undue influence or exact monopoly rents in any aspect of the distribution system. As we know from our past and current examinations, however, there have been competitive dislocations because of the misuse of market power. Our proposed rules are meant to address such problems, to the extent that they continue to exist.

This preliminary regulatory impact assessment discusses the likely costs and benefits of our proposed rules. However, we do not have information of the kind and detail that would enable us to quantify the proposals' benefits to air travellers, airlines, and travel agencies, or to estimate the costs of complying with our proposed rules for the systems, airlines and travel agencies with accuracy. We are also not able to estimate the long-term consequences of our rules on CRS competition, including incentives for technological innovation and improved productivity. The overriding benefit of greater competition and higher productivity in the air travel industry is, of course, its downward pressure on air fares and the benefits consumers enjoy as a result.

This preliminary analysis is necessarily relying on a qualitative assessment of the costs and benefits of the rules. We specifically request that interested parties provide us with detailed information about the possible consequences of our proposed rules, especially their benefits, costs, and economic and competitive impacts.

3. The Systems' Market Power

We are proposing to readopt the rules with revisions, because we have tentatively found that rules are necessary to keep systems and airlines that own or market systems from engaging in conduct that would reduce competition in the airline and airline distribution industries, increase airline costs and thus the fares charged airline travellers, and lead to travel agents and their customers receiving incomplete or biased information on airline service options.

This notice of proposed rulemaking explains our tentative view that the systems might engage in such conduct if not checked by regulations. As discussed in detail earlier, the systems appear to have market power against airlines, because travel agencies sell seventy percent of all airline tickets, travel agents rely on a system for booking over ninety percent of their domestic tickets and eighty percent of their international tickets, and because most travel agency offices use one system for all or almost all of their bookings.

Since relatively few travel agency offices make extensive use of more than one system, most airlines have had to participate in every system in order to make their services readily saleable by the travel agents using each system. No airline can afford to lose access to a significant number of distribution outlets, as explained elsewhere in this notice. As a result, competition and market forces have not disciplined the price or quality of services offered airline participants. The systems accordingly have established booking fees for airlines that exceed their costs of providing CRS services to the airlines. The systems in contrast compete vigorously for travel agency

subscribers (with the exception of certain areas dominated by an airline affiliated with a system), and travel agencies often receive CRS services at little or no cost. Some travel agencies obtain large cash bonuses for choosing one system rather than another.

The Internet's growing importance in airline distribution does not seem to have significantly eroded each system's market power thus far. Most airlines continue to obtain a large majority of their revenues from bookings made through travel agencies using a system, both on-line travel agencies and ''brick-and-mortar'' agencies. As discussed earlier in this notice, many consumers will continue to prefer using travel agents, and airlines will have a limited ability to shift consumers into on-line bookings.

The systems' market power has been reflected in their fees and other terms for airline participation. The fees paid by airlines and other travel suppliers provide about ninety percent of the systems' revenues. Travel agencies, the other main user of system services, produce no more than ten percent of the systems' revenues. The average booking fee in 2000 was $3.54 per segment for airlines using the highest level of CRS service. Booking fees equal about two percent of the revenue obtained by airlines through the systems. This is a significant level of expense in an industry that historically has had thin margins of profitability as a percentage of sales.

Another example of the systems' market power was their recently-discontinued practice of charging booking fees for passive transactions. Travel agents often make passive bookings in order to properly serve their customers, but such bookings usually do not directly benefit the airlines, which nonetheless are charged fees for them. In addition, the record indicates that some travel agents use the passive booking capability to make unnecessary bookings in order to meet the minimum-booking quota established under their productivity pricing formulas. The systems have not taken effective action in response to complaints by participating airlines about abusive transactions. The annual fee liability for passive bookings and other bookings considered unnecessary by participating airlines amounted to $5 million to $10 million for some airlines, and such bookings accounted for eight to ten percent of their total fees. Aloha December 23, 1997 Supp. Comments at 2; Alitalia Comments at 4; Qantas Comments at 4. The systems stopped charging participating airlines for passive bookings after we began this proceeding, but their action does not indicate that participating airlines have any bargaining leverage over the price and terms for participation. Furthermore, because the systems that stopped charging airlines fees for passive bookings raised their other fees, they apparently suffered no loss in revenues.

An additional instance of the systems' use of their market power was the adoption and enforcement of parity clauses by three of the systems before we banned that practice. Parity clauses required a participating airline to participate in a system at at least as high a level as they participated in any other system, whether or not the airline considered the terms and quality of that system's functionality of value. When we were considering our proposal to prohibit parity clauses, Alaska and Midwest Express estimated that compliance with Sabre's demands would increase their CRS costs by about ten percent. We adopted a rule barring systems from enforcing such clauses against airlines that do not own or market a competing system.

System actions like this that increase airline costs over time will lead to higher fares for consumers.

4. Proposed Rules

We will broadly discuss the potential benefits and costs of the major elements of our proposed rules, especially from the perspective of their potential to enhance competition or to remove barriers to competition. One of the main objectives of our regulatory policy is to promote consumer welfare by reducing the cost of airline transportation by proposing and adopting rules that will result in more efficient and competitive airline, CRS, and travel agency industries. We find it preferable to propose and adopt rules that rely upon marketplace forces to ensure and invigorate competition, discipline competitive problems, and inspire technological innovations rather than rules that require direct, detailed, and burdensome oversight by the Department. We hope to promote consumer benefits while imposing few, if any, additional costs on those industries. We are also inviting comments on some proposals that would eliminate such regulatory requirements on the ground that such action would promote the operation of market forces in the CRS business. Preliminarily, we believe that it is possible that our proposed rules may raise costs or lower revenues in varying degrees for some firms in the air travel distribution industry. However, we believe that our overall efforts to promote a more competitive industry will result in greater efficiency and substantial benefits to the traveling public.

The following discussion describes our current beliefs about the desirability of continuing the CRS rules and their applicability to airline and non-airline systems, the use of third-party hardware and software by travel agencies and their ability to use one terminal to access several systems and databases, the mandatory participation requirement of the current rules, display bias, booking fees, the availability of marketing and booking data information, and travel agency contracts. To the extent that we are proposing to readopt existing rules, we will partly rely on the findings and analysis made in our last review of the rules unless we have updated or modified them in this notice. The body of the notice sets forth in detail the basis for our proposed rules. Our intent here is to focus generally on the impact on competition.

(a) Continuing Need for the CRS Rules and Their Applicability

The Department is proposing to readopt the CRS rules with some important modifications. Two such proposed modifications are the elimination of the mandatory participation requirement and the prohibition against discriminatory booking fees. Despite changes in CRS ownership and the growing use of the Internet as a distribution tool, the structural and competitive conditions of the CRS industry that prompted the Department to readopt regulations seem to continue to exist today. Neither the Internet nor other developments in the airline and airline distribution industries have substantially changed those conditions. On-going developments in airline distribution, however, may make the rules largely unnecessary in the future.

Without the rules, we tentatively believe that the systems would have the power and incentive to distort airline competition, to provide inaccurate or misleading information to consumers, and to charge discriminatory fees, as they did prior to the implementation of the current rules. The systems would also engage in contract practices and other actions that would restrict or eliminate the ability of each travel agency to make significant use of any alternative to the principal CRS used by that agency. Alternatives could include a second system, direct links to airline internal reservations systems, and the Internet. Thus, we believe that

continued regulation of the CRS industry may be necessary.

A related issue is whether the CRS rules should govern the practices of reservations systems that are not owned or controlled by airlines. In this regard, we are proposing to apply the CRS rules to these non-airline systems as well as to airline systems. As with the airline systems, the non-airline systems apparently have market power over airlines. A non-airline system could use its power to distort airline competition or mislead consumers, and such a system is as likely as the airline systems to engage in practices that would unreasonably restrict the ability of airlines and travel agencies to use alternatives to the systems, thereby increasing airline costs (and thus the fares paid by consumers).

Our proposal to readopt some of the existing rules should not generally impose additional burdens on the systems, since they have been subject to the rules since the Board first promulgated them. Our proposed elimination of the mandatory participation rule and modification of the rule barring discriminatory booking fees should reduce regulatory burdens for the industry. Since the systems have already taken steps to comply with them, the other rules generally should not impose additional costs on the systems. We believe that our modifications should not impose substantial costs on the systems. The systems would have to revise their subscriber contract practices and pricing policies, however. If our proposed revisions lead to greater competition for the systems, the systems' revenues from participating airlines and other travel suppliers could decline. That impact would be offset by lower costs and greater efficiencies for airlines and travel agencies.

Some commenters have maintained that, notwithstanding the relatively minor costs associated with possible incremental changes in the current rules, the existing rules do involve significant costs. They maintain that the existing rules contribute directly to the high costs of airline distribution (in the form of booking fees) by insulating the systems from competitive market forces. In today's market environment, the requirements for mandatory participation and non-discriminatory booking fees have allegedly transformed a purported pro-competitive shield into an anti-competitive one because the rules insulate the systems from having to negotiate with airlines about the terms for participation in a system.

We do not believe that the rules increased the costs of airline distribution. In our view the systems' market power stemmed from the structure of the airline and airline distribution businesses, not the consequences of our rules. We invite the parties, however, to comment on this issue. We are also proposing to end the mandatory participation requirement and the prohibition against discriminatory booking fees, since doing so may enable airlines to obtain better terms for system participation. These changes may give airlines additional flexibility and some bargaining leverage that could be used to obtain more favorable prices and improved service.

(b) The Use of Third-Party Hardware and Software

Most travel agents use personal computers to obtain airline information and make reservations. The systems have commonly provided equipment to their travel agency subscribers, often at little or no cost. Travel agents could easily access any system or travel database or the information and booking services available through the Internet from the same computer.

We adopted a rule giving travel agencies the right to use third-party hardware and software and to access any system or database from their equipment unless the equipment was owned by one of the systems. This rule kept systems from denying their subscribers the ability to use the equipment to access another system or database. Many travel agencies have taken advantage of that rule. In 1999 thirty-six percent of all travel agencies used their own terminals, and about thirty percent of all travel agents used their computer terminals to access the Internet as well as a system.

The systems, however, have commonly offered travel agencies contracts for CRS services with equipment at prices comparable to their contracts for CRS services without equipment. This practice has made it uneconomical for many agencies to purchase their own equipment. Travel agencies that chose the system's equipment are usually denied permission to access another system or airline database from that equipment.

We are proposing to readopt the existing rule on third-party hardware and software and to eliminate the provision that allows a system to block travel agencies from using equipment owned by the system to access other systems and databases.

This proposal (and the related proposals on subscriber contracts) should decrease airline costs, since they would make it practicable for airlines to persuade travel agents to book airline seats by a direct link with the airline's internal reservations system or through an airline website. The airlines' ability to bypass the systems would create competitive discipline for the systems' prices and terms for airline participation. The proposal would also give travel agencies more flexibility in using alternatives to the systems and make them better able to serve their customers. The travel agencies' greater ability to use alternatives to the systems should foster technological innovation, for other firms may develop alternative services that would duplicate many of the functions now provided travel agents by the systems.

The proposal would not keep systems from charging travel agencies for the use of their equipment. The proposal, if effective, would lead to lower revenues for the systems, if travel agents bypass the systems for bookings, since that would weaken the systems' ability to charge supracompetitive booking fees. Travel agencies obtaining their equipment from a system, however, might face higher charges for the equipment.

(c) The Mandatory Participation Rule

Our mandatory participation rule, section 255.7, has required each airline with an ownership interest of five percent or more in a system (a ''system owner'') to participate in competing systems at the same level at which it participates in its own system, if the other systems' terms for participation at that level are commercially reasonable. We adopted the rule because some U.S. airlines with an ownership interest in one system limited their participation in competing systems, or denied those systems complete information on their fares and services, in order to encourage travel agencies in their hub cities to use their own system. U.S. systems competing overseas at times encountered similar discriminatory treatment from foreign airlines; when such an airline refused to participate in a U.S. system (or participated at a low level or denied important information on fares and services), the U.S. system found it almost impossible to obtain subscribers in that airline's home country.

We are proposing not to readopt this rule. The mandatory participation rule may impose significant costs on some airlines, since it requires them to participate in competing systems when they may prefer for legitimate business reasons not to participate. We are uncertain whether the rule imposes significant costs. The airlines that own or market a system (with one exception) already participate in competing

systems at a high level. However, the major airlines assert that they would obtain some bargaining leverage against the systems if they were not restricted by the mandatory participation rule and the rules did not bar discriminatory booking fees.

(d) Bias

The systems' display of airline flights and fares has a profound effect on airline competition. Travel agents tend to book one of the first flights displayed on the screen by a system. Changes in CRS display algorithms can increase or decrease an airline's revenues by millions of dollars annually. The systems' conduct demonstrate that a flight's position on a CRS display continues to affect how often travel agents will book customers on that flight. For example, in our last display bias rulemaking, Alaska alleged that Galileo was using a display algorithm designed to benefit its major owner, United, and that the resultant displays would reduce Alaska's annual revenues by about $15 million. Midwest Express estimated its annual revenue loss from the display at several million dollars.

We propose to maintain the rule against display bias to give airlines an opportunity to compete on the merits. This would also enable travel agents to operate efficiently and provide good service to their customers.

(e) Booking Fees

Our current rules prohibit each system from charging unreasonably discriminatory booking fees. The booking fees charged airlines for CRS participation have long been a source of airline complaints. In our past analyses of the industry, we have found that the systems have the market power to charge participating airlines supracompetitive booking fees, since they are not disciplined by competition.

We still believe that high booking fees are probably imposing burdensome costs that most airlines have not been able to avoid and that are likely to increase the fares paid by consumers. We propose to eliminate the prohibition against discriminatory fees but not to attempt to regulate the level of fees. A rule requiring systems to charge only reasonable fees, or fees related to costs, would be costly to administer and difficult to apply. Determining whether a system's fees were reasonable, or justified by system costs, would demand, among other things, an allocation of the system's costs between three users: Airlines and other travel suppliers participating in the system, airlines using the system as their internal reservations system, and travel agency subscribers. Moreover, each system offers different levels of participation and features, each with its own price. We are therefore focusing on rule proposals that would give airlines some opportunity to bypass the systems and to avoid participation in one or more systems. Our proposed ending of the mandatory participation requirement and the prohibition against discriminatory booking fees may enable some airlines at least to bargain for better terms for system participation. These changes may also enable the systems to offer better terms to airlines that might otherwise choose not to participate (or choose to participate only at a low level), like some new-entrant airlines.

(f) Marketing and Booking Data

Section 255.10 of our rules requires each system to make available to all participating airlines on non-discriminatory terms any marketing and booking data that the system chooses to generate from its bookings. In practice, each system sells detailed booking and marketing data that show how many bookings are made by each travel agency on each airline in each markets and on each flight and that show the fare basis used for each booking. The systems make the data available almost on a realtime basis.

Due to the cost of buying and processing the data (often called MIDT tapes), most of the airlines buying the data are the larger airlines. They use the data for marketing research and route development purposes and for implementing their override commission and corporate discount fare programs. They also use the data to deter travel agencies from booking competitors. In addition, each airline's knowledge of the number of bookings and the fare bases for those bookings likely dampens fare competition. In an oligopolistic industry like the airline industry, fare competition often depends on firms in the industry not knowing the prices being charged by their competitors.

We are proposing to restrict the amount of detailed data that can be bought by airlines. We are considering, among other things, whether we should bar airlines from obtaining information on the bookings made by individual travel agencies and information on bookings for airlines that have not consented to the release of such information. Our goal is to allow the systems to sell as much data as possible while minimizing the harm that might be caused airline competition, because we recognize as well that the airlines purchasing the data have made significant investments in developing the ability to process and analyze the marketing and booking information, that the systems have made significant investments of their own, and that the systems obtain large amounts of revenue from selling the data.

Our proposals would benefit consumers by increasing airline competition. Restricting the data available to airlines would benefit travel agencies by enabling them to book customers on smaller airlines without fear that the dominant airline will find out.

The proposals could reduce the systems' revenues, since they would not be able to sell as much data as before, and the airlines buying the data may be unwilling to pay as much since an airline dominating a metropolitan area would no longer be able to use the data to compel travel agencies in that city to reduce or end its bookings on competing airlines.

(g) Subscriber Contracts and Productivity Pricing

Our current rules seek to give travel agencies a reasonable opportunity to switch systems or use multiple systems. The rules therefore prohibit certain types of travel agency contract clauses that unreasonably restrict the use of alternative systems. For example, the rules prohibit systems from treating an agency's failure to meet minimum booking quotas as a breach of contract, since such ''minimum use'' clauses keep travel agencies from using more than one system. Our current proposals seek to strengthen those rules in several respects.

We are asking the parties to comment on proposals to shorten the maximum permissible term of subscriber contracts. The rules allow systems to offer travel agencies five-year contracts as long as the agencies are also offered contracts with a term of no more than three years. In practice, the systems typically made the three-year contract offers unattractive in order to force travel agencies to choose the five-year contract. Some travel agencies nonetheless have three-year contracts for system services, and more recently systems have been offering the smaller travel agencies (but not larger travel agencies) the option of choosing contracts with shorter terms and no minimum booking requirements.

The long-term subscriber contracts handicap travel agencies, because they cannot switch to another system if the system that they are currently using lowers the quality of its service. Long-term contracts may additionally prevent travel agencies from keeping up with

technological developments. The long-term contracts would not deny subscribers flexibility in responding to technological developments and changes in service quality if they did not deter subscribers from making significant use of more than one system. The contracts' damages clauses, which we are not proposing to regulate, typically require a travel agency to pay substantial damages if it terminates the contract before the end of its term. Long-term contracts can be beneficial insofar as they give the parties some assurance of stability in the contractual relationship, but the systems' contracts with travel agencies seemingly give subscribers little protection against changes in price and quality of service. We are therefore requesting the parties to comment on whether the rules should fix the maximum contract term at three years or adopt the European rule allowing subscribers to terminate a contract on several months notice after the contract has been in effect for one year.

We are also proposing to restrict or prohibit the systems' use of productivity pricing, a pricing structure that gives travel agencies CRS services at discounted rates when they meet a monthly minimum booking quota, and similar provisions that effectively deter travel agencies from using alternative systems and databases. In our last rulemaking we determined to allow the systems to use productivity pricing, unlike minimum use clauses, because productivity pricing appeared to be a rational mechanism for encouraging travel agents to use equipment provided by a system more effectively. Experience has shown that the systems may be using productivity pricing as a tool to keep travel agencies from bypassing their principal system for any significant number of bookings.

Insofar as productivity pricing deters subscribers from using alternatives to their principal system, it would reinforce the systems' existing market power against the airlines. It would thereby enable the systems to continue imposing supracompetitive booking fees on airlines, which leads to higher airfares. Productivity pricing would similarly discourage technological innovation. It would make travel agency operations less responsive to consumer needs and undercut airline competition, because it would keep travel agents from using alternative sources of airline information and booking capabilities, such as airline websites, that might provide better fares for agency customers.

The proposed rule could reduce the systems' marketing costs. The systems' competition for subscribers causes them to offer travel agencies CRS services at little or no cost, and they offer some agencies large cash bonuses in the expectation of capturing the lion's share of the agency's bookings. The systems can afford these incentives because they are able to charge supracompetitive booking fees to airlines and other travel suppliers. The proposal could also lead to lower airline costs by enabling airlines and travel agencies to bypass the systems, a step which would create competitive discipline for booking fees. Ending productivity pricing would, however, reduce the revenues of many travel agencies, especially the larger travel agencies, although at least one travel agency group supports proposals for restricting (but not prohibiting) productivity pricing.

(h) On-Line Distribution Systems

We are not proposing to adopt rules regulating distribution systems that utilize the Internet, although we propose to clarify the application of our full-fare advertising policy insofar as it involves the systems' display of airfares and the listing by travel agencies of their service fees separately from the airfare.

Consumers are increasingly using the Internet for obtaining information on airline services and other travel information and for buying airline tickets. On-line bookings are significantly less costly for airlines, and many consumers see the Internet as the most efficient and convenient way to investigate airline services and to make bookings. Consumers can use airline websites and on-line travel agencies.

The parties seeking rules that would regulate airline distribution over the Internet have focused on two issues: The potential for bias in the displays offered by on-line travel agencies and the airlines' alleged discrimination in favor of Orbitz, the on-line travel agency created by five of the largest airlines, and against the other on-line travel agencies. We have tentatively concluded that it would be premature to adopt rules on these issues. If on-line travel agencies engage in conduct that would deceive consumers, we can and will use our enforcement authority under section 411 to stop any such practices. We have already done so with respect to certain displays of fares by airline and on-line travel agency websites. We are similarly investigating Orbitz to see whether its operations involve potential violations of section 411. If its operations appear to be unlawful, we have the authority to address those issues.

5. Preliminary Summary of the Rules' Costs and Benefits

Our rules should make the airline and CRS businesses more competitive. The traveling public will be the ultimate beneficiary of our proposed rules.

These issues are complex in their potential competitive effects and their likely role as incentives and disincentives. Furthermore, they are so closely tied together that a change designed to correct a problem in one segment of the industry might create a problem in another segment. In some instances, the cost impact might be short-term but the benefits might be realized only over the long run, especially if our rule proposals would result in a more competitive and more efficient distribution system. We therefore believe that our proposals would lead to a more efficient airline distribution system, lower costs for airlines, and greater flexibility for most travel agencies. We ask the parties to provide additional information on the costs and benefits of our proposals.

As discussed in the notice of proposed rulemaking, we have considered alternatives to our proposed rules. In general, we have concluded that more extensive regulation would not provide benefits outweighing its costs and that it would unduly interfere with the flexibility and efficiency of the systems, travel agencies, and airlines. Less extensive regulation, on the other hand, would tend to leave the systems' market power in place, thereby allowing the systems to continue to operate free of market discipline with respect to the services provided airlines.

Initial Regulatory Flexibility Statement

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller U.S. and foreign airlines and smaller travel agencies. This notice of proposed rulemaking sets forth the reasons for our rule proposals and their objectives and legal basis.

Our proposed rules would have a significant economic impact on a substantial number of small business entities. In particular, the rules would affect travel agencies and air carriers, including regional air carriers. The proposal to give travel agencies a greater ability to use third-party hardware and

software and to use a CRS terminal to access other databases would benefit small business entities. To the extent that airlines can operate more efficiently and reduce their costs, the rules would also affect all small entities that purchase airline tickets, since airline fares may be somewhat lower than they would otherwise be, although the difference may be small.

The travel agency industry is relatively unconcentrated, although the larger agencies have been increasing their market share. The industry, however, remains very competitive.

Our proposed rules should increase the efficiency of the travel agency industry. For example, agencies would have a greater ability to use multiple systems and databases. Travel agencies should be able to obtain better information and booking capabilities on carriers than is possible using a single system. New firms may enter the business of providing information and transaction capabilities on airline services.

The proposal to eliminate certain restrictive subscriber contract provisions—productivity pricing provisions and five-year contracts—would benefit travel agencies by giving them more flexibility in switching systems and in using multiple systems. As a result, there should be increased competition among the systems for agency subscribers. Since the travel agency industry is so competitive, most of the benefit of improved CRS pricing and services would be passed on to agency customers.

Our proposed rule blocking airlines from obtaining marketing and booking information disclosing bookings by specific travel agencies would be consistent with the agencies' wish for confidential treatment of the data.

We have not adopted several proposals that could raise travel agency costs. If we had adopted a rule limiting the booking fees paid by airlines, the vendors would have increased subscriber charges in order to offset the lower revenues from air carriers. We are not proposing to limit the level of booking fees, however.

Our proposals to prohibit or restrict productivity pricing may lead to increased CRS costs for some travel agencies, but the affected travel agencies would be the larger agencies.

The existing rules affect the operations of smaller travel agencies, primarily by prohibiting certain CRS practices that could unreasonably restrict the travel agencies' ability to use more than one system or to switch systems. The rules prohibit CRS contracts that have a term longer than five years, give travel agencies the right to use third-party hardware and software, and prohibit certain types of contract clauses, such as minimum use and parity clauses, that restrict an agency's ability to use multiple systems. By prohibiting display bias based on carrier identity, the rules also enable travel agencies to obtain more useful displays of airline services.

Our new rule proposals should benefit most airlines. Our rule giving travel agencies the right to access other databases from agency-owned CRS terminals will enable carriers to establish direct links between their internal systems and agencies, thereby making it possible for them to obtain some bookings from agencies without paying booking fees. Our proposal to restrict the kind of marketing and booking data provided by the systems would protect smaller airlines against efforts by large airlines to pressure travel agencies into ending their bookings with competing airlines.

Continuing the rules would protect smaller non-owner airlines from several potential system practices that could injure their ability to operate profitably and compete successfully. No smaller airline has a CRS ownership interest. Market forces do not significantly influence the systems' treatment of airline participants. As a result, if there were no rules, the airlines affiliated with the systems could use them to prejudice the competitive position of other airlines. The rules provide important protection to smaller airlines. For example, by prohibiting systems from ranking and editing displays of airline services on the basis of carrier identity, they limit the ability of each system to bias its displays in favor of its owner airlines and against other airlines. The rules, on the other hand, impose no significant costs on smaller airlines.

Another group of beneficiaries of our proposed rules would be firms providing services and databases that compete with those offered by the systems. Many of these firms are small business entities. Our proposed rules would increase the subscribers' ability to access other databases and give firms providing such information and transaction capabilities a much greater opportunity to market their services.

Our proposed rule contains no direct reporting, record-keeping, or other compliance requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with our proposed rules.

Interested persons may address our tentative conclusions under the Regulatory Flexibility Act in their comments submitted in response to this notice of proposed rulemaking.

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 the proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Thomas Ray at (202) 366–4731.

Paperwork Reduction Act

The proposed rules contain no collection-of-information requirements subject to the Paperwork Reduction Act, Public Law 96–511, 44 U.S.C. Chapter 35. *See* 57 FR at 43834.

Federalism Implications

This request for comments will have no 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. Therefore, in accordance with Executive Order 13132, dated August 4, 1999, we have determined that it does not present sufficient federalism implications to warrant consultations with State and local governments.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Government 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 rule does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Consultation and Coordination With Tribal Governments

This proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Therefore, it is exempt from the consultation requirements of Executive Order 13175. If tribal implications are identified during the comment period, we will undertake appropriate consultations with the affected Indian tribal officials.

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 this is not classified as a ''significant energy action'' under that order because it is a ''significant regulatory action'' under Executive Order 12866 and it would not have a significant adverse effect on the supply, distribution, or use of energy.

Environment

The rule would have no significant impact on the environment.

List of Subjects

14 CFR Part 255

Air carriers, Antitrust, Consumer protection, Reporting and record keeping requirements, Travel agents.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Consumer protection.

1. 14 CFR Part 255 is proposed to be revised to read as follows:

PART 255—AIRLINE COMPUTER RESERVATIONS SYSTEMS

Sec.
255.1 Purpose.
255.2 Applicability.
255.3 Definitions.
255.4 Display of information.
255.5 Defaults and service enhancements.
255.6 Contracts with participating carriers.
255.7 Contracts with subscribers.
255.8 Use of third-party hardware, software and databases.
255.9 Marketing and booking information.
255.10 Exceptions.
255.11 Prohibition against carrier bias.

Authority: 49 U.S.C. 40101, 40102, 40105, 40113, 41712.

§ 255.1. Purpose.

(a) The purpose of this part is to set forth requirements for the marketing and operation of computer reservations systems used by travel agents and certain related air carrier distribution practices so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation and the sale of air transportation.

(b) Nothing in this part operates to exempt any person from the operation of the antitrust laws set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).

§ 255.2. Applicability.

This part applies to firms that operate computerized reservations systems for travel agents in the United States, and to the sale in the United States of interstate, overseas, and foreign air transportation and of other airline services through such systems. Each carrier that owns, controls, operates, or markets a system shall ensure that the system's operations comply with the requirements of this part.

§ 255.3. Definitions.

Affiliate means any person controlling, owned by, controlled by, or under common control with a carrier.

Availability means information provided in displays with respect to the seats a carrier holds out as available for sale on a particular flight.

Carrier means any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 40102 (3), 49 U.S.C. 40102 (22), and 14 CFR 298.2(f), respectively, that is engaged directly in the operation of aircraft in passenger air transportation.

Discriminate, *discrimination*, and *discriminatory* mean, respectively, to discriminate unjustly, unjust discrimination, and unjustly discriminatory.

Display means the system's presentation of carrier schedules, fares, rules or availability to a subscriber by means of a computer terminal.

Integrated display means any display that includes the schedules, fares, rules, or availability of all or a significant proportion of the system's participating carriers.

On-time performance code means a single-character code supplied by a carrier to the system in accordance with the provisions of 14 CFR Part 234 that reflects the monthly on-time performance history of a nonstop flight or one-stop or multi-stop single plane operation held out by the carrier in a CRS.

Participating carrier means a carrier, including a system owner, that has an agreement with a system for display of its schedules, fares, or seat availability, or for the making of reservations or issuance of tickets through a system.

Service enhancement means any product or service offered to subscribers or participating carriers in conjunction with a system other than the basic display of information on schedules, fares, rules, and availability, and the basic ability to make reservations or issue tickets for air transportation.

Subscriber means a ticket agent, as defined in 49 U.S.C. 40102 (40), that holds itself out as a neutral source of information about, or reservations for, the air transportation industry and that uses a system.

System means a computerized reservations system offered to subscribers for use in the United States that contains information about schedules, fares, rules or availability of carriers and provides subscribers with the ability to make reservations, if it charges any other carrier a fee for system services, and if it is used by a subscriber under a formal contract with the system.

System owner means a carrier that holds any of the equity of a system or that has one or more affiliates that hold such an equity interest.

§ 255.4 Display of information.

(a) All systems shall provide at least one integrated display that includes the schedules, fares, rules, and availability of all participating carriers in accordance with the provisions of this section. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor. No system shall make available to subscribers any integrated display unless that display complies with the requirements of this section.

(1) Each system must offer an integrated display that uses the same editing and ranking criteria for both on-line and interline connections and does not give on-line connections a system-imposed preference over interline connections. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other display maintained by the system vendor.

(2) Each integrated display offered by a system must either use elapsed time as a significant factor in selecting service options from the database or give single-plane flights a preference over connecting services in ranking services in displays.

(b) In ordering the information contained in an integrated display, systems shall not use any factors

directly or indirectly relating to carrier identity.

(1) Systems may order the display of information on the basis of any service criteria that do not reflect carrier identity and that are consistently applied to all carriers, including each system owner, and to all markets.

(2) When a flight involves a change of aircraft at a point before the final destination, the display shall indicate that passengers on the flight will change from one aircraft to another.

(3) Each system shall provide to any person upon request the current criteria used in editing and ordering flights for the integrated displays and the weight given to each criterion and the specifications used by the system's programmers in constructing the algorithm.

(c) Systems shall not use any factors directly or indirectly relating to carrier identity in constructing the display of connecting flights in an integrated display.

(1) Systems shall select the connecting points (and double connect points) to be used in the construction of connecting flights for each city pair on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including each system owner, and to all markets.

(2) Systems shall select connecting flights for inclusion (''edit'') on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including each system owner.

(3) Systems shall provide to any person upon request current information on:

(i) All connecting points and double connect points used for each market;

(ii) All criteria used to select connecting points and double connect points;

(iii) All criteria used to ''edit'' connecting flights; and

(iv) The weight given to each criterion in paragraphs (c)(3)(ii) and (iii) of this section.

(4) Participating carriers shall be entitled to request that a system use up to five connect points (and double connect points) in constructing connecting flights for the display of service in a market. The system may require participating carriers to use specified procedures for such requests, but no such procedures may be unreasonably burdensome, and any procedures required of participating carriers also must be used by any system owner when it requests or causes its system to use specific points as connect points (or double connect points).

(5) When a system selects connecting points and double connect points for use in constructing connecting flights it shall use at least fifteen points and six double connect points for each city-pair, except that a system may select fewer such connect or double connect points for a city-pair where:

(i) Fewer than fifteen connecting points and six double connect points meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria, along with all additional connecting points and double connect points requested by participating carriers.

(6) If a system selects connecting points and double connect points for use in constructing connecting flights it shall use every point requested by itself or a participating carrier up to the maximum number of points that the system can use. The system may use fewer than all the connect points requested by itself and participating carriers to the extent that:

(i) Points requested by the system and participating carriers do not meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria.

(7) If a connecting service is sold under the codes of two or more carriers, each system shall ensure that the service is displayed only once under the code of each carrier.

(d) Each system shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information or the information of a system owner. Each system shall display accurately information submitted by participating carriers. No system owner may use procedures for providing information on its own services to its system that are not available to participating carriers. Each system shall provide to any person upon request all current data base update procedures and data formats.

(e) Systems shall use or display information concerning on-time performance of flights as follows:

(1) Within 10 days after receiving the information from participating carriers or third parties, each system shall include in all integrated schedule and availability displays the on-time performance code for each nonstop flight segment and one-stop or multi-stop single plane flight, for which a participating carrier provides a code.

(2) A system shall not use on-time flight performance as a ranking factor in ordering information contained in an integrated display.

(f) Each participating carrier shall ensure that complete and accurate information is provided each system in a form such that the system is able to display its flights in accordance with this section.

(g) A system may make available to subscribers the internal reservations system display of a system owner or other participating carrier, provided that all participating carriers are offered the ability to make their internal reservations displays available to subscribers, and provided further that a subscriber and its employees may see any such display only by requesting it for a specific transaction.

§ 255.5 Defaults and service enhancements.

(a) In the event that a system offers a service enhancement to a system owner or other participating carrier, it shall offer the enhancement to all participating carriers on nondiscriminatory terms, except to the extent that such service enhancement is still in the development stage or that participation is not immediately feasible for technical reasons, in which event the system shall make it available to all participating carriers as soon as possible.

(b) No system may create or maintain a default in any system feature that automatically prefers one or more system owners or airlines that directly or indirectly market the system over other participating carriers.

§ 255.6 Contracts with participating carriers.

(a) No system may condition participation in its system on the purchase or sale of any other goods or services.

(b) Notwithstanding paragraph (a) of this section, a system may condition participation in its system in the United States on a participating carrier's agreement to participate in the system or affiliated systems in other countries, if the system and such affiliates agree:

(1) That the display of services in such system and its affiliates will not use any factors related to carrier identity and

(2) That any fees charged the carrier shall not be discriminatory.

(c) A system shall provide upon request to carriers current information on its fee levels and fee arrangements with other participating carriers. A system's bill to a participating carrier for any fee must contain adequate information and be on magnetic media so that the participating carrier can determine whether the bill is accurate. At a minimum, booking fee bills must

include the following information for each segment: PNR record locator number, passenger name, booking status, agency ARC number, pseudo-city code, CRS transaction date, city-pair information, flight number, flight date, class of service, and type of CRS booking.

(d) No system may require a carrier (other than a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system) to maintain any particular level of participation or buy any enhancements in its system on the basis of participation levels or enhancements selected by that carrier in any other foreign or domestic computerized reservations system. A system may not compel a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system, to maintain a particular level of participation or buy an enhancements in its system on the basis of participation levels or enhancements selected by that carrier in another foreign or domestic computerized reservations system, until 14 days after it has given the Department and such carrier written notice of its intent to take such action.

(e) No system may bar a carrier from treating its subscribers differently from subscribers to other systems, if the difference in treatment is based on the system charging higher booking fees or offering poorer service to participating airlines than other systems, unless that carrier owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system. No system may require any carrier as a condition to participation to provide it with fares that the carrier has chosen not to sell through any other system.

§ 255.7 Contracts with subscribers.

(a) No subscriber contract may have a term in excess of five years. No system may offer a subscriber or potential subscriber a subscriber contract with a term in excess of three years unless the system simultaneously offers such subscriber or potential subscriber a subscriber contract with a term no longer than three years. No contract may contain any provision that automatically extends the contract beyond its stated date of termination, whether because of the addition or deletion of equipment or because of some other event. No contract may require a subscriber to pay damages for breach that are based upon any estimate or expectation that the subscriber would have used the system for any specified number of bookings during the remainder of the contract term.

(b) No system may directly or indirectly impede a subscriber from obtaining or using any other system. Among other things, no subscriber contract or contract offer may require the subscriber to use a system for a minimum volume of transactions, and no subscriber contract or contract offer may require the subscriber to lease a minimum number or ratio of system components based upon or related to:

(1) The number of system components leased from another system vendor or

(2) The volume of transactions conducted on any other system.

(c) No system may offer a subscriber either a payment of any kind or a discount from its fees for a subscriber's use of system services or equipment that is conditioned upon such subscriber's use of the system for a minimum share of the subscriber's total transactions. No system may directly or indirectly offer a subscriber any financial inducement designed or intended to encourage the subscriber to use a system for a minimum share of the subscriber's total transactions. No system may impose a penalty or liability of any kind on a subscriber as a result of such subscriber's failure to use the system for a minimum share of the subscriber's total transactions.

(d) No system owner or carrier that directly or through an affiliate markets a system in the United States may require use of its system by the subscriber in any sale of its air transportation services.

(e) No system owner or carrier that directly or through an affiliate markets a system in the United States may require that a travel agent use or subscribe to its system as a condition for the receipt of any commission for the sale of its air transportation services.

(f) No system may charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

§ 255.8 Use of third-party hardware, software and databases.

(a) No system may prohibit or restrict, directly or indirectly:

(1) The use of third-party computer hardware or software in conjunction with CRS services, except as necessary to protect the integrity of the system,

(2) The use of a CRS terminal to access directly any other system or database providing information on airline services, or

(3) The use of a back-office accounting system in conjunction with bookings made outside that system.

(b) This section prohibits, among other things:

(1) A system's imposition of fees in excess of commercially reasonable levels to certify third-party equipment;

(2) A system's undue delays or redundant or unnecessary testing before certifying such equipment;

(3) A system's refusal to provide any services normally provided subscribers because of a subscriber's use of third-party equipment or because of the subscriber's using the same equipment for access to both the system and to another system or database;

(4) The system's termination of a subscriber contract because of the subscriber's use of third-party equipment or use of the same equipment for access to the system and to another system or database; and

(5) The pricing of system services for subscribers using third-party hardware and software at a level which is disproportionately high in relation to the pricing of services for subscribers that do not use third-party hardware and software.

(c) A system shall make available to developers of third-party hardware and software on commercially reasonable terms the nonproprietary system architecture specifications and other nonproprietary technical information needed to enable such developers to create products that will be compatible with the system.

(d) Nothing in this section shall be construed to require any system or system owner:

(1) To develop or supply any particular product, device, hardware or software to enable a subscriber to use another system, or

(2) To provide service or support with respect to any product, device, hardware, software, or service not provided to a susbscriber by the system or system owner.

§ 255.9 Marketing and booking information.

(a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

(b) Each system shall make available to all foreign participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to bookings on international services that it elects to generate from its system, provided that no system may provide such data to a foreign carrier if the foreign carrier or an affiliate owns, operates, or controls a system in a foreign country, unless such carrier or

system provides comparable data to all U.S. carriers on nondiscriminatory terms. Before a system provides such data to a foreign carrier, it shall give written notice to each of the U.S. participating carriers in its system that it will provide such data to such foreign carrier. The data made available by a system shall be as complete and accurate as the data provided a system owner.

(c) Any U.S. or foreign carrier receiving data on international bookings from a system must ensure that no one has access to the data except its own personnel and the personnel of any outside firm used for processing the data on its behalf, except to the extent that the system or a system owner provides such access to other persons.

(d) Notwithstanding paragraphs (a) and (b) of this section, no system may sell, and no carrier may buy or obtain, directly or indirectly, any marketing, booking, or sales data relating to carriers generated by a system insofar as the data include data identifying sales by individual subscribers, provided, that a system may sell, and a carrier may buy, data on sales or bookings in which that carrier will provide all or part of the transportation that identifies the individual subscriber making that sale or booking.

(e) Notwithstanding paragraphs (a) and (b) of this section, no system may sell, and no carrier may buy or obtain, directly or indirectly, any marketing, booking, or sales data relating to carriers generated by a system insofar as the data include data generated from sales or bookings on any carrier that has not consented to the inclusion of data on its sales or bookings in the data being sold under this section.

§ 255.10 Exceptions.

(a) The obligations of a system under § 255.4 shall not apply with respect to a carrier that refuses to enter into a contract that complies with this part or fails to pay a nondiscriminatory fee. A system shall apply its policy concerning treatment of non-paying carriers on a uniform basis to all such carriers, and shall not receive payment from any carrier for system-related services unless such payments are made pursuant to a contract complying with this part.

(b) The obligations of a system under this part shall not apply to any foreign carrier that operates or whose affiliate operates an airline computer reservations system for travel agents outside the United States, if that system discriminates against the display of flights of any United States carrier or imposes discriminatory terms for participation by any United States carrier in its computer reservations system, provided that a system must continue complying with its obligations under this part until 14 days after it has given the Department and such foreign carrier written notice of its intent to deny such foreign carrier any or all of the protections of this part.

§ 255.11 Prohibition against carrier bias.

(a) No carrier may induce or attempt to induce a system to create a display that would not comply with the requirements of § 255.4.

(b) No system or carrier may make available to subscribers (by itself or in conjunction with a third party) any computer hardware or software that reorders an integrated system display on the basis of carrier identity.

2. The authority citation for 14 CFR Part 399 continues to read as follows:

Authority: 49 U.S.C. 40101 *et seq.*

3. 14 CFR 399.84 is proposed to be revised to read as follows:

§ 399.84. Price advertising

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, or a system (as defined by 14 CFR 255.3) for passenger air transportation, a tour *i.e.*, a combination of air transportation and ground accommodations), or a tour component (*e.g.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.

(b) In any advertising or solicitation by an agent of an air carrier or indirect air carrier, the agent must separately list its service fees, if any, from the price for the air transportation, tour, or tour component, provided, that any offer to sell specific air transportation, tour, or tour component services must also state the entire price to be paid by the customer to the agent for such air transportation, tour, or tour component, including any service fee charged by the agent, and provided further, that such separate listing of a service fee will be considered an unfair and deceptive practice if the service fee is ad valorem in nature, if the fee exceeds the greater of $20 or ten percent of the price for the air transportation, tour, or tour component, and if the amount of the fee is not prominently disclosed and placed near the advertised fare or price.

Issued in Washington, DC on October 29, 2002.

Norman Y. Mineta,

Secretary of Transportation.

[FR Doc. 02–28645 Filed 11–12–02; 8:45 am]

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Federal Register

Friday,
November 15, 2002

Part IV

Securities and Exchange Commission

17 CFR Parts 240, 245 and 249
Insider Trades During Pension Fund Blackout Periods; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 245 and 249

[Release No. 34–46778; IC–25795; File No. S7–44–02]

RIN 3235–AI71

Insider Trades During Pension Fund Blackout Periods

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing rules to clarify the application and prevent evasion of section 306(a) of the Sarbanes-Oxley Act of 2002. Section 306(a) prohibits the directors and executive officers of an issuer from directly or indirectly purchasing, selling, or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity securities transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, the proposed rules would specify the content and timing of the notice that issuers must provide to their directors and executive officers and to the Commission about a blackout period.

DATES: Comments must be received on or before December 16, 2002.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, United States Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following electronic mail address: rule-comments@sec.gov. To help us process and review your comments more efficiently, comments should be submitted by one method only. All comment letters should refer to File No. S7–44–02; this file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[1]

[1] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Mark A. Borges, Special Counsel, or Elizabeth M. Murphy, Chief, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2910, at the United States Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0312.

SUPPLEMENTARY INFORMATION: We are proposing new Regulation BTR[2] under the Securities Exchange Act of 1934 (''Exchange Act'')[3] and amendments to Exchange Act rules 13a–11[4] and 15d–11[5] and to forms 20–F,[6] 40–F[7] and 8–K[8] under the Exchange Act.

I. Introduction

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the ''Act'') was enacted.[9] Section 306(a) of the Act, entitled ''Prohibition of Insider Trading During Pension Fund Blackout Periods,'' expressly prohibits any director or executive officer of an issuer of any equity security, directly or indirectly, from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during any blackout period with respect to such equity security, if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer.[10] Section 306(a) further directs us, in consultation with the Secretary of Labor, to issue rules to clarify the application of this provision and to prevent evasion thereof.[11]

Pension plan ''blackout periods'' occur for a variety of administrative purposes. Their occurrence and timing are often, but not always, within the control of the plan administrator.[12] The most common reasons for imposing a blackout period include:

- Changes in investment alternatives;
- Changes in the frequency of portfolio valuations;
- Changes in plan record-keepers or other service providers;
- Changes in plan trustees; and
- Corporate mergers, acquisitions and spin-offs that affect the pension coverage of groups of participants.[13]

Generally, during a blackout period, plan participants can contribute to their accounts, but cannot switch their account funds between investment options. Understandably, plan participants often are troubled by the prospect of a blackout, which may lock them into their existing investment choices for an extended period of time. Even participants who view their plan accounts as part of an overall long-term investment strategy may be uncomfortable with the possibility of being unable to change investment choices when an unforeseen event, such as a sudden stock price decline, occurs during a blackout period.

In the past year, several highly-publicized cases have demonstrated the catastrophic consequences that can befall employees who have invested substantially all of their retirement savings in their employer's equity securities when the issuer's securities fall sharply during a blackout period.[14] There also have been allegations that, at the time that rank-and-file employees were precluded from selling their employer's equity securities in their individual pension plan accounts, corporate executives were exercising and cashing out their employee stock options and selling other securities acquired through the company's equity compensation plans.

Section 306(a) is intended to address this problem. It prohibits an issuer's directors and executive officers from trading in equity securities of the issuer when a substantial number of the issuer's employees are unable to engage in transactions involving equity securities of the issuer through their individual pension plan accounts. Section 306(a) is designed to address the apparent unfairness of an issuer's directors and executive officers being able to sell their equity securities when the issuer's employees cannot. The statute's trading prohibition should mitigate the risk that corporate executives are putting their personal

[2] 17 CFR 245.100–104.

[3] 15 U.S.C. 78a *et seq.*

[4] 17 CFR 240.13a–11.

[5] 17 CFR 240.15d–11.

[6] 17 CFR 249.220f.

[7] 17 CFR 249.240f.

[8] 17 CFR 249.308.

[9] Pub. L. 107–204, 116 Stat. 745 (2002).

[10] Section 306(a)(1) of the Act.

[11] Section 306(a)(3) of the Act.

[12] These periods during which plan participants or beneficiaries are not permitted to access their accounts are sometimes also referred to as ''lockdowns,'' transition periods'' or ''quiet periods.'' Blackout periods can range from a few days to several months in duration.

[13] For example, in the case of a change in plan record-keepers, the ''blackout period'' is intended to give the old record-keeper time to perform final reconciliation of participant and beneficiary records and plan assets and to transfer the plan records to the new record-keeper. The new record-keeper then is given time to enter participant and beneficiary accounts into its administration system and to verify the accuracy of the plan records.

[14] See, for example, Ellen E. Schultz & Theo Francis, *Why Company Stock is a Burden for Many—And Less So for a Few,* Wall St. J., Nov. 2, 2001, at A1; Elizabeth Wine, *Enron Faces Lawsuits Over Handling of Pension Plan,* Fin. Times, Nov. 28, 2002, at 30.

interests ahead of their responsibilities to their companies, their employees and their companies' security holders. The required notice should ensure that directors and executive officers of an issuer, as well as investors, are aware of an impending blackout period on a timely basis.

Section 306(a) becomes effective on January 26, 2003, 180 days after the date of enactment of the Act.[15] We are proposing new Regulation Blackout Trading Restriction (''BTR'') to clarify the scope and application of section 306(a).[16]

II. Regulation BTR

A. Statutory Trading Prohibition

Section 306(a) of the Act seeks to equalize the treatment of corporate executives and rank-and-file employees with respect to their ability to engage, during a pension plan blackout period, in transactions in an issuer's equity securities that were acquired in connection with their service to, or employment with, the issuer. As proposed, Regulation BTR would clarify, and seek to prevent evasion of, section 306(a)'s statutory trading prohibition as follows:

- Proposed Exchange Act rule 100 would define terms used in the regulation.
- Proposed Exchange Act rule 101 would clarify the operation of the general statutory prohibition on trading by directors and executive officers during a pension plan blackout period and set forth exceptions to the prohibition.
- Proposed Exchange Act rule 102 would set forth exceptions to the definition of ''blackout period.''
- Proposed Exchange Act rule 103 would clarify the operation of the general statutory private remedy for violation of section 306(a).
- Proposed Exchange Act rule 104 would set forth the content and delivery requirements for the notice that an issuer must provide in connection with a blackout period.

In order to give effect to section 306(a) in a manner consistent with Congressional intent, we propose to use a number of concepts that have been developed under section 16 of the Exchange Act.[17] This approach provides an appropriately broad scope to the statutory trading prohibition of section 306(a), seeks to prevent evasion of the prohibition, takes advantage of a well-established body of rules and interpretations concerning the trading activities of corporate insiders and facilitates enforcement of the trading prohibition of section 306(a) by generally allowing reference to trading reports filed pursuant to section 16(a) of the Exchange Act.[18] A discussion of each of these proposed rules and related issues follows.

B. Discussion

1. Issuers Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers as defined in the Act. Section 2(a)(7) of the Act provides that the term ''issuer'' means an issuer (as defined in section 3(a)(8) of the Exchange Act):[19]

- The securities of which are registered under section 12 of the Exchange Act;[20]
- That is required to file reports under section 15(d) of the Exchange Act;[21] or
- That files, or has filed, a registration statement that has not yet become effective under the Securities Act of 1933 (the ''Securities Act'')[22] and that has not been withdrawn.[23]

Accordingly, section 306(a) applies, and proposed Regulation BTR would apply, to the directors and executive officers of domestic issuers, foreign private issuers, banks and savings associations, small business issuers and, in rare instances, to registered investment companies.[24]

(a) *Foreign Private Issuers*

Section 306(a) of the Act, by its terms, applies to foreign private issuers.[25] Under proposed Regulation BTR, the statutory trading prohibition of section 306(a) would apply to equity security transactions by directors and executive officers of a foreign private issuer when 50% or more of the participants or beneficiaries in pension plans maintained by the issuer who are located in the United States and its territories and possessions[26] are subject to a blackout period, and the affected employees represent a significant portion of the issuer's plan participants.[27] It would not apply if a blackout period affected only plan participants or beneficiaries located outside the United States.

This approach is consistent with the purposes of the statute. We believe that, in enacting section 306(a), Congress was seeking principally to protect pension plan participants and beneficiaries located in the United States, and generally leaving to foreign authorities issues related to the interests of plan participants located outside the United States. It also conforms to our policy of focusing the protections of the federal securities laws on U.S.-based investors.

Request for Comment

- What impact would section 306(a) and proposed Regulation BTR have on

[15] *See* section 306(c) of the Act.

[16] Section 306(b) of the Act directs the Secretary of Labor to issue initial guidance and a model notice pursuant to section 101(i)(6) of ERISA (requiring 30-day advance notice of a pension plan blackout period to the plan's participants and beneficiaries) not later than January 1, 2003. In addition, the Secretary of Labor must promulgate interim final rules not later than October 13, 2002 (75 days after the date of enactment of the Act). These interim final rules were issued by the Department of Labor on October 11, 2002 (67 FR 64766). For purposes of section 306(b), the term ''blackout period'' is defined more expansively than in section 306(a) of the Act and includes any period of more than three consecutive business days in which any ability to change investments in any assets, to obtain distributions or to obtain loans is suspended, limited or restricted. In addition, section 306(b) applies to pension plans regardless of whether the plans invest in an issuer's equity securities.

[17] 15 U.S.C. 78p. Because the purposes of section 306(a) of the Act and section 16 are not identical, however, we do not mean to suggest that section 306(a) and proposed Regulation BTR will always be interpreted the same as section 16 if the purposes diverge or the interests of investors require.

[18] 15 U.S.C. 78p(a).

[19] 15 U.S.C. 78c(a)(8). Section 3(a)(8) 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.''

[20] 15 U.S.C. 78*l*.

[21] 15 U.S.C. 78o(d).

[22] 15 U.S.C. 77a *et seq.*

[23] This definition of ''issuer'' would be set forth in proposed Exchange Act rule 100(k).

[24] Section 306(a) does not, and proposed Regulation BTR would not, apply to entities that do not issue equity securities, such as issuers of asset-backed securities.

[25] For purposes of the Exchange Act, a ''foreign private issuer'' is defined to mean ''any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.'' See Exchange Act Rule 3b–4(c) (17 CFR 240.3b–4(c)).

[26] Proposed Regulation BTR would use the term ''state'' to identify the participants or beneficiaries located in the United States and its territories and possessions. Under proposed Exchange Act rule 100(m), the term ''state'' would have the meaning set forth in section 3(a)(16) of the Exchange Act (15 U.S.C. 78c(a)(16)). Section 3(a)(16) defines the term ''state'' to mean ''any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.''

[27] *See* section II.B.5(c) below.

the willingness of foreign private issuers to raise capital in the public U.S. capital markets, to list on U.S. markets and to register their securities under the Securities Act or the Exchange Act?

• Will the application of proposed Regulation BTR to foreign private issuers unduly discourage these issuers from implementing equity-based compensation plans for the benefit of their U.S.-based employees?

• Should section 306(a) and proposed Regulation BTR apply more broadly to foreign private issuers? If so, explain how.

(b) *Banks and Saving Associations*

The statutory trading prohibition of section 306(a) of the Act applies to directors and executive officers of banks and savings associations that satisfy the definition of ''issuer'' under section 2(a)(7) of the Act. The Act amended section 12(i) of the Exchange Act [28] to make it clear that the federal banking agencies have the authority to administer and enforce various provisions of the Act, including the statutory trading prohibition of section 306(a), with respect to banks and savings associations.[29]

(c) *Small Business Issuers*

Section 306(a) of the Act generally does not distinguish between large and small issuers. Accordingly, section 306(a)'s trading prohibition applies to any entity that satisfies the definition of ''issuer'' under section 2(a)(7) of the Act without regard to the entity's size, including small business issuers.[30] We note, however, that because many small companies do not file Exchange Act reports or registration statements under the Securities Act, not all small companies would be subject to section 306(a) and proposed Regulation BTR.

Request for Comment

• Is the compliance burden for small business issuers disproportionate to the benefits to be obtained from compliance with section 306(a) and proposed Regulation BTR? If so, should we exclude them from section 306(a) and proposed Regulation BTR? Would some other threshold for exclusion be more appropriate than the small business issuer definition?

• Is there any basis for treating pension plans sponsored by small business issuers differently than other pension plans? If blackout periods imposed on pension plans sponsored by small business issuers were excluded from proposed Regulation BTR, what would be the impact on plan participants?

(d) *Registered Investment Companies*

The statutory trading prohibition of section 306(a) of the Act applies to directors and executive officers of registered investment companies that register a class of securities under section 12 of the Exchange Act or that are required to file reports under section 15(d) of the Exchange Act or that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. Investment companies, however, typically do not have employees because they are externally managed, with investment advisory and other services provided by affiliated and unaffiliated parties pursuant to contracts with the investment company. Without employees, investment companies typically do not maintain employee pension plans, and, as a practical matter, there would generally be no blackout periods triggering the statutory trading prohibition. Nonetheless, there are some cases, for example, internally managed investment companies, where a registered investment company that compensates its officers and directors with its own shares may have employees of its own and the statutory trading prohibition could apply in practice.[31]

Under proposed Exchange Act rule 104, the required notice to the Commission of a blackout period must be filed on form 8–K. However, Exchange Act rules 13a–11(b) [32] and 15d–11(b) [33] exempt registered management investment companies from form 8–K filing requirements. Accordingly, we are proposing an amendment to those rules that would subject such investment companies to form 8–K filing requirements for the sole purpose of meeting any filing obligation that might arise under proposed Regulation BTR.

Request for Comment

• Should we exclude investment companies from proposed Regulation BTR? If so, what would be the rationale for the exclusion?

• With regard to the proposed form 8–K filing requirement, we request public comment on feasible alternatives that minimize the reporting burdens on registered investment companies. In addition, we request comment on the utility to investors of the reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing those reports.

2. Persons Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers subject to the Act. Proposed Exchange Act rule 100 would define these terms for purposes of section 306(a).

(a) *Directors*

Under proposed Exchange Act rule 100(c)(1), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''director'' would have the meaning set forth in section 3(a)(7) of the Exchange Act.[34] In determining whether an individual would be a director of an issuer for purposes of section 306(a) and proposed Regulation BTR, the individual's title would not be dispositive as to whether he or she is a director.[35] An individual may be a

[28] 15 U.S.C. 78*l*(i).

[29] *See* section 3(b)(4) of the Act.

[30] Under regulation S–B (17 CFR 228.10 *et seq.*), a ''small business issuer'' is defined to mean ''a company that meets all of the following criteria: (i) Has revenues of less than $25,000,000; (ii) is a U.S. or Canadian issuer; (iii) is not an investment company; and (iv) if a majority-owned subsidiary, the parent corporation is also a small business issuer. *Provided however,* that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer's outstanding securities held by non-affiliates) of $25,000,000 or more.'' *See* item 10(a)(1) of Regulation S–B (17 CFR 228.10).

[31] *See Baker, Fentress & Company, et al.*, Release Nos. 40–23571 (Nov. 24, 1998) (notice) and 40–23619 (Dec. 22, 1998) (order) (permitting internally managed closed-end investment company to provide equity-based compensation, including stock, stock options, and stock appreciation rights to its officers, directors, and employees); *Association of Publicly Traded Investment Funds,* Release Nos. 40–14541 (May 28, 1985) (notice) and 40–14594 (June 21, 1985) (order) (''1985 APTIF Order'') (permitting internally managed closed-end investment companies to offer their employees deferred compensation in the form of stock options and stock appreciation rights); *Association of Publicly Traded Investment Funds,* Release Nos. 40–15439 (Nov. 26, 1986) (notice) and 40–15496 (Dec. 23, 1986) (order) (amending 1985 APTIF Order to permit profit-sharing retirement plans qualified under section 401(a) of the Internal Revenue Code). See also *Interpretive Matters Concerning Independent Directors of Investment Companies,* Release No. 40–24083 (Oct. 14, 1999) (release stating that the staff would not recommend enforcement action against registered open-end investment companies that compensate directors with their shares, provided that a fixed dollar value is assigned to directors' services prior to the time that the compensation in shares is payable).

[32] 17 CFR 240.13a–11(b).

[33] 17 CFR 240.15d–11(b).

[34] 15 U.S.C. 78c(a)(7). Section 3(a)(7) defines the term ''director'' to mean ''any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.'' As we recently noted, this definition reflects a functional and flexible approach to determining whether a person is a director of an entity. *See* Release No. 34–46685 (Oct. 18, 2002) (67 FR 65325) at n. 7.

[35] As under section 16 of the Exchange Act, in determining whether an advisory, emeritus or honorary director would be a director for purposes of section 306(a) and proposed Regulation BTR, attention would be given to the individual's underlying responsibilities or privileges with

director without holding the title, if he or she functions as a director.[36]

Request for Comment

• Is it appropriate to use the definition in section 3(a)(7) of the Exchange Act to define the term ''director'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

(b) *Executive Officers*

Under proposed Exchange Act rule 100(h)(1), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''executive officer'' would be defined in the same manner as the term ''officer'' is defined in Exchange Act rule 16a–1(f).[37] While the Exchange Act rules contain a separate definition of the term ''executive officer,''[38] we believe that, for purposes of section 306(a) and proposed Regulation BTR, the broader definition in Exchange Act rule 16a–1(f) is more appropriate because of its focus on the policy-making functions of the subject individual.[39] In addition, by using this definition, issuers that are subject to section 16 of the Exchange Act would be better able to coordinate the operation of their insider trading programs and to monitor the individuals subject to the provisions of both section 16 and section 306(a).

Request for Comment

• Is it appropriate to use the definition of the term ''officer'' in Exchange Act Rule 16a–1(f) to define the term ''executive officer'' for purposes of section 306(a) and proposed Regulation BTR?

• If not, should we use the definition in Exchange Act rule 3b–7, or some other definition? Should the scope of the definition be broader or narrower? If so, explain why.

(c) *Foreign Private Issuers*

Under proposed Exchange Act rule 100(c)(2), for purposes of section 306(a) of the Act and proposed Regulation BTR, in the case of a foreign private issuer, the term ''director'' would mean a director who is a management employee of the issuer. Under proposed Exchange Act rule 100(h)(2), for purposes of section 306(a) and proposed Regulation BTR, in the case of a foreign private issuer, the term ''executive officer'' would mean the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers (or, if there is none, the controller) of the issuer. Because foreign private issuers are not subject to section 16 of the Exchange Act,[40] we believe that it is appropriate to specifically enumerate the directors and executive officers of a foreign private issuer who would be subject to section 306(a) and proposed Regulation BTR rather than relying on a section 16 definition. This would assist foreign private issuers in identifying the individuals who would be subject to section 306(a) and proposed Regulation BTR. In addition, many foreign private issuers have lower-level employee representatives on their boards of directors, and we do not believe that section 306(a) and proposed Regulation BTR should be extended to these individuals or to other non-employee directors of foreign companies.

Request for Comment

• Is it appropriate to use a different definition of the terms ''director'' and ''executive officer'' for foreign private issuers than for domestic issuers?

• Is it appropriate to limit the individuals who would be considered the directors and executive officers of a foreign private issuer for purposes of section 306(a) and proposed Regulation BTR? If not, explain why.

• Should the proposed definition cover other executive officers of a foreign private issuer in addition to the three enumerated officers? Should we exclude the principal accounting officer from the definition? In each case, explain why.

• Are there other directors of a foreign private issuer who should be included in the definition other than management directors? If so, explain who and why.

(d) *Termination of Status*

Because of the definitions described above, the statutory trading prohibition of section 306(a) of the Act and the provisions of proposed Regulation BTR would no longer apply to an individual who ceases to be a director or executive officer of an issuer.

3. Securities Subject to Trading Prohibition

Section 306(a) of the Act applies to any equity security of an issuer other than an exempt security.[41] To effectuate the intended purpose of section 306(a) and to prevent evasion of the statutory trading prohibition, proposed Exchange Act rule 100(f) would define ''equity security of the issuer'' to include any equity security or derivative security relating to an issuer, whether or not issued by that issuer.[42] Thus, section 306(a) and proposed Regulation BTR would apply to any equity security that

respect to the issuer and whether he or she has a significant policy-making role with the issuer. *See* Release No. 34–28869 (Feb. 21, 1991) (56 FR 7242), at section II.A.1. An individual may hold the title ''director'' and yet, because he or she is not acting as such, not be deemed a director. Release No. 34–26333 (Dec. 2, 1988) (53 FR 49997), at section III.A.2. (''In general, honorary directors need not be treated as directors for purposes of Section 16, because they usually do not take part in formulating and deciding policy issues concerning the issuer, and do not have general access to material, non-public information.'')

[36] *See* the Commission's *amicus curiae* brief filed in *Gryl* versus *Shire Pharmaceuticals Group PLC,* 298 F.3d 136 (2d Cir. 2002). Where the individual does not have the title, however, he or she must have more than access to non-public information about the issuer, and must do more than assist the board in formulating policy.

[37] 17 CFR 240.16a–1(f). Exchange Act rule 16a–1(f) defines the term ''officer'' to mean ''an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust.''

[38] *See* Exchange Act rule 3b–7 (17 CFR 240.3b–7). This definition differs from the definition in Exchange Act rule 16a–1(f) in that it does not expressly include a registrant's principal financial officer or principal accounting officer (or controller). It also does not expressly address officers of a parent corporation or how to identify a registrant's executive officers when a registrant is a limited partnership or a trust.

[39] Thus, the standard for determining whether an individual is an ''executive officer'' for purposes of section 306(a) of the Act and proposed Regulation BTR would be the same as those applicable under Exchange Act rule 16a–1(f). For example, the term ''policy-making functions'' would not include policy-making functions that are not significant. Similarly, if pursuant to item 401(b) of Regulation S–K (17 CFR 229.401(b)), an issuer identifies an individual as an ''executive officer,'' it would be presumed that the board of directors of the issuer has made that judgment and that the individuals so identified are executive officers of the issuer for purposes of section 306(a) and proposed Regulation BTR, as are such other persons enumerated in Exchange Act rule 16a–1(f) but not in item 401(b). *See* the note to Exchange Act rule 16a–1(f).

[40] *See* Exchange Act rule 3a12–3 (17 CFR 240.3a12–3).

[41] For purposes of section 306(a) of the Act, proposed Exchange Act rule 100(i) would define the term ''exempt security'' by reference to the definition in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)).

[42] For example, this would include a security-based swap agreement, a standardized option, a security future on an equity security and a security future on a narrow-based security index. *See*, for example, Release No. 34–28869 (Feb. 8, 1991) (56 FR 7242) and Release No. 33–8107 (Jun. 21, 2002) (67 FR 43234). A ''security-based swap agreement'' is defined in section 206B of the Gramm-Leach-Bliley Financial Modernization Act of 1999, as amended by H.R. 4577, Pub. L. 106–554, 114 Stat. 2763.

relates to an equity security of the director or executive officer's company, even if the security is issued by a third party.[43]

(a) *Equity Security*

Under proposed Exchange Act Rule 100(e), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''equity security'' would have the same meaning as in the definition set forth in section 3(a)(11) of the Exchange Act[44] and Exchange Act rule 3a11–1.[45] In the case of foreign issuers, this definition would include depositary shares evidenced by American Depositary Receipts (''ADRs'').[46]

Request for Comment

• Is it appropriate to use the definitions in section 3(a)(11) of the Exchange Act and Exchange Act rule 3a11–1 to define the term ''equity security'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

(b) *Derivative Securities*

Under proposed Exchange Act rule 100(d), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''derivative security'' would have the same meaning as the definition of the term ''derivative security'' set forth in Exchange Act rule 16a–1(c).[47] As previously indicated, this definition would be interpreted in a manner consistent with the rules and interpretations that have developed under section 16 of the Exchange Act. For example, an interest that may be settled only in cash, but the value of which is denominated or based on an equity security, such as phantom stock, would be considered a derivative security for purposes of section 306(a) and proposed Regulation BTR. Consequently, an acquisition of a ''cash-only'' derivative security or the exercise, sale or other transfer of the security during a blackout period would be subject to the statutory trading prohibition unless pursuant to an exempt transaction.

Request for Comment

• Is it appropriate to use the Exchange Act Rule 16a–1(c) definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

• Are there instruments included in the definition of ''derivative security'' for purposes of section 16 of the Exchange Act that we should exclude from the definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR?

—Should we exclude an interest that may be settled solely in cash, the value of which is denominated or based on an equity security, from the definition of ''derivative security'' used for purposes of section 306(a) and proposed Regulation BTR?

• Are there instruments excluded from the definition of ''derivative security'' for purposes of section 16 of the Exchange Act that we should include in the definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR?

—Should we include derivative securities without a fixed exercise price in the definition of ''derivative security'' used for purposes of section 306(a) and proposed Regulation BTR?

4. Transactions Subject to Trading Prohibition

Section 306(a) of the Act prohibits a director or executive officer from purchasing, selling or otherwise acquiring or transferring any equity security of an issuer during a pension plan blackout period, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. Thus, the scope of the statutory trading prohibition is limited to:

• An acquisition of equity securities during a blackout period if the acquisition is in connection with service or employment as a director or executive officer; and

• A disposition of equity securities during a blackout period if the disposition involves equity securities acquired in connection with service or employment as a director or executive officer.[48]

Proposed Regulation BTR would clarify how section 306(a) is intended to apply to each of these two categories of transactions.

(a) *''Acquired in Connection with Service or Employment''*

Section 306(a) of the Act limits the statutory trading prohibition to equity securities that a director or executive officer acquires in connection with his or her service or employment as a director or executive officer.[49] To implement this limitation, proposed

[43] This would follow the approach that the Commission has taken under section 16 of the Exchange Act. *See* Exchange Act rule 16a–1(d) (17 CFR 240.16a–1(d)).

[44] 15 U.S.C. 78c(a)(11). Section 3(a)(11) defines the term ''equity security'' to mean ''any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.''

[45] 17 CFR 240.3a11–1. Exchange Act rule 3a11–1 defines the term ''equity security'' to mean ''any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.''

[46] An ADR is a negotiable certificate of interest representing American depositary shares that represent an ownership interest in a specified number or fraction of securities that have been deposited with a depositary. Section 306(a) of the Act and proposed Regulation BTR would apply in the same manner whether the transaction or the benefit plan in question involved ADRs or the deposited securities that they represent. Likewise, section 306(a) and proposed Regulation BTR would apply to purchases, sales, acquisitions and transfers that occur in the United States or outside the United States.

[47] 17 CFR 240.16a–1(c). Exchange Act rule 16a–1(c) defines the term ''derivative securities'' to mean ''any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include: (1) Rights of a pledgee of securities to sell the pledged securities; (2) rights of all holders of a class of securities of an issuer to receive securities pro rata, or obligations to dispose of securities, as a result of a merger, exchange offer, or consolidation involving the issuer of the securities; (3) rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or the tax withholding consequences of receipt, exercise or vesting; (4) interests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority; (5) interests or rights to participate in employee benefit plans of the issuer; or (6) rights with an exercise or conversion privilege at a price that is not fixed; or (7) options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.''

[48] While section 306(a) of the Act uses the word ''acquires'' to describe the equity securities that are subject to the statutory trading prohibition, we believe that Congress intended to cover equity securities whenever acquired, whether before or during a pension plan blackout period. The nature of the transactions that are subject to the trading prohibition confirm this conclusion. The language in proposed Exchange Act rule 101(a) reflects this interpretation.

[49] Section 306(a)(1) of the Act expressly limits the scope of the statutory trading prohibition to equity securities that a director or executive officer acquires ''in connection with his or her service or employment as a director or executive officer.'' Accordingly, equity securities of an issuer that are not acquired in connection with service or employment as a director or executive officer would not be subject to section 306(a) or proposed Regulation BTR.

Exchange Act rule 100(a) defines this term to include equity securities acquired by a director or executive officer:

- At a time when he or she was a director or executive officer of the issuer, under a compensatory plan, contract, authorization or arrangement, including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit-sharing (whether or not set forth in any formal plan document), including a compensatory plan, contract, authorization or arrangement with a parent, subsidiary or affiliate of the issuer;
- At a time when he or she was a director or executive officer of the issuer, as a result of any transaction or business relationship that is described in paragraph (a) or (b) of item 404 of Regulation S–K [50] or, in the case of foreign private issuers, item 7.B of form 20–F [51] (but without application of the disclosure thresholds of such provisions), to the extent that he or she has a pecuniary interest [52] in the equity securities;
- As ''director's qualifying shares'' or other securities that he or she must hold to meet an issuer's minimum ownership requirements for directors or executive officers; or
- Prior to becoming, or while, a director or executive officer of the issuer if the equity security was acquired as an inducement to service or employment with the issuer or a parent, subsidiary or affiliate of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

While it is clear that Congress intended section 306(a) to cover transactions involving equity securities that are acquired through grants and awards under employee stock option, restricted stock and other common equity compensation plans, we believe that the broad language of the statute encompasses any plan, contract, authorization or arrangement that results in the acquisition of issuer equity securities in exchange for the performance of services for, or employment with, an issuer. The definition in proposed Exchange Act rule 100(a)(1) is intended to reach these types of plans and arrangements. This would ensure that issuers do not shift the form of their compensation programs to enable directors and executive officers to evade the application of section 306(a).

The definition in proposed Exchange Act rule 100(a)(2) would include equity securities that have been acquired solely or primarily as a result of an individual's status as a director or executive officer. While this definition may reach equity securities that were, in fact, acquired in arms-length commercial transactions, we believe that inclusion of these transactions is necessary to prevent evasion of the statutory trading prohibition.

The definition in proposed Exchange Act rule 100(a)(3) would include securities that an individual has acquired to satisfy requirements that the individual be a security holder of the issuer in order to serve on the issuer's board of directors (so-called ''directors' qualifying shares'') and securities that a director or executive officer has acquired to satisfy an issuer's minimum ownership guidelines or requirements for directors or executive officers, including equity securities acquired on the open market for such purposes. Finally, the definition in proposed Exchange Act rule 100(a)(4) would include equity securities acquired at a time when an individual has not yet become a director or executive officer of the issuer, but which are clearly related to his or her service or employment, such as a grant or award made to induce an individual to join an issuer's board of directors or to become an employee of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

Request for Comment

- Are the transactions involving the acquisition of equity securities described in proposed Exchange Act rule 100(a) consistent with purposes of section 306(a) and proposed Regulation BTR? Should any of the described transactions be excluded from the definition of ''acquired in connection with service or employment''? If so, what would be the rationale for the exclusion?
- Are there any other situations where equity securities acquired by a director or executive officer should be considered ''acquired in connection with service or employment'' as a director or executive officer?
- For purposes of determining whether equity securities received under a compensatory plan, contract or arrangement were ''acquired in connection with service or employment,'' would it be helpful to reference the existing definition of an ''employee benefit plan'' under the federal securities laws?
- In the case of equity securities acquired by an individual as result of a merger, consolidation or other acquisition transaction involving the issuer, should such equity securities be considered ''acquired in connection with service or employment as a director or executive officer'' only where they replace equity securities that otherwise would satisfy the requirements of the definition? For example, where an employee of a target company becomes an executive officer of an acquiring company and, in connection with the merger, consolidation or other acquisition transaction of the two entities, is issued equity securities of the acquiring company to replace equity securities of the target company, should these equity securities received be considered ''acquired in connection with service or employment as a director of executive officer'' only to the extent that they were otherwise acquired in connection with service or employment as a director or executive officer of the target company?
- Should proposed Regulation BTR contain a ''safe harbor'' provision specifying acquisitions of an issuer's equity securities by directors and executive officers of the issuer that are not ''acquired in connection with service or employment'' as a director or executive officer? If so, what acquisitions of an issuer's equity securities should fall within the ''safe harbor''?

(b) *Indirect Interests*

The statutory trading prohibition of section 306(a) of the Act applies to both indirect, as well as direct, purchases, sales or other acquisitions or transfers of equity securities of the issuer by a director or executive officer.[53] Similarly, to prevent evasion of the statutory trading prohibition, the definition of ''acquired in connection with service or employment'' in proposed Exchange Act rule 100(a) would apply to indirect, as well as direct, acquisitions of equity securities for the benefit of a director or executive officer. For purposes of section 306(a), an acquisition or disposition of equity securities would be considered an acquisition or disposition by a director or executive officer if the director or

[50] 17 CFR 229.404(a) and (b).

[51] 17 CFR 249.220f.

[52] For purposes of section 306(a) of the Act, proposed Exchange Act rule 100(l) would define the terms ''pecuniary interest'' and ''indirect pecuniary interest'' by reference to the definitions in Exchange Act rule 16a–1(a)(2) (17 CFR 240.16a–1(a)(2)). Exchange Act rule 16a–1(a)(2)(i) (17 CFR 240.16a–1(a)(2)(i)) defines the term ''pecuniary interest'' to mean ''the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities.'' The definition in proposed Exchange Act rule 100(l) also would encompass the portfolio exclusion of Exchange Act rule 16a–1(a)(2)(iii) (17 CFR 240.16a–1(a)(2)(iii)).

[53] *See* proposed Exchange Act rule 101(a).

executive officer has a pecuniary interest[54] in the transaction.

To promote consistency and to simplify compliance, the term ''pecuniary interest'' would be interpreted in a manner consistent with the rules and interpretations that have developed under section 16 of the Exchange Act. Accordingly, a purchase, sale or other acquisition or transfer of equity securities by immediate family members[55] sharing the same household, a partnership, corporation, limited liability company or trust would be attributable to a director or executive officer for purposes of the statutory trading prohibition of section 306(a)(1) and proposed Exchange Act rule 101(a) if he or she is deemed to have an indirect pecuniary interest[56] in the equity securities in question. An acquisition of equity securities by an immediate family member sharing the same household, a partnership, corporation, limited liability company or trust would be attributable to a director or executive officer for purposes of determining whether the acquisition is ''in connection with service or employment'' if the acquisition otherwise satisfies the definition in proposed Exchange Act rule 100(a) and he or she is deemed to have an indirect pecuniary interest in the equity securities in question.

Request for Comment

- Is it appropriate to use the definition in Exchange Act rule 16a-1(a)(2) to define the term ''pecuniary interest'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?
  - —Are the definitions that determine the operation of the definition of the term ''pecuniary interest'' for purposes of section 16 of the Exchange Act appropriate for determining the application of section 306(a) and proposed Regulation BTR to indirect acquisitions of equity securities?
  - —Instead, should the application of section 306(a) and proposed Regulation BTR to indirect acquisitions of equity securities use a different standard, such as the beneficial ownership rules under section 13(d) of the Exchange Act,[57] for purposes of determining whether equity securities were acquired ''in connection with service or employment'' as a director or executive officer? If so, explain why.
  - —Should the application of section 306(a) and proposed Regulation BTR to indirect acquisitions and dispositions of equity securities use a different standard, such as the beneficial ownership rules under section 13(d) of the Exchange Act, for purposes of determining whether an acquisition or disposition of equity securities during a blackout period is subject to the statutory trading prohibition? If so, explain why.

(c) *Service or Employment Presumption*

Since the statutory trading prohibition of section 306(a) of the Act applies only to equity securities acquired in connection with service or employment as a director or executive officer, the statute, by its terms, does not completely preclude a director or executive officer from engaging in an acquisition or disposition of the equity securities of the issuer during a blackout period. This possibility may present difficulties in determining whether a particular transaction during a blackout period, such as a sale on the open market, involves equity securities that are subject to section 306(a) or other equity securities.

To simplify identification and eliminate tracing the source of equity securities involved in a disposition transaction and to prevent possible evasion of the statute, proposed Exchange Act rule 101(b) establishes an irrebuttable presumption that any equity securities sold or otherwise transferred during a blackout period were acquired in connection with service or employment as a director or executive officer to the extent that the director or executive officer holds such securities, without regard to the actual source of the securities disposed. To avoid an overly-broad application of the presumption, however, in a given blackout period, equity securities held by a director or executive officer that were acquired in connection with service or employment could only count against a single disposition transaction during that blackout period.

For example, if an executive officer owned 1,000 shares of the issuer's common stock, 250 of which were acquired as the result of the exercise of an employee stock option, a sale of 250 shares of common stock during a blackout period would be presumed to be a sale of the option shares and therefore subject to the statutory trading prohibition of section 306(a) and proposed Exchange Act rule 101(a), without regard to the actual source of the shares sold. A subsequent sale of 250 shares of common stock during the same blackout period, however, would not trigger the statutory trading prohibition since the option shares would have been deemed sold in the first transaction.

Request for Comment

- Is it appropriate to presume that any equity securities acquired or disposed of during a blackout period were acquired in connection with service or employment as a director or executive officer? If not, is there an alternative way to determine the source of equity securities acquired or disposed of during a blackout period that effectively prevents evasion of the statutory trading prohibition of section 306(a) and proposed Regulation BTR?
- Where the presumption is applied, should the equity securities acquired in connection with service or employment as a director or executive officer that were deemed sold or otherwise disposed of be excluded for purposes of applying the presumption to a sale or other disposition of equity securities in a subsequent blackout period? If so, explain why.
- Should the presumption that equity securities acquired or disposed of during a blackout period were acquired in connection with service of employment as a director or executive officer be rebuttable? If so, under what circumstances?

(d) *Transitional Matters*

Except as provided in proposed Exchange Act rule 100(a), equity securities acquired by an individual before he or she became a director or executive officer of an issuer would not be subject to section 306(a) of the Act or proposed Regulation BTR.[58] This would exclude from the statutory trading prohibition any equity securities acquired under a plan, contract, authorization or arrangement while the individual was an employee, but not a director or executive officer, of the issuer.

On the other hand, equity securities acquired by an individual in connection with service or employment as a director or executive officer before a company constituted an ''issuer'' under the definition contained in section 2(a)(7) of the Act would be subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Similarly, equity securities acquired in connection with an individual's service or employment as a director or executive officer before the effective date of the Act would be subject to

[54] *See* n. 52 above.

[55] As defined in Exchange Act rule 16a-1(e) (17 CFR 240.16a-1(e)) to include ''any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and shall include adoptive relationships.''

[56] *See* proposed Exchange Act rule 100(l).

[57] 15 U.S.C. 78m(d).

[58] *See* section II.B.4(a) above.

section 306(a) and proposed Regulation BTR.

Request for Comment

• Should we exclude equity securities acquired by an individual before he or she became a director or executive officer of an issuer from section 306(a) of the Act and proposed Regulation BTR?

• Is it necessary or appropriate to treat equity securities acquired by a director or executive officer before a company became an ''issuer'' as defined in section 2(a)(7) of the Act as equity securities subject to section 306(a) and proposed Regulation BTR to prevent evasion of the statutory trading prohibition?

(e) *Exempt Transactions*

Section 306(a)(3) of the Act permits us to provide appropriate exemptions from the statutory trading prohibition of section 306(a), including purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election. Because we believe that there are a number of transactions involving the acquisition or disposition of an equity security of an issuer that do not appear to present the concerns that section 306(a) is intended to remedy, we propose to exempt several types of transactions from the statutory trading prohibition if adequate safeguards exist. Proposed Exchange Act rule 101(c) would exempt:

• Acquisitions of equity securities under dividend or interest reinvestment plans;

• Purchases or sales of equity securities pursuant to a contract, instruction or written plan that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c); [59]

• Purchases or sales of equity securities pursuant to certain ''tax-conditioned'' plans,[60] other than discretionary transactions; [61] and

• Increases or decreases in the number of equity securities held as a result of a stock split or stock dividend applying equally to all equity securities of that class, including a stock dividend in which equity securities of a different issuer are distributed, and acquisitions of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.

In the case of the acquisition of an equity security pursuant to a dividend or interest reinvestment plan, under proposed Exchange Act rule 101(c)(1) the acquisition would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR if made under a broad-based plan providing for the regular reinvestment of dividends or interest that does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants.[62] Similarly, under proposed Exchange Act rule 101(c)(4), an increase or decrease in the number of equity securities held by a director or executive officer resulting from a stock split or stock dividend would be exempt where the transaction applies equally to all equity securities of that class, including a stock dividend in which equity securities of a different issuer are distributed, as would an acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.[63]

Because a purchase or sale of equity securities pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c) is made pursuant to an advance election, such a transaction does not necessarily give rise to the problem that section 306(a) is intended to address as long as the individual was not aware of the impending blackout.[64] Under proposed Exchange Act rule 101(c)(2), transactions that satisfy the affirmative defense conditions of Exchange Act rule 10b5–1(c) would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR as long as the advance election was not made or modified during the blackout period or at the time the director or executive officer was aware of the impending blackout. To be eligible for the exemption, the binding contract must have been executed, the instruction must have been given or the written plan must have been adopted, before the director or executive officer received notice of the imposition of the blackout period. In addition, a director or executive officer must not be aware of the impending blackout at the time the contract is executed, the instruction is given or the plan is adopted, including any modifications to the contract, instruction or plan.

Under proposed Exchange Act rule 101(c)(3), a purchase or sale of equity securities pursuant to a Qualified Plan,[65] Excess Benefit Plan [66] or Stock Purchase Plan [67] would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR.[68] These plans must satisfy specified provisions of the Internal Revenue Code that are designed to ensure non-discriminatory treatment of plan participants and generally involve automatic, periodic acquisitions of equity securities made pursuant to advance elections. Foreign private issuers may have employee benefit plans that are not required to satisfy the Internal Revenue Code, but instead satisfy foreign tax and other laws. As proposed, these plans would not come within the exemption under proposed Exchange Act rule 101(c)(3).

Generally, the exemption would not extend to ''discretionary transactions,'' [69] such as an intra-plan transfer involving an issuer equity securities fund or a cash distribution funded by a volitional disposition of an issuer equity security, that occurred during a blackout period. Except as described in the following sentence, these transactions would be considered

[59] 17 CFR 240.10b5–1(c).

[60] *See* Exchange Act rule 16b–3(c) (17 CFR 240.16b–3(c)). These include Qualified Plans, Excess Benefit Plans and Stock Purchase Plans as defined in Exchange Act rule 16b–3(b) (17 CFR 240.16b–3(b)). *See* nn. 65, 66 and 67 below.

[61] As defined in Exchange Act rule 16b–3(b)(1) (17 CFR 240.16b–3(b)(1)).

[62] This exemption would be similar to the exemption for dividend and interest reinvestment plans under Exchange Act rule 16a–11 (17 CFR 240.16a–11).

[63] This exemption would be similar to the exemption for stock splits, stock dividends and pro rata rights under Exchange Act rule 16a–9 (17 CFR 240.16a–9).

[64] Awareness of an impending blackout period would be considered awareness of material, nonpublic information that would render the affirmative defense unavailable. *See* Exchange Act rule 10b5–1(c)(1)(i)(A) (17 CFR 240. 10b5–1(c)(1)(i)(A)).

[65] As defined in Exchange Act rule 16b–3(b)(4) (17 CFR 240.16b–3(b)(4)).

[66] As defined in Exchange Act rule 16b–3(b)(2) (17 CFR 240.16b–3(b)(2)).

[67] As defined in Exchange Act rule 16b–3(b)(5) (17 CFR 240.16b–3(b)(5)).

[68] Accordingly, as proposed an acquisition or disposition of equity securities made in connection with death, disability, retirement or termination of employment or a transaction involving a diversification or distribution required by the Internal Revenue Code to be made available to plan participants would be exempt from the statutory trading prohibition of section 306(a) of the Act because these transactions are not discretionary transactions.

[69] 17 CFR 240.16b–3(b)(1). Exchange Act rule 16b–3(b)(1) defines the term ''discretionary transaction'' to mean ''a transaction pursuant to an employee benefit plan that: (i) Is at the volition of a plan participant; (ii) is not made in connection with the participant's death, disability, retirement or termination of employment; (iii) is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and (iv) results in either an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security.''

a purchase or sale of equity securities of the issuer subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Notwithstanding the foregoing, a discretionary transaction that occurred during a blackout period pursuant to an advance election that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c) as described above would be eligible for exemption from the statutory trading prohibition of section 306(a) and proposed Regulation BTR.

Request for Comment

• Is it appropriate to exempt the described transactions from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If not, explain why.

• Should we consider other transactions for exemption from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt a transfer of equity securities without the receipt of consideration, such as a bona fide gift, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt an acquisition or disposition of equity securities resulting from an involuntary event, such as the death of a director or executive officer or pursuant to an order of a court or other judicial or administrative authority, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt the closing of a derivative security position as a result of its exercise or conversion, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position, such as an employee stock option, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption? Commenters are requested to justify their views in light of the express statutory prohibition against acquiring equity securities of an issuer in connection with service or employment as a director or executive officer during a blackout period. Should such an exemption be limited to situations where the position was established without awareness of an impending blackout period? Should such an exemption be limited to situations where the position would expire, mature or otherwise terminate during the blackout period?

—Should we exempt the closing of a derivative security position as a result of its exercise or conversion, and the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption? Should such an exemption be limited to situations where the position was established without awareness of an impending blackout period?

• Should we provide an express exemption for the exercise of a put equivalent position during a blackout period written by a director or executive officer before a blackout period that is exercised by a counterparty during the blackout period? Should such an exemption be limited to circumstances where the director or executive officer does not exercise any influence over the timing of the exercise?

• Should we provide an express exemption for a sale or other transfer of the equity security by a director or executive officer that is compelled by the laws or other requirements of an applicable jurisdiction? If so, what should be the scope of the exemption?

• Is it appropriate to exempt a discretionary transaction from the statutory trading prohibition of section 306(a) and proposed Regulation BTR where the transaction occurs pursuant to an advance election that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c)? If not, should a discretionary transaction that otherwise would occur during a blackout period be deferred until the end of the blackout period rather than prohibited?

• Should an acquisition or disposition of equity securities made in connection with death, disability, retirement or termination of employment or transactions involving a diversification or distribution required by the Internal Revenue Code to be made available to plan participants be subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, explain why.

• Do foreign private issuers have employee benefit plans that are substantially similar to Qualified Plans, Excess Benefit Plans and Stock Purchase Plans that should be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

• Because there may be a variety of employee benefit plans and other compensatory arrangements under foreign law that may not be eligible for the exemption under proposed Exchange Act rule 100(c)(3) because they do not satisfy the requirements of the Internal Revenue Code, should we exempt purchases and sales of equity securities pursuant to compensatory plans and arrangements of a foreign private issuer that are substantially similar to Qualified Plans, Excess Benefit Plans and Stock Purchase Plans? Alternatively, because of the potential number of variations in plans and arrangements, should we address exemptions in this area on a case-by-case basis?

5. Blackout Period

Section 306(a)(4)(A) of the Act defines the term ''blackout period'' to mean any period of more than three consecutive business days during which the ability of not fewer than 50% of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell or otherwise acquire or transfer an interest in any equity security of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan. Proposed Exchange Act rule 100(b) would clarify the scope of this provision and address the application of this definition to both domestic and foreign private issuers.

Request for Comment

• Should we define the term ''blackout period'' to be shorter than the three consecutive business days specified in the statute? If so, how long should the period be and why? Are there particular types of abuses that we should consider in determining the appropriate length of the period?

—In view of the fact that the statutory definition will automatically become effective on January 26, 2003, would there be any adverse consequences from having a more restrictive definition in our rules than the definition that will become effective under the statute?

—If we were to define the term ''blackout period'' to be shorter than three consecutive business days, how should we harmonize the definition with the definition of ''blackout period'' contained in the interim final rule recently issued by the Department of Labor under section 306(b) of the Act?

(a) *Individual Account Plans*

Section 306(a)(5) of the Act defines the term ''individual account plan'' by

reference to section 3(34) of the Employee Retirement Income Security Act of 1974 (''ERISA'').[70] Section 3(34) defines the term ''individual account plan'' to mean ''a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.'' [71] This definition encompasses a variety of pension plans, including section 401(k) plans, profit-sharing and savings plans, stock bonus plans and money purchase pension plans. Proposed Exchange Act rule 100(j) would clarify that, for purposes of section 306(a) of the Act, this definition also includes non-qualified deferred compensation arrangements that reflect the elements described in the definition. As provided under section 306(a)(5), proposed Exchange Act rule 100(j) would exclude a one-participant retirement plan from the definition.[72]

Request for Comment

• Does the general statement about non-qualified deferred arrangements provide sufficient guidance as to when these arrangements would be considered ''individual account plans'' for purposes of section 306(a)(5) and proposed Exchange Act rule 100(j)? If not, what additional guidance should we give in this area?

(b) *50% Test*

Under section 306(a)(4)(A) of the Act, a blackout period occurs only where at least 50% of the participants or beneficiaries under all individual account plans maintained by the issuer are subject to a temporary suspension by the issuer or by a fiduciary of the plan of more than three consecutive business days that prevents the participants or beneficiaries from purchasing, selling or otherwise acquiring or transferring an interest in any equity security of the issuer held in the individual account plans. Proposed Exchange Act rule 100(b) would clarify that, for purposes of making this calculation, the individual account plans ''maintained by the issuer'' would include only individual account plans in which participants or beneficiaries held or could hold equity securities of the issuer, whether or not the account plan actually contained equity securities of the issuer at the time of the calculation. This would include individual account plans that:

• Permit participants or beneficiaries to invest their plan contributions in the equity securities of the issuer;

• Include an ''open brokerage window'' that permit participants or beneficiaries to invest in the equity securities of any publicly-traded company, including the issuer;

• Match employee contributions with equity securities of the issuer; or

• Reallocate forfeitures that included equity securities of the issuer to the remaining plan participants.

The proposed rule also would provide that, for purposes of determining the individual account plans ''maintained by the issuer,'' the rules under section 414(b), (c), (m) and (o) of the Internal Revenue Code [73] with respect to entities treated as a single employer with respect to an issuer would apply.[74] The ''single employer'' rules of section 414 are designed to aggregate the employees of an affiliated group of businesses to ensure compliance with the limitations on the absolute and relative amounts of benefits that can be provided to individual employees or groups of employees under tax-qualified employee benefit programs.[75] While each business within a controlled group [76] may have its own employee benefit plan or plans, and each plan can provide different benefit structures, profiles of the covered employee groups, including the compensation and benefit levels for each participant, must be maintained and monitored to enable the single employer, deemed to exist for the controlled group, to determine that the plans are in compliance with the applicable requirements. We believe that these rules reflect the appropriate principles for determining the individual account plans of an issuer and its parent, subsidiary and affiliated entities that should be aggregated for purposes of determining whether a blackout period affects 50% or more of the individual account plans maintained by an issuer.

Request for Comment

• Is it necessary or appropriate to apply the ''single employer'' rule of section 414(b), (c), (m) and (o) of the Internal Revenue Code for purposes of determining the individual account plans ''maintained by the issuer'' for purposes of the 50% test? If not, why not? Should some of the provisions be applied, but not others? If so, which ones? For example, is it necessary or appropriate to apply the rules under section 414(m), which address whether separate service organizations constitute an affiliated group, for purposes of identifying individual account plans maintained by the issuer?

• Is there an alternative ''control group'' concept that we should use to determine the individual account plans that are to be considered ''maintained by the issuer'' for purposes of the 50% test? For example, would it be appropriate to use the definition of an ''affiliate'' set forth in section 407(d)(7) of the Employee Retirement Income Security Act of 1974 to determine which individual account plans are ''maintained by the issuer'' for purposes of section 306(a)(4)(A)?

• Is it necessary or appropriate to include individual account plans that merely provide for an ''open brokerage window'' that permit participants or beneficiaries to invest in the equity securities of any publicly-traded company in the description of individual account plans that should be considered in the 50% test? If not, explain why.

(c) *Application of 50% Test*

For purposes of section 306(a) of the Act, once an issuer identified the relevant individual account plans for purposes of the 50% test, it would apply the test by comparing the number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer that will be subject to a temporary

[70] 29 U.S.C. 1002(34).

[71] *Id.*

[72] A ''one-participant retirement plan'' is defined under section 101(i)(8)(B) of ERISA (29 U.S.C. 1021(i)(8)(B)) to mean ''a retirement plan that: (i) On the first day of the plan year: (I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or (II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)), (ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business, (iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses), (iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and (v) does not cover a business that leases employees.''

[73] 26 U.S.C. 414(b), (c), (m) and (o). Section 414(b) provides that, for purposes of various provisions of the Internal Revenue Code, all employees of all corporations that are members of a ''controlled group'' of corporations are to be treated as employed by a single employer. Section 414(c) provides ''single-employer'' treatment for certain groups of partnerships and proprietorships under common control, while section 414(m) provides ''single-employer'' treatment for organizations that provide services for one another.

[74] See proposed Exchange Act rule 100(b)(3).

[75] These include prohibitions against discriminating in favor of highly compensated employees, vesting requirements and benefit limits.

[76] A ''controlled group'' of corporations is defined in section 1563(a) of the Internal Revenue Code (26 U.S.C. 1563(a)).

suspension of trading in such equity securities to the overall number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer.[77] If this percentage is at least 50%, the statutory trading prohibition would apply to the directors and executive officers of a domestic issuer.

In the case of a foreign private issuer, however, a concurrent second calculation would be applied to determine if the statutory trading prohibition was triggered. This calculation would compare the number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer subject to the temporary suspension of trading in such equity securities to the overall number of participants or beneficiaries under all individual account plans maintained by the issuer worldwide.[78] If this percentage is greater than 15% and the concurrent 50% test also is met, the statutory trading prohibition would apply to the directors and executive officers of the foreign private issuer. As previously discussed, although this second calculation is not reflected in section 306(a), we believe that such a test should be applied to ensure that the statutory trading prohibition is limited to the directors and executive officers of foreign private issuers where a significant portion of their overall plan participants or beneficiaries are located in the United States.

The application of these principles is illustrated by the following examples:

- *Example 1.* Company X is a foreign private issuer with 100,000 employees worldwide who participate in pension plans maintained by the issuer. 30,000 participants are located in the United States. A fiduciary of the issuer's U.S. pension plan initiates a blackout that will affect 16,000 of the U.S. participants. Since plan participants located in the United States who are subject to the blackout comprise 50% or more of the total number of participants located in the United States (16,000/30,000), and plan participants located in the United States who are subject to the blackout represent more than 15% of the total number of plan participants worldwide (16,000/100,000), the statutory trading prohibition of section 306(a) would apply to the foreign private issuer's directors and executive officers.
- *Example 2.* Company X is a foreign private issuer with 100,000 employees worldwide who participate in pension plans maintained by the issuer. 10,000 participants are located in the United States. A fiduciary of the issuer's U.S. pension plan initiates a blackout that will affect 7,000 of the U.S. participants. Although plan participants located in the United States who are subject to the blackout comprise 50% or more of the total number of participants located in the United States (7,000/10,000), because plan participants located in the United States who are subject to the blackout represent less than 15% of the total number of plan participants worldwide (7,000/100,000), the statutory trading prohibition of Section 306(a) would not apply to the directors and executive officers of the foreign private issuer.

Request for Comment

- Is it appropriate to limit the scope of the definition of the term ''blackout period'' to situations where the participants or beneficiaries under individual account plans that are affected by the temporary trading suspension represent 50% or more of the participants or beneficiaries under individual account plans located in the United States and its territories and possessions?
- Is it appropriate to limit the scope of the definition of the term ''blackout period'' in the case of a foreign private issuer to situations where the participants or beneficiaries located in the United States under all individual account plans maintained by the issuer subject to the temporary trading suspension also represent a significant portion of the overall number of the participants or beneficiaries under all individual account plans maintained by the issuer worldwide? If so, should the threshold for applying section 306(a) be higher or lower (such as 20% or 10%) than 15% of worldwide individual account plan participants or beneficiaries? If not, what would be the rationale for applying section 306(a) to a broader group of foreign private issuers?
- What would be an appropriate measurement date for determining the number of participants or beneficiaries in an individual account plan for purposes of conducting the 50% test? Should this number be determined as of the end of the most recent plan fiscal year, the end of the most recent fiscal quarter or some other date? What are the relevant considerations in selecting an appropriate measurement date?
- Is it necessary or appropriate for the proposed rules to ensure that the 50% test considers plan participants or beneficiaries who are United States citizens or residents who are on temporary assignment abroad?
- Would it be helpful for us to provide additional examples of the application of the 50% test? If so, are there specific fact patterns that we should address in the examples?

(d) *Exceptions to Definition of Blackout Period*

Section 306(a)(4)(B) of the Act expressly excludes two categories of transactions from the definition of ''blackout period.'' These exceptions include:

- A regularly scheduled period in which the participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if such period is:

—Incorporated into the individual account plan; and

—Timely disclosed to employees before they become participants under the individual account plan or as a subsequent amendment to the plan; and

—Any suspension described in the general definition of ''blackout period'' that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.[79]

Section 306(a)(4)(B) further directs us to prescribe regulations to implement these exceptions. Accordingly, proposed Exchange Act rule 102 clarifies the application of the exceptions.[80] Proposed Exchange Act rule 102(a) would address the exception for regularly scheduled blackout periods by providing that the requirement that the blackout period be incorporated in the individual account plan could be satisfied by including a description of the regularly scheduled blackout period, including the plan transactions to be suspended during, or otherwise affected by, the blackout and its frequency and duration, in the documents or instruments under which the plan operates. The proposed rule also would provide that disclosure of the blackout period to an employee would be timely if the employee was provided notice of the blackout period at any time prior to when, or within 30 calendar days after, he or she formally enrolled in the plan, or, in the case of a subsequent amendment to the plan, within 30 calendar days after the adoption of the amendment. The notice could be in any

[77] *See* proposed Exchange Act rule 100(b)(1).

[78] *See* proposed Exchange Act rule 100(b)(2).

[79] *See* section 306(a)(4)(B)(i) and (ii) of the Act.

[80] These clarifications are necessary to resolve ambiguities that might otherwise require literal compliance with the conditions of the exceptions in order to avoid having the temporary trading suspension constitute a blackout period for purposes of section 306(a)(1).

graphic form that is reasonably accessible to the intended recipient.

In the case of a blackout imposed to consolidate plans following a merger acquisition, divestiture or similar transaction, proposed Exchange Act rule 102(b) would clarify that the blackout period would not trigger the statutory trading prohibition of section 306(a) if its principal purpose is to enable individuals to become participants or beneficiaries in the plan, or to terminate participation in the plan, even though the blackout also is used to effect other administrative actions that are incidental to the admission or withdrawal of plan participants or beneficiaries. In addition, the proposed rule would provide that the exception would be available only with respect to the participants or beneficiaries of the acquired or divested entity.

Request for Comment

- Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that a regularly scheduled blackout period will be considered ''incorporated'' into an individual account plan if it is included in any of the documents or instruments, such as the summary plan description, under which the account plan operates? If so, explain why.
- Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that disclosure of a regularly scheduled blackout period to an employee would be timely if the employee was provided notice of the blackout period at any time prior to when, or within 30 calendar days after, he or she formally enrolls in the plan? If not, explain why. Should the timeliness of disclosure be measured with respect to an event other than formal enrollment in an individual account plan?
- Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that disclosure of a regularly scheduled blackout period to an employee would be timely in the event of a subsequent amendment to an individual account plan if the employee was provided notice of the blackout period within 30 calendar days after the adoption of the amendment? If not, explain why. Should the timeliness of disclosure be measured with respect to an event other than formal enrollment in an individual account plan?
- Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) the method by or form in which an issuer may timely disclose to employees the existence of a regularly scheduled blackout period? If so, explain why.
- Should the exception in proposed Exchange Act rule 102(a) contain a *de minimis* threshold that would not cause the loss of the exception in the event that some plan participants or beneficiaries failed to receive timely notice of the regularly scheduled blackout period? If so, should the *de minimis* threshold be a number (such as fewer than 5 or 10) or a percentage (such as fewer than 1% or 2%) of participants or beneficiaries that have individual account plans? What should the threshold be?
- Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(b) that a blackout period following a merger, acquisition, divestiture or similar transaction would be excepted if it principally involves the enrollment of individuals in an individual account plan? If not, why not? Should we identify the type of administrative activities that would be considered incidental to the principal purpose of the blackout period?
- Is it necessary or appropriate to limit the exception in proposed Exchange Act rule 102(b) to the participants or beneficiaries of the acquired or divested entity? If not, why not?

6. Remedies

Section 306(a) of the Act contains two distinct remedies. First, a violation of the statutory trading prohibition of section 306(a) is subject to a possible Commission enforcement action.[81] In addition, where a director or executive officer realizes a profit from a prohibited transaction during a blackout period, an issuer, or a security holder of the issuer on its behalf, may bring an action to recover the profit.[82] Accordingly, liability under section 306(a) of the Act is not limited solely to recovery of the profit realized by a director or executive officer from a prohibited transaction.[83] Proposed Regulation BTR embodies both of these contemplated remedies.

(a) *Commission Enforcement*

Section 306(a)(1) of the Act provides that it is unlawful for a director or executive officer of an issuer of any equity security, directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer during a blackout period with respect to the equity security if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer. This express prohibition against the trading of equity securities during a blackout period, as contemplated by section 306(a)(1) of the Act, provides the necessary predicate for enforcement actions and sanctions under the Exchange Act.[84]

Consequently, a director or executive officer who violates the statutory trading prohibition of section 306(a) would be subject to possible civil injunctive actions, cease-and-desist proceedings, civil penalties and all other remedies available to the Commission to redress violations of the Exchange Act.[85] Under appropriate circumstances, a director or executive officer also could be subject to possible criminal liability.[86]

(b) *Private Right of Action*

Section 306(a)(2) of the Act provides that any profit realized by a director or executive officer subject to the statutory trading prohibition of section 306(a)(1) of the Act inures to, and is recoverable by, the issuer, irrespective of the director or executive officer's motive or intention upon entering into the transaction. This remedy reflects a strict standard of liability for prohibited transactions that is similar to the standard that forms the basis for a private right of action under section 16(b) of the Exchange Act.[87]

Under section 306(a)(2)(B) of the Act, the issuer may institute an action to recover a director or executive officer's realized profits from a prohibited transaction at law or in equity in any court of competent jurisdiction. If the issuer fails or refuses to bring an action within 60 days after the date of request, or fails diligently to prosecute the action

[81] *See* sections 3(b)(1) and 306(a)(1) of the Act.

[82] *See* section 306(a)(2)(A) and (B) of the Act.

[83] In this respect, section 306(a) of the Act differs from section 16(b) of the Exchange Act, where the statute provides solely a private right of action (and profit disgorgement can be the only consequence). In addition, a transaction that is subject to the statutory trading prohibition of section 306(a) may, under some circumstances, also result in the operation of the ''short-swing profits'' recovery provision of section 16(b) of the Exchange Act and form the basis for an action under Exchange Act rule 10b–5 (17 CFR 240.10b–5).

[84] Section 3(b)(1) of the Act provides that ''[a] violation of any provision of the Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 * * * or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations.'' Thus, a violation of section 306(a) of the Act, although not codified in the Exchange Act, would be subject to the same penalties as an Exchange Act violation.

[85] *See* sections 21 and 21C of the Exchange Act (15 U.S.C. 78u and 78u–3).

[86] *See* section 32 of the Exchange Act (15 U.S.C. 78ff).

[87] As under section 16(b) of the Exchange Act, issues of scienter and materiality, which are necessary elements of an anti-fraud action under the Exchange Act, would not be relevant to a private action under section 306(a) and proposed Regulation BTR.

thereafter, the owner of any equity security of the issuer may bring such an action in the name, and on behalf of, the issuer.

Because section 306(a) protects pension plan participants or beneficiaries, we believe that Congress intended to provide standing to bring an action to all holders of the equity securities of the issuer, including plan participants and beneficiaries who hold equity securities of the issuer in their individual account plans, as of the date of the subject transaction. Proposed Exchange Act rule 103 would reflect this approach. As set forth in section 306(a)(2)(B), no suit may be brought more than two years after the date on which the recoverable profits were realized.

Request for Comment

• Where a transaction involving the equity securities of an issuer gives rise to both private right of action under section 306(a) and section 16(b) of the Exchange Act, should a recovery under one provision be offset against a recovery under the other provision? If so, explain why.

• Similarly, where a transaction involving the equity securities of an issuer gives rise to both private right of action under section 306(a) and an action under Exchange Act rule 10b–5, should a recovery under one provision be offset against a recovery under the other provision? If so, explain why.

As noted above, the private right of action under section 306(a)(2) serves a remedial purpose that is similar to the purpose of section 16(b). While foreign private issuers would be subject to section 306(a)(2), they are not subject to the profit recovery and other provisions of section 16. This treatment reflects foreign private issuers' concerns relating to the strict liability nature of section 16(b), as well as jurisdictional issues that would likely arise in connection with applying section 16(b) to offshore transactions involving the equity securities of foreign private issuers by non-U.S. resident directors and officers.

Request for Comment

• Should foreign private issuers be exempt from the private right of action under section 306(a)(2)? If so, what are the jurisdictional and policy reasons that would support such an exemption? Are there other ways to address the jurisdictional issues and other matters relating to foreign private issuers in this area? Is the potential for Commission enforcement action under section 306(a) a sufficient remedy with respect to foreign private issuers?

(c) *Realized Profits*

For purposes of section 306(a) of the Act, a security holder could initiate a private action only if a director or executive officer realized a profit as a result of a purchase, sale or other acquisition or transfer of an equity security during a blackout period. As under section 16(b) of the Exchange Act, this concept of realized profit would mean that the director or executive officer received a direct or indirect pecuniary benefit from the transaction.[88] The question of whether a transaction has resulted in the realization of recoverable profits is complex. It is further complicated where the prohibited transaction is a purchase or other acquisition of equity securities during a blackout period.

There are several possible ways to calculate realized profits. In the case of a sale or other disposition of equity security during a blackout period, this includes:

• The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;

• The difference between the most recent purchase or acquisition price, if any, of an equity security acquired in connection with service or employment as a director or executive officer before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;

• The difference between the lowest purchase or acquisition price, if any, of an equity security acquired in connection with service or employment as a director or executive officer during a specified period before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security in the case of a transfer without receipt of consideration;

• The difference between the average market value of the equity securities of the issuer during a specified period before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration; and

• The difference between the actual amount received as a result of the sale or other transfer of the equity security and the market value of the equity securities of the issuer on the first date after the end of the blackout period.[89]

In the case of a purchase or other acquisition of an equity security during a blackout period, this includes:

• The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received in the case of a sale of the equity security or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;

• The difference between the purchase or acquisition price, if any, of the equity security and the market value of the equity securities of the issuer on the first date after the end of the blackout period;

• The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received or (b) the market value of the equity security at the time of transfer without receipt of consideration in the case of a sale or other transfer of any equity security (whether or not the security purchased or acquired) after the end of the blackout period; and

• The difference between the purchase or acquisition price, if any, of the equity security and the earlier of (a) the actual amount received upon the sale or other disposition of the equity security or (b) the market value of the equity security on the first anniversary of the last day of the blackout period.

In view of the complexity associated with this issue, we are not proposing a specific approach for calculating realized profits at this time. Instead, we solicit comment on the various approaches described above, as well as any other approaches that would be consistent with the purposes of section 306(a).

Request for Comment

• Should we propose a specific formula for the calculation of ''realized profits'' that are recoverable under the private right of action provided in section 306(a)?

—If so, what would be an appropriate calculation for a transaction involving a sale or other transfer of equity securities during a blackout period?

[88] *See* Exchange Act rule 16a–1(a)(2)(i) (17 CFR 240.16a–1(a)(2)(i)). *See* also *Feder* v. *Frost,* 220 F.3d 29, 34 (2d Cir. 2000).

[89] In addition, where the prohibited transaction involves the disposition of a derivative security, the profit recovery guidelines of Exchange Act rule 16b–6(c) and (d) (17 CFR 240–16b–6(c) and (d)) could possibly apply.

—Similarly, what would be an appropriate calculation for a transaction involving a purchase or other acquisition of equity securities during a blackout period? In either case, explain how the suggested calculation specifically relates to the ability to profit by trading during the blackout period.

• Should we refrain from providing guidance, and instead leave profit calculations to the courts based on the facts and circumstances of the particular case?

7. Notice

Section 306(a)(3) of the Act requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that would trigger the statutory trading prohibition of section 306(a)(1). Proposed Exchange Act rule 104 would clarify how issuers would satisfy this statutory directive.

(a) *Notice Requirement*

Proposed Exchange Act rule 104(a) would reflect the general requirement of section 306(a)(3) of the Act that, in any case in which a director or executive officer of an issuer of any equity security is subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR, the issuer of the equity securities must provide notice of the blackout period to the director or executive officer, as well as to the Commission.[90]

(b) *Content of Notice*

The required content of the notice would be set forth in proposed Exchange Act rule 104(b)(1).[91] As proposed, the notice would include the following information:

• The reason or reasons for the blackout period;

• A description of the plan transactions to be suspended during, or otherwise affected by, the blackout period;

• The description of the class of equity securities subject to the blackout period;

• The actual or expected beginning and ending dates of the blackout period; and

• The name, address and telephone number of the person designated by the issuer to respond to inquiries about the blackout period, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.

An indication of the beginning and ending dates of the blackout period is intended to enable directors and executive officers to factor the anticipated duration of the blackout into their pre-blackout period investment activities and decisions and to apprise them as to when they would be able to recommence their trading activities. Given the potential impact of a blackout period on a director or executive officer's ability to engage in transactions involving equity securities of the issuer, it is likely that they may have questions about a blackout period. For this reason, the proposed notice would have to contain the name, address and telephone number of the person designated by the issuer to answer questions concerning the blackout period.

Request for Comment

• Is the information proposed to be included in the required notice useful? Should the required notice include additional or different information?

(c) *Notice to Directors and Executive Officers*

Proposed Exchange Act rule 104(b)(2) would require notice to directors and executive officers to be provided at least 15 calendar days in advance of commencement of the blackout period. The notice could be in any graphic form that is reasonably accessible to the intended recipient. For purposes of the proposed rule, notice would be considered provided as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically.

In some instances, it may not be practicable for an issuer to provide the required notice to its directors and executive officers within the time period specified in the proposed rule. For example, where commencement of the blackout period was due to events that were unforeseeable, or to circumstances that were beyond the reasonable control of, the issuer, such as a major computer or other technical failure, a 15-day advance notice requirement may be impracticable.[92] The proposed rule would excuse an issuer from the 15-day notice requirement where the issuer makes a written determination that the circumstances preclude compliance with the requirement and notifies the affected directors and executive officers as soon as reasonably practicable. We anticipate that issuers would need to rely on this exception only in rare circumstances.

If there was a subsequent change in the beginning or ending dates of the blackout period, an issuer would be required to provide directors and executive officers with an updated notice explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in the prior notice. The updated notice would be required to be provided as soon as reasonably practicable, unless such notice in advance of the termination of a blackout period is impracticable.

Request for Comment

• Is 15 days advance notice sufficient? Should the advance notice period be longer or shorter (such as 30 days or 10 days)? Should the reference to days be ''business,'' rather than ''calendar,'' days? Should we adopt a more flexible ''reasonable time'' standard?

• For purposes of the notice requirement as it applies to directors and executive officers, should we establish an outside maximum period (such as 30 days) in which to provide the notice to ensure that notice is not provided so far in advance of the blackout period commencement date as to undermine its importance to directors and executive officers?

• Is the proposed exception to the 15-day notice requirement of proposed Exchange Act rule 104 appropriate? Is the proposed exception too broad? If so, how should it be revised to ensure that issuers provide timely notice while still providing flexibility for unforeseeable events?

• Does a general exception for ''unforeseeable circumstances'' and ''circumstances that are beyond the control of the issuer'' provide issuers with sufficient guidance as to the types of situations that would not be subject

[90] Although notice is required by section 306(a)(6) of the Act, an issuer's failure to provide notice would not be an affirmative defense to an enforcement action for a violation of section 306(a)(1) or proposed Exchange Act rule 101(a) or to a private action to recover profits under section 306(a)(2) or proposed Exchange Act rule 103(a). In addition, an issuer's failure to provide notice where a director or executive subsequently violated the statutory trading prohibition of section 306(a)(1) may result in an enforcement action against the issuer for causing the director or executive officer's violation.

[91] While section 306(a)(3) of the Act does not require a notice to contain any specific information, we believe that it is essential to fulfilling the purpose of the provision to ensure that the notice contain certain minimum information about the blackout that would be of value to affected directors and executive officers and the public.

[92] We note that, for purposes of section 306(b) of the Act, the 30-day advance notice requirement does not apply if 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 ERISA or where commencement of the blackout period is due to events that were unforeseeable or circumstances that were beyond the control of the issuer or the plan administrator. *See* section 306(b)(1)(i)(2)(C) of the Act.

to the 15-day notice requirement? If not, what additional guidance should we give in this area?

• Is there a better means of ensuring that directors and executive officers receive timely notification of an impending blackout period? Does the required notice need to be in graphic form or would directors and executive officers find oral notice sufficient?

(d) *Notice to the Commission*

While section 306(a)(6) of the Act merely requires that an issuer provide notice of an impending blackout period to the Commission, we believe that the principal purpose of this requirement is to ensure that an issuer's security holders have notice of the blackout period so that they can monitor compliance with the statutory trading prohibition. This objective is best achieved by requiring that the notice to the Commission be provided in a publicly-available document. Accordingly, proposed Exchange Act rule 104(b)(3) would require that notice to the Commission be provided on form 8–K. The content of the required report on form 8–K would be the same as the content of the required notice to directors and executive officers.

The proposed new disclosure item under form 8–K would require an issuer to disclose the imposition of a blackout period (as defined in proposed Exchange Act rule 100(b)) upon the earlier of receipt of notice of the blackout from the plan administrator [93] or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.[94]

Foreign private issuers are not required to file current reports on form 8–K.[95] We are not proposing to change this reporting requirement at this time. Instead, we are proposing changes to forms 20–F and 40–F that would require a foreign private issuer to file as an exhibit to the report copies of all notices provided to directors and executive officers pursuant to section 306(a)(3) of the Act and proposed Exchange Act rule 104 during the previous fiscal year, unless the notices previously have been provided to the Commission in a report on form 6–K. Of course, a foreign private issuer may make the required disclosure under cover of form 6–K, and we encourage foreign private issuers to do so.

Request for Comment

• Should the required notice to the Commission have to be filed on form 8–K? Is another approach for filing the required notice with the Commission, such as a posting on an issuer's Internet web site, more appropriate? If so, how would the imposition of the blackout period be communicated to investors?

• Is the information in the proposed form 8–K item useful? Should the proposed form 8–K item include additional or different information?

• Is the proposed triggering event for the form 8–K filing appropriate? Is the person designated by the issuer to oversee the issuer's pension plans the proper person to whom the issuer should look for determining when a form 8–K is required? Would another person, such as the agent for service of legal process for the issuer, be more appropriate?

• Should we require foreign private issuers to file the notice required under section 306(a)(3) and proposed Exchange Act rule 104 under cover of form 6–K? Should we otherwise require a foreign private issuer to make such notices public before the filing of an annual report on form 20–F or 40–F? If so, how?

• Where the pension plan of a foreign private issuer is subject to section 15(d) of the Exchange Act and files reports on form 11–K,[96] should the plan be required to file a form 8–K disclosing the blackout period? If so, should such a requirement be in addition to, or replace, the requirement that the foreign private issuer provide notice to the Commission?

(e) *Transition Period*

Section 306(c) of the Act provides that section 306 will take effect on January 26, 2003. Consequently, for purposes of proposed Regulation BTR, the notice requirement would apply to blackout periods commencing on or after January 26, 2003. For blackout periods occurring between January 26, 2003 and February 10, 2003 (the date 15 days after the effectiveness of the statute), issuers should furnish notice as soon as reasonably possible. This approach is intended to ensure that the statutorily-required notice is provided with respect to blackout periods that commence before February 11, 2003.

III. General Request for Comment

We are proposing Regulation BTR to implement section 306(a) of the Sarbanes-Oxley Act. We solicit comment, both specific and general, upon each aspect of the proposed rules. If you would like to submit written comments on the proposed rules, to suggest changes or to submit comments on other matters that might affect the proposed rules, we encourage you to do so.

We also solicit comment on the following general aspects of the proposed rules:

• Are there aspects of the proposed rules that we should eliminate? Are there aspects that we should supplement?

• Are there aspects of the proposed rules where the concepts developed under section 16 of the Exchange Act should not be used as a guide to clarify the scope and application of section 306(a)?

• Are the proposed transition provisions with respect to the required notice to directors and executive officers and the Commission appropriate? Should different transition provisions be considered?

In addition, we request comment on whether any further changes to our rules and forms are necessary or appropriate to implement the objectives of section 306(a) of the Act and proposed Regulation BTR.

IV. Paperwork Reduction Act

The proposed rules and form amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[97] We are submitting the proposed rules and form amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[98] The title for the proposed collection of information with respect to the proposed rules will be ''Regulation BTR.'' The title for the collections of information with respect to the

[93] Such notice is required to be provided to the issuer under section 306(b)(1)(i)(2)(E) of the Act.

[94] *See* proposed item 5.04 of form 8–K. This proposed amendment to form 8–K would supersede the proposal adding an item requiring disclosure of any known event that would have the effect of materially limiting, restricting or prohibiting participants in an employee benefit, retirement or stock ownership plan from acquiring, disposing or converting their holdings, other than a periodic or other limitation, restriction or prohibition based on presumed or actual knowledge of or access to material non-public information, if that plan is broadly available to the issuer's employees. *See* proposed item 5.04 to form 8–K, Release No. 33–8106 (June 17, 2002) (67 FR 42914). While today's proposal is narrower than the June proposal, it is consistent with section 306(a) of the Act.

[95] Foreign private issuers are required to file under the cover of form 6–K (17 CFR 249.306) copies of all material information that the foreign private issuer makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange or otherwise distributes to its security holders.

[96] 17 CFR 249.311.

[97] 44 U.S.C. 3501 *et seq.*

[98] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

proposed form amendments are ''Form 20–F,'' ''Form 40–F'' and ''Form 8–K.''

Form 20–F (OMB Control No. 3235–0288) is used by foreign private issuers to either register a class of securities under the Exchange Act or provide an annual report required under the Exchange Act. Form 40–F (OMB Control Number 3235–0381) is used by foreign private issuers to file reports under the Exchange Act after having registered securities under the Securities Act and by certain Canadian registrants.

Form 8–K (OMB Control No. 3235–0060) prescribes information, such as material events or corporate changes, that an issuer that is subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act must disclose on a current basis. Form 8–K also may be used, at an issuer's option, to report any events that the issuer deems to be of importance to security holders. Issuers also may use the form to satisfy the public disclosure requirements of Regulation FD.[99] An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

A. Summary of Proposed Rules

The proposed rules would clarify the application and prevent evasion of section 306(a) of the Sarbanes-Oxley Act. Section 306(a) prohibits the directors and executive officers of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity securities transactions, if the equity security was acquired in connection with the director's or executive officer's service or employment as a director or executive officer. Section 306(a) also requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the commencement of a blackout period. The proposed rules would specify the content and timing of this notice. The required notice is a ''collection of information'' requirement.

Compliance with the proposed rules would be mandatory. The information required by the proposed rules would not be kept confidential.

B. Reporting and Cost Burden Estimates

In order to estimate the potential compliance burden for the proposed collection of information, we have made the following assumptions. The notice requirements of section 306(a) of the Act apply to issuers that have a class of securities registered under section 12 of the Exchange Act. These requirements also apply, via section 15(d) of the Exchange Act, to issuers with an effective registration statement under the Securities Act that are not otherwise subject to the registration requirements of section 12 of the Exchange Act, and to issuers that have filed a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. We estimate that there are approximately 18,200 entities that fit these descriptions.[100]

We then calculated the number of issuers that are likely to maintain participant-directed individual account plans and the likely number of plans maintained by these issuers. Based on statistics tabulated by the Department of Labor with respect to the number of individual account plans currently in existence, we estimate that 30% of issuers maintain individual account plans and that, on average, these issuers maintain 1.5 plans each.[101]

We then developed an assumption 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 a given year. Based on research conducted by the Department of Labor to estimate the frequency of the imposition of blackout periods that would trigger the notice requirement,[102] as adjusted to reflect the narrower definition of the term ''blackout period'' for purposes of section 306(a),[103] we estimate that potentially affected plans will impose blackout periods on average once every five years. Among these, some plans will not impose blackout periods, some will impose blackout periods that do not trigger the notice requirement (that is, a temporary suspension for a period of three or fewer consecutive business days) and some may have blackout periods more frequently.

We therefore assume that 20% of potentially affected plans will impose a blackout period in any given year. We request comment and any additional information that would confirm or otherwise inform this assumption. The resulting number of plans assumed to be affected by the notice requirement is approximately 1,230 plans per year.[104]

In developing burden estimates, we estimated that it will take an issuer, on average, two hours to draft the notice to directors and executive officers and three hours to draft a current report on form 8–K which must be filed to provide the required notice to the

[99] 17 CFR 243.100–103.

[100] This estimate is based, in part, on the total number of issuers that are operating companies that filed annual reports on form 10–K (8,484), form 10–KSB (3,820), form 20–F (1,194) or form 40–F (134) during the 2001 fiscal year, which are required of all operating company issuers with a class of securities registered under section 12 of the Exchange Act and all such companies subject to section 15(d) of the Exchange Act, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N–SAR, and these entities are included in our estimate of the number of entities that would be subject to the requirements of proposed Regulation BTR. With regard to investment companies, because these entities generally do not have employees, and therefore typically do not maintain pension plans, there generally would be no blackout periods that would trigger the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Therefore, while there may be instances in which the proposed regulation would apply, we would expect the burden on investment companies as a group to be negligible. We request comment or additional information that might confirm or otherwise inform this assumption.

[101] Although the entities subject to the requirements of proposed Regulation BTR include registered investment companies, because it is unlikely that an investment company would maintain a pension plan and, as a practical matter, there would generally be no blackout periods triggering the statutory trading prohibition of section 306(a) of the Act, we excluded these entities from our subsequent calculations. (18,200 entities—4,500 investment companies × 30% × 1.5 plans = 6,165 plans.) This number is consistent with the Department of Labor's estimate of the number of participant-directed individual account plans that filed form 5500 for fiscal year 1998 (6,145 plans).

[102] In conducting its research, the Department of Labor 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 three to four 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. *See* Department of Labor Release (Oct. 11, 2002) (67 FR 64766), at section D, Paperwork Reduction Act Analysis.

[103] While the Department of Labor estimated that, on average, a pension plan would experience a blackout period once every four years, we have adjusted this estimate to reflect the fact that, for purposes of section 306(a) of the Act, the definition of a ''blackout period'' is limited to a temporary trading suspension involving issuer equity securities, while, for purposes of section 306(b), the definition of a ''blackout period'' includes a temporary suspension, limitation or restriction affecting the direction or diversification of account assets, plan loans or plan distributions.

[104] 6,165 plans × 20% = 1,233 plans. Based on the number of annual reports filed on forms 10–K, 10–KSB, 20–F and 40–F, we estimate that 90% of these plans are maintained by operating issuers (12,304/13632), 9% by foreign private issuers that file on form 20–F (1,194/13,632) and 1% by foreign private issuers that file on form 40–F (134/13,632).

Commission.[105] We then estimated that 75% of the burden associated with the preparation of the required notices will be borne by the issuer and that 25% of the burden will be borne by outside counsel retained by the issuer to assist in preparing the notices to directors and executive officers and to the Commission.[106] Preparation of the required notice for directors and executive officers is estimated to require approximately 1,845 hours [107] and cost approximately $250,000 annually,[108] and preparation of current reports on form 8–K to provide the required notice to the Commission is estimated to require approximately 2,490 hours [109] and cost approximately $336,000 annually.[110] The inclusion of the required information in annual reports on form 20–F is estimated to require approximately 249 hours [111] and cost approximately $33,625 annually,[112] and the inclusion of the required information in annual reports on form 40–F is estimated to require approximately 28 hours [113] and cost approximately $3,735 annually.[114]

The estimated burden for distribution of the notices takes several factors into account, including an assumed number of blackout periods triggering required notices, an assumed number of directors and executive officers affected annually, the number of notices that will be provided electronically and on paper and the differential costs of electronic and paper distribution methods.[115] Notices provided to the Commission on a current report on form 8–K and in the annual reports on form 20–F and 40–F would be transmitted electronically via the Commission's Electronic Data Gathering, Analysis and Retrieval (''EDGAR'') system. Those directors and executive officers not estimated to receive notice electronically are assumed to receive the notice on paper. No time or direct cost is attributed to electronic distribution methods other than the time required to prepare the notice or form, as the case may be, because it is assumed that notices are drafted in electronic form, issuers use existing infrastructure to communicate electronically and the cost of electronic transmission is negligible. Paper notice distribution to directors and executive officers is estimated to require approximately 512 hours [116] and cost approximately $3,075 annually.[117]

The total burden of providing the required notice to an issuer's directors and executive officers are estimated to be approximately 2,357 hours [118] and approximately $253,075 annually.[119] The total burden hours of complying with form 8–K, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 733,990 hours, an increase of 2,490 hours [120] from the current annual burden of 731,500 hours. The total burden hours of complying with form 20–F, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 652,472 hours, an increase of 249 hours [121] from the current annual burden of 652,223 hours. The total burden hours of complying with form 40–F, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 1,134 hours, an increase of 28 hours [122] from the current annual burden of 1,106 hours.

The total dollar cost of complying with form 8–K, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $73,492,000, an increase of $336,000 [123] from the current annual burden of $73,156,000. The total dollar cost of complying with form 20–F, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $587,033,625, an increase of $33,625 [124] from the current annual burden of $587,000,000. The total dollar cost of complying with form 40–F, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $998,736, an increase of $3,736 [125] from the current annual burden of $995,000. Comments concerning the accuracy of these burden estimates, and any suggestions for reducing the burden, should be directed to the Commission as described below.

C. Request for Comment

We request comment in order to: (a) Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the proposed rules; (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the proposed rules on those who respond, including through the use of automated collection techniques or other forms of information technology.[126]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the proposed collection of information requirement should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange

[105] These estimates are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and disseminating communications to directors and executive officers and filing Exchange Act reports with the Commission.

[106] These percentages are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and filing Exchange Act reports with the Commission. We have used an estimated hourly rate of $300.00 to determine the estimated cost to issuers of having the required notice reviewed by outside counsel. We arrived at this hourly rate estimate after consulting with several private law firms. We then have multiplied this hourly rate by a factor of 1.35 to reflect appropriate overhead charges.

[107] 1,230 plans × 2 hours × .75 = 1,845 hours.

[108] 1,230 plans × 2 hours × .25 x $405 = $249,075.

[109] 1,230 plans × 3 hours × .75 × .90 = 2,491 hours.

[110] 1,230 plans × 3 hours × .25 × $405 × .90 = $336,251.

[111] 1,230 plans × 3 hours × .75 x .09 = 249 hours. We note that, because under proposed Regulation BTR the statutory trading prohibition of Section 306(a) of the Act would be triggered, in the case of a foreign private issuer, only where number of plan participants or beneficiaries affected by a temporary trading suspension exceeds 15% of all participants or beneficiaries under plans maintained by the issuer, these estimates may overstate the actual compliance burden.

[112] 1,230 plans × 3 hours × .25 × $405 × .09 = $33,625.

[113] 1,230 plans × 3 hours × .75 × .01 = 28 hours.

[114] 1,230 plans × 3 hours × .25 × $405 × .01 = $3,736.

[115] For purposes of this estimate, we have assumed that the number of blackout periods triggering the notice requirement is 1,230 each year, the average number of directors and executive officers of an issuer is 10, 50% of the notices would be provided electronically and that paper distribution would require five minutes per notice for copying and mailing, plus $0.50 for paper and postage. These estimates are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and disseminating communications to directors and executive officers.

[116] 1,230 blackout periods × five notices × five minutes per notice = 512.5 hours.

[117] 1,230 blackout periods × five notices x $0.50 per notice = $3,075.

[118] 1,845 hours + 512 hours = 2,357 hours.

[119] $250,000 + $3,075 = $253,075.

[120] *See* n. 109 above.

[121] *See* n. 111 above.

[122] *See* n. 113 above.

[123] *See* n. 110 above.

[124] *See* n. 112 above.

[125] *See* n. 114 above.

[126] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Commission, 450 Fifth Street NW., Washington, DC 20549–0609, with reference to File No. S7–44–02. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–44–02 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

Section 306(a) of the Act prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired by the director or executive officer in connection with his or her service or employment as a director or executive officer. In addition, section 306(a) requires an issuer to provide timely notice to its directors and executive officers, and the Commission, of the imposition of a pension plan blackout period. The statute is intended to restrict the ability of corporate insiders to trade in the equity securities of an issuer at a time when a substantial number of the issuer's employees are unable to engage in transactions involving equity securities of the issuer through their individual pension plan accounts.

The proposed rules would, upon adoption, clarify the application of section 306(a) and prevent evasion of its statutory trading prohibition. We recognize that any implementation of the Sarbanes-Oxley Act likely will result in costs as well as benefits and have an effect on the economy. We are sensitive to the costs and benefits of proposed rules that would specify the content and timing of the notice that issuers are required to provide to their directors and executive officers and that would mandate the required notice to the Commission to be provided on a form 8–K or, in the case of foreign private issuers, in their annual reports on form 20–F or 40–F. We discuss these costs and benefits below.

A. Benefits

Section 306(a) will, and the proposed rules would, have several important benefits. By restricting the ability of directors and executive officers to trade in an issuer's equity securities when plan participants are unable to do so, the proposed rules would mitigate the differential treatment between plan participants and beneficiaries and the directors and executive officers of the issuer with respect to such securities. This should tie the interests of directors and executive officers more closely to that of other security holders.

The content and timing requirements for the notice contemplated by section 306(a) would help ensure that directors and executive officers of an issuer have all relevant information about an impending blackout period. This will enable these individuals to conform their activities to the statutory trading prohibition and to avoid any appearance of a conflict of interest between their corporate responsibilities and their personal trading activities. In addition, requiring that notice to the Commission be provided on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F, will help ensure that an issuer's security holders have notice of an impending blackout period. In turn, this will enable security holder to monitor compliance with the statutory trading prohibition of section 306(a). These benefits are difficult to quantify.

B. Costs

The costs associated with the proposed rules are primarily attributable to the statutory requirement to prepare and distribute advance notice of the imposition of a blackout period to directors and executive officers and to the Commission. For purposes of the Paperwork Reduction Act, we estimated the aggregate costs for issuers required to provide this notice to be approximately $625,000 per year and the related burden to be approximately 5,125 hours.[127]

While compliance with the statute and the proposed rules is the individual obligation of an issuer's directors and executive officers, it is likely that issuers will incur costs in assisting these individuals in observing the proposed trading restriction. Accordingly, issuers may incur costs associated with assisting their directors and executive officers in determining whether transactions in equity securities of the issuer are exempt from the insider trading prohibition of the proposed rules and in identifying and tracking the equity securities that are subject to the insider trading prohibition. These costs are difficult to quantify, but all are imposed by the statute.

We believe that many U.S. issuers already maintain internal procedures for assisting their directors' and officers' compliance with the provisions of section 16 of the Exchange Act and preventing violations of section 10(b) of the Exchange Act and Exchange Act rule 10b–5. It is likely that these issuers will enhance these internal procedures to address the trading restrictions of section 306(a) of the Act and proposed Regulation BTR. Some issuers may need to institute appropriate internal procedures. Other issuers may need to modify existing procedures. Because the scope and sophistication of these internal procedures are likely to vary among issuers, it is difficult to provide an accurate estimate of the incremental cost of enhancing existing systems. Because we do not have data to quantify the cost of implementing, or upgrading and strengthening existing, internal insider trading procedures, we seek comments and supporting data on these costs.

Section 306(a) also imposes costs on directors and executive officers of an issuer that is subject to section 306(a)'s trading prohibition. Restrictions on trading activities increase the financial exposure to directors and executive officers during blackout periods and reduce their financial flexibility. This may result in losses in their portfolios. In addition, because the directors and executive officers of issuers that are subject to the reporting requirements of the Exchange Act are already subject to restrictions on their trading activities, such as restrictions that confine their trading to designated ''window'' periods, the introduction of an additional trading restriction to this existing framework may, in some instances, limit the ability of a director or executive officer to trade for significant periods. This also may result in losses in their portfolios. These costs are difficult to quantify, but are mitigated somewhat by the timely notice required by the statute.

C. Request for Comments

We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed rules. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[127] *See* the discussion in section IV.B above.

VI. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis, or IRFA, has been prepared in accordance with the Regulatory Flexibility Act.[128] The IRFA pertains to new rules that we are proposing to clarify the application of section 306(a) of the Act and to prevent evasion of its statutory trading prohibition. The proposed rules also would specify the content and timing of notice that issuers are required to provide to their directors and executive officers and the Commission about the imposition of a pension plan blackout period.

A. Reasons for, and Objectives of, New Rules

Section 306(a) of the Act prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, section 306(a) requires issuers to provide timely notice to their directors and executive officers and the Commission of the imposition of a blackout period. The proposed rules, which would clarify the application of section 306(a) and prevent evasion of its statutory trading prohibition, are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of those participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts.

B. Legal Basis

We are proposing the new rules under the authority set forth in sections 3, 13, 23(a) and 36 of the Exchange Act, sections 30 and 38 of the Investment Company Act and sections 3(a) and 306(a) of the Act.

C. Small Entities Subject to the Proposed Rules

Section 306(a) of the Act affects, and the proposed rules would affect, small entities the securities of which are registered under section 12 of the Exchange Act, that are required to file reports under section 15(d) of the Exchange Act or that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. For purposes of the Regulatory Flexibility Act, the Exchange Act[129] defines the term ''small business,'' other than an investment company, to be an issuer that, on the last day of its most recent fiscal year, has total assets of $5 million or less.[130] The statute and proposed rules apply only to issuers with pension plans; we do not have data to indicate the number of small issuers that maintain pension plans, but according to available data, only 30% of all issuers maintain such plans. Furthermore, our data indicates that temporary trading suspensions that would be subject to section 306(a) occur to a plan once every five years. If these percentages are accurate regardless of an issuer's size, the proposed rules should only affect approximately 150 small entities per year. We estimate that there are approximately 2,500 issuers that are subject to the Act that are not investment companies and that have assets of $5 million or less.[131] There are approximately 225 registered investment companies that may be considered small entities. However, as noted above,[132] we anticipate that the burden imposed on investment companies by section 306(a) and the proposed rules would be negligible.

D. Reporting, Record Keeping and Other Compliance Requirements

Section 306(a) of the Act requires issuers, including ''small businesses,'' to provide timely notice to directors and executive officers and the Commission of a blackout period. The proposed rules would specify the content and timing of this notice. The statute's basic prohibition against trading during blackout periods is largely self-executing and does not afford us with substantial discretion to exercise regulatory flexibility with respect to small businesses.

While a cost will be incurred in complying with the notice requirement, we believe that these costs will be minimal for small businesses. A required notice is likely to be prepared once for each blackout period and distributed to affected directors and executive officers. In addition, a current report on form 8–K would be prepared and filed with the Commission. The cost of preparing and distributing the required notice to directors and executive officers is estimated to be approximately $590 annually for both large and small businesses.[133] The notice requirement involves a design standard in that the content of the proposed notice to directors and executive officers and the form and content of the notice to the Commission is dictated by the proposed rules and would be comparable for all issuers, including small, as well as large, entities. We do not believe that excepting small businesses from making the notice would be in the interests of their directors and executive officers, or consistent with the statute.

While we are proposing the specific content of the required notice to directors and executive officers, we do not dictate the specific form of the notice. In addition, we are proposing that the notice to the Commission be provided electronically through the filing of a current report on form 8–K. Nonetheless, we wish to address in our final rulemaking any special issues facing small businesses with respect to blackout period notices, and any alternatives consistent with the objectives of section 306(a) of the Act that may serve to facilitate compliance.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap or conflict with the proposed rules.

F. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In that regard, we are considering the following alternatives: (a) Establishing different compliance or reporting requirements that take into account the resources of small entities, (b) clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities and (c) exempting small entities from all or part of the proposed rules. The proposed rules are intended to ensure that corporate insiders do not trade in an issuer's equity securities during periods when the ability of participants or beneficiaries in the issuer's pension plans to purchase, sell or otherwise acquire or transfer equity securities of the issuer has been temporarily suspended. We do not currently believe that an exemption is

[128] 5 U.S.C. 603.

[129] 17 CFR 240.0–10(a).

[130] A similar definition is provided under Securities Act rule 157 (17 CFR 230.157).

[131] This estimate is based on filings with the Commission.

[132] *See* the discussion in section IV.B above.

[133] ($253,073 + (2,357 × $200 per hour)/1,230 blackouts = $589. *See also* section IV.B above.

necessary (since the cost of compliance is low) or appropriate (since Congress did not indicate that there should be different treatment for small businesses). Nevertheless, we solicit comment as to whether small business issuers should be excluded from the proposed rules. We also seek comment on the scope of the proposed disclosure, the cost of preparing it and whether the obligation can be simplified or clarified. If the cost is disproportionately large for small businesses, we will consider appropriate modifications to the proposed rules.

G. Request for Comments

We encourage the submission of comments with respect to any aspect of the IRFA. In particular, we request comment on the number of small businesses that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small businesses that would be affected and how to quantify the impact of the proposed rules. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [134] we must advise the Office of Management and Budget as to whether the proposed rules constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Where a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed rules on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[134] Pub. L. 104–121, title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

VIII. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act [135] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed rules would clarify the application and prevent evasion of section 306(a) of the Act. Section 306(a) prohibits the directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired by the director or executive officer in connection with his or her service or employment as a director or executive officer. In addition, under section 306(a) an issuer is required to provide timely notice to its directors and executive officers and the Commission of the imposition of a pension plan blackout period.

The proposed rules, which would clarify the application of section 306(a), are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of these participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts. While the statute may have an impact on competition by placing restrictions on the ability of directors and executive officers of issuers with pension plans to trade that are not placed on issuers without such plans, we do not believe that the proposed rules would impose any burden on competition. Issuers would incur some costs in complying with the proposed rules. These costs would include preparing the required notice to include the information specified in the proposed rules and providing notice to the Commission on a current report on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F. We request comment on whether the proposed rules, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[135] 15 U.S.C. 78w(a)(2).

IX. Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act [136] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. The proposed rules would clarify the application and prevent evasion of section 306(a) of the Act. Section 306(a) prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, section 306(a) requires issuers to provide timely notice to their directors and executive officers and the Commission of the imposition of a pension plan blackout period.

The proposed rules, which would clarify the application of section 306(a), are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of these participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts. While the statute may have an impact on competition, we do not believe that the proposed rules would impose any burden on competition, other than some burden on the efficiency of the market on an issuer's equity securities during a pension plan blackout period. This burden is imposed by the statute. We are not aware of any impact on capital formation that would result from the proposed rules. Issuers would incur some costs in complying with the proposed rules. These costs would include preparing the required notice to include the information specified in the proposed rules and providing notice to the Commission on a current report on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F. We request comment on whether the

[136] 15 U.S.C. 78c(f).

proposed rules, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support or their views to the extent possible.

X. Statutory Authority

The rules contained in this release are being proposed under the authority set forth in sections 3, 13, 23(a) and 36 of the Exchange Act, sections 30 and 38 of the Investment Company Act and sections 3(a) and 306(a) of the Sarbanes-Oxley Act of 2002.

List of Subjects in 17 CFR Parts 240, 245 and 249

Reporting and record keeping requirements, Securities.

Text of Proposed Rules and Forms

In accordance with the foregoing, title 17, chapter II, of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

Section 240.13a–11 is also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–11 is also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

2. Section 240.13a–11 is amended by:

a. Removing the sectional authority following § 240.13a–11; and

b. Revising paragraph (b).

The revision reads as follows:

§ 240.13a–11 Current reports on Form 8–(§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter.

3. Section § 240.15d–11 is amended by:

a. Removing the sectional authority following § 240.15d–11; and

b. Revising paragraph (b).

The revision reads as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file periodic reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter.

4. Part 245 is added to read as follows:

PART 245—REGULATION BLACKOUT TRADING RESTRICTION

[Regulation BTR—Blackout Trading Restriction]

Sec.
245.100 Definitions.
245.101 Prohibition of insider trading during pension fund blackout periods.
245.102 Exceptions to definition of blackout period.
245.103 Remedy.
245.104 Notice.

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

Sections 245.100—245.104 are also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

§ 245.100 Definitions.

As used in Regulation BTR (§§ 245.100 through 245.104), unless the context otherwise requires:

(a) The term *acquired such equity security in connection with service or employment as a director or executive officer,* when applied to a director or executive officer, means that he or she acquired, directly or indirectly, an equity security of the issuer:

(1) At a time when he or she was a director or executive officer of the issuer, under a compensatory plan, contract, authorization or arrangement, including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit-sharing (whether or not set forth in any formal plan document), including a compensatory plan, contract, authorization or arrangement with a parent, subsidiary or affiliate of the issuer;

(2) At a time when he or she was a director or executive officer of the issuer, as a result of any transaction or business relationship that is described in paragraph (a) or (b) of item 404 of Regulation S–K (§ 229.404 of this chapter) or, in the case of a foreign private issuer, item 7.B of form 20–F (§ 249.220f of this chapter) (but without application of the disclosure thresholds of such provisions), to the extent that he or she has a pecuniary interest (as defined in paragraph (l) of this section) in the equity securities;

(3) As directors' qualifying shares or other securities that he or she must hold to meet an issuer's minimum ownership requirements for directors or executive officers; or

(4) Prior to becoming, or while, a director or executive officer of the issuer if the equity security was acquired as an inducement to service or employment with the issuer or a parent, subsidiary or affiliate of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

(b) Except as provided in § 245.102, the term *blackout period*:

(1) With respect to the equity securities of any issuer (other than a foreign private issuer), means any period of more than three consecutive business days during which the ability to purchase, sell or otherwise acquire or transfer an interest in any equity security of such issuer held in an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan with respect to not fewer than 50% of the participants or beneficiaries under all individual account plans (as defined in paragraph (j) of this section) maintained by the issuer that permit participants or beneficiaries located in any State (as defined in paragraph (m) of this section) to acquire or hold equity securities of the issuer;

(2) With respect to the equity securities of any foreign private issuer (as defined in § 240.3b–4(c) of this chapter), means any period of more than three consecutive business days during which both:

(i) The conditions the paragraph (b)(1) of this section are met; and

(ii) The participants or beneficiaries so restricted comprise more than 15% of the participants or beneficiaries under all individual account plans maintained by the issuer that permit participants or beneficiaries to acquire or hold equity securities of the issuer.

(3) In determining the individual account plans (as defined in paragraph (j) of this section) maintained by the issuer for purposes of this paragraph (b), the rules under Section 414(b), (c), (m) and (o) of the Internal Revenue Code (26 U.S.C. 414(b), (c), (m) and (o)) are to be applied.

(c) (1) The term *director* has, except as provided in paragraph (c)(2) of this section, the meaning set forth in section 3(a)(7) of the Exchange Act (15 U.S.C. 78c(a)(7)).

(2) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the term *director* means those individuals within the definition set forth in section 3(a)(7) of the Exchange Act who are management employees of the issuer.

(d) The term *derivative security* has the meaning set forth in § 240.16a–1(c) of this chapter.

(e) The term *equity security* has the meaning set forth in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and § 240.3a11–1 of this chapter.

(f) The term *equity security of the issuer* means any equity security or derivative security relating to an issuer, whether or not issued by that issuer.

(g) The term *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(h) (1) The term *executive officer* has, except as provided in paragraph (h)(2) of this section, the meaning set forth in § 240.16a–1(f) of this chapter.

(2) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the term *executive officer* means the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers (or, if there is none, the controller) of the issuer.

(i) The term *exempt security* has the meaning set forth in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)).

(j) The term *individual account plan* means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account, including a deferred compensation arrangement that contains the aforementioned features, except that such term does not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(8)(B))).

(k) The term *issuer* means an issuer (as defined in section 3(a)(8) of the Exchange Act (15 U.S.C. 78c(a)(8))), the securities of which are registered under section 12 of the Exchange Act (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or that 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.

(l) The term *pecuniary interest* has the meaning set forth in § 240.16a–1(a)(2)(i) of this chapter and the term *indirect pecuniary interest* has the meaning set forth in § 240.16a–1(a)(2)(ii) of this chapter. § 240.16a–1(a)(2)(iii) of this chapter also shall apply to determine pecuniary interest for purposes of this regulation.

(m) The term *State* has the meaning set forth in section 3(a)(16) of the Exchange Act (15 U.S.C. 78c(a)(16)).

§ 245.101 Prohibition of insider trading during pension fund blackout periods.

(a) Except to the extent otherwise provided in paragraph (c) of this section, it is unlawful under section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) for any director or executive officer of an issuer of any equity security (other than an exempt security), directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer (other than an exempt security) during any blackout period with respect to such equity security, if such director or executive officer acquires or previously acquired such equity security in connection with his or her service or employment as a director or executive officer.

(b) For purposes of section 306(a)(1) of the Sarbanes-Oxley Act of 2002, any purchase, sale or other acquisition or transfer of an equity security of the issuer during a blackout period will be deemed to be a transaction involving an equity security ''acquired in connection with service or employment as a director or executive officer'' (as defined in § 245.100(a)) to the extent that the director or executive officer has a pecuniary interest (as defined in § 245.100(l)) in such an equity security and the equity security has not previously been subject to the operation of section 306(a)(1) during the same blackout period.

(c) The following transactions are exempt from section 306(a)(1) of the Sarbanes-Oxley Act of 2002:

(1) Any acquisition of equity securities resulting from the reinvestment of dividends in, or interest on, equity securities of the same issuer if the acquisition is made pursuant to a plan providing for the regular reinvestment of dividends or interest and the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants;

(2) Any purchase or sale of equity securities of the issuer pursuant to a contract, instruction or written plan that satisfies the affirmative defense conditions of § 240.10b5–1(c) of this chapter; provided that, for purposes of this section, awareness of an impending blackout period (as defined in § 245.100(b)) will constitute awareness of material, non-public information;

(3) Any purchase or sale of equity securities pursuant to a Qualified Plan (as defined in § 240.16b–3(b)(4) of this chapter), an Excess Benefit Plan (as defined in § 240.16b–3(b)(2) of this chapter) or a Stock Purchase Plan (as defined in § 240.16b–3(b)(5) of this chapter) other than a Discretionary Transaction (as defined in § 240.16b–3(b)(1) of this chapter) unless such Discretionary Transaction meets the conditions of paragraph (c)(2) of this section; and

(4) The increase or decrease in the number of securities held as a result of a stock split or stock dividend applying equally to all securities of that class, including a stock dividend in which equity securities of a different issuer are distributed; and the acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.

§ 245.102 Exceptions to definition of blackout period.

The term ''blackout period,'' as defined in § 245.100(b), does not include:

(a) A regularly scheduled period in which the participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if a description of the blackout period, including the plan transactions to be suspended during, or otherwise affected by the blackout and its frequency and duration, is:

(1) Included in the documents or instruments under which the individual account plan operates; and

(2) Disclosed to an employee before he or she formally enrolls, or within 30 days following formal enrollment, as a participant under the individual account plan or within 30 days after the adoption of an amendment to the plan. For purposes of this paragraph (a)(2), the disclosure may be provided in any

graphic form that is reasonably accessible to the employee; or

(b) Any suspension described in § 245.100(b) the principal purpose of which is to permit persons affiliated with the acquired or divested entity to become participants or beneficiaries, or to cease to be participants or beneficiaries, in an individual account plan following a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.

§ 245.103 Remedy.

(a) *Recovery of Profits.* Section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) provides that any profit realized by a director or executive officer from any purchase, sale or other acquisition or transfer of any equity security of an issuer in violation of section 306(a)(1) will inure to and be recoverable by the issuer, regardless of any intention on the part of the director or executive officer in entering into the transaction.

(b) *Actions to recover profit.* Section 306(a)(2) of the Sarbanes-Oxley Act of 2002 provides that an action to recover profit in accordance with may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any equity security of the issuer in the name and on behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit may be brought more than two years after the date on which such profit was realized.

§ 245.104 Notice.

(a) In any case in which a director or executive officer is subject to section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) in connection with a blackout period (as defined in § 245.100(b)) with respect to any equity security, the issuer of the equity security must timely notify each director or officer and the Commission of the blackout period.

(b) For purposes of this section:

(1) The notice must include:

(i) The reason or reasons for the blackout period;

(ii) A description of the plan transactions to be suspended during, or otherwise affected by, the blackout period;

(iii) A description of the class of equity securities subject to the blackout period;

(iv) The actual or expected beginning and ending dates of the blackout period; and

(v) The name, address and telephone number of the person designated by the issuer to respond to inquiries about the blackout period, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions; and

(2) (i) Notice to an affected director or executive officer will be considered timely if the notice described in paragraph (b)(1) of this section is provided (in graphic form that is reasonably accessible to the recipient) at least 15 calendar days in advance of the commencement of the blackout period;

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the requirement to give at least 15 days advance notice will not apply in any case in which the inability to provide advance notice of the blackout period is due to events that were unforeseeable to or circumstances that were beyond the reasonable control of the issuer, and the issuer reasonably so determines in writing. Determinations described in the preceding sentence must be dated and signed by an authorized representative of the issuer. In any case in which this exception to the 15-day advance notice requirement applies, the issuer must provide the notice described in paragraph (b)(1) of this section, as well as a copy of the written determination, to all affected directors and executive officers as soon as reasonably practicable before the blackout period commences; and

(3) Notice to the Commission will be considered timely if:

(i) The issuer, except as provided in paragraph (b)(3)(ii) of this section, files a current report on form 8–K (§ 249.308 of this chapter) within the time prescribed for filing the report under the instructions for the form; or

(ii) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the issuer includes the information set forth in paragraph (b)(1) of this section in the first annual report on form 20–F (§ 249.220f of this chapter) or 40–F (§ 249.240f of this chapter) required to be filed after the receipt of the notice of a blackout period required by 29 CFR 2520.101–3(c) within the time prescribed for filing the report under the instructions for the form.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 249 is amended by revising the sectional authority for § 249.308 to read as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

* * * * *

Section 249.308 is also issued under 15 U.S.C. 80a–29, 15 U.S.C. 80a–37 and secs. 3(a), 302 and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

6. Form 20–F (referenced in § 249.220f) is amended by:

a. Renumbering paragraph (10) as paragraph (11) under ''Instructions as to Exhibits''; and

b. Adding paragraph (10) under ''Instructions as to Exhibits.''

The addition reads as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Instructions As To Exhibits

* * * * *

10. Any notice required by rule 104 of Regulation BTR (17 CFR 245.104 of this chapter) that you sent during the past fiscal year to a director or executive officer (as defined in 17 CFR 245.100(d) and (h) of this chapter) concerning any equity security subject to a blackout period (as defined in 17 CFR 245.100(c) of this chapter) under rule 101 of Regulation BTR (17 CFR 245.101 of this chapter) if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer (as defined in 17 CFR 245.100(a)). Each notice must have included the information specified in 17 CFR 245.104(b) of this chapter.

Note: The exhibit requirement in paragraph (10) applies only to an annual report, and not to a registration statement, on form 20–F. The Commission will consider the attachment of any rule 104 notice as an exhibit to a timely filed Form 20–F annual report to satisfy an issuer's duty to notify the Commission of a blackout period in a timely manner. Although an issuer need not submit a rule 104 notice under cover of a form 6–K, if an issuer has already submitted this notice under cover of form 6–K, it need not attach the notice as an exhibit to a form 20–F annual report.

* * * * *

7. Form 40–F (referenced in § 249.240f) is amended by adding new paragraph (7) to general instruction B to read as follows:

Note: The text of form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 40–F

* * * * *

General Instructions

* * * * *

B. Information To Be Filed On This Form

* * * * *

(7) An issuer must attach as an exhibit to an annual report filed on form 40–F a copy of any notice required by rule 104 of Regulation BTR (17 CFR 245.104 of this

chapter) that it sent during the past fiscal year to a director or executive officer (as defined in 17 CFR 245.100(d) and (h) of this chapter) concerning any equity security subject to a blackout period (as defined in 17 CFR 245.100(c) of this chapter) under rule 101 of Regulation BTR (17 CFR 245.101 of this chapter) if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer (as defined in 17 CFR 245.100(a)). Each notice must have included the information specified in 17 CFR 245.104(b) of this chapter.

Note: The Commission will consider the attachment of any rule 104 notice as an exhibit to a timely filed form 40–F annual report to satisfy an issuer's duty to notify the Commission of a blackout period in a timely manner. Although an issuer need not submit a rule 104 notice under cover of a form 6–K, if an issuer has already submitted this notice under cover of form 6–K, it need not attach the notice as an exhibit to a form 40–F annual report.

* * * * *

8. Form 8–K (referenced in § 249.308) is amended by:

a. Revising General Instruction 1; and

b. Adding item 5.04 under ''Information to be Included in the Report.''

The revision and addition read as follows:

Note: The text of form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

B. Events to be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to item 5.04 is required to be filed within two business days after the earlier of receipt of notice of the blackout period (as defined in § 245.100(b)) from the plan administrator or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.

* * * * *

Information To Be Included in the Report

* * * * *

Item 5.04. Temporary Suspension of Trading Under Registrant's Employee Benefit Plans

Upon the earlier of receipt of notice of a blackout period (as defined in § 245.100(b)) from the plan administrator or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions, provide the information specified in § 245.104(b) of this chapter.

* * * * *

Dated: November 6, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–28869 Filed 11–14–02; 8:45 am]

BILLING CODE 8010–01–U

Federal Register

Friday,
November 15, 2002

Part V

Department of Education

34 CFR Chapter I

Boy Scouts of America Equal Access Act; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Chapter I

RIN 1870–AA12

Boy Scouts of America Equal Access Act

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are soliciting comments from interested parties on the Boy Scouts of America Equal Access Act. This Act directs the Secretary of Education, through the Office for Civil Rights, to ensure compliance with this new law. We will consider comments received from interested parties in developing proposed regulations.

DATES: We must receive your comments on or before December 16, 2002.

ADDRESSES: Address all comments about the Boy Scouts of America Equal Access Act to Gerald A. Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW., room 5000 MES, Washington, DC 20202–1100. If you prefer to send your comments through the Internet, use the following address: *boyscoutscomments@ed.gov.* You must include the term ''Boy Scouts'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Doreen Dennis, Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW., room 5038 MES, Washington, DC 20202–1100. Telephone: (202) 205–8635 or 1–800–421–3481.

If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (877) 521–2172.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Background

On January 8, 2002, the President signed into law the ''No Child Left Behind Act of 2001'' (NCLB), Public Law 107–110, amending the Elementary and Secondary Education Act of 1965 (ESEA). Included in the amendments to the ESEA is the ''Boy Scouts of America Equal Access Act'' (Boy Scouts Act). The Boy Scouts Act applies to public elementary and secondary schools, local educational agencies (LEAs), and State educational agencies (SEAs) that are recipients of funds made available through the Department of Education (the Department). Under this law, no covered elementary or secondary school that provides an opportunity for one or more outside youth or community groups to meet on school premises or in school facilities before or after school hours shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America or any other youth group listed in title 36 of the United States Code as a patriotic society.

The Boy Scouts Act directs the Secretary of Education, through the Office for Civil Rights, to enforce this law in a manner consistent with the procedure used under section 602 of the Civil Rights Act of 1964, with respect to public elementary and secondary schools, LEAs, and SEAs that receive funds made available through the Department. If a public school or agency does not comply with the Boy Scouts Act, it would be subject to the Department's enforcement actions.

Invitation To Comment

We invite you to submit comments concerning issues for which you believe regulations would be necessary or helpful. Your questions and concerns will provide valuable information in developing any proposed regulations.

In particular, we are seeking comments and information on the following questions:

1. Which entities make the decisions about the use of school facilities for non-school purposes? If the entities making the decisions are not schools, LEAs, or SEAs, what is the relationship between these entities and the schools, LEAs, or SEAs?

2. Are fees charged for the use of school facilities? If so, how are the fees determined? Are all groups that want to use the school facilities charged the same fee? Do the entities that have control over use of school facilities have the authority to waive fees? Do schools, LEAs, or SEAs (or other entities that have control over use of school facilities) consider an organization's membership or leadership criteria when determining whether to grant access, charge a fee, or waive a fee?

3. Do schools, LEAs, or SEAs (or other entities that have control over use of school facilities) have formal procedures that explicitly discuss the criteria used to determine whether a request for use or a fee waiver will be granted?

4. Are distinctions drawn between ''outside'' groups and school groups, with respect to the use of school facilities? If so, what criteria are used to determine whether an entity is considered an ''outside'' group? Are associations such as parent teacher associations (PTAs) considered ''outside'' groups?

5. If ''outside'' groups have access to school facilities for meetings, do those groups have access to any other school benefits or services as well, such as school bulletin boards, school newsletters, school public address systems, or other means of distributing information on school premises?

6. What does it mean for schools, LEAs, or SEAs to sponsor any group? How does a school sponsor a group? Are school-sponsored groups considered ''outside'' groups?

While we have suggested these issues for your consideration, we welcome comments on any issues relating to the Boy Scouts Act.

During and after the comment period, you may inspect all public comments submitted in response to this notice in room 5036, 330 C Street, SW., Washington, DC, between the hours of 10 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Comments

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

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Authority: Public Law 107–110.

Dated: October 30, 2002.

Rod Paige,

Secretary of Education.

[FR Doc. 02–29037 Filed 11–14–02; 8:45 am]

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