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Presidential Documents

Title 3—

The President

Proclamation 7789 of May 21, 2004

National Maritime Day, 2004

By the President of the United States of America

A Proclamation

National Maritime Day provides an opportunity to recognize the men and women of the United States Merchant Marine and their contributions to our national security and economic strength.

Since they first offered their ships and services to assist the Continental Navy in our struggle for independence, to their distinguished service in World War II, merchant mariners have courageously sacrificed to protect our country and defend our freedoms. In 1936, America recognized the contributions of these patriots and established the U.S. Merchant Marine ''as a naval or military auxiliary in time of war or national emergency.'' Today, merchant mariners are delivering essential supplies and equipment to our troops in Iraq and bravely serving the cause of liberty. They continue to play an important role in our Nation's efforts to advance democracy, peace, and freedom around the world, and we are grateful for their dedication.

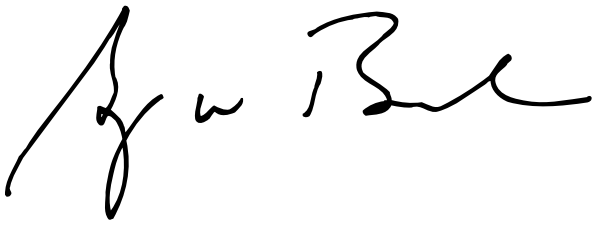
Merchant mariners also contribute significantly to the U.S. maritime transportation system. More than 95 percent of non-North American trade enters our country through our seaports. These ports handle more than $740 billion and 2 billion tons of domestic and international freight each year. Those in the maritime industry, including merchant mariners, enhance waterborne commerce and help promote America's economic growth.

Today, we honor the courage, determination, and service of our Nation's merchant mariners and remember the many who have given their lives in defense of our country. Their work reflects the patriotism and devotion to duty that make America great.

In recognition of the importance of the U.S. Merchant Marine, the Congress, by joint resolution approved on May 20, 1933, as amended, has designated May 22 of each year as ''National Maritime Day,'' and has authorized and requested that the President issue an annual proclamation calling for its appropriate observance.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim May 22, 2004, as National Maritime Day. I call upon the people of the United States to celebrate this observance and to display the flag of the United States at their homes and in their communities. I also request that all ships sailing under the American flag dress ship on that day.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of May, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



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Presidential Documents

Proclamation 7790 of May 21, 2004

National Safe Boating Week, 2004

By the President of the United States of America

A Proclamation

Our Nation's many waterways give millions of boating enthusiasts the opportunity to enjoy the outdoors and spend time with family and friends. With nearly 13 million recreational boats on our oceans, lakes, and rivers, boating is a popular pastime. However, far too many Americans are hurt or killed each year in boating accidents that are largely preventable.

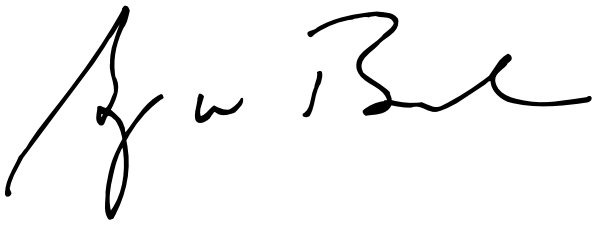
Each year, of the thousands of boating accidents that occur, many are caused by operators who are careless, reckless, or inexperienced. In most cases, boat operators had received no safety instruction, and many of those who died could have been saved if they had worn life jackets. During National Safe Boating week, we seek to raise awareness to improve safety and reduce accidents on our Nation's waters.

Across the Nation, many groups are working to teach recreational boaters how they can make boating safer through the 2004 North American Safe Boating Campaign. These include the U.S. Coast Guard, the Coast Guard Auxiliary, the National Safe Boating Council, and the National Association of State Boating Law Administrators. These groups recommend that boaters get boat safety checks, ensure that boats are properly maintained, take safe boating classes, be aware of homeland security issues, always wear a life jacket, and never operate a boat under the influence of alcohol or drugs. By learning about boating safety and taking some simple precautions, recreational boaters can reduce the risk of accidents and ensure that they enjoy their time on the water responsibly.

In recognition of the importance of safe boating practices, the Congress, by joint resolution approved June 4, 1958 (36 U.S.C. 131), as amended, has authorized and requested the President to proclaim annually the 7-day period prior to Memorial Day weekend as ''National Safe Boating Week.''

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim May 22 through May 28, 2004, as National Safe Boating Week. I encourage the Governors of the 50 States and the Commonwealth of Puerto Rico, and officials of other areas subject to the jurisdiction of the United States, to join in observing this occasion. I also urge all boaters to learn more about safe boating practices, always wear life jackets, and take advantage of boating safety programs throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of May, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



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Rules and Regulations

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

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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1650, 1653, 1655 and 1690

Methods of Withdrawing Funds From the Thrift Savings Plan; Court Orders and Legal Processes Affecting Thrift Savings Plan Accounts; Loan Program; Thrift Savings Plan

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is amending the court order regulations to remove attorneys from the list of permissible court order payees and to require non-English court orders to be accompanied by a certified English translation. The Executive Director is revising the TSP loan regulations to assess a $50 fee on new TSP loans, restrict a participant to a single general purpose loan at any time, and implement a 60-day waiting period between the date a participant repays a loan and the date the TSP will accept an application for a new loan of the same type. Finally, the Executive Director is clarifying the regulations pertaining to powers of attorney documents, guardianship orders, and conservatorship orders.

DATES: This final rule is effective July 1, 2004.

FOR FURTHER INFORMATION CONTACT: Patrick J. Forrest on (202) 942–1661.

SUPPLEMENTARY INFORMATION: The Executive Director administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. 99–335, 100 Stat. 514. The TSP provisions of FERSA have been codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

On April 7, 2004, the Executive Director published this rule in proposed form in the **Federal Register** (69 FR 18294). The Executive Director requested comments on the proposed rule and received sixty-eight comments on the loan program changes. One comment came from a Federal employees' union, one came from a commercial entity, and the remaining came from TSP participants. The commercial entity asked the Board to clarify proposed sections 1655.21, 1690.12 and 1690.13; they are clarified in the final rule. One of the participants also commented favorably about the proposed changes to the court order, guardianship order, conservatorship order, and power of attorney regulations.

Union Comment

A Federal employees' union commented that the Federal Employees' Retirement System was designed to place more of the risk and financial burden of saving for retirement on the Federal employees and that, in exchange, those employees receive ''direct access'' to their retirement savings ''to use them as they see fit.'' By making it more difficult and expensive for participants to use their own savings, the union continued, the Board is ''breaking a promise made to federal employees upon the inception of the Thrift Savings Plan.'' The union concluded that the Board is attempting to dictate the financial needs of participants beyond the current reasonable loan restrictions. The union also wrote that with recent low mortgage rates, participants need TSP loans to invest in real property.

There can be no question that the money in the TSP belongs to the TSP participants; however, the TSP was created by the Federal Employees' Retirement System Act of 1986 (FERSA) and exists to provide retirement income to participants and their beneficiaries. To encourage the growth of TSP accounts, Congress exempted TSP contributions and earnings from Federal income taxation until they are withdrawn from the TSP. Just as importantly, Congress also protected TSP accounts from dissipation by restricting the ability of anyone, including the participant, to access the money in the TSP. For example, a creditor generally cannot access the money in the participant's account. With respect to participants' access, FERSA only allows in-service withdrawals in cases of financial hardship or, if the participant is still employed, on one occasion after reaching 59½. *See* 5 U.S.C. 8433(h).

Congress also placed restrictions on TSP loans to prevent the dissipation of retirement savings. FERSA requires the TSP to follow the Internal Revenue Code provisions that apply to private sector retirement plan loans. 5 U.S.C. 8433(g)(3). Among other things, those provisions set a maximum dollar amount for loans, require continuous loan payments, require the TSP to charge interest on TSP loans, and limit the length of time over which a loan can be repaid. Initially, FERSA limited the reasons for which a loan could be taken; Congress eliminated this ''purpose'' test in 1996 in favor of the current rule allowing a general purpose loan.

Therefore, it is incorrect to conclude that Congress gave participants ''direct access'' to the savings in their TSP accounts ''to use them as they see fit.'' FERSA states only that a participant ''may apply to the Board for permission to borrow from [his or her] account.'' 5 U.S.C. 8433(g)(1). The Executive Director, therefore, must establish the conditions under which a loan request will be granted. 5 U.S.C. 8433(g)(2). Consistent with the purpose of the TSP, these policies must promote saving for retirement.

The Executive Director has determined that the current loan program has allowed many participants to use the TSP as a source of ready cash, which can be detrimental to long-term retirement savings. The Executive Director concluded that it is appropriate to limit access to a TSP loan to reinforce the importance of borrowing from the TSP only as a last resort.

With respect to the union's comment that participants need TSP loans to invest in real estate, the Executive Director is not changing the rules applicable to TSP residential loans.

Finally, the union commented that a $50 loan fee was inappropriate because it makes the TSP loan program more expensive. The fee will not increase the

expense of the loan program, except to the participant who obtains a loan. Currently, every participant pays the costs of administering the loan program, even those who have never taken a loan. However, the Executive Director has determined that the costs of the loan program should, instead, be borne by the approximately 620,000 participants who use the TSP loan program, rather than by the 2.6 million participants who do not. By way of comparison, most private sector retirement plans charge loan fees. Of those that do, more than 70 percent charge a loan fee of $50 or more.

Participant Comments

Every comment received from a participant addressed the proposed $50 loan fee. Thirty-one participants objected to the proposed fee. Many wrote that the fee is unnecessary because they assume (incorrectly) that either the interest charged on TSP loans pays for the expenses of the loan program, that the Department of Agriculture provides recordkeeping services for the TSP free of charge, or that the Board receives an appropriation from Congress to pay the TSP's administrative expenses. Other participants oppose the fee because they assume the Board will use the extra funds to hide TSP administrative expenses or even that the Board will divert the loan fees for non-TSP purposes. As explained below, none of these assumptions is true.

Although the TSP charges each participant interest on his or her loan, the interest collected is deposited into the participant's account, it is not used to pay TSP administrative expenses. 5 CFR 1655.9(c). Furthermore, although the TSP recordkeeper is a component of a Federal agency, its Congressional appropriations do not pay the TSP's administrative expenses. Rather, the Board pays the Department of Agriculture for the cost of its services, including the costs of administering the TSP loan program. The Board does not receive an annual appropriation to pay these expenses, or any other TSP expense; rather, the Board pays all TSP expenses with funds that belong to the TSP participants. 5 U.S.C. 8437(c)(3), 8437(d), and 8439(a)(3). TSP administrative expenses cost each participant approximately .07 percent of his or her account balance each year.

Although some participants asked the Board to retain the policy of charging the loan program's expenses to all participants, as explained above, the Executive Director has determined that it is more equitable if the costs of the loan program are borne by the participants who use the program.

One participant asked if the TSP would charge the loan fee even if the loan application were rejected. The loan fee is not an application fee; it will cover the costs of processing and servicing the loan. Therefore, as explained in final § 1655.21, the TSP will deduct the loan fee from the loan proceeds only when it issues a loan. One participant also commented that the TSP should only charge the loan fee once because a participant should only pay for ''underwriting'' approval once. There is no underwriting approval in the TSP loan program.

In contrast, thirty-eight participants wrote that the loan fee is appropriate, primarily because it will lower the cost of administering the TSP to those who do not use the loan program. Some participants asked the Board to charge a fee greater than $50 or to base the amount of the fee on the dollar amount of the loan. The Board will not base the loan fee on the dollar amount of the loan because the fee is intended only to pay the administrative costs of a TSP loan, which do not vary with the size of the loan. Several participants also suggested that the TSP eliminate the loan program altogether. The Board will not eliminate the loan program because it is an important benefit that the TSP is required by FERSA to provide.

Some participants asked the Board to charge fees for other TSP transactions, such as interfund transfers and in-service withdrawals. The Executive Director does not plan to charge transaction fees in addition to the loan fee; however, decreasing the cost of the program for participants is an important consideration and the Executive Director does review all costs from time to time to determine whether they are appropriate.

Forty-three participants commented on the Executive Director's proposal to limit participants to a single general purpose loan; thirty-three objected to the change. Most wrote that the Board should not impose any restrictions on their ability to use their own money. As explained in the answer to the union comment, the Executive Director's proposal is consistent with the purpose of the TSP, which is to grow retirement savings.

Many commenters oppose limiting participants to a single general purpose loan because they want to borrow from their TSP accounts to pay for medical and dental expenses, home repair or improvement, car repairs, or school tuition. Other participants oppose the changes because they want to use TSP loans to pay off high interest credit cards or as capital to start a business. The loan program changes will not prevent a participant from obtaining a TSP loan to pay such expenses. Rather, the changes will limit a participant to a single general purpose loan. This purpose of this limitation is to promote the use of the TSP as a retirement savings plan and to reinforce the importance of borrowing from the TSP as a last resort. The TSP is a retirement savings plan, not a savings account that should be used to finance short-term needs, refinance consumer debt or start a business. A participant who may need money in the near future and who does not have adequate savings should consider those short-term needs carefully before deciding how much to contribute to the TSP.

Several commenters who oppose limiting participants to a single general purpose loan also wrote that the TSP is a necessary source of emergency funds in the case of financial hardship. However, TSP funds remain available if a participant can qualify for financial hardship in-service withdrawals.

Forty participants commented on the 60-day waiting period between paying off a loan and receiving another of the same type; thirty-one of them oppose the change. Those who stated a reason for opposing the change (other than those reasons discussed above) believe it unreasonably limits their ability to obtain a loan or is simply designed to discourage loans.

Before proposing the 60 day waiting period, the Executive Director undertook a study of the loan program; that study revealed that an increasing number of participants repeatedly pay off one loan and simultaneously apply for another. These participants are apparently using the TSP as an ongoing vehicle for financing their living expenses, rather than as a retirement savings plan. The waiting period is designed to correct this abusive practice.

The waiting period also solves an administrative problem. Many participants simultaneously submit a new loan application with a loan payoff check. In such a case, the TSP cannot process the new loan application until it processes and deposits the loan payoff check, waits for it to clear, posts the funds to the participant's account, and closes the loan. Given the enormous volume (900,000) of TSP loans that are in existence, it is not administratively reasonable to manually manage large numbers of pending loan applications until the outstanding loan is closed and a new loan request can be processed. A limited waiting period, clearly communicated to participants and equitably applied, provides a systematic solution to this administrative problem.

Several commenters questioned the Board's decision to advertise an implementation date for the loan program changes before receiving comments on the proposed rule. Others asked the Board to delay implementation of the new rules. The Executive Director publicly announced the loan program changes in mid-2003 for a mid-2004 implementation date; since then, he has made numerous public statements about his intent to change the loan program. In addition, the Board announced the changes on the TSP Web site, the Thriftline, and in a one-time written notice mailed to every participant with an outstanding TSP loan. Before publishing the proposed loan regulations in the **Federal Register**, the Executive Director discussed the changes in Congressional hearings, the January 2004 TSP *Highlights* (a TSP publication), the April 2004 TSP *Highlights,* numerous press interviews, and sought the advice of the Employee Thrift Advisory Council (ETAC). The ETAC is a 15-member body established by FERSA to advise the Board on TSP matters. ETAC members represent members of the Uniformed Services and Federal and postal employees, both active and retired, at all levels of government, from wage earners to senior executives.

The Board also welcomes the opportunity to review and respond to comments from participants who take an active interest in the TSP and wish to offer suggestions. Some participants who read the *Highlights* or news reports wrote letters to the Agency and the Agency fully considered their comments. Additionally, the Executive Director formally solicited comments from participants when he published the proposed loan regulations. The comment process allows the Board to address any misunderstandings about the proposed loan changes, to learn if there are unanticipated legal or policy impediments to the proposed changes, and to hear suggestions about how better to implement the proposed changes. Although the comments received did not cause the Executive Director to make any changes to the proposed loan rules, he did carefully consider all comments received.

Section 1655.2

Proposed § 1655.2(c) explains the general rule that a participant must be eligible to contribute to the TSP before he or she can apply for a TSP loan. It also explains an exception to that rule (a participant can apply for a loan if his or her TSP contributions were suspended when he or she obtained a financial hardship in-service withdrawal). However, proposed § 1655.2(c) did not explain a second exception. Specifically, a participant can apply for a loan if he or she is not eligible to make TSP contributions because the participant stopped contributing to the TSP and is not yet eligible to resume contributing. Final § 1655.2(c) explains this exception.

The Executive Director is publishing the proposed rule as a final rule with several other clarifying changes to proposed sections 1655.21, 1690.12 and 1690.13.

Regulatory Flexibility Act

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

Paperwork Reduction Act

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

Unfunded Mandates Reform Act of 1995

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

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the Board submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 814(2).

List of Subjects

5 CFR Parts 1650, 1653 and 1690

Employee benefit plans, Government employees, Pensions, Retirement.

5 CFR Part 1655

Employee benefit plans, Government employees, Military personnel, Pensions, Retirement.

Dated: May 20, 2004.

Gary A. Amelio,

Executive Director Federal Retirement Thrift Investment Board.

■ For the reasons set forth in the preamble, the Board amends 5 CFR chapter VI as follows:

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

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

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

Subpart G—Spousal Rights

§ 1650.61 [Amended]

■ 2. Amend § 1650.61 by removing ''§ 1650.64'' from paragraph (b) and ''§ 1650.65'' from paragraph (c)(1), and adding in their places ''this subpart''.

§ 1650.62 [Amended]

■ 3. Amend § 1650.62 by removing ''§ 1650.64'' from paragraph (b) and ''§ 1650.65'' from paragraph (c), and adding in their places ''this subpart''.

§ 1650.64 [Amended]

■ 4. Amend § 1650.64 by removing ''§ 1650.64'' from paragraph (a)(1) and adding in its place ''this subpart''.

PART 1653—COURT ORDERS AND LEGAL PROCESSES AFFECTING THRIFT SAVINGS PLAN ACCOUNTS

■ 5. The authority citation for part 1653 is revised to read as follows:

Authority: 5 U.S.C. 8435, 8436(b), 8437(e), 8439(a)(3), 8467, 8474(b)(5) and 8474(c)(1).

Subpart A—Retirement Benefits Court Orders

■ 6. Amend section 1653.2 by revising paragraph (a)(4) to read as follows:

§ 1653.2 Qualifying retirement benefits court orders.

(a) * * *

(4) A court order can require a payment only to a spouse, former spouse, child or dependent of a participant.

* * * * *

■ 7. Amend section 1653.3 by revising the last sentence of paragraph (b) introductory text to read as follows:

§ 1653.3 Processing retirement benefits court orders.

* * * * *

(b) * * * To be complete, a court order must be written in English or be accompanied by a certified English translation and contain all pages and

attachments; it must also provide (or be accompanied by a document that provides):

* * * * *

PART 1655—LOAN PROGRAM

■ 8. The authority citation for part 1655 is revised to read as follows:

Authority: 5 U.S.C. 8433(g), 8439(a)(3) and 8474.

■ 9. Revise section 1655.2 to read as follows:

§ 1655.2 Eligibility for loans.

A participant can apply for a TSP general purpose or residential loan if:

(a) More than 60 calendar days have elapsed since the participant has repaid in full a TSP loan of the same type.

(b) The participant is in pay status;

(c) The participant is eligible to contribute to the TSP (or would be eligible to contribute but for the suspension of the participant's contributions because he or she obtained a financial hardship in-service withdrawal or because he or she stopped contributing to the TSP and is not yet eligible to resume contributing);

(d) The participant has at least $1,000 in employee contributions and attributable earnings in his or her account; and

(e) The participant has not had a TSP loan declared a taxable distribution within the last 12 months for any reason other than a separation from Government service.

■ 10. Amend section 1655.4 by revising the second sentence to read as follows:

§ 1655.4 Number of loans.

* * * One of the two outstanding loans may be a residential loan and the other one may be a general purpose loan. * * *

■ 11. Revise paragraph (b) of section 1655.11 to read as follows:

§ 1655.11 Loan acceptance.

* * * * *

(b) The participant has the maximum number of loans outstanding under § 1655.4;

* * * * *

■ 12. Add a new section 1655.21 to read as follows:

§ 1655.21 Loan fee.

The TSP will charge a participant a $50.00 loan fee when it disburses the loan and will deduct the fee from the proceeds of the loan.

PART 1690—THRIFT SAVINGS PLAN

■ 13. The authority citation for Part 1690 continues to read as follows:

Authority: 5 U.S.C. 8474.

■ 14. Revise section 1690.12 to read as follows:

§ 1690.12 Power of attorney.

(a) A participant or beneficiary can appoint an agent to conduct business with the TSP on his or her behalf by using a power of attorney (POA). The agent is called an attorney-in-fact. The TSP must approve a POA before the agent can conduct business with the TSP; however, the TSP will accept a document that was signed by the agent before the TSP approved the POA. The TSP will approve a POA if it meets the following conditions:

(1) The POA must give the agent either general or specific powers, as explained in paragraphs (b) and (c) of this section;

(2) A notary public or other official authorized by law to administer oaths or affirmations must authenticate, attest, acknowledge, or certify the participant's or beneficiary's signature on the POA; and

(3) The POA must be submitted to the TSP recordkeeper for approval.

(b) *General power of attorney.* A general POA gives an agent unlimited authority to conduct business with the TSP, including the authority to sign any TSP-related document. By way of example, a POA grants such authority by authorizing the agent to act on behalf of the participant or beneficiary with respect to ''all matters,'' ''personal property,'' ''Federal Government retirement benefits,'' or ''business transactions.''

(c) *Specific power of attorney.* A specific power of attorney gives an agent the authority to conduct specific TSP transactions. A specific POA must expressly describe the authority it grants. By way of example, a specific POA may authorize an agent to ''obtain information about my TSP account'' or ''borrow or withdraw funds from my TSP account.''

■ 15. Revise section 1690.13 to read as follows:

§ 1690.13 Guardianship and conservatorship orders.

(a) A court order can authorize an agent to conduct business with the TSP on behalf of an incapacitated participant or beneficiary. The agent is called a guardian or conservator and the incapacitated person is called a ward. The TSP must approve a court order before an agent can conduct business with the TSP; however, the TSP will accept a document that was signed by the agent before the TSP approved the court order. The TSP will approve a court order appointing an agent if the following conditions are met:

(1) A court of competent jurisdiction (as defined at 5 CFR 1690.1) must have issued the court order;

(2) The court order must give the agent either general or specific powers, as explained in paragraphs (b) and (c) of this section;

(3) The agent must satisfy the TSP that he or she meets any precondition specified in the court order, such as a bonding requirement;

(4) The court order must be submitted to the TSP record keeper for approval.

(b) *General grant of authority.* A general grant of authority gives a guardian or conservator unlimited authority to conduct business with the TSP, including the authority to sign any TSP-related document. By way of example, an order gives a general grant authority by appointing a ''guardian of the ward's estate,'' by permitting a guardian to ''conduct business transactions'' for the ward, or by authorizing a guardian to care for the ward's ''personal property'' or ''Federal Government retirement benefits.''

(c) *Specific grant of authority.* A specific grant of authority gives a guardian or conservator authority to conduct specific TSP transactions. Such an order must expressly describe the authority it grants. By way of example, an order may authorize an agent to ''obtain information about the ward's TSP account'' or ''borrow or withdraw funds from the ward's TSP account.''

[FR Doc. 04–11844 Filed 5–25–04; 8:45 am]

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FARM CREDIT ADMINISTRATION

12 CFR Parts 614 and 615

RIN 3052–AB96

Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; OFI Lending

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, agency, or we) adopts a final rule that amends regulations governing other financing institutions (OFIs). The purpose of the final rule is to make it easier for OFIs to obtain funding for short- and intermediate-term loans to farmers, ranchers, aquatic producers, farm-related businesses, and rural homeowners through Farm Credit System (FCS, Farm Credit, or System) banks. The FCA believes that these

changes will make credit to agriculture and other eligible borrowers in rural America more affordable. The final rule removes unnecessary provisions in the existing OFI regulations that: Impede the flow of credit; or do not enhance safe and sound operations. The FCA also adopts conforming amendments to its capital regulations.

DATES: *Effective Date:* This regulation will be effective 30 days after publication in the **Federal Register** during which time either or both Houses of Congress are in session. We will publish a notice of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Dennis K. Carpenter, Senior Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or

Richard A. Katz, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–2020.

SUPPLEMENTARY INFORMATION:

I. Background

This rulemaking began on April 20, 2000, with an advance notice of proposed rulemaking (ANPRM) that asked all interested parties specific questions about the funding and discount relationship between Farm Credit banks and OFIs.[1] FCA staff subsequently conducted telephone and field interviews with interested parties. On August 3, 2001, we held a public meeting in Des Moines, Iowa, where interested parties offered suggestions on how we could facilitate greater cooperation between System and non-System lenders in providing credit to agriculture and rural America. The public meeting addressed both the OFI program and other arrangements where the FCS and non-System lenders could help each other in extending credit to farmers, ranchers, and other eligible borrowers in rural America.

Many of the comments and suggestions that we received from the ANPRM, interviews, and at the public meeting were incorporated into the proposed rule to revise both our OFI and the investment in farmers' notes (Farmers' Notes) regulations.[2] Basically, the proposed OFI rule would allow OFIs to establish a funding and discount relationship with any one Farm Credit Bank (FCB) or agricultural credit bank (ACB) (collectively Farm Credit banks). The proposed rule also would strengthen the equitable treatment provisions in the existing regulations by requiring a Farm Credit bank, at the request of an OFI or OFI applicant; to: (1) Disclose how it prices funds for OFIs; and (2) justify any discrepancy in the cost of funding between OFIs and associations. Another feature of the proposed rule is that it would allow Farm Credit banks to disclose the identity of OFIs with their consent. The preamble to the proposed OFI rule clarified the FCA's position on borrower rights, and it offered suggestions for improving relationships between OFIs and the System, and the role of the FCA Ombudsman. The FCA also proposed changes to the Farmers' Notes regulation and conforming amendments to its capital regulations regarding risk weighting for OFIs and Farmers' Notes.

The FCA received 111 comment letters on the proposed rule. A total of 8 comment letters came from the System; 1 from the Farm Credit Council (FCC), 5 from Farm Credit banks, and 2 from associations. Other commenters were an agricultural credit cooperative OFI, a Community Development Financial Institution (CDFI), the Credit Union National Association (CUNA), which is a trade association for credit unions, and two individuals. Finally, 98 letters came from commercial bankers, including the Independent Community Bankers of America (ICBA) and its state-affiliated associations.

The vast majority of the commenters generally supported the proposed OFI rule, but both System and non-System commenters offered suggestions and raised concerns about particular issues. Commercial banks and their affiliated trade associations opposed the proposed Farmers' Notes rule. These commenters asked the FCA to hold a public meeting, seek additional public comment, and solicit congressional input before adopting a final Farmers' Notes rule. Several FCS and non-System commenters asked the FCA to revise or clarify certain provisions in the proposed capital risk-weighting regulations that applied to OFIs.

We are enacting a final rule on OFIs, which includes conforming amendments to the capital regulations concerning the risk weighting of System bank loans to OFIs. We are not adopting a final Farmers' Notes rule at this time because we are continuing to consider the best regulatory approach to this program.

II. Final OFI Rule

As explained earlier, the purpose of this rule is to make it easier for OFIs to obtain funding from Farm Credit banks for their short- and intermediate-term loans to agricultural and aquatic producers, farm-related business, and rural homeowners. Improving OFI access to the funding and discount services of Farm Credit banks could make affordable credit more available to farmers, ranchers, and other eligible borrowers. Farm Credit banks fulfill their missions as a Government-sponsored enterprise by enhancing the liquidity of OFIs, thereby lowering the cost of funding agriculture.

The FCA now addresses concerns and suggestions that the commenters raised about various issues of the proposed OFI rule.

A. Assured Access (§ 615.4540(b)(1))

Section 1.7(b)(4)(B)(i) of the Farm Credit Act of 1971, as amended (Act) requires FCA regulations to assure that the funding and discount services of Farm Credit banks are available on a reasonable basis to any OFI that is significantly involved in lending for agricultural and aquatic purposes. Currently, § 614.4540(b)(1) states that Farm Credit banks must ''fund, discount, or provide other similar financial assistance to any creditworthy OFI that * * * maintains at least 15 percent of its loan volume at a seasonal peak in loans and leases to farmers, ranchers, aquatic producers and harvesters.'' Section 1.7(b) of the Act and § 614.4540 of the regulations allow OFIs that do not meet this 15-percent threshold to fund and discount their short- and intermediate-term loans at Farm Credit banks, but they are not assured access if credit becomes scarce.

During earlier phases of this rulemaking, some commercial banks and System lenders expressed the opinion that the 15-percent threshold was too onerous, and they asked the FCA to reduce or eliminate it. Some of these commenters mistakenly believed that § 614.4540(b)(1) automatically excluded non-System lenders from the OFI program if agricultural or aquatic loans did not compromise at least 15 percent of their loan portfolios. Although the current regulation assures access to creditworthy OFIs that maintain at least 15 percent of their loan volume at a seasonal peak in agricultural loans, some commenters erroneously thought that it only provided assured access to those OFIs that always maintain at least 15 percent of their loan portfolio in farm loans. The preamble to the proposed rule dispelled both of these misconceptions.[3]

The FCA did not propose to change the 15-percent threshold as the factor that determines whether an OFI is

[1] *See* 65 FR 21151 (April 20, 2000).

[2] *See* 68 FR 47502 (August 11, 2003).

[3] *See* 68 FR 47502, 47505 (August 11, 2003).

assured access to funding from a Farm Credit bank. The preamble to the proposed rule explained that the standard that the FCA uses to determine whether a non-System lender is substantially involved in agricultural lending is more permissive than the 25-percent benchmark that the Federal Deposit Insurance Corporation established for nonmember banks that it insures, and is comparable to the measure used by the Board of Governors of the Federal Reserve System.[4] The FCA invited comments on alternatives that reasonably demonstrate that an OFI is significantly involved in agricultural lending because the agency is open to ideas that would make this program more attractive to OFIs.

The FCA received two comment letters about assured access. Both letters came from FCS institutions that support the 15-percent threshold as the appropriate standard for determining whether an OFI is significantly involved in agricultural lending.

The final rule retains the 15-percent threshold in existing § 614.4540(b)(1). The 15-percent threshold strikes a fair balance between the needs of small rural lenders and larger institutions. Agricultural loans usually comprise a larger percentage of the loan assets of small rural lenders. However, larger institutions may extend more overall credit, in dollar terms, to farmers, although agricultural loans are a much smaller percentage of their loan portfolios.

B. Place of Discount (§ 614.4550)

Non-System lenders and many Farm Credit banks have long considered place of discount restrictions as a major reason why the OFI program has not been widely used by commercial banks and other agricultural lenders. Historically, OFIs borrowed from the Farm Credit bank that serves the territory where the OFIs maintain their headquarters or makes most of their loans. As a result, OFIs have maintained a funding or discount relationship with a System bank that is owned and controlled by their competitors.

In 1998, the FCA sought to remedy this problem by adopting current § 614.4550, which established new place of discount rules for OFIs. Under this regulation, every OFI must apply first to the Farm Credit bank that serves the territory where the OFI operates. If the Farm Credit bank denies funding, or otherwise fails to approve a completed application within 60 days, the OFI may apply to any other Farm Credit bank. Additionally, the regulation allows a Farm Credit bank to consent to another System bank funding or discounting loans for an OFI.

The ANPRM, interviews, and public meeting revealed widespread dissatisfaction with the place of discount rule in § 614.4550. Except for one Farm Credit bank, all System and non-System commenters favored repealing all restrictions on place of discount so OFIs could choose their System funding bank. The one Farm Credit bank that opposed repealing § 615.4550 was concerned that FCS associations would be placed at a competitive disadvantage.

In response to these comments, the FCA proposed to revise § 615.4550 so OFIs could fund or discount loans with any FCS bank. The FCA reasoned that this approach would free Farm Credit banks from potential pressure by associations not to lend to their competitors. Another factor that supports the proposed rule is that when Farm Credit banks compete for OFI credit, the OFI may be able to obtain a more favorable funding cost, which it can then pass on to farmers and ranchers.[5]

The proposed rule would require a Farm Credit bank to notify another System bank in writing within 5 business days of receiving an application from an OFI that maintains its headquarters or has more than 50 percent of its loan volume in the territory of the other Farm Credit bank. The purpose of this notice requirement is to give the bank in whose territory the OFI is located ample opportunity to contact the applicant and offer it funding and discount services. The proposed rule would not allow any OFI to borrow from two or more Farm Credit banks at the same time. The preamble to the proposed rule justified this ban on safety and soundness grounds.

The FCA received 100 comments about place of discount. Of this total, 92 came from commercial banks or their trade associations, 6 from System banks and associations, and 1 each from CUNA and the agricultural credit cooperative OFI. All commercial bank commenters and CUNA supported the FCA's position on place of discount. None of these commenters sought any revision to proposed § 614.4550. System commenters agreed that an OFI should be allowed to fund or discount short-or intermediate-term loans with the Farm Credit bank of its choice.

However, System commenters opposed the 5-day notice requirement in the proposed rule. These commenters claim that the notice requirement grants too much flexibility to OFIs while imposing unnecessary burdens on System banks. One commenter thought that the OFI should bear the burden of notifying the local Farm Credit bank that it is taking its business elsewhere. Two System commenters stated that the mere receipt of a credit application from an OFI located outside its chartered territory does not mean that the Farm Credit bank will approve funding. Since the FCS bank is unlikely to make a credit decision within 5 days, these commenters stated that it should be under no obligation to notify the Farm Credit bank that serves the territory where the OFI is located.

System commenters and the agricultural credit cooperative OFI opposed the ban on two or more Farm Credit banks simultaneously funding the same OFI. Many of these commenters stated that our safety and soundness rationale was unpersuasive. These commenters note that many OFIs already have multiple sources of funding, and that multilender financing of commercial borrowers is commonplace today in credit markets. All of these commenters suggest that intercreditor agreements among different Farm Credit banks will adequately resolve the FCA's safety and soundness concerns about disputes over collateral if the OFI fails.

The FCA adopts final § 614.4550, which enables creditworthy OFIs to seek and establish a funding and discount relationship with the Farm Credit bank of their choice. Allowing OFIs to choose their System funding bank frees them from the problems associated with obtaining credit from banks that are owned and controlled by their competitors. This approach may lower the funding costs and improve the liquidity of OFIs which could, in turn, reduce the cost of credit to farmers, ranchers, and other eligible rural residents.

In response to System commenters, the FCA does not view the 5-day notice requirement as a burden on Farm Credit banks. This notice requirement ensures that Farm Credit banks communicate with each other in providing funding and liquidity to OFIs. Additionally, this regulatory requirement enables each Farm Credit bank to consider offering funding and discount services to OFIs in its chartered territory. The 5-day notice requirement has no relationship to the credit approval process at a Farm Credit bank that receives an application from an OFI outside its territory. Written notice is required within 5 days, regardless of whether the Farm Credit bank has considered or acted upon an application received from such OFIs.

[4] Ibid.

[5] Ibid.

Simply providing written notice to another Farm Credit bank within 5 days is neither costly nor difficult to any System bank that receives applications from OFIs outside its chartered territory.

The FCA retains the ban on two or more Farm Credit banks simultaneously funding the same OFI. Although System arguments against this ban have some merit, policy concerns justify the FCA's decision to retain it. In retail credit markets, financing by multiple lenders of the same borrower and intercreditor agreements are commonplace. However, discount banks established by Congress to fulfill a public policy mission generally do not engage in such practices. For example, two Federal Reserve Banks or two Federal Home Loan Banks do not simultaneously fund the same member bank. Generally, each FCS association receives all of its funding from one Farm Credit bank. In addition, an association cannot seek credit from another System bank unless its funding bank consents. Therefore, the ban on two or more Farm Credit banks simultaneously funding the same OFI is consistent with the FCA's policy of requiring FCS banks to treat their OFIs and System associations equitably.

The agricultural credit cooperative OFI expressed concern about how the ban on two FCS banks simultaneously funding the same OFI would affect its business. The commenter stated that its parent is an agricultural cooperative that borrows from the ACB under title III of the Act, while it is an OFI that borrows from a Farm Credit bank and sells participations in loans to FCS associations. The FCA clarifies that nothing in the proposed or final regulation prevents: (1) OFIs from participating in loans with System associations; or (2) any parent or affiliate which is an agricultural cooperative from borrowing from the ACB under title III of the Act.

C. Borrower Rights (§ 614.4560(d))

Section 4.14A(a)(6)(B) of the Act expressly requires OFIs to adhere to borrower rights, ''but only with respect to loans discounted or pledged under section 1.7(b)(1).'' The borrower rights that apply to loans that OFIs discount or pledge with a Farm Credit bank are: (1) Effective Interest Rate (EIR) disclosures; (2) notice of adverse credit decision; (3) the right to appeal adverse credit decisions to the lender's credit review committee; (4) receiving copies of certain documents; and (5) the right to restructure distressed loans. An existing regulation, § 614.4560(d), implements section 4.14A(a)(6)(B) of the Act by requiring OFIs to comply with borrower rights on those loans that Farm Credit banks fund or discount.

During all phases of this rulemaking, System and commercial bank commenters have repeatedly advised the FCA that borrower rights are an impediment to the success of the OFI program. However, many commenters acknowledged that the Act requires OFIs to comply with borrower rights requirements. The FCA cannot repeal § 614.4560(d) because it implements statutory borrower rights requirements.

The FCA proposed a technical correction to § 614.4560(d) that would remove the reference to section 4.36 of the Act from the regulation because the plain language of the statute grants the right of first refusal only to borrowers of FCS institutions that operate under titles I or II of the Act, not OFIs. One System commenter agreed with the technical correction to § 614.4560(d), while all other commenters expressed no opinion about this matter. The final rule removes the reference to section 4.36 of the Act from § 614.4560(d) so that the regulation conforms to the statute.

The FCA recently moved all borrower rights regulations to part 617.[6] For this reason, the FCA revises all of the cross-references in final § 614.4560(d) to the borrower rights regulations to reflect this change.

Currently, § 614.4560(d) states that borrower rights apply to ''all loans that an OFI *funds* or discounts through a Farm Credit Bank or agricultural credit bank * * *'' (Emphasis added). Earlier, a Farm Credit bank pointed out that section 4.14A(a)(6)(B) of the Act requires an OFI to comply with borrower rights, ''but only with respect to loans discounted or pledged under section 1.7(b)(1).'' As a result, this System bank asserted that the language in § 614.4560(d) exceeds the scope of section 4.14A(a)(6) of the Act. Specifically, the Farm Credit bank interpreted section 4.14A(a)(6) of the Act to mean that borrower rights apply to OFI loans only during the time that they are actually pledged to the funding bank as collateral. Under this interpretation, most borrower rights would not apply to OFI loans because many of these rights apply before or after the time that these loans are actually pledged to the System funding bank. Examples of borrower rights that would not apply to OFI loans under this interpretation are: (1) Most EIR disclosures; (2) the right to appeal certain adverse credit decisions to an OFI's credit review committee; and (3) the right to restructure a distressed loan that the OFI has removed from collateral at its System funding bank. Under the bank's suggested interpretation of the statute, section 4.13A of the Act would be the only borrower rights provision of the Act that would always apply to OFI borrowers. This provision enables System and OFI borrowers to obtain copies of: (1) All loan documents they sign or deliver; (2) loan appraisals on their assets that the lender uses in making credit decisions; and (3) the lender's articles of incorporation and bylaws.

The proposed rule retained the provision in § 614.4560(d), which states that borrower rights apply to all loans that an OFI funds or discounts through a Farm Credit bank. The preamble to the proposed rule thoroughly examined and analyzed the text, structure, and legislative history of the borrower rights provisions of the Act, and it explained in detail why borrower rights apply to all loans that OFIs fund through a Farm Credit bank. The discussion in the preamble to the proposed rule revealed that Congress intended to grant OFI borrowers whose loans are funded by a Farm Credit bank all of these rights and protections, even at times when their loans are not actually pledged as collateral to the System funding bank.

Except for one association, which expressed no opinion on this matter, all other System commenters opposed the FCA's interpretation of the borrower rights provision of the Act. These commenters stated that this approach conflicts with the FCA's stated goal of making the OFI program more attractive to potential and existing OFIs. Some commenters stated that the FCA's position was impractical because neither the agency nor the funding bank can enforce compliance with borrower rights after an OFI has removed a distressed loan from collateral.

None of these commenters offered new information or provided any legal analysis that would cause the FCA to change its interpretation of section 4.14A(a)(6) of the Act. Accordingly, the FCA reaffirms its interpretation of section 4.14A(a)(6) that it presented in the preamble to the proposed rule. Under section 4.14A(a)(6) of the Act, borrower rights apply to all loans that an OFI funds or discounts through a Farm Credit bank. The borrower continues to be entitled to borrower rights after the OFI removes the loan from collateral. Only a statutory amendment could resolve the concerns raised by the commenters.

The ICBA and its member banks stated that depository institutions should not have to comply with borrower rights because they must

[6] *See* 69 FR 10901 (March 9, 2004).

comply with the Community Reinvestment Act (CRA). These commenters asked the FCA to treat compliance with the CRA as a substitute to compliance with borrower rights requirements.

The FCA responds that the Act explicitly requires OFIs to comply with borrower rights on all loans that they fund or discount through a Farm Credit bank, regardless of whether they are also subject to the CRA. The purposes, objectives, and compliance mechanism of the CRA are separate, distinct, and independent from the borrower rights requirements of the Act. The CRA does not provide farmers, ranchers, and aquatic producers and harvesters the rights and protections on agricultural loans that the Act confers on them. Neither the Act nor the CRA authorizes depository institutions to substitute CRA requirements for compliance with borrower rights. For this reason, the FCA has no authority to grant this request.

One Farm Credit bank asked the FCA to clarify that borrower rights do not apply to loans that an OFI pledges as supplemental collateral. Under § 614.4570(c), Farm Credit banks may require an OFI to pledge supplemental collateral or provide other credit enhancements that support the lending relationship. Farm Credit banks take supplemental collateral from their OFIs out of an abundance of caution. However, Farm Credit banks do not fund or discount supplemental collateral pledged by their OFIs. For this reason, borrower rights would not apply to agricultural loans that OFIs pledge to their System funding bank as supplemental collateral.

D. Equitable Treatment (§ 614.4590)

An FCA regulation, § 614.4590, requires Farm Credit banks to treat OFIs and FCS associations equitably. More specifically, § 614.4590(a) requires that Farm Credit banks apply comparable and objective loan underwriting standards and pricing requirements to both OFIs and FCS associations. Under § 614.4590(b), the total charges that a System bank assesses its OFIs must be comparable to the total charges it imposes on its affiliated associations. Section 614.4590(b) additionally requires that any variation between the overall funding costs that OFIs and FCS associations are charged by the same funding bank must result from differences in credit risk and administrative costs to the FCB or ACB.

Many respondents to the ANPRM and speakers at the public meeting told the FCA that Farm Credit banks continue to favor FCS associations over OFIs. According to these commenters, this perception of unfair treatment deters many agricultural lenders from becoming OFIs, while existing OFIs feel that FCS associations always receive preferential treatment from System funding banks.

Commercial bank commenters suggested that our regulations could rectify this problem by mandating equal, rather than equitable, treatment of OFIs and FCS associations. Because these commenters stated that this disparity of treatment was especially evident in the price of funding that Farm Credit banks charge their associations and OFIs, they asked the FCA to amend § 614.4590 so it requires Farm Credit banks to disclose to OFIs exactly how they price their loans to both OFIs and FCS associations. These commenters also stated that the FCA should require Farm Credit banks to identify the specific components that make up their cost of funds to OFIs and the amount of these components in terms of basis points. Another suggestion was that § 614.4590 should be revised so it expressly prohibits Farm Credit banks from charging OFIs fees that are not charged to FCS associations. Some commercial banks commented that the regulation should require Farm Credit banks to pay dividends or patronage to OFIs.

In response to these comments, the FCA proposed adding two new provisions to § 614.4590. Proposed § 614.4590(c) would require each FCB or ACB to provide any OFI or OFI applicant, upon request, a copy of its policies, procedures, loan underwriting standards, and pricing guidelines for OFIs. This provision would also require that the pricing guidelines must identify the specific components that make up the cost of funds for OFIs and the amount of these components in basis points. Proposed § 614.4590(d) would require each FCB or ACB to explain in writing the reasons for any variation in the overall funding costs it charges OFIs and FCS associations if such information is requested by an OFI or OFI applicant. This provision would require a Farm Credit bank to compare the costs that it charges OFIs and FCS associations as groups or, if possible, variations between groups of OFIs and FCS associations that are of a similar size. However, proposed § 614.4590(d) would expressly prohibit System funding banks from disclosing financial or confidential information about individual FCS associations.

The FCA declined requests to amend § 614.4590 so it would require equal, instead of equitable, treatment of FCS associations and OFIs. The preamble to the proposed rule listed five fundamental differences that distinguish FCS associations from OFIs. The FCA reasoned that these fundamental differences preclude § 614.4590 from mandating equal treatment for associations and OFIs. The preamble to the proposed rule also explained that these fundamental differences mean that OFIs expose Farm Credit banks to different credit risks and administrative costs than direct lender associations. As a result, some disparity in cost of funds that an FCB or ACB charges FCS associations and OFIs may be justified. The proposed rule did not require Farm Credit banks to pay dividends or patronage to their OFIs because the FCA found it inappropriate to impose, by regulation, business practices on FCS institutions in the absence of a compelling safety and soundness reason.[7]

In response to the proposed rule, the FCA received comment letters on equitable treatment from the FCC, a Farm Credit bank, an agricultural credit cooperative OFI, the ICBA and several of its commercial bank members. The two System commenters believe that the new disclosure requirements in proposed § 614.4590 impose costs and burdens on FCS banks that outweigh the benefits to OFIs. The Farm Credit bank stated that the revisions to § 614.4590 ''are heavily slanted in favor of the OFIs.'' Both System commenters expressed concern that § 614.4590 would require Farm Credit banks to disclose ''proprietary pricing procedures'' and information to OFIs, which could now establish a funding or discount relationship with any System bank under § 614.4550. Although commercial bank commenters support the new disclosure requirements in § 614.4590, they continue to state that this regulation should require equal, rather than equitable, treatment of associations and OFIs.

The commercial bank commenters urged the FCA to enact a final rule that requires the equal funding costs for FCS associations and OFIs because in their view, System institutions ''have easy access to all the credit they need'' while OFIs must rely on several funding sources, each which is limited. Commercial banks and the agricultural credit cooperative OFI asked the FCA to require FCS banks to: (1) Earmark the capital contribution of each OFI, and (2) pay patronage and dividends to OFIs whenever FCS associations receive such payments.

After considering these comments, the FCA has decided to enact proposed § 614.4590 as a final rule without

[7] *See* 68 FR 47502, 47505 (August 11, 2003).

revision. The final rule appropriately balances the interests of Farm Credit banks, OFIs, and System associations.

In response to System concerns, the FCA believes that OFI program will become more transparent because final § 614.4590(c) and (d) now require Farm Credit banks to disclose pricing information to their OFIs. Transparency enables both OFIs and FCA examiners to objectively determine whether a Farm Credit bank is treating its associations and OFIs equitably. Allowing OFIs to choose their System funding bank while simultaneously requiring Farm Credit banks to disclose pricing information to OFIs achieves the FCA's objective of making this program more attractive to existing and potential OFIs. Disclosing pricing information helps OFIs make informed decisions in selecting their System funding bank. As a result, the OFI can pass these pricing advantages along to farmers, ranchers, and other eligible borrowers. Funding and discounting loans for OFIs is part of the public policy mission of System banks, which are cooperative institutions that are jointly and severally liable for FCS debt. Accordingly, the FCA is not persuaded by the commenters' arguments that the regulation gives OFIs access to ''proprietary'' pricing information at several different Farm Credit banks.

Commercial bank commenters offered no new information or analysis that would persuade the FCA to amend this regulation so it requires equal, rather than equitable, treatment of OFIs and FCS associations. In fact, the most recent comments from commercial banks reinforce the notion that OFIs are fundamentally different than FCS associations. Thus, OFIs pose different credit risks to System banks than associations which, in turn, could justify the differential in the cost of funding charged to the two groups of lenders.

The FCA declines the request that the final rule require FCS banks to: (1) Allocate the capital contribution of each OFI; and (2) pay patronage and dividends to OFIs when FCS associations receive similar payments. System banks distribute patronage and dividends to their shareholders in accordance with their bylaws. FCA regulations do not prescribe business practices at System institutions in the absence of compelling safety and soundness reasons. However, each System bank must factor in capital contributions as well as patronage and dividend payments when it prices credit for an OFI. The new regulatory disclosure requirements make it easier for the OFIs and other interested parties to determine whether Farm Credit banks are pricing OFI credit equitably.

E. Ombudsman

Many commercial banks and their trade associations asked us in their response to the ANPRM and during the public meeting to appoint an Ombudsman to assist OFI applicants and existing OFIs in establishing and maintaining good relations with System funding banks. On February 25, 2003, the FCA Board established the Office of the Ombudsman. The public announcement, which informed the public of the creation of this office stated, ''The Office of the Ombudsman will be an effective, neutral and confidential resource and liaison for the public.'' One of many duties of the Ombudsman is to address the concerns of OFIs and facilitate better relationships between them and the FCS. The FCA repeated this information in the preamble to the proposed rule.[8]

The FCC and a System bank stated in their comment letters that the sole task of the Ombudsman is to serve as an advocate for OFIs. Since System banks pay for the Office of the Ombudsman through assessments that the FCA levies on them, these commenters suggest that it would be appropriate for these banks to pass the cost along to their OFIs. One commenter stated that the FCA has no express statutory authority to establish the Ombudsman position.

The FCA repeats what it said in the public announcement and the preamble to the proposed regulation. The FCA emphasizes that the Office of the Ombudsman is an effective, neutral and confidential resource and liaison for the public. Addressing the concerns of OFIs is only one of the Ombudsman's duties.

Several provisions of title V of the Act grant the FCA power to establish the Office of the Ombudsman. Section 5.9 of the Act enables our Board to ''provide for the performance of all the powers and duties vested in the Farm Credit Administration.'' Section 5.11(b) of the Act empowers the Chairman of the FCA to ''appoint such personnel as may be necessary to carry out the functions of the Farm Credit Administration.'' This section of the Act also states, ''The appointment by the Chairman of the heads of major administrative divisions under the Board shall be subject to the approval of the Board.'' The FCA Board voted to establish this office in order to address concerns by members of the public about how the agency or the System is carrying out their responsibilities under the Act.

The FCA would oppose any attempt by System banks to encumber their OFIs with the entire cost of the Office of the Ombudsman. Such attempts would violate the requirement in § 614.4590 that Farm Credit banks treat their associations and OFIs equitably.

F. Disclosure of OFI Identities (§ 614.4595)

The ANPRM asked the public whether FCA regulations should allow Farm Credit banks to disclose the identities of the OFIs that they fund. Current FCA regulations prohibit FCS institutions from releasing information about their retail borrowers and stockholders to the public.[9] However, the FCA never interpreted these regulations as prohibiting the release of names of FCS associations that borrow from Farm Credit banks.[10] The preambles to both the ANPRM and the proposed rule explained why the FCA believes that the reasons for protecting the identity of retail borrowers do not apply to financial institutions that fund and discount loans with a Farm Credit bank.[11] As both preambles explained, retail borrowers often are individual consumers, and keeping their identities confidential shields them from unwanted marketing solicitations or publicity involving their personal financial business whereas OFIs could benefit from the disclosure of their identity because it could make prospective retail borrowers aware of other credit options.

In response to ANPRM comments and testimony in the public meeting, the FCA proposed a new regulation, § 614.4595 which would allow Farm Credit banks to disclose to the public the names, addresses, telephone numbers, and Internet Web site addresses of those OFIs that consent in writing. The proposed regulation also would require each Farm Credit bank to adopt policies and procedures for: (1) Obtaining and maintaining the consent of its OFIs; and (2) disclosing this information to the public. Financial statements of Farm Credit banks should not disclose the identity of an OFI unless it consents. The FCA believes that this regulatory approach empowers each OFI to make the decision whether disclosure of its name, address, telephone number, and Internet Web site address to the public is in its best interest.

[8] Ibid.

[9] 12 CFR part 618, subpart G.

[10] In fact, information about the identities of FCS associations is widely available because it is contained in financial statements that Farm Credit banks release to the public.

[11] *See* 65 21151, 21154 (April 20, 2000); 68 FR 47502, 47508 (August 11, 2003).

The FCA received comments about this issue from the FCC, two Farm Credit banks, the ICBA, and CUNA. The FCC and a System bank see no need for this regulation because they believe that the regulations in subpart G of part 618, which govern the release of information about System borrowers and shareholders, already permits Farm Credit banks to disclose the identity of an OFI that consents. If the FCA adopts a final disclosure regulation for OFIs, two System banks suggest preamble clarifications and minor edits to the text of § 614.4595. The CUNA supports proposed § 614.4595 because it believes that disclosure of a credit union's identity will help inform farmers, ranchers, and other eligible borrowers about their other credit options and the benefits of credit union membership. The ICBA suggests the FCA switch from an ''opt-in'' to an ''opt-out'' approach in the final rule. Under an ''opt-out'' approach, each Farm Credit bank would automatically disclose an OFI's identity to the public unless the OFI instructed it, in writing, not to do so. The ICBA contends that an ''opt-out'' approach is consistent with the trend in the law governing disclosure of customer information by financial institutions.

The FCA adopts § 614.4595 as a final rule after slightly changing the text of the regulation in response to a comment from a System bank. The FCA disagrees with the two System commenters that this regulation is unnecessary because the regulations in subpart G of part 618 already govern releases of information about System borrowers and shareholders. As the preambles to the ANPRM and proposed rule explain, the regulations in subpart G of part 618 apply only to releasing information about retail borrowers. For this reason, a new regulation is needed to clarify the authority of System banks to disclose information about OFIs.

The FCA declines the ICBA's request to revise § 615.5495 so that the final regulation requires System banks to disclose an OFI's identity unless the OFI ''opts-out.'' The FCA believes that the ''opt-in'' approach in the proposed rule is easier for System banks to administer than the ''opt-out'' approach favored by the commenter. Requiring an OFI to affirmatively consent, in writing, to the disclosure of its identity avoids the misunderstandings and miscommunications that are more likely to occur if disclosure happens automatically unless or until the OFI takes action to stop it. Also, the FCA's ''opt-in'' approach gives OFIs more control and flexibility over the decision to allow System funding banks to publicly disclose their identity than the ICBA's ''opt-out'' approach. Under the approach in § 615.4595, the OFI decides whether to allow its System funding bank to disclose its identity to the public, and then it communicates its decision to the bank, which honors its decision. In contrast, disclosure occurs under the ''opt-out'' approach unless the OFI takes action to stop it by a certain deadline.

Under final § 614.4595, a Farm Credit Bank or agricultural credit bank may disclose to members of the public the name, address, telephone number, and Internet Web site address of any affiliated OFI only if such OFI, through a duly authorized officer, consents in writing. Each Farm Credit Bank and agricultural credit bank must adopt policies and procedures for requesting, obtaining, and maintaining the consent of its OFIs and for disclosing this information to the public.

The FCA inserted the word ''requesting'' into the final regulation § 614.4595 in response to a comment from a Farm Credit bank. The commenter suggested that the FCA change the word ''obtaining'' in the proposed regulation to ''requesting.'' According to the commenter, a System bank should not be accountable for ''obtaining'' consent from an OFI. The commenter believes that ''requesting'' the OFI's consent is the most the System funding bank can do. After considering this comment, the FCA amended the regulation so it requires System banks to adopt policies and procedures for ''requesting, obtaining, and maintaining'' the consent of its OFIs. This revision enhances the clarity and accuracy of the final regulation. A Farm Credit bank must request and obtain the OFI's written consent before it can publicly disclose the OFI's identity.

One Farm Credit bank asked the FCA for assurances that § 614.4595 does not restrict the System bank's right to file financing statements or other routine public filings that protect its security interest under applicable law. The FCA affirms that the final rule does not hinder the right or ability of any System bank to perfect its security lien in collateral pledged by its OFIs. This approach is similar to other Federal laws that protect the privacy of consumers who buy goods and services on credit. Although these laws restrict the release of confidential information by the creditor, they do not prevent the creditor from filing public documents that enable it to collect the debt in event of default.

G. Associations Acting as Farm Credit Bank Agents

Both System and non-System commenters suggested in their responses to the ANPRM and during testimony at the public meeting that FCS associations could serve as an effective conduit for funding OFIs. These commenters pointed out that associations often have established relationships with local OFIs and other commercial lenders. In many cases, FCS associations and existing and potential OFIs already have entered into joint financing arrangements for common borrowers.

The FCA stated in the preamble to the proposed rule that the Act allows only Farm Credit banks that operate under title I of the Act, not FCS associations, to establish funding and discount relationships with OFIs. However, the preamble to the proposed rule pointed out that section 1.5(18) of the Act allows a Farm Credit bank to delegate to associations such functions as the bank deems appropriate while section 2.2(19) allows a direct lender association to perform functions delegated to it by its funding bank. Thus, sections 1.5(18) and 2.2(19) of the Act enable FCS associations to act as point-of-contact or servicing agents for the Farm Credit bank in its lending relationship with its OFIs.[12]

Allowing FCS associations to act as intermediaries between Farm Credit banks and OFIs may make this program more successful and reduce tensions between the System and OFIs. In particular, designating associations as intermediaries and servicing agents for Farm Credit banks on their OFI loans may help diminish the competitive rivalries that have historically troubled the relationship between OFIs and associations. Farmers and ranchers benefit when FCS associations and OFIs work together. Agreements between the parties can establish these arrangements and, therefore, no new regulation is necessary.

The FCA received 2 comment letters about this issue from a Farm Credit bank and association. The Farm Credit bank commenter concurred that existing statutory authorities are sufficient to support associations acting as agents of Farm Credit banks in their relationship with OFIs and, therefore, no regulation is necessary. The association fully supported allowing associations to act as intermediaries for the Farm Credit banks in establishing and servicing OFI relationships.

[12] *See* 68 FR 47502, 47508 (August 11, 2003).

The FCA reaffirms that FCS associations have no authority under the Act to lend directly to OFIs, but they can act as intermediaries or servicing agents on loans from a Farm Credit bank to OFIs.

H. OFI Lending Limits

In 1998, the FCA repealed former § 614.4565, which imposed a lending limit on the amount of credit that any OFI could extend to a single credit risk with FCS funds. At the time, we acknowledged that certain OFIs would remain subject to lending limits that their primary regulator imposes under applicable Federal or state law. The preamble to the final rule stated that we expect each Farm Credit bank to prudently manage risk exposures to concentrations in OFI loan portfolios through underwriting standards and its general financing agreement (GFA) with each OFI.[13]

After the FCA repealed former § 614.4565, some Farm Credit banks considered imposing a lending limit on both FCS associations and OFIs that is lower than the lending limit that: (1) § 614.4353 establishes for System direct lender associations; and (2) Federal or state laws place on depository institutions. During earlier phases of this rulemaking, two non-System commenters asked us to enact a new regulation that would forbid Farm Credit banks from imposing a lending limit on OFIs that is lower than the limit established by applicable Federal or state law. The FCA declined this request because it is inconsistent with safety and soundness. The preamble to the proposed rule stated that each Farm Credit bank may establish, by underwriting standards and the GFA, limits on its exposure to concentrations in the loan portfolios of both FCS associations and OFIs that are more stringent than lending limits imposed by statute or regulation, as long as it does not favor FCS associations over OFIs.[14]

The FCA received comments on this issue from a Farm Credit bank, the ICBA, and 95 commercial banks. The Farm Credit bank supported the FCA's position. The ICBA agreed with the FCA that lending limits imposed by FCS banks on OFIs should be on the same basis as for FCS associations. The ICBA asserted that System banks should not impose ''unduly restrictive'' lending limits on OFIs, and they should be commensurate with limits set by the OFI's parent or primary regulator. Several commercial banks continued to urge the FCA to enact a regulation that prevents Farm Credit banks from imposing a lending limit that is more stringent than the limit established by Federal or state law.

The FCA reaffirms its earlier position that each Farm Credit bank may establish, by underwriting standards and GFAs, limits on its exposure to concentrations in the loan portfolios of FCS associations and OFIs that are more stringent than lending limits imposed by statute or regulation. However, System banks would not be treating OFIs equitably if they establish lending limits that favor FCS associations over OFIs. Additionally, any decision by a Farm Credit bank to establish a lending limit that is more stringent than the limit imposed on an OFI by applicable Federal or state law, or its corporate parent must have a safety and soundness justification. Commercial bank commenters have provided no new information or analysis that would persuade the FCA to prohibit Farm Credit banks, by regulation, from imposing a lending limit on OFIs that is more stringent than the limit established by law or the corporate parents of such OFIs. The FCA declines this request.

I. Eligible Collateral Pledged To Support an OFI's Discounting Arrangements With a Farm Credit Bank (§ 614.4570)

Currently, § 614.4570 requires a secured lending relationship between each Farm Credit bank and every OFI. Under § 614.4570(b)(2), each FCB or ACB must perfect its security interest in any and all obligations and the proceeds thereunder that the OFI pledges as collateral, in accordance with applicable state law. Additionally, § 614.4570(c) allows each FCB and ACB to require its OFIs to pledge supplemental collateral to support the lending relationship.

A comment letter from a System bank acknowledged that the Act prohibits Farm Credit banks from: (1) Advancing funds for long-term real estate mortgages to OFIs; and (2) accepting mortgages as primary collateral from OFIs. The commenter opined that the statutory ban on System banks funding and discounting agricultural mortgages for OFIs is a major impediment to expansion of this program. The commenter then asked the FCA to develop regulatory interpretations that would enable System banks to overcome this obstacle.

As acknowledged by the commenter, the Act does not authorize long-term funding for OFIs. FCA regulations, policies, or interpretations must comply with the Act. Therefore, an amendment to the Act is necessary to authorize Farm Credit banks to fund or discount agricultural mortgage loans that OFIs make to their customers.

J. Improving the Relationship Between Farm Credit Banks and OFIs

In response to the ANPRM and during the public meeting, several System and non-System commenters offered various suggestions for improving the relationship between Farm Credit banks and prospective and existing OFIs. The commenters' suggestions are confidence-building measures that could attract more OFIs to establish funding and discount relationships with Farm Credit banks. These suggestions could help improve relations between existing OFIs and their funding banks and encourage prospective OFIs to establish funding and discount relationships with Farm Credit banks.

The FCA conveyed these ideas to Farm Credit banks by publishing the suggestions in the preamble to the proposed rule. These suggestions would require Farm Credit banks to take the initiative and reach out to existing and prospective OFIs. More specifically, the FCA encouraged Farm Credit banks to consider developing internal programs and initiatives that:

1. Establish outreach programs for contacting prospective OFIs and providing them with information about the banks' services;
2. Routinely publish updated information about their products and services for OFIs, and their underwriting standards, funding terms and conditions, and pricing guidelines for OFI loans;
3. Allow OFI representatives to observe meetings of the banks' board of directors;
4. Promote better communication through roundtable discussions, focus groups, and public discussions that bring OFIs, associations, and other interested parties together to discuss issues of mutual interest;
5. Work with OFIs to identify and remove administrative barriers that hinder OFI access;
6. Allow FCS associations to act as intermediaries and servicing agents on extensions of credit from the funding bank to OFIs, as discussed earlier; and
7. Identify best practices for OFIs.

The FCA published these suggestions in the preamble to the proposed rule because we are strongly committed to the success of the OFI program. The FCA reasoned that by adopting the internal programs and initiatives described above, Farm Credit banks can attract more OFIs which, in turn, will provide eligible farmers, ranchers, aquatic producers and harvesters, farm-related businesses, and rural

[13] *See* 63 FR 36541, 36545 (July 7, 1998).

[14] *See* 68 FR 47502, 47508 (August 11, 2003).

homeowners with more plentiful and affordable credit, as Congress intended. Another passage in the preamble to the proposed rule advised the public that the FCA may provide additional guidance to Farm Credit banks about improving the OFI program through bookletters, informational memoranda, and the Office of the Ombudsman. The preamble to the proposed rule informed the public that new regulations may not be required to implement these suggestions for improving the OFI program.[15]

The FCA received several comments about this guidance from both FCS and non-System commenters. Letters from commercial banks strongly supported the recommendations and urged the FCA to encourage Farm Credit banks to undertake all of these initiatives so: (1) Their relationships with OFIs would improve; and (2) this program would become more attractive to non-System agricultural lenders. In contrast, System commenters stated that the FCA was interfering in the internal business affairs of System banks without any safety or soundness justification. These commenters found it unusual for the preamble to encourage certain practices at System banks while acknowledging that new regulations are unnecessary.

Four System commenters objected to the suggestion that Farm Credit banks invite OFI observers to their board meetings. According to these commenters, matters discussed at bank board meetings are confidential and only board members and officers attend such meetings. One System commenter objected to the suggestion that Farm Credit banks identify best management practices for OFIs. From this commenter's perspective, OFIs are independent financial institutions that are responsible for their own operation, and Farm Credit banks should not attempt to impose their own views about best management practices on their OFIs. This commenter expressed concern that System banks could be exposed to lender liability claims if they prescribed best management practices to their OFIs.

As stated earlier, the FCA is committed to the success of the OFI program. Providing funding and liquidity to OFIs is an essential and integral part of the public policy mission of System banks to ensure that farmers and ranchers always have access to sound, adequate, and constructive credit. The FCA offered these seven suggestions in the hope that they would encourage System banks to: (1) Reach out to potential OFI applicants and existing OFIs; and (2) take the initiative in building confidence between OFIs and the System. All of these suggestions concentrated on ideas for improving communications between the System and non-System agricultural lenders that are, or may become OFIs.

From time to time, the FCA and other regulators offer guidance to institutions that they regulate. The suggestions are not mandatory, but are guidelines, which pertain to business practices instead of safety and soundness or compliance with laws and regulations. System banks may consider other approaches that foster strong and healthy relationships with OFIs in addition to, or instead of, the ideas that the FCA has suggested. If System banks invite OFI observers to their board meetings, they should consider appropriate measures that protect the confidentiality of information. The FCA emphasizes the importance of System banks reaching out to OFIs.

K. CDFIs

A CDFI urged the FCA to amend the OFI regulations so they facilitate System bank lending to CDFIs that primarily serve young, beginning, small, and low resource farmers and ranchers. The commenter made no specific regulatory recommendations to the FCA with regard to CDFIs being designated as OFIs. The commenter did suggest a regulatory change to treat CDFIs as the equivalent of Organization for Economic Cooperation and Development (OECD) banks[16] for risk-weighting purposes. We address this comment later under section III. *Capital Risk Weighting* of this preamble.

CDFIs are private sector financial intermediaries that offer financial services to economically distressed communities. These institutions provide economically distressed communities with credit, capital, and financial services that often are unavailable from other financial institutions. The Community Development Financial Institutions Fund (CDFI Fund), which is a wholly owned Government corporation within the United States Department of the Treasury (Treasury), certifies and oversees CDFIs.

CDFIs attract capital for their operations from both private and public sources of funding. The CDFI Fund provides financial and technical assistance in the form of grants, loans, equity investments, and deposits to competitively selected CDFIs. The private sector also provides equity investments and credit to CDFIs. Some CDFIs are depository institutions and, therefore, they obtain some funds for their operations from deposits as well as credit lines with other lenders. CDFIs work in partnership with other financial institutions to channel credit and investment into economically distressed communities.

There are six basic types of CDFIs. Specific language in section 1.7(b)(1)(B) of the Act determines whether an entity is eligible to borrow from a Farm Credit bank as an OFI and would authorize certain types of CDFIs as OFIs. Under section 1.7(b)(1)(B) of the Act and § 614.4540 of FCA regulations, two types of CDFIs, community development banks and community development credit unions, could become OFIs that fund, discount, or obtain other similar financial assistance from a Farm Credit bank in order to extend short- and intermediate-term credit to eligible borrowers for authorized purposes pursuant to sections 1.10(b) and 2.4(a) and (b) of the Act. Since the mission of CDFIs is to serve economically distressed segments of the population, those CDFIs that become OFIs may use funding, discount services, and other financial assistance from a Farm Credit bank to serve young, beginning, small, and low resource farmers and ranchers. In addition, the FCA encourages Farm Credit banks to work with eligible CDFIs that make loans or extend other similar financial assistance to agriculture and are interested in establishing an OFI relationship. Because of eligibility restrictions in the Act for OFI funding, no other amendments to the regulations are allowable.

Section 4.19(a) of the Act mandates that Farm Credit banks and associations have programs for furnishing sound and constructive credit and related services to young, beginning, and small (YBS) farmers and ranchers. According to the statute, the YBS program of each FCS direct lender association must comply with policies prescribed by the board of their funding banks. Section 4.19(a) of the Act also states, ''Such programs shall assure that such credit and services are available in coordination with other units of the Farm Credit System serving the territory *and with other governmental and private sources of credit.*'' (Emphasis added.)

A CDFI that seeks funding, discount services, and other financial assistance

[15] Ibid.

[16] *OECD* means the group of countries that are full members of the Organization for Economic Cooperation and Development, regardless of entry date, as well as countries that have concluded special lending arrangements with the International Monetary Fund's General Arrangement to Borrow, excluding any country that has rescheduled its external sovereign debt within the previous 5 years. For purposes of United States banking operations, all federally regulated depository institutions are considered the equivalent of OECD banks.

from a Farm Credit bank should consult with the bank about how they can work together to provide credit to YBS and low resource farmers and ranchers. When feasible, the Farm Credit bank should encourage CDFIs and local FCS associations to coordinate their efforts to serve YBS and low resource farmers and ranchers.

III. Capital Risk Weighting

A. Background

As discussed in the preamble to the proposed rule, we have interpreted our capital adequacy regulations as requiring Farm Credit banks to risk weight loans to OFIs at 100 percent. In contrast, existing § 615.5210(f)(2)(ii)(I) allows Farm Credit banks to risk weight loans to System associations at 20 percent. This means Farm Credit banks currently hold more capital (at a minimum) for loans to OFIs than loans to System associations, which in many cases have similar structures and financial conditions as OFIs. The preamble to the ANPRM explained, in detail, the risk-reducing features of FCS associations that justified a 20-percent risk weighting.[17]

The FCA acknowledged in the preambles to the ANPRM and the proposed rule that many OFIs, particularly commercial banks or their affiliates, might pose no greater risk to their FCS funding bank than System associations. However, unregulated non-bank OFIs could expose the FCS bank to greater risk than FCS associations and regulated OFIs.

The risk-weighting categories in FCA's capital regulations are patterned after the risk-weighting categories in the 1988 Basel Accord, which apply to all depository institutions regulated by the other Federal bank regulatory agencies. As a result, many, but not all, OFIs have the same risk-reducing features as FCS associations.

The FCA proposed amendments to § 615.5210 that would permit Farm Credit banks to risk weight their loans to OFIs that are Federal- or state-regulated depository institutions, or their affiliates, at 20 percent. Under this proposal, Farm Credit banks would continue to risk weight loans to OFIs that are unregulated, or exhibit a higher risk profile at either 50 or 100 percent, depending on certain factors.

The proposed rule would establish a 20-percent risk weighting for OFIs that are either: (1) An equivalent to an OECD bank (Federal- or state-regulated depository institution); (2) subsidiaries of OECD equivalent banks or bank holding companies and carry full guarantees from such parent entities; or (3) an institution that carries one of the three highest ratings from a nationally recognized statistical rating organization (NRSRO).[18] OFIs are required by regulations to pledge full recourse on all loans they fund or discount with a Farm Credit bank.

Proposed § 615.5210 would establish a 50-percent risk weighting for OFIs that: (1) Are not OECD banks but otherwise meet similar capital and operational standards; and (2) carry an investment grade or higher NRSRO rating. The FCA proposed to retain a 100-percent risk weighting for all loans to OFIs that do not qualify for the 20-percent or 50-percent risk-weight categories.

B. Comments Received

We received 98 comments on capital risk weighting in response to our proposed rule. The comments came from 3 Farm Credit banks, a CDFI, an OFI that is affiliated with a group of farmer cooperatives, the CUNA, the ICBA, and 91 commercial banks. The majority of the commenters supported differentiating the risk weighting of loans to OFIs based on the structure and risk-mitigating characteristics of the OFIs.

The 3 Farm Credit banks generally supported the proposed capital risk-weighting rule for OFIs. However, these commenters sought clarification of two issues, and they requested two technical changes to the regulation. The CUNA supported the rule as proposed, while the ICBA and 47 bankers supported equal risk weighting for FCS associations and OFIs that are depository institutions or their affiliates. Forty-four (44) commercial bank commenters supported equal risk-weighting treatment for all OFIs and the FCS associations. The CDFI stated that the final rule should require Farm Credit banks to risk weight all CDFIs at 20 percent. The CDFI also stated that all CDFIs should be treated as equivalent to OECD banks because of the CDFIs ''good standing'' status with Treasury. The agricultural credit cooperative OFI expressed concern that the new regulation will increase the cost of funds to OFIs that are risk weighted at 100 percent.

A Farm Credit bank asked the FCA to clarify whether the three highest NRSRO investment ratings (for institutions that are risk weighted at 20 percent) include subset designations (*e.g.*, AAA+, AA+, or A+). The FCA responds that the regulation refers to the generic rating categories, not plus or minus signs that show relative standing within each rating category. Under this regulation, for example, a rating of ''AA−'' would be within the second highest investment-grade ratings by an NRSRO.

Two Farm Credit banks asked the FCA whether the full recourse requirement for OFIs extended to their parents. According to these commenters, requiring both the parent and the OFI subsidiary to pledge full recourse on the OFI's loan (so the funding bank could risk weight it at 20 percent) could become a significant impediment to the growth of the OFI program. One of these commenters expressed concern that requiring the parent to pledge full recourse to the System funding bank clashes with its capital reasons for establishing an OFI subsidiary. The FCA replies that the rule requires full recourse from the OFI. Generally, the full recourse requirement would not extend to an OFI's parent, but the System funding bank could require it to provide such a guarantee as a condition for approving the OFI for credit.

A Farm Credit bank suggested that the final rule allow OFIs that are not OECD banks or their affiliates to qualify for a 20-percent risk weighting if they receive an investment grade or higher rating from a NRSRO. Under the proposed rule, such OFIs do not qualify for a 20-percent risk weighting unless a NRSRO rates them in one of the three highest investment rating categories. However, OFIs that are not OECD banks or their affiliates could qualify for a 50-percent risk weighting under the proposed rule if they receive an investment-grade rating by a NRSRO and they meet the other requirements of this regulation.

The FCA rejects the commenter's recommendation because it eliminates the distinction in the regulation between OFIs that are risk weighted at 20 percent and those that are risk weighted at 50 percent. NRSRO ratings provide Farm Credit banks with a credible, objective, and independent standard for determining risk exposure from an OFI. Each risk-weighting category in our regulation is based on the System's potential exposures to risk, as well as risk mitigation factors. A lower investment rating from a NRSRO means that an OFI (that is not an OECD bank or its affiliate) exposes its System

[17] *See* 65 FR 21151 (April 20, 2000).

[18] ''Nationally recognized statistical rating organization'' means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (or any successor Division) (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers.

funding bank to greater risks which, in turn, justifies a 50-percent, not a 20-percent, risk weighting. The FCA's approach is consistent with the approach taken by the other federal bank regulatory agencies and pending revisions to the Basel Accord. For this reason, the final rule will require each Farm Credit bank to risk weight OFIs that are not OECD banks or their affiliates at 20 percent only if they achieve and maintain one of the three highest investment-grade ratings from a NRSRO.

A Farm Credit bank asked the FCA to amend a provision in the proposed rule so that an OFI can qualify for a 50-percent risk weighting if its loan is guaranteed by a parent that receives an investment grade or higher rating from a NRSRO. The rule already allows an OFI to qualify for a 20-percent risk weighting if its parent: (1) Guarantees the loan; and (2) has one of the three highest NRSRO investment-grade ratings. The commenter sought this change so that the final rule applies consistent standards for risk weighting OFIs at either 20 or 50 percent. The FCA agrees with the commenter and, accordingly, the final rule includes this change.

As discussed earlier, the agricultural credit cooperative OFI expressed concern that this regulation will increase the cost of funds to OFIs that are risk weighted at 100 percent. The FCA believes that this concern has no merit. All OFIs are currently risk weighted at 100 percent. Lowering the risk weighting of some OFIs based on lower risk profiles should not result in increased costs to other OFIs. Although the regulation differentiates between OFIs on the basis of risk to the funding bank, the FCA does not expect that FCS banks should raise the cost of funding that they charge to OFIs that do not fall within the 20- or 50-percent risk-weighting categories.

In response to the ICBA and other commercial bank commenters, the FCA confirms that the final rule treats FCS associations and OECD banks the same for risk-weighting purposes. As discussed earlier, the CDFI inquired about the risk weighting of CDFIs that become OFIs. The FCA replies that CDFIs as a group are not considered the equivalent of OECD banks despite their ''good standing'' status with Treasury. The certification criteria imposed on CDFIs by Treasury are mission-based rather than safety- and soundness-based and, therefore, do not address risk identification and control criteria as required of the OECD banks by the federal bank regulatory agencies. Accordingly, it would be inconsistent with the agency's safety- and soundness-based regulations to automatically equate CDFIs as equivalent to the risk weighting for OECD banks. However, CDFIs that are community banks and credit unions would probably qualify as OECD banks and, therefore, a Farm Credit bank could risk weight discounted CDFI loans at 20 percent.

Forty-four (44) commercial bank commenters took the position that the risk weighting for all OFIs and FCS associations should be the same. As explained earlier, not all OFIs pose the same risks to their funding banks. Some OFIs are not OECD banks or their affiliates. In other cases, nonbank OFIs do not meet the capital, risk identification and control, and operational standards that apply to OECD banks, or they do not carry an investment-grade rating from a NRSRO. For these reasons, not all OFIs should be risk weighted at 20 percent.

C. Final Rule

The final rule establishes a 20-percent risk weighting for OFIs that are either: (1) An equivalent to an OECD bank (Federal-or state-regulated depository institution); (2) subsidiaries of OECD equivalent banks or bank holding companies and carry full guarantees from such parent entities; or (3) an institution that carries one of the three highest investment-grade ratings from a NRSRO.

Under final § 615.5210, a 50-percent risk weighting applies to OFIs that: (1) Are not OECD banks but otherwise meet similar capital, risk identification and control, and operational standards; and (2) carry an investment-grade or higher NRSRO rating, or the claim is guaranteed by a parent company with such a rating.

The final rule establishes a 100-percent risk weighting for all OFI loans that do not qualify for the 20-percent or 50-percent risk-weight categories. OFIs that are well-capitalized and well-managed expose the System to less risk. Therefore, FCS institutions need less capital to support loans to these OFIs. This approach is consistent with the direction from the pending Basel Accord revisions, which are currently under consideration.

Lowering the capital requirements for most OFI loans will lower the operating costs of the OFI program to Farm Credit banks. This, in turn, should lower the cost of funds to well-capitalized and well-managed OFIs. Lower funding costs should enable these OFIs to reduce interest rates charged to their borrowers. These results would advance the System's public policy mission to provide affordable credit on a consistent basis to agriculture and rural America. Greater flexibility for the risk weighting of OFI loans should provide the Farm Credit banks additional incentives to expand their lending to both existing and new OFIs.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 614

Agriculture, Banks, Banking, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 615

Accounting, Agriculture, Banks, Banking, Government securities, Investments, Rural areas.

■ For the reasons stated in the preamble, parts 614 and 615, chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 614—LOAN POLICIES AND OPERATIONS

■ 1. The authority citation for part 614 continues to read as follows:

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a–2, 2279b, 2279c–1, 2279f, 2279f–1, 2279aa, 2279aa–5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart P—Farm Credit Bank and Agricultural Credit Bank Financing of Other Financing Institutions

■ 2. Revise § 614.4540(c) to read as follows:

§ 614.4540 Other financing institution access to Farm Credit Banks and agricultural credit banks for funding, discount, and other similar financial assistance.

* * * * *

(c) *Underwriting standards.* Each Farm Credit Bank and agricultural credit bank shall establish objective policies, procedures, pricing guidelines, and loan underwriting standards for determining the creditworthiness of each OFI applicant. A copy of such policies, procedures, guidelines, and standards shall be made available, upon request to each OFI and OFI applicant.

* * * * *

■ 3. Revise § 614.4550 to read as follows:

§ 614.4550 Place of discount.

A Farm Credit Bank or agricultural credit bank may provide funding, discounting, or other similar financial assistance to any OFI applicant. However, a Farm Credit Bank or agricultural credit bank cannot fund, discount, or extend other similar financial assistance to an OFI that maintains its headquarters, or has more than 50 percent of its outstanding loan volume to eligible borrowers who conduct agricultural or aquatic operations in the chartered territory of another Farm Credit bank unless it notifies such bank in writing within five (5) business days of receiving the OFI's application for financing. Two or more Farm Credit banks cannot simultaneously fund the same OFI.

■ 4. Revise § 614.4560(d) to read as follows:

§ 614.4560 Requirements for OFI funding relationships.

* * * * *

(d) The borrower rights requirements in part C of title IV of the Act, and the regulations in part 617 of this chapter shall apply to all loans that an OFI funds or discounts through a Farm Credit Bank or agricultural credit bank, unless such loans are subject to the Truth-in-Lending Act, 15 U.S.C. 1601 *et seq.*

* * * * *

■ 5. Amend § 614.4590 by adding new paragraphs (c) and (d) to read as follows:

§ 614.4590 Equitable treatment of OFIs and Farm Credit System associations.

* * * * *

(c) Upon request, each Farm Credit Bank or agricultural credit bank must provide each OFI and OFI applicant, that has or is seeking to establish a funding relationship with the Farm Credit Bank or agricultural credit bank, a copy of its policies, procedures, loan underwriting standards, and pricing guidelines for OFIs. The pricing guidelines must identify the specific components that make up the cost of funds for OFIs, and the amount of these components expressed in basis points.

(d) Upon request of any OFI or OFI applicant, that has or is seeking to establish a funding relationship with the Farm Credit Bank or agricultural credit bank, the bank must explain in writing the reasons for any variation in the overall funding costs it charges to OFIs and affiliated direct lender associations. The written explanation must compare the cost of funds that the Farm Credit Bank or agricultural credit bank charges the OFIs and affiliated direct lender associations. When possible, the written explanation shall compare the costs of funding that the bank charges several OFIs and Farm Credit associations that are similar in size. However, the Farm Credit Bank or agricultural credit bank must not disclose financial or confidential information about any individual Farm Credit association.

Subpart P—[Amended]

■ 6. Amend part 614, subpart P by adding a new § 614.4595 to read as follows:

§ 614.4595 Public disclosure about OFIs.

A Farm Credit Bank or agricultural credit bank may disclose to members of the public the name, address, telephone number, and Internet Web site address of any affiliated OFI only if such OFI, through a duly authorized officer, consents in writing. Each Farm Credit Bank and agricultural credit bank must adopt policies and procedures for requesting, obtaining, and maintaining the consent of its OFIs and for disclosing this information to the public.

PART 615—FUNDING AND FISCAL AFFAIRS, LOAN POLICIES AND OPERATIONS, AND FUNDING OPERATIONS

■ 7. The authority citation for part 615 continues to read as follows:

Authority: Secs. 1.5, 1.7, 1.10, 1.11, 1.12, 2.2, 2.3, 2.4, 2.5, 2.12, 3.1, 3.7, 3.11, 3.25, 4.3, 4.3A, 4.9, 4.14B, 4.25, 5.9, 5.17, 6.20, 6.26, 8.0, 8.3, 8.4, 8.6, 8.7, 8.8, 8.10, 8.12 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2018, 2019, 2020, 2073, 2074, 2075, 2076, 2093, 2122, 2128, 2132, 2146, 2154, 2154a, 2160, 2202b, 2211, 2243, 2252, 2278b, 2278b–6, 2279aa, 2279aa–3, 2279aa–4, 2279aa–6, 2279aa–7, 2279aa–8, 2279aa–10, 2279aa–12); sec. 301(a) of Pub. L. 100–233, 101 Stat. 1568, 1608.

Subpart H—Capital Adequacy

■ 8. Amend § 615.5210 by adding new paragraphs (f)(2)(ii)(M); (f)(2)(iii)(C); and (f)(2)(iv)(E) to read as follows:

§ 615.5210 Computation of the permanent capital ratio.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

* * * * *

(M) Claims on other financing institutions provided that:

(*1*) The other financing institution qualifies as an OECD bank or it is owned and controlled by an OECD bank that guarantees the claim, or

(*2*) The other financing institution has a rating in one of the highest three investment-grade rating categories from a NRSRO or the claim is guaranteed by a parent company with such a rating, and

(*3*) The other financing institution has endorsed all obligations it pledges to its funding Farm Credit bank with full recourse.

(iii) * * *

(C) Claims on other financing institutions that:

(*1*) Are not covered by the provisions of paragraph (f)(2)(ii)(M) of this section, but otherwise meet similar capital, risk identification and control, and operational standards, or

(*2*) Carry an investment-grade or higher NRSRO rating or the claim is guaranteed by a parent company with such a rating, and

(*3*) The other financing institution has endorsed all obligations it pledges to its funding Farm Credit bank with full recourse.

(iv) * * *

(E) Claims on other financing institutions that do not otherwise qualify for a lower risk-weight category under this section.

* * * * *

Dated: May 20, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 04–11849 Filed 5–25–04; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

Clarification of Substituted Federal Enforcement for Parts of Missouri's Permanent Regulatory Program and Findings on the Status of Missouri's Permanent Regulatory Program; Correction

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

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to the final rule published in the **Federal Register** on Thursday, April 15, 2004 (69 FR 19927). Three paragraphs were inadvertently removed from 30 CFR 925.18. This correction will restore the previously-published three paragraphs which list the minimum requirements that must be contained in Missouri's proposal to OSM to reassume full authority of Missouri's surface coal mining and reclamation program.

This rule is being made effective immediately in order to expedite the actions required of the State to resume full authority for its approved program.

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: John W. Coleman, Mid-Continent Regional Coordinating Center, Office of Surface Mining, 501 Belle Street, Alton, Illinois 62002. Telephone: (618) 463–6460.

SUPPLEMENTARY INFORMATION:

Background

On August 4, 2003, OSM notified the Governor of Missouri that serious problems existed that were adversely affecting the Missouri Department of Natural Resources implementation and enforcement of the Missouri surface coal mining and reclamation program. In accordance with the provisions of 30 CFR 733.12(f), we announced our decision, effective August 22, 2003, to institute direct Federal enforcement for those portions of the Missouri program that the State could not adequately implement and enforce. With the substitution of Federal enforcement authority, we outlined a process by which Missouri could regain full authority for its program.

In the April 15, 2004, **Federal Register** (69 FR 19927), we further clarified our position regarding the portions of the Missouri program that we directly enforce and set forth our findings regarding the status of those portions of Missouri's program for which we required remedial actions.

Need for Correction

As published, the amendatory language in the April 15, 2004, **Federal Register** notice inadvertently deleted existing regulatory text. This correction will restore that regulatory text which contains important information for the State to use when it submits its proposal to regain full authority to implement its regulatory program.

List of Subjects in 30 CFR Part 925

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 12, 2004.

Chad Calvert,

Acting Assistant Secretary, Land and Minerals Management.

Accordingly, 30 CFR part 925 is amended by making the correcting revisions as set forth below.

PART 925—MISSOURI

■ 1. The authority citation for part 925 continues to read as follows:

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

■ 2. Section 925.18 is amended by adding paragraphs (c)(1), (c)(2), and (c)(3) to read as follows:

§ 925.18 State remedial actions.

* * * * *

(c) * * *

(1) *Funding.* The proposal must demonstrate to the satisfaction of OSM a commitment to fully fund the Missouri program.

(2) *Staffing.* The proposal must demonstrate to the satisfaction of OSM a commitment to hire a sufficient number of qualified personnel to comply with all inspection and enforcement, permitting, and bonding requirements of the approved Missouri program.

(3) *Adherence to approved program.* The proposal must include provisions, policy statements, and other affirmative evidence sufficient to assure OSM that the MLRP will be in full compliance at all times with the provisions of the Missouri program.

* * * * *

[FR Doc. 04–11707 Filed 5–25–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–021]

Drawbridge Operation Regulations; Atchafalaya River; Melville, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Melville Railroad Vertical Lift Bridge across the Atchafalaya River, mile 107.4, near Melville, St. Landry and Pointe Coupee Parishes, Louisiana. This deviation allows the bridge to remain closed to navigation for two (2) four-hour segments each day on Friday and Saturday, June 11–12, 2004. The deviation is necessary to repair and replace rails on the bridge.

DATES: This deviation is effective from 7 a.m. on Friday June 11, 2004, until 5 p.m. on Saturday June 12, 2004.

ADDRESSES: Materials referred to in this document are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building, room 1313, 500 Poydras Street, New Orleans, Louisiana 70130–3310 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Bridge Administration Branch of the Eighth Coast Guard District maintains the public docket for this temporary deviation.

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

SUPPLEMENTARY INFORMATION: The Union Pacific Railroad has requested a temporary deviation in order to remove and replace rails on the Melville Railroad Vertical Lift Bridge across the Atchafalaya River, mile 107.4, near Melville, St. Landry and Pointe Coupee Parishes, Louisiana. The repairs are necessary to ensure the safety of the bridge. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 7 a.m. until 11 a.m. and from 1 p.m. until 5 p.m. on Friday, June 11, 2004, and Saturday, June 12, 2004.

The bridge has a vertical clearance of four feet above mean high water in the closed-to-navigation position and 54 feet above mean high water in the open-

to-navigation position. Navigation at the site of the bridge consists mainly of tows with barges and some recreational pleasure craft. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels. No alternate routes are available. The bridge will be able to open for emergencies.

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

Dated: May 13, 2004.

Marcus Redford,

Bridge Administrator.

[FR Doc. 04–11893 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 3 and 5

[Docket No.: 2003–P–019]

RIN 0651–AB63

Revision of Power of Attorney and Assignment Practice

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is revising the rules of practice to allow for more efficient processing of powers of attorney and assignment documents within the Office. For example, the Office will require applicants to use the Office's Customer Number practice if more than ten registered patent practitioners are to be made of record. In addition, the Office is eliminating some mail stops (*i.e.*, CPA, Provisional Patent Application) that were found not be useful in routing correspondence within the Office, and creating a new mail stop (Licensing and Review) to assist the Office in the proper routing of national security classified and secrecy order papers. Finally, because the Office is discontinuing the current Office practice of returning patent and trademark assignment documents submitted by mail for recording in the assignment database, only copies of assignment documents may be submitted for recording in the Office's Assignment records.

DATES: *Effective Date:* June 25, 2004. Any associate power of attorney filed before this date will continue to be effective.

FOR FURTHER INFORMATION CONTACT: Karin Ferriter ((703) 306–3159) (Office of the Deputy Commissioner for Patent Examination Policy), Mary Hannon ((703) 308–8910, ext. 137) (Office of the Commissioner for Trademarks), or Robert J. Spar ((703) 308–5107) (Office of the Deputy Commissioner for Patent Examination Policy), directly by phone, or by facsimile to (703) 872–9411, or by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

SUPPLEMENTARY INFORMATION: A purpose of this final rule is to limit the number of patent practitioners that a patent applicant, or an assignee of the patent applicant, can name in a power of attorney. If more than ten registered patent attorneys or registered patent agents are to be appointed, then the Office's Customer Number practice must be used. This change is necessary to eliminate the undue processing burden on the Office when a power of attorney naming more than ten patent practitioners is submitted in patent applications. In addition, a purpose of this final rule is to eliminate the associate power of attorney practice in patent cases. An associate power of attorney is not necessary for a patent practitioner to take most actions in a patent application. Instead of filing an associate power of attorney, a patent practitioner can file an ''Authorization to Act in a Representative Capacity'' (note the sample form posted on the Office's Internet Web site at: *http://www.uspto.gov/web/forms/sb0084.pdf).* Another purpose of this final rule is to eliminate an original assignment document from the list of documents that may be submitted for recordation. This is because the Office shall no longer be returning assignment documents after they have been scanned into the Office's electronic assignment database, and any assignee that submits the original assignment document will be unable to retrieve the document.

The Office provides for the use of a Customer Number to identify either an address for patent-related correspondence, or a set of patent attorneys and agents who may be identified with a patent application as patent practitioners of record. Customer Number practice permits the correspondence or fee address, or the list of practitioners of record to be easily changed in a large number of patent applications by filing a single request for Customer Number data change. A separate revocation of power of attorney, or appointment of a new power of attorney would not need to be filed in each patent application if a Customer Number Data Change Request (PTO/SB/124) is filed. As a result, if a patent attorney or patent agent is to begin to represent a client, or is discontinuing representation of a client, on a particular set of applications, and, if the power of attorney for that set of applications was originally to the patent practitioners associated with a Customer Number, then the list of patent practitioners associated with the Customer Number should be changed to reflect the addition or deletion. When Customer Number practice is used, a separate document does not need to be filed by applicant for each application in which the list of practitioners associated with the Customer Number is to be changed; only one Customer Number Data Change Request is required to eliminate any patent practitioners who should no longer be associated with the Customer Number. Alternatively, a new power of attorney to a list of patent practitioners or to the patent practitioners associated with a different customer number may be filed in each application in which the power of attorney should be changed.

The rules pertaining to power of attorney are revised to reflect Customer Number practice, a practice wherein an applicant or an assignee of the entire interest of the applicant in a patent application can give power of attorney to a list of registered patent practitioners associated with a Customer Number. *See Manual of Patent Examining Procedure* (8th ed. 2001) (Rev. 1, Feb. 2003) (MPEP), Section 403, for a description of Customer Number practice. The rules are also revised to explain the requirements of a power of attorney and to limit the number of practitioners who may be given a power of attorney without using Customer Number practice. Furthermore, the patent rules are amended to discontinue the ''associate'' power of attorney practice, to clarify the procedures related to revocation of power of attorney, and to clarify how a registered practitioner may sign a document in a representative capacity.

Documents affecting the title to a patent or trademark property (*e.g.*, assignments, or security interests) are currently recorded in the Office's assignment database, upon submission of the document with the appropriate cover sheet and the fee required by 35 U.S.C. 41(d)(1). In addition, Government Interests are recorded, upon submission of the document, as required by Executive Order 9234 of February 18, 1944 (9 FR 1959, 3 CFR 1943–1948

Comp., p. 303). Since 1995, assignment documents have been recorded in the Office's Assignment database without stamping or otherwise marking the document that was submitted for recordation. The automated system that receives documents for recordation assigns the reel and frame number to the document and places the recordation stampings on the images that are stored in the automated system. The Office is increasing the integrity of its internal patent application record maintenance by adopting a new electronic data processing system for the storage and maintenance of all the records associated with patent applications. The new system includes the process of scanning all incoming papers to create an image file of the papers associated with patent applications. Papers that are scanned are stored, and then destroyed according to a record retention schedule. Consistent with this new practice, the Office will discontinue the practice of returning assignment documents that were mailed to the Office, and will require assignment documents to be submitted on 8½ by 11-inch paper (21.6 by 27.9 cm) (''letter size'') or DIN size A4 (21.0 by 29.7 cm).

To assist applicants in identifying the application or patent to which a Notice of Recordation relates, the Notice has been revised to reflect the title of the invention and docket number stored in the Office's electronic records, if the notice of recordation is for a single property (application or patent). Any docket number included on the Assignment Cover sheet will only be used in the Office's electronic financial records for purposes of processing the recordation fee, but will not be entered into other electronic records for the patent or patent application.

Discussion of Specific Rules

The Office is amending sections of 1.1, 1.12, 1.31, 1.33, 1.34, 1.36, 1.53, 1.363, 3.1, 3.21, 3.24, 3.25, 3.27, 3.31, 3.34, 3.41, 3.81, and 5.1 of title 37 of the Code of Federal Regulations (CFR), and adding new § 1.32 to title 37 CFR.

Section 1.1: Section 1.1(a)(4)(i) is amended to add ''submitted by mail'' and to delete ''or under § 3.81 of this chapter'' to require that assignments submitted by mail contemporaneously with a request to issue a patent to an assignee be sent to Mail Stop Assignment Recordation Services instead of Mail Stop Issue Fee in order to more efficiently direct assignment documents. Section 1.1 is also amended to remove paragraph (f). The Office has determined that Mail Stop Provisional Patent Application is not useful in the routing of correspondence within the Office.

Section 1.12: Section 1.12(b) is amended to replace ''has not been published under 35 U.S.C. 122(b) are not available to the public'' with ''is open to the public pursuant to § 1.11 or for which copies or access may be supplied pursuant to § 1.14, are available to the public'' in order to clarify the assignment records that are available to the public. Section 1.12(b) is further amended to provide that copies of any such assignment records and related information that are not available to the public shall be obtainable only upon written authority of the applicant or applicant's assignee, patent attorney, or patent agent or upon a showing that the person seeking such information is a bona fide prospective or actual purchaser, mortgagee, or licensee of such application, unless it shall be necessary to the proper conduct of business before the Office or as provided in part 1.

As revised, § 1.12(b) more clearly provides, for example, for an application that is relied upon under 35 U.S.C. 120 in an application that has issued as a patent, any assignment records relating to the parent application could be considered to relate to the patent. Before the amendment to § 1.12(b), the text of the rule suggested that the assignment records for the parent application were not available to the public. This was not the intended construction, and was inconsistent with MPEP § 301.01. As revised § 1.12(b) provides that the assignment records for the parent application of a patent, or an application that has published under 35 U.S.C. 122(b), are open to public inspection.

Section 1.31: Section 1.31 is amended to revise the title to refer to ''registered patent attorney or patent agent'' and to introduce the term ''power of attorney.'' Section 1.31 is also revised to add ''United States'' before ''Patent and Trademark Office'' in the definition of ''Office'' to properly reflect the current name of the Office in the rule. See 35 U.S.C. 1(a).

Section 1.32: New § 1.32 sets forth definitions related to power of attorney. Section 1.32 does not apply to power of attorney in an international application (§ 1.455). The terms ''power of attorney,'' ''principal,'' ''revocation,'' and ''Customer Number'' are defined, and the requirements for a power of attorney are set forth. The term ''patent practitioner'' is not separately defined, but is a collective reference to a registered patent attorney or registered patent agent.

''Power of attorney'' is defined in paragraph (a)(1) of § 1.32 as a written document by which a principal designates a registered patent attorney or a registered patent agent (collectively ''patent practitioner'') to act on his or her behalf.

''Principal'' is defined in paragraph (a)(2) of § 1.32 as either the applicant for patent (§ 1.41(b)) or the assignee of the entire interest of the applicant, and the entity who executes a power of attorney designating one or more agents to act on his or her behalf. An appointment by fewer than all of the applicants, or assignees of the entire interest of the applicants requires a petition under § 1.183 to waive the requirement of § 1.32(b)(4) that the applicant, or the assignee of the entire interest of the applicant sign the power of attorney.

The term ''patentee'' has not been included in this definition because use of the term ''patentee'' would make the rule unnecessarily complicated. Although the term ''patentee'' often is a reference to the assignee, the patentee could also be the inventors, or if an inventor is deceased or legally incapacitated, the inventors and the legal representative of such an inventor. An inventor who could not be reached or refused to join in the filing of a patent application would not be an applicant as set forth in § 1.41(b), but would still be a patentee, but once a patent has issued, the signature of the nonsigning inventor should still not be required on any power of attorney. Accordingly, the term ''patentee'' does not necessarily reference the same group of individuals as the term ''applicant'' and has not been used in the rules so that the applicant, not necessarily the patentee, could change the power of attorney, for example, in an application that has issued as a patent.

''Revocation'' is defined in paragraph (a)(3) of § 1.32 as the cancellation by the principal of the authority previously given to a registered patent attorney or registered patent agent to act on his or her behalf.

''Customer Number'' is defined in paragraph (a)(4) of § 1.32 to be a number that may be used to: (i) Designate the correspondence address of a patent application or patent such that the correspondence address for the patent application or patent would be the address associated with the Customer Number; (ii) designate the fee address (§ 1.363) of a patent by a Customer Number such that the fee address for the patent would be the address associated with the Customer Number; and (iii) specify, in a power of attorney, that each of the patent practitioners associated

with a Customer Number have a power of attorney.

Section 1.32(b) sets forth the requirements for a power of attorney, other than a power of attorney in an international application (*see* § 1.455 for the power of attorney in an international application and note that Customer Number practice cannot be used in an international application). To comply with § 1.32(b), the power of attorney, in an application other than an international application, must: (1) Be in writing; (2) name one or more representatives in compliance with (c) of this section; (3) give the representative power to act on behalf of the principal; and (4) be signed by the applicant for patent (§ 1.41(b)) or the assignee of the entire interest of the applicant. Furthermore, pursuant to § 1.32(c), a power of attorney may only name as representative: (1) One or more joint inventors (§ 1.45); (2) those registered patent practitioners associated with a Customer Number; or (3) ten or fewer registered patent attorneys or registered patent agents (see § 10.6 of this subchapter)(patent practitioners). Except as provided in § 1.32(c)(1) or (c)(2), the Office will not recognize more than ten patent practitioners as being of record in an application or patent. If a power of attorney names more than ten patent practitioners, such power of attorney must be accompanied by a separate paper indicating which ten patent practitioners named in the power of attorney are to be recognized by the Office as being of record in application or patent to which the power of attorney is directed.

New § 1.32(c)(3) sets a limit on the number of patent practitioners who can be given a power of attorney without using Customer Number practice because it is extremely burdensome for the Office to manually enter a long list of patent practitioners, particularly where the same list of patent practitioners is to be entered for a large number of applications, and to update that listing. Applicants desiring to appoint a large number of patent practitioners may continue to do so, but Customer Number practice will be required in order to have more than ten patent practitioners recognized by the Office as being of record and reflected in Office computer systems. See § 1.32(c)(2).

If more than ten patent practitioners have been named in a combined declaration and power of attorney (*e.g.*, from an earlier filed application (*see* § 1.63(d)(1)(iv))), then the Office of Initial Patent Examination will enter the practitioners indicated on the separate paper filed pursuant to § 1.32(c)(3). If more than ten patent practitioners are listed on a power of attorney, and no separate paper under § 1.32(c)(3) is filed, then no patent practitioners will be made of record. If a separate paper is not provided and a patent practitioner later attempts to sign a batch update request to request that the address associated with the Customer Number be used for the correspondence address and/or the fee address for the patent applications listed on the spreadsheet (*see Notice of Elimination of Batch Update Practice to Change Power of Attorney,* 1272 *Off. Gaz. Patent Office Notices* 24 (July 1, 2003)), the request will be rejected because the patent practitioner is not of record. Applicant may then submit a newly executed power of attorney complying with § 1.32, or submit a copy of the previously filed power of attorney accompanied by a separate paper indicating which ten practitioners are to be made of record pursuant to § 1.32(c)(3).

Customer Number practice allows the Office to enter a single five or six digit number into the Office computer system instead of a large number of patent practitioners and is a more appropriate use of Office resources than continuing to permit applicants to give a power of attorney to an unlimited number of practitioners. *See* MPEP § 403.

Section 1.33: Section 1.33(a) is revised to reflect Customer Number practice. If applicant provides, in a single document, both a complete typed address and a Customer Number and requests that both be used for the correspondence address, the address associated with the Customer Number will be used. Section 1.33(a) is revised to include the following sentence: ''If more than one correspondence address is specified in a single document, the Office will establish one as the correspondence address and will use the address associated with a Customer Number, if given, over a typed correspondence address.'' Applicants will often specify the correspondence address in more than one paper that is filed with an application, and the address given in the different places sometimes conflicts. Where the applicant specifically directs the Office to use a correspondence address in more than one paper, priority will be accorded to the correspondence address specified in the following order: (1) Application data sheet (ADS); (2) application transmittal; (3) oath or declaration (unless power of attorney is more current); and (4) power of attorney. Accordingly, if the ADS includes a typed correspondence address, and the declaration gives a different address (*i.e.*, the address associated with a Customer Number) as the correspondence address, the Office will use the typed correspondence address as included on the ADS. In the experience of the Office, the ADS is the most recently created document and tends to have the most current address. After the correspondence address has been entered according to the above procedure, it will only be changed pursuant to § 1.33(a)(1).

A Customer Number merely provided in correspondence without an instruction to use the Customer Number for the correspondence address or for any other purposes, *e.g.*, a Customer Number that is adjacent the heading of the paper, is not a specific direction to use the Customer Number for any purpose.

Section 1.33(b)(1) is revised to change the reference from § 1.34(b) to new § 1.32(b).

Section 1.33(b)(2) is revised to change § 1.34(a) to § 1.34 to be consistent with the revision to § 1.34.

Section 1.33(c) revised to change the cross-reference to § 1.32(b) instead of § 1.34(b) and to change the reference to § 1.34(a) to § 1.34 to be consistent with the revision to § 1.34.

Section 1.34: Section 1.34 is revised to change the title to ''Acting in a Representative Capacity.'' The paragraph designation for paragraph (a) and '', pursuant to § 1.31,'' are deleted. In addition, ''the registered patent attorney or patent agent should specify his or her registration number with his or her signature'' is changed to ''the registered patent attorney or patent agent must specify his or her name and the registration number with his or her signature.'' When a registered patent attorney or patent agent acts in a representative capacity, it should be clear who is signing the paper. Because signatures are not always legible and because sometimes the wrong registration number is given, it is necessary for the registered patent attorney or agent to include his or her name so that the identity of the person who is acting in a representative capacity may be identified.

Paragraph (b) of § 1.34 is deleted. With Customer Number practice, the associate power of attorney practice set forth in § 1.34(b) is no longer necessary because once power of attorney is given to the patent practitioners associated with a Customer Number, the list of patent practitioners of record may easily be changed. Additionally, for a patent practitioner to have the most information with which to represent his client, the patent practitioner needs to

have access to the private Patent Application Information Retrieval (private PAIR) system on the Office's Internet Web site (*http://PAIR.uspto.gov*), and a patent practitioner can only have direct access to private PAIR if he or she is associated with the Customer Number, and if the Customer Number is used for the correspondence address of the application. Private PAIR provides patent practitioners with access to the Office's computer systems that track the patent file history, and, if the application is maintained in the Image File Wrapper (IFW) system, access to the images of the documents in the file history. Furthermore, private PAIR provides *pro se* applicants and patent practitioners with information about recently mailed correspondence from the Office for a particular Customer Number. Furthermore, private PAIR provides an explanation of any patent term extension or patent term adjustment calculations for the patent application. A patent practitioner who does not have access to private PAIR is disadvantaged in representing a client compared to a practitioner who has access to private PAIR. See the discussion with respect to comment 9 below.

A government entity or assignee may have multiple law firms or sets of attorneys working on their patent applications. Such an entity should consider having multiple Customer Numbers, with a separate Customer Number for each set of patent attorneys, and having at least one in-house patent practitioner listed on each listing of patent practitioners associated with a Customer Number so that the government entity or assignee has access to private PAIR for all of their patent applications.

An applicant or assignee of the entire interest of the applicant who gives a power of attorney to a limited number of patent practitioners has expressed a desire to be represented by only those patent practitioners. As § 1.34 is revised, if Customer Number practice is not used, an applicant or assignee of the entire interest of the applicant will be required to sign a new power of attorney in order for an associate practitioner to be ''of record'' in addition to the specifically identified principal patent practitioner. Of course, a registered patent practitioner may still act in a representative capacity pursuant to § 1.34 (by providing his or her name and a registration number with his or her signature), and the rule changes do not change this flexibility. A patent practitioner who is acting in a representative capacity pursuant to § 1.34 may conduct an interview with an examiner. *See* MPEP § 713.05. A patent practitioner who is acting in a representative capacity can also file amendments and other papers (§ 1.33(b)(2)). A patent practitioner who is acting in a representative capacity pursuant to § 1.34 may not, however, change the correspondence address (§ 1.33(a)(2)) (except where an executed oath or declaration has not been filed, and the patent practitioner filed the application)), expressly abandon the application without filing a continuing application (§ 1.138(b)), or sign a terminal disclaimer (§ 1.321(b)(1)(iv)). A patent practitioner who is signing on behalf of the assignee of the entire interest may (*i.e.*, not signing in a representative capacity or as a patent practitioner of record), however, sign these same documents upon compliance with § 3.73(b), if the practitioner is authorized to act on behalf of the assignee.

A patent attorney or agent who has been given a power of attorney cannot change the power of attorney from the set of patent practitioners appointed by the applicant or assignee of the entire interest of the applicant to a Customer Number (or change from one Customer Number to another). To appoint a new power of attorney, the applicant or assignee of the entire interest of the applicant must be involved and must sign the power of attorney. Where a large number of patent applications of a single assignee are involved, the assignee may wish to consider giving the patent practitioners a power of attorney that is not specific to an application, similar to the General Power of Attorney used in Patent Cooperation Treaty (PCT) practice, and having one of the patent practitioners with general power of attorney take action by submitting a copy of the power of attorney and a statement in compliance with § 3.73(b). Form PTO/SB/80 is available for this purpose and is posted on the Office's Internet Web site at *www.uspto.gov,* under forms.

Section 1.36: Section 1.36 is revised to include new paragraphs (a) and (b) so that revocation of power of attorney and withdrawal as attorney or agent of record are addressed in separate paragraphs. In addition, ''or authorization of agent'' is deleted because the term ''power of attorney'' has been defined to include an authorization of an agent. The cross-reference to § 1.31 is changed to § 1.32(b).

Section 1.36(a) addresses revocation of a power of attorney. A registered patent attorney or patent agent is notified of any revocation with a ''Notice Regarding Change in Power of Attorney.'' A power of attorney to the patent practitioners associated with a Customer Number that is filed subsequent to another power of attorney will be treated as a revocation of the previously granted power of attorney. The Office can only recognize one Customer Number at a time for power of attorney purposes. When the power of attorney is to the patent practitioners associated with a Customer Number, the power of attorney is considered to be revoked when the power of attorney to the practitioners associated with the Customer Number is revoked. The revoked power of attorney may be replaced with either a new power of attorney to a new Customer Number or a power of attorney to a new list of patent practitioners. A power of attorney is not considered revoked when the list of patent practitioners associated with a Customer Number is changed (as by filing a Request for Customer Number Data Change (PTO/SB/124)). When the power of attorney is revoked, a single notice is mailed to the correspondence address in effect before the power of attorney was revoked. An associate registered patent attorney or patent agent is not separately informed of a revocation. As a result, § 1.36(a) has been revised to no longer suggest that such an associate practitioner would be separately notified of the revocation of power of attorney.

When power of attorney is given to the registered patent practitioners associated with a Customer Number, for example with PTO/SB/81, the list of patent practitioners associated with the Customer Number is changed by changing the data associated with the Customer Number (using, for example PTO/SB/124 (2 pages 124A & 124B), Request for Customer Number Data Change). No notice is given to the patent practitioners who are added or removed from the Customer Number.

Section 1.36(b) provides that when the power of attorney for an application is given to the practitioners associated with a Customer Number, all of the patent practitioners associated with the Customer Number will not be permitted to withdraw if an application with the power of attorney has an Office action to which a reply is due and insufficient time remains in the time period for reply for applicant to prepare a reply. *See* MPEP § 402.06.

Section 1.53: Section 1.53 is amended by removing paragraph (d)(9) and redesignating paragraph (d)(10) as paragraph (d)(9). The Office has determined that Mail Stop CPA is not useful in the routing of correspondence within the Office.

Section 1.363: Section 1.363 is amended by adding paragraph (c), which states ''A fee address must be an address associated with a Customer Number.'' At the time of issue fee payment, applicants may designate a fee address for maintenance fee purposes (hereafter, fee address) by submitting a ''Fee Address'' Indication form (PTO/SB/47) as an attachment to the Fee(s) Transmittal (PTOL–85B). If no Customer Number was previously acquired from the Office for the address being designated as the fee address, a Request for Customer Number form (PTO/SB/125) should also be attached to the Fee(s) Transmittal (PTOL–85B). If a fee address is established in an allowed application or patent, the Office will send all maintenance fee correspondence (such as maintenance fee reminder notices) to the fee address; and the Office will send all other correspondence, to the correspondence address of record. *See Customer Number Required in Order to Establish a Fee Address, 1261 Off. Gaz. Pat. Office 19* (August 6, 2002).

Section 3.1: Section 3.1 is revised to identify which trademark applications are covered by 37 CFR part 3, and to delete ''or a transfer of its entire right, title and interest in a'' so that the definition of an assignment includes a transfer of part of the right, title and interest in a registered mark or a mark for which an application to register has been filed. Section 3.1 is also revised to add ''United States'' before ''Patent and Trademark Office'' in the definition of ''Office'' to properly reflect the current name of the Office in the rule. See 35 U.S.C. 1(a).

Section 3.21: Section 3.21 is revised to change ''its date of execution, name of each inventor, and title of the invention'' to ''the name of each inventor and the title of the invention.'' Section 3.21 is also revised to change ''the provisional application by name of each inventor and title of the invention'' to ''the provisional application by the name of each inventor and the title of the invention'' by adding ''the'' before ''name'' and ''title.''

The phrase ''its date of execution'' has been deleted from § 3.21 because the date of execution of a declaration is no longer required on a declaration (*see* MPEP § 602.05 and because the application could be executed on more than one date, and thus there may be no single date of execution). Accordingly, the date of execution of the application is not particularly useful in identification of the patent application and is deleted as unnecessary.

Section 3.24: Section 3.24 is revised to include two paragraphs, namely, paragraphs (a) and (b).

New paragraph (a) of § 3.24 addresses documents and cover sheets for electronic submissions (*e.g.*, patent assignment documents filed via the Electronic Filing System (EFS) or the Electronic Patent Assignment System (EPAS)), and requires all documents submitted electronically to be submitted as digitized images in Tagged Image File Format (TIFF). In addition, when printed to a paper size of 8½ by 11 inches (21.6 by 27.9 cm)(''letter size'') or DIN size A4 (21.0 by 29.7 cm), the document must be legible and a one-inch (2.5 cm) margin must be present on all sides.

New paragraph (b) of § 3.24 addresses documents and cover sheets for paper and facsimile submissions. Section § 3.24(b) provides that for paper submissions (*e.g.*, documents that are mailed to the Office), the original document may no longer be submitted. Section 3.24(b) provides that ''[e]ither a copy of the original document or an extract of the original document'' must be submitted for recordation. Section 3.24(b) also explains why original documents should not be submitted for recording: ''The Office will not return recorded documents, so original documents must not be submitted for recording.'' The Office is moving to uniform processing of incoming papers, with incoming papers being scanned upon receipt, electronically routed within the Office, and an appropriate reply being transmitted to applicant or his representative. With this uniform procedure, the Office will not return or retain assignment documents submitted for recordation. As a result, the Office is not permitting the submission of originals of assignment documents, and instead is requiring that a copy or an extract of an original document be submitted. The term ''an extract of the original document'' is being added to reflect the current practice of submitting redacted copies of assignment documents, where part of an assignment document discusses matters other than assignment of interests related to a patent.

Section 3.24 is further revised to provide, in paragraph (b), that documents (copies) submitted for recording must be on sheets of paper having a size of 8½ by 11 inches (21.6 by 27.9 cm)(''letter size'') or DIN size A4 (21.0 by 29.7 cm). ''Legal-size'' (8½ by 14 inch or 21.64 by 33.1 cm) sheets of paper are no longer permissible. If the original assignment document is on ''legal size'' sheets of paper, the assignment document should be reduced to 8½ by 11-inch or DIN size A4 paper for submission to the Office (*e.g.*, by photocopying onto letter-size paper). Sheets of paper that are either 8½ by 11 inches (21.6 by 27.9 cm) or DIN size A4 (21.0 by 29.7 cm) are required for scanning purposes.

Section 3.25: Section 3.25 is amended to delete paragraph (a)(1) and renumber paragraphs (a)(2) through (4) as (a)(1) through (3), respectively. Paragraph (a)(1) is deleted to prohibit applicants from submitting the original assignment document (because applicants should retain the original of the assignment document). Paragraph (a)(1) of § 3.25, as renumbered, is further revised to insert ''original'' before ''document'' in order to clarify that only a copy of an original assignment document may be submitted for recording.

Section 3.25(c) is revised to add paragraph (1) to state that electronic submissions (*e.g.*, ETAS for trademark assignment documents) must be attached as a digitized image in Tagged Image File Format (TIFF), to move the existing requirements for paper submissions into paragraph (2), and to specify that the document (copy) submitted for recording must have a one-inch margin when printed on 8 ½ by 11 inch (21.6 by 27.9 cm) or DIN size A4 (21.0 cm by 29.7 cm) paper. Legal-size paper is no longer permitted. See the discussion of this change above for patents (§ 3.24).

Section 3.27: Section 3.27 is revised to change ''to be recorded'' to ''submitted by mail for recordation'' because documents and cover sheets submitted for recording may be faxed or electronically submitted to the Office and need not be mailed. Only documents submitted by mail need to be addressed as set forth in the rule. Section 3.27 is also revised to delete ''or with a request under § 3.81''. As explained with respect to § 3.81, when an applicant requests a patent to issue to an assignee, the assignment document should be separately submitted for recordation because inclusion of the assignment document with the request to issue the patent to the assignee slows down the recordation process.

Section 3.31: Section 3.31(a)(7) is revised to set forth the requirements for signature of patent and trademark cover sheets filed electronically. These requirements correspond to the requirements set forth in §§ 2.33(d) and 2.193(c)(1)(iii) of this chapter for electronically transmitted trademark filings.

Trademark assignments may be submitted electronically with the Electronic Trademark Assignment

System (ETAS), which is available on the Office's Internet Web site. See *http://etas.uspto.gov/*. Patent assignments may be electronically submitted using a similar tool, the Electronic Patent Assignment System (EPAS), and may also be submitted using EFS. When submitting a copy of an assignment using ETAS or EPAS, the cover sheet is completed and signed electronically. As with electronic submission of a trademark application, a signature may be applied to an assignment cover sheet by either: (1) Placing a symbol comprised of letters, numbers, and/or punctuation marks between forward slash marks in the signature block on the electronic submission (*e.g.* Jane P. Doe); or (2) signing the cover sheet using some other form of electronic signature specified by the Director. *See Trademark Manual of Examining Procedure* (TMEP) § 804.05, Signature of Electronically Transmitted Applications (May 2003).

Section 3.31(c)(1) is revised to simplify the requirements for the cover sheet to only require identification of whether the document to be recorded relates to a governmental interest.

Paragraph (f) is added to § 3.31, and provides that a trademark cover sheet should include the citizenship of the parties conveying and receiving the interest, and that if the party receiving the interest is a partnership or joint venture, the cover sheet should set forth the names, legal entities, and national citizenship (or the state or country of organization) of all general partners or active members. This information is required for purposes of examination of the application or registration file. Providing this information when the assignment is recorded may avoid a subsequent Office action by an examiner.

Section 3.34: Section 3.34(b) is revised to delete ''the originally recorded document or'' to thereby provide that it is ''a copy of the document originally submitted for recording'' that must be submitted. As explained above, the Office is revising the procedure for handling assignment documents and will no longer be returning the document that is submitted for recording.

Section 3.41: Section 3.41(b)(2) is revised to include electronic and facsimile submission as a means in which a statement of Government interest could be submitted for recordation without incurring a fee. Section 3.41(b)(2) is also revised to change the cross-reference to § 3.27 because § 3.27 was previously revised to delete § 3.27(b).

Section 3.81: Section 3.81(a) is revised to change ''name(s)'' to ''name'' and ''assignee(s)'' to ''assignee'' because under rules of statutory and regulatory construction, the singular includes the plural unless the context indicates otherwise. Furthermore, § 3.81(a) is amended to change ''should be accompanied by the assignment and either a direction to record the assignment in the Office pursuant to § 3.28, or a statement under § 3.73(b)'' to ''must state that the document has been filed for recordation as set forth in § 3.11.'' When an assignment document is submitted for recording, the preferred submission is by facsimile to (703) 306–5995, or through an electronic filing system (*e.g.*, ETAS for trademark assignment documents or EPAS or EFS for patent assignment documents), and not by mail. Accordingly, the Office has revised the rules to enable patent applicants to state that the assignment documents have been filed for recordation, rather than including the assignment documents for recordation with the request.

Paragraphs (a) and (b) of § 3.81 are revised to delete the reference to a statement under § 3.73(b). If the application has been assigned, the assignment document should be submitted for recording as set forth in § 3.11 for the patent to issue showing the name of the assignee. Although during prosecution a statement under § 3.73(b) can be relied upon to establish that an assignee is of record, pursuant to § 3.73(b)(1)(i), ''the documents submitted to establish ownership may be required to be recorded pursuant to § 3.11 in the assignment records as a condition to permitting the assignee to take action.'' By the time that a patent issues, any assignment should have been submitted for recording, and reliance upon § 3.73(b) should not be necessary. Furthermore, although during prosecution of an application the Office will have an opportunity to require recordation, at issuance, prosecution has come to a close and there is no other practical opportunity for the Office to require recordation before the patent is issued.

Section 3.81(b) is revised to read ''[a]fter payment of the issue fee: Any request for issuance of an application in the name of the assignee submitted after the date of payment of the issue fee, and any request that a patent be corrected to state the name of the assignee, must state that the assignment was submitted for recordation as set forth in § 3.11 before issuance of the patent, and must include a request for a certificate of correction under § 1.323 of this chapter (accompanied by the fee set forth in § 1.20(a)) and the processing fee set forth in § 1.17(i) of this chapter.'' This modifies the practice relating to issuance of a patent to an assignee by requiring that after payment of an issue fee, a request for a certificate of correction must be filed in order to obtain issuance of the patent to an assignee. Thus, where assignment information is submitted after payment of the issue fee, the patent document will not include the assignment information, but the assignment information will be included in a Certificate of Correction. Furthermore, the practice of allowing a patent to issue to an assignee when a § 3.73(b) statement has been filed, but an assignment has not been recorded is discontinued. *See* MPEP § 1481. Section 3.81(c)(1) is amended to change ''assignee(s)'' to ''assignee'' and ''inventor(s)'' to ''inventor'' because the singular includes the plural unless the context indicates otherwise. *See* 1 U.S.C. 1.

Section 5.1: Section 5.1(a) is revised to add Mail Stop L&R to the address so that the address reads as follows: All correspondence in connection with this part, including petitions, should be addressed to: Mail Stop L&R, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313–1450. National security classified applications and other related papers may also be hand-carried to Licensing and Review, Technology Center 3600, as provided in § 5.1(c).

Response to Comments: The Office published a notice proposing changes to the rules of practice regarding power of attorney and assignment practice. *See Clarification of Power of Attorney Practice, and Revisions to Assignment Rules*, 68 FR 38258 (June 27, 2003), 1272 *Off. Gaz. Pat. Office Notices* 181 (July 29, 2003). The Office received nine written comments (from one intellectual property organization, seven patent practitioners, and one business). Comments in support of a change are not discussed. The other comments and the Office's response to those comments follow:

Comment 1: An editorial change to § 1.12(b) was recommended to change the term ''such records and related information'' because the use of the term was confusing.

Response: The suggestion has been adopted and ''such records and related information'' has been changed to ''assignment records, digests, and indexes'.

Comment 2: The definition of ''power of attorney'' in § 1.32(a) was recommended to be revised to include designating a patent attorney or patent

agent or an individual authorized to practice before the Office in patent cases. Another comment noted that the use of ''agent'' in § 1.32 was confusing, and recommended revision to avoid using the term ''agent'' to include an attorney.

Response: These suggestions have been adopted. The definition of power of attorney and the remainder of the rule have been revised accordingly. Instead of using ''agent'' the term ''representative'' or ''patent practitioner'' has been used. The term ''an individual authorized to practice before the Office in patent cases'' has not been included, however, because such a person is considered to have limited capacity to take action on behalf of a patent applicant (*see* § 10.9(a) and (b)), and is not recognized by the Office as an attorney or agent of record, and is not entered into the Office's computer systems as having a power of attorney.

Comment 3: The term ''principal'' in § 1.32(a)(2) was suggested as being too narrowly defined, and it was suggested that the term be defined broadly enough to include an appointment by fewer than all of the inventors.

Response: This suggestion has not been adopted, but the language has been clarified in regard to appointments by fewer than all the applicants or assignees. Where all the applicants, or the assignees of the entire interest of all the applicants, do not give power of attorney to the same patent practitioners, a petition under § 1.182 is currently required before the Office will permit the split power of attorney. *See* MPEP § 402.10. The term ''all the inventors'' is specifically not used in order to provide for the situation where an inventor is deceased or where a petition under § 1.47 has been granted (the applicant would then either be fewer than all of the inventors or the party with proprietary interest pursuant to § 1.47(b)). If the term ''inventors'' was used, then in any application in which a petition under § 1.47 was granted, a petition under § 1.183 would also always be required to permit the power of attorney to be signed by fewer than all of the inventors, or by an assignee who is the assignee of the entire interest of the applicant, but not the assignee of the entire interest in the application (due to the lack of an assignment from the inventor, or if deceased, the legal representative of the inventor, who did not sign the declaration). With a split power of attorney, both patent practitioners are required to sign any response to an Office action, and to participate in any interviews in the patent application, which tends to delay prosecution of the patent application. Accordingly, applicants need to show good and sufficient reasons why more than one practitioner is necessary to represent applicants for the patent, and such an explanation will need to be provided in a petition under § 1.183 to waive the requirements of § 1.32(b)(4) for the applicant or the assignee of the entire interest of the applicant to sign the power of attorney.

Comment 4: One comment noted that in § 1.32(a)(3) revocation should also be defined as including the situation where the power of attorney is revoked by a new principal, and suggested that the definition be modified to address this situation. Another comment suggested that a new power of attorney act as a revocation of all prior powers of attorney.

Response: The suggestion to expand the definition of revocation to include revocation by a new or different principal has been adopted. In the definition of revocation (§ 1.32(a)(3)), ''by the principal'' has been deleted after ''previously given''. As to the comment that a new power of attorney act as revocation of all prior powers of attorney, this suggestion has not been adopted because automatic revocation will only occur in certain situations. When an original power of attorney is filed giving power of attorney to attorneys A, B, and C, and the same principal subsequently files another power of attorney, giving power of attorney to D without revoking all prior powers of attorney, the subsequently filed power of attorney will be treated as a revocation of the original power of attorney. Similarly, if the applicant signed the original power of attorney, and an assignee of the entire interest of the applicant later takes action and files a new power of attorney, the original power of attorney is revoked and replaced by the power of attorney filed by the assignee. In addition, if a power of attorney is given to the practitioners associated with a Customer Number, and a (second) power of attorney is later received giving power of attorney to patent practitioners associated with a different Customer Number, the second power of attorney will be processed, with the first Customer Number being replaced with the second. The power of attorney to the practitioners associated with the first Customer Number is automatically revoked in this situation. In all of these situations, the most recently filed power of attorney will control.

Comment 5: Several comments opposed the requirement in § 1.32(b)(2) to use Customer Number practice if more than ten patent practitioners are to be named. They argued that the proposed rule would require an applicant to choose between naming only a law firm by using the law firm's Customer Number, or to name ten attorneys in order to name some patent practitioners in the law firm as well as others not in the law firm. The commentators encouraged the Office to consider amending the rule to allow for appointment of both practitioners and Customer Numbers, as well as more than one Customer Number. The comments argued that using different Customer Numbers for different combinations of in-house practitioners and outside firm practitioners is burdensome and risky. One comment contended that all patent practitioners associated with a Customer Number needed to be at the same address.

Response: Applicants and assignees currently, as a matter of practice, do have to choose between giving a power of attorney to a list of individual practitioners and a power of attorney to the practitioners associated with a Customer Number. This is because the Office's computer systems only allow either a list of individual practitioners or a Customer Number to be entered, but not both, nor more than one Customer Number. The proposal to allow for entry of multiple Customer Numbers would likely result in separate registration numbers being entered. The programming required to allow for more than one Customer Number would be very costly, and updating the list of patent practitioners would be burdensome on the Office, so it has not been adopted.

A Customer Number does not need to have only patent practitioners in a single law firm associated with it. Instead, a Customer Number can be used to list all of the patent practitioners associated with a given client and who are working together to represent the client. As a result, requiring the use of a Customer Number if more than ten attorneys are to be appointed power of attorney would not require an applicant to make the choice suggested by the comment. Furthermore, to allow any of the patent practitioners access to private PAIR, Customer Number practice must be used.

The comments have not explained why appointment of more than ten patent practitioners, particularly hundreds of patent practitioners, is necessary. When a long list of patent practitioners is submitted to the Office, this list must be constantly updated with a separate submission for each application. When a patent practitioner leaves a law firm, he must file a withdrawal for each application in which he has a power of attorney. There

could be thousands of applications in which he was given a power of attorney, even though he never personally signed a single communication in any of them. If the proper action is not taken in the application, he or she can be held responsible for the failure to take the appropriate action because he did not timely withdraw. Given the Office's extremely liberal policy of accepting correspondence from a patent practitioner who is acting in a representative capacity pursuant to § 1.34, whether someone is of record is only relevant for a patent practitioner signing a change of correspondence address, an express abandonment without filing a continuing application, or a disclaimer. The work required for the Office to constantly update the lists of patent practitioners of record in receipt, matching and processing of the relevant paper has not been shown to be justified in exchange for the value actually given to applicants.

All patent practitioners associated with a Customer Number do not need to be at the same address. A Customer Number can be used like a client number, with all the patent practitioners who represent the client being associated with a single Customer Number.

Comment 6: Another comment asked if more than one Customer Number could be used to designate the list of patent practitioners of record so that applicants could give power of attorney to Customer Number A (all in-house counsel), and Customer Number B (several patent practitioners who are not in-house counsel). Alternatively, it was suggested that § 1.32(b)(2) be revised to permit the naming of more than one Customer Number.

Response: The suggestion has not been adopted. As stated in response to comment 5, in order to implement a change to permit use of more than one Customer Number to identify either the list of patent practitioners to be made of record or the correspondence address, reprogramming of multiple Office computer systems would be required, which is an automation project that the Office does not have resources to devote to at this time. Furthermore, the Office could not reprogram the software to allow multiple Customer Numbers to be used for the list of patent practitioners without also allowing multiple Customer Numbers being used for the correspondence address because access to private PAIR is a function of the correspondence address being associated with a single Customer Number. Thus, if the Office were to allow more than one Customer Number to be given for correspondence address purposes so that practitioners associated with each of the Customer Numbers can have access to private PAIR, then applicants would need to elect a single Customer Number for mailing purposes, and the Office would have to reprogram its system so as to be able to capture only the elected Customer Number for mailing purposes. The more Customer Numbers that the applicant has associated with a given application, the more likely that the applicant will need to change one or more of the Customer Numbers associated with the application. If only a single Customer Number is used (the Office permits up to three different Customer Numbers to be used, one for the power of attorney, one for the correspondence address and one for the fee address, but the same Customer Number can be used), then only a single Request for Customer Number Data Change can effectuate any changes necessary to the list of patent practitioners, or the address associated with a Customer Number. Given that a law firm, or a sole practitioner, can have multiple Customer Numbers without the Office being required to make any programming changes, it is more appropriate for the patent practitioners to use multiple Customer Numbers, with each Customer Number for a set of practitioners to be associated with a set of patent applications, rather than the Office to incur the cost of permitting multiple Customer Numbers to be used for the correspondence address (private PAIR access), or for the list of patent practitioners of record in an application.

Comment 7: Most of the comments opposed the proposal of denying entry of a power of attorney that was not in compliance with the proposed rules, and noted that there would be significant costs to applicants as a result of this policy. For example, where the power of attorney was given by the applicant in a combined declaration and power of attorney, many comments argued that a new declaration would be required to provide a proper power of attorney, and that a new declaration would be difficult to obtain because the applicant may no longer be employed by the company. Several comments emphasized the burden to applicants in changing their forms to comply with the limit of ten patent practitioners of record and requested a several-year delay in the effective date.

Response: After careful consideration, the Office has decided to permit applicants to supply a separate paper listing the patent practitioners who shall be made of record. Where a power of attorney is included as part of a declaration pursuant to § 1.63, and the power of attorney does not comply with § 1.32(b), the declaration would not be considered defective so long as the requirements of § 1.63 (or § 1.64) are met. If a separate paper indicating which ten registered patent attorneys or registered patent agents named in the power of attorney are to be recognized by the Office as being of record in the application or patent to which the power of attorney is directed is provided pursuant to § 1.32(c)(3), then the registered patent practitioners listed on the separate paper will be made of record. On the other hand, if the power of attorney does not comply with § 1.32(b) and the separate paper of § 1.32(c)(3) is not provided, then no patent practitioners will be made of record.

The Office does not encourage combined declarations and power of attorney. If such a combined format is used, however, it is recommended that the following language be inserted into the oath or declaration so that the patent practitioner will be able to take instructions from the actual client:

> The undersigned hereby authorizes the U.S. attorney or agent named herein to accept and follow instructions from _____ as to any action to be taken in the United States Patent and Trademark Office regarding this application without direct communication between the U.S. attorney or agent and the undersigned. In the event of a change in the persons from whom instructions may be taken, the U.S. attorney or agent named herein will be so notified by the undersigned.

See Responsibilities of Practitioners Representing Clients in Proceedings Before the Patent and Trademark Office, 1091 *Off. Gaz. Patent Office* 26 (May 25, 1988). If the client is the company that employed the inventor, then if the company is the assignee of the entire interest of the applicant, the assignee should sign the power of attorney in the patent application, not the inventor who may no longer be employed by the assignee (company). Because an inventor who is no longer being employed by a company is unlikely to be represented by a patent practitioner who has filed a patent application on behalf of the assignee, the fact that it would be difficult to obtain the signature of the inventor on a new power of attorney is not persuasive, and a petition under § 1.183 to waive this provision of the rules is unlikely to be granted for such a reason. An inventor may be available to sign a power of attorney, but may have a divergent interest from the company. Where the company (assignee) has not chosen to intervene in the application, and the power of attorney is given by the inventor (applicant), the inventor may later revoke the original power of

attorney to the patent practitioners chosen by the assignee and appoint his/her own patent attorney and change the correspondence address in the application (or patent). Such an exercise of authority by an inventor (applicant) is appropriate so long as the assignee of the entire interest of the applicant has not appointed a power of attorney, but adds unnecessary complexity to the prosecution of the application.

Where a power of attorney lists more than ten patent practitioners and the Office enters those patent practitioners listed on a separate paper provided pursuant to § 1.32(c)(3), a patent practitioner who is not recognized as the patent attorney or patent agent of record and, as a result is not entered into the Office's computer systems, is not required to request to be withdrawn, if the practitioner ceases to represent the applicant or assignee of the applicant. If such a patent practitioner files a request to withdraw, the Office will enter the paper in the patent application file, but will not process the paper, as the practitioner cannot be withdrawn because the practitioner was not made of record and was not entered into the Office's computer records.

Comment 8: One comment, while questioning the wisdom of having any limit on the number of patent practitioners who may be given a power of attorney, suggested a limit of 25, and for the Office to enter in the first 25 when more than 25 are listed in a power of attorney. Alternatively, it was suggested in two comments that a fee be required for the entry of more than 10 patent practitioners. Another comment questioned the limit contending that where an application is electronically filed, the Office does not have to enter in any lists of registration numbers, because if PrintEFS were updated, the application data sheet could be scanned and optical character recognition (OCR) be used to upload the data.

Response: A smaller number would be preferred by some, a larger by others, but the Office has decided that ten best balances the need of applicants to appoint several practitioners without using Customer Number practice and the need of the Office to avoid unnecessary work. The suggestion to adopt a fee to accept more than a set number of patent practitioners of record is noted and may be pursued in a future rule making, but the extra burden associated with entering additional names was a significant factor for not adopting the suggestions at this time.

Comment 9: Many comments disapproved of the deletion of associate power of attorney practice. The comments argued that when a new attorney takes over prosecution of a patent application from a former counsel, an associate power of attorney is useful to bridge the gap until a new power of attorney can be executed. In addition, an associate power of attorney is considered useful where a patent practitioner of record who is not in the Washington, DC, area appoints another patent practitioner within the area to assist in the prosecution for the purpose of some procedural or petition matter, but does not wish to have the practitioner made of record in all patent applications (as would happen if they used Customer Number practice, and added the practitioner to the list of practitioners associated with the Customer Number). Another comment argued that the associate power of attorney practice was desirable because of the delays in obtaining a new power of attorney, and that such delays would lead to the original attorney of record receiving correspondence for too long. Another comment suggested that the rules be amended to provide that an associate attorney's authority is not dependent upon the continued representation by the appointing principal attorney.

Response: Associate power of attorney practice has been eliminated because the practice is unnecessary in view of Customer Number practice. Customer Number practice, like an associate power of attorney, allows the list of patent practitioners to be changed easily to add an attorney without execution of a new power of attorney from the client, and therefore it is not necessary to be able to give an associate power of attorney if the power of attorney is to the practitioners associated with a Customer Number. Instead of using an associate power of attorney, if the power of attorney is to the patent practitioners associated with a Customer Number, a Request for Customer Number Data Change can be filed to add a practitioner that would have been given an associate power. In order to most effectively represent a patent applicant, a patent practitioner needs access to the private Patent Application Information Retrieval (private PAIR) system. Private PAIR enables the practitioner to obtain direct access the Office's electronic records for a patent application, including in many instances images of the papers in the patent application. In order to obtain access to these records, however, a Customer Number must be associated with the correspondence address of the application, and the registered practitioner must be associated with the Customer Number. The availability of the associate power of attorney practice to add new patent practitioners would encourage practitioners to give an associate power of attorney rather than having a new power of attorney to the practitioners associated with a Customer Number signed by the applicant or assignee of the entire interest of the applicant, even though the new power of attorney to the practitioners associated with a Customer Number would enhance their ability to represent the applicant or assignee of the entire interest of the applicant because of the access to private PAIR gained by Customer Number practice.

Using a Customer Number effectively as a client number, so that both in-house patent counsel and other patent practitioners are associated with the Customer Number, may only be appropriate for clients who file many patent applications. If the set of practitioners who are representing a client on a matter is so unique that it is not efficient to establish a Customer Number specifically for this set of practitioners, then the power of attorney would be to a list of patent practitioners and the correspondence address could be given as a Customer Number so that only those patent practitioners associated with the Customer Number for the correspondence address (a subset of those with power of attorney) would have access to private PAIR.

As to the suggestion that an associate power of attorney is necessary for the attorney to conduct an interview, *e.g.*, in the situation where a non-Washington, DC, firm appoints a Washington, DC, area patent practitioner to conduct an interview in a patent application, it is noted that the Washington, DC, patent practitioner does not need to be of record or have an associate power of attorney if the Washington, DC, practitioner has in their possession a copy of the application file. Even if the Washington, DC, practitioner does not have a copy of the application file, the practitioner may conduct an interview with ''proper authority from the applicant or attorney or agent of record in the form of a paper on file in the application.'' *See* MPEP § 713.05. Should an examiner object to a practitioner who is not of record conducting the interview, the practitioner is encouraged to bring a letter signed by an attorney of record, authorizing the practitioner to conduct the interview. For example, a sample of an ''Authorization to Act in a Representative Capacity'' is posted on the Office's Internet Web site under ''Forms'' at *http://www.uspto.gov/web/forms/sb0084.pdf.* A faxed copy of the letter would be acceptable.

Similarly, a patent practitioner does not need to be of record to file a reply to an Office action. *See* § 1.34, and MPEP §§ 405 and 714.01(c). Although the practitioner who is acting in a representative capacity pursuant to § 1.34 cannot sign a change of correspondence address (§ 1.33(a)(2)), a disclaimer (§ 1.321), or a request to expressly abandon a patent application (§ 1.138) (unless also filing a continuing application), he can take all other actions necessary to continue the prosecution of the application. An associate power of attorney does not put a patent practitioner in a significantly better position to represent an applicant than they could exercise by acting in a representative capacity pursuant to § 1.34. An associate power of attorney does, however, increase the workload of the Office as the Office practice was to enter the associate patent attorneys or patent agents into the Office computer records, indicate that the practitioner is an associate attorney, and then change the listing if the primary attorney ceased to have a power of attorney, or as new associates were appointed. In order to reduce the paperwork that the Office needs to process for a patent application, the Office will no longer enter associate powers of attorney into the electronic records for patent applications so as to make the associate attorney of record.

Patent practitioners with an associate power of attorney cannot directly access private PAIR, and as a result, are less able to represent a client than one with direct access to private PAIR. Private PAIR allows access to the Office's computer records for the patent application, for example to the Patent Application Locating and Monitoring (PALM) system contents, to the patent term adjustment calculations, and, if the application is maintained in the Image File Wrapper (IFW) system, to the image filed of the documents in the file history. One particularly helpful feature of private PAIR is the ''View Outgoing Correspondence,'' a feature that allows patent practitioners to obtain a list of applications with recently mailed correspondence, and, if the application is maintained in the IFW system, to view the documents. To have access to private PAIR for a patent application, the patent practitioner must be associated with a Customer Number that is associated with the correspondence address for the application. In addition, the patent practitioner's computer system (or his or her paralegal's computer system) must be loaded with the appropriate software. Public PAIR also allows access to much of this same information, but is only available for applications that have either published or issued as patents. If the patent practitioner merely has an associate power of attorney, the practitioner is not associated with the Customer Number, and is not able to access Private PAIR. Without access to private PAIR, a patent practitioner may not have access to the complete patent application file and cannot fully represent the client. For example, patent term adjustment calculations are available in private PAIR, but are not mailed to applicants.

Currently, the Office records both primary attorneys of record (who may not be associated with a Customer Number) as well as associate powers of attorney in the Office's PreExam computer system, so as to have a readily available list of patent practitioners of record for a particular application. Since an associate power of attorney terminates with the termination of the power of attorney to the patent practitioner who gave the associate power of attorney, associate powers of attorney require record keeping in addition to the entry of the associate powers of attorney into attorney of record fields, because the Office must take down the associate power of attorney once the primary attorney no longer has power of attorney. The suggestion to allow an associate power of attorney to remain valid even after the power of attorney to the primary attorney has been revoked, or where the primary attorney has withdrawn, has not been adopted. If an applicant or assignee desires the associate to be an attorney of record, the applicant or assignee should sign the required power of attorney.

In the situation where a practitioner is being brought in to assist with some overflow work, no appointment of an associate power of attorney is necessary before the Office is willing to accept the paper from the practitioner. Part 1 of the rules of practice do not address engagement letters between one patent practitioner and another. As a result, if the attorney of record desires the assistance of another patent practitioner, the rules of practice do not prohibit the patent practitioner from obtaining an ''Associate Power of Attorney'' or ''Authorization of Agent'' from the patent practitioner of record for their records. Furthermore, such a document would be considered a showing under § 1.34 that a person was acting in a representative capacity pursuant to § 1.34 on behalf of the applicant.

As to the delay inherent in obtaining a new power of attorney, although the original attorney will no longer be permitted to give an associate power of attorney, the original attorney can withdraw, or simply change the correspondence address to the new attorney's address.

Comment 10: One comment explained that the list of practitioners associated with a Customer Number usually only includes the partners in a firm, whereas an associate power of attorney was given to associate attorneys. The comment argued that eliminating associate power of attorney practice would hamper development of associate attorneys.

Response: The Office's computer system does not allow both a power of attorney to the practitioners associated with a Customer Number and either a list of patent practitioners (without use of a Customer Number) or another list of practitioners associated with a different Customer Number. Accordingly, the Office cannot enter a power of attorney to a Customer Number and an associate power of attorney. Furthermore, the relationship between being of record in a patent application (as would have occurred where the Office was able to enter an associate power of attorney), and being able to develop as a patent practitioner is not understood. A patent practitioner who is an associate at a firm could act in a representative capacity pursuant to § 1.34, under the direction of a practitioner of record. The inability to sign a change of correspondence address, has little to do with professional development.

Comment 11: Many comments suggested that a benefit of associate power of attorney practice is to permit someone who is not of record to conduct an interview, and that many examiners deny such an interview because the attorney is not of record, even though the Manual of Patent Examining Procedure states that such an interview is acceptable.

Response: Applicants desiring to have an attorney who is not of record and are concerned that the examiner may question the authority of the practitioner to conduct the interview should delegate to the practitioner the authority to conduct the interview by a separate letter, such as an ''Authorization to Act in a Representative Capacity.'' This sample template is available on the Office's Internet Web site in the listing of forms after PTO/SB/83. A faxed copy of such a letter would be acceptable, and the practitioner could bring a copy of the letter to the interview in the event that the examiner has a question about the authority of the practitioner.

Comment 12: One comment noted that having applicant execute a new

power of attorney would not be unduly burdensome, but requested clarification of the effect of elimination of associate power of attorney practice upon previously filed associate powers of attorney.

Response: Previously filed associate powers of attorney remain valid, and will continue to be effective.

Comment 13: One comment noted a discomfort with the use of Customer Number practice in that if the Office transposes digits when entering the Customer Number, the correspondence goes to an entirely incorrect address.

Response: The Office is sensitive to the need to carefully check for the correct entry of Customer Numbers and is taking steps to ensure that the correct Customer Number is entered. For example, when the Office keys in a Customer Number, the address associated with the Customer Number is retrieved. This address is compared to the name of the firm or company that filed the patent application, and any street address included with the application papers, to check the accuracy of the Customer Number that is entered. Applicants can assist the Office in improving the accuracy of entry of the Customer Number by ensuring that the Customer Number is clear and legible (*e.g.*, at least 12- or 14-point font and not fuzzy).

Comment 14: One comment stated that the proposal to require the exact name as registered with his or her signature was unreasonable, but noted that it was not clear that the exact name as registered was in fact being proposed to be required.

Response: The Office did intend to propose to require the exact name as registered, as this change was also included in the rule changes proposed in a recent notice of proposed rule making. *See Changes To Support Implementation of the United States Patent and Trademark Office 21st Century Strategic Plan,* 68 FR 53816 (Sep. 12, 2003), 1275 *Off. Gaz. Pat. Office Notices* (Oct. 7, 2003) (proposed rule). On reflection, the Office agrees that it is not necessary to obtain the exact name as registered to confirm the identity of the person signing the correspondence, but will instead require the typed name of the person signing the correspondence. Signatures are not always legible, and digits on registration numbers are sometimes transposed or inadvertently omitted. Accordingly, having a typed name is considered necessary.

Comment 15: As to § 1.36, one comment stated that the revocation of the power of attorney should be available to fewer than all of the inventors, or fewer than the assignee of the entire interest of the applicant.

Response: The suggestion has not been adopted. The current practice is to permit revocation by fewer than all of the applicants only if a petition under § 1.182 is filed, explaining why a split power of attorney is necessary. *See* MPEP § 402.10. Having more than one attorney or an attorney and an applicant required to sign all correspondence in an application often leads to the application becoming abandoned due to the difficulty in obtaining the necessary signatures. As a result, the rules have not been amended to provide for fewer than all of the applicants to be able to revoke the power of attorney without a showing of sufficient cause.

Comment 16: One comment suggested that .jpg files be added to the list of formats accepted for electronic submission of assignment documents pursuant to § 3.24 and § 3.25, arguing that this format is accepted in Trademarks.

Response: At this time it is not feasible for the Office to expand the formats that will be accepted for electronic submission of assignment documents. The format .jpg is acceptable for Trademark documents filed through Trademark Electronic Application System (TEAS), but not assignments of Trademarks filed through ETAS.

Comment 17: Two comments noted the change in practice proposed in § 3.34 would be more acceptable to applicants if the Notice of Recordation were modified to also include an Attorney Docket Number, as well as the title of the invention according to the application on filing. Alternatively, one comment suggested use of the Express Mail number as an identifier on the Notice of Recordation.

Response: The proposal to use the Express Mail number as an identifier is not adopted. The Office can process faxed or electronically filed assignment documents much quicker than those received by mail, and allowing use of an Express Mail number would promote a practice of mailing at a time when the Office is seeking to discourage mailing and encourage electronic submissions. The Office has, however, adopted the suggestion to include the title of the invention, but notes that the title that will be printed on the Notice of Recordation is the title reflected in the Office's computer records, and will not be rekeyed from the assignment. As to the attorney docket number, the suggestion has also been adopted, if the assignment is for a single property. The notice of recordation cannot reflect docket numbers if the assignment is for more than one patent or trademark.

Comment 18: Another comment stated that sometimes the wrong patent assignment document is attached to the Notice of Recordation, and having a copy of the document has been useful in the past to enable the mix-up to be addressed.

Response: The Office has made patent and trademark assignment records available over the Internet. Although the copy of a patent assignment document cannot be displayed using *http://assignments.uspto.gov/assignments/q?db=pat,* the assignment records on the Internet provide a mechanism to check if the patent assignment was recorded correctly.

Administrative Procedure Act: This final rule changes the rules of practice to Office procedures involving power of attorney practice and recording of assignment documents. The changes addressed in this final rule are limited to the format for and the manner of submitting, establishing and changing the power of attorney, for submitting documents to be recorded in the assignment records, and the availability of assignment records to the public. Therefore, these changes involve rules of agency practice and procedure under 5 U.S.C. 553(b)(A). *See Bachow Communications Inc.* v. *FCC,* 237 F.3d 683, 690 (DC Cir. 2001). Therefore, prior notice and opportunity for public comment were not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law). Nevertheless, the Office did provide an opportunity for public comment on the changes in the notice of proposed rule making because the Office desires the benefit of public comment on the proposed changes.

Regulatory Flexibility Act: As prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553 (or any other law), a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required. See 5 U.S.C. 603. The changes in this final rule impose no additional fees on patent applicants.

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: This final rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collections of information involved in this final rule have been reviewed and previously approved by OMB under OMB control numbers 0651–0027, 0651–0032, 0651–0034, and 0651–0035. The changes in this final rule do not affect the information requirements associated with these information collections. Therefore, the Office is not submitting these information collection packages to OMB for review and approval.

The title, description and respondent description of each of the information collections are shown below with an estimate of the annual reporting burdens. Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. The principal impacts of the changes in this proposed rule are to: (1) Provide for power of attorney to a Customer Number and to limit the number of attorneys who may be given a power of attorney without using a Customer Number; (2) eliminate associate power of attorney practice; (3) require attorneys acting in a representative capacity to specify their name and registration number; (4) allow access to assignment records except those relating to any pending or abandoned patent application which is preserved in confidence under § 1.14; (5) provide that assignment documents submitted for recording must be on certain sizes of paper; (6) specifically state that the assignment documents that are submitted for recording will not be returned; (7) for assignments that are submitted electronically, provide for an electronic signature; (8) require the citizenship of the parties conveying and receiving the interest on a trademark assignment cover sheet; (9) provide that a request to issue a patent to an assignee filed after issue fee payment must be accompanied by a request for a certificate of correction; and (10) change the address that would be used for mailing certain patent applications.

OMB Number: 0651–0027.

Title: Recording Assignments.

Form Numbers: PTO–1594 and PTO–1595.

Type of Review: Approved through June of 2005.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, local, or tribal governments.

Estimated Number of Respondents: 240,345.

Estimated Time Per Response: 30 minutes.

Estimated Total Annual Burden Hours: 120,173 hours.

Needs and Uses: The Office records over 200,000 assignments or documents related to ownership of patent and trademark cases each year. The Office requires a cover sheet to expedite the processing of these documents and to ensure that they are properly recorded.

OMB Number: 0651–0032.

Title: Initial Patent Application.

Form Number: PTO/SB/01–07, PTO/SB/13PCT, PTO/SB/16–19, PTO/SB/29 and 29A, PTO/SB/101–110.

Type of Review: Approved through July of 2006.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, local, or tribal governments.

Estimated Number of Respondents: 454,287.

Estimated Time Per Response: 22 minutes to 10 hours and 45 minutes.

Estimated Total Annual Burden Hours: 4,171,568 hours.

Needs and Uses: The purpose of this information collection is to permit the Office to determine whether an application meets the criteria set forth in the patent statute and regulations. The standard Fee Transmittal form, New Utility Patent Application Transmittal form, New Design Patent Application Transmittal form, New Plant Patent Application Transmittal form, Declaration, Provisional Application Cover Sheet, and Plant Patent Application Declaration will assist applicants in complying with the requirements of the patent statute and regulations, and will further assist the USPTO in processing and examination of the application.

OMB Number: 0651–0034.

Title: Secrecy and License to Export.

Form Numbers: None.

Type of Review: Approved through April of 2004.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, local, or tribal governments.

Number of Respondents: 1,669.

Estimated Time Per Response: Between 30 minutes and 4 hours.

Estimated Total Annual Burden Hours: 1,310 hours.

Needs and Uses: When disclosure of an invention may be detrimental to national security, the Director of the USPTO must issue a secrecy order and withhold the publication of the application or grant of a patent for such period as the national interest requires. The USPTO is also required to grant foreign filing licenses in certain circumstances to applicants filing patent applications in foreign countries. This collection is used by the public to petition the USPTO to allow disclosure, modification, or rescission of a secrecy order, or to obtain a general or group permit. Applicants may also petition the USPTO for a foreign filing license, a retroactive license, or to change the scope of a license.

OMB Number: 0651–0035.

Title: Representative and Address Provisions.

Form Numbers: PTO/SB/80/81/82/83/122/123/124A/124B/125A/125B.

Type of Review: Approved through November of 2005.

Affected Public: Individuals or households, business or other for-profit, not for-profit institutions and Federal Government.

Estimated Number of Respondents: 355,005.

Estimated Time Per Response: 3 minutes (0.05 hours) to 1 hour 30 minutes (1.5 hours).

Estimated Total Annual Burden Hours: 30,088 hours.

Needs and Uses: Under 35 U.S.C. 2 and 37 CFR 1.31–1.36 and 1.363, this information is used to submit a request to grant or revoke power of attorney in an application or patent, to withdraw as patent attorney or patent agent of record, or to designate or change the correspondence address for one or more applications or patents, and to request or change information associated with a customer number.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or to the Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC 20503, (Attn: USPTO Desk Officer).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and record keeping requirements, Small Businesses.

37 CFR Part 3

Administrative practice and procedure, Inventions and patents, Reporting and record keeping requirements.

37 CFR Part 5

Classified information, foreign relations, inventions and patents.

■ For the reasons set forth in the preamble, 37 CFR parts 1, 3 and 5 are amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Amend § 1.1 by revising paragraph (a)(4)(i) to read as follows, and by removing and reserving paragraph (f).

§ 1.1 Addresses for non-trademark correspondence with the United States Patent and Trademark Office.

(a) * * *

(4) *Office of Public Records correspondence.* (i) Assignments. All patent-related documents submitted by mail to be recorded by Assignment Services Division, except for documents filed together with a new application, should be addressed to: Mail Stop Assignment Recordation Services, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450. *See* § 3.27.

* * * * *

(f) [Reserved]

■ 3. Revise § 1.12(b) to read as follows:

§ 1.12 Assignment records open to public inspection.

* * * * *

(b) Assignment records, digests, and indexes relating to any pending or abandoned patent application, which is open to the public pursuant to § 1.11 or for which copies or access may be supplied pursuant to § 1.14, are available to the public. Copies of any assignment records, digests, and indexes that are not available to the public shall be obtainable only upon written authority of the applicant or applicant's assignee or patent attorney or patent agent or upon a showing that the person seeking such information is a bona fide prospective or actual purchaser, mortgagee, or licensee of such application, unless it shall be necessary to the proper conduct of business before the Office or as provided in this part.

* * * * *

■ 4. Revise § 1.31 to read as follows:

§ 1.31 Applicants may be represented by a registered patent attorney or patent agent.

An applicant for patent may file and prosecute his or her own case, or he or she may give a power of attorney so as to be represented by a registered patent attorney or registered patent agent. *See* § 10.6 of this subchapter. The United States Patent and Trademark Office cannot aid in the selection of a registered patent attorney or patent agent.

■ 5. Add new § 1.32 to read as follows:

§ 1.32 Power of attorney.

(a) Definitions.

(1) *Power of attorney* means a written document by which a principal designates a registered patent attorney or a registered patent agent to act on his or her behalf.

(2) *Principal* means either an applicant for patent (§ 1.41(b)) or an assignee of entire interest of the applicant. The principal executes a power of attorney designating one or more registered patent attorneys or registered patent agents to act on his or her behalf.

(3) *Revocation* means the cancellation by the principal of the authority previously given to a registered patent attorney or registered patent agent to act on his or her behalf.

(4) *Customer Number* means a number that may be used to:

(i) Designate the correspondence address of a patent application or patent such that the correspondence address for the patent application or patent would be the address associated with the Customer Number;

(ii) Designate the fee address (§ 1.363) of a patent such that the fee address for the patent would be the address associated with the Customer Number; and

(iii) Submit a list of practitioners such that those registered patent practitioners associated with the Customer Number would have power of attorney.

(b) A power of attorney must:

(1) Be in writing;

(2) Name one or more representatives in compliance with (c) of this section;

(3) Give the representative power to act on behalf of the principal; and

(4) Be signed by the applicant for patent (§ 1.41(b)) or the assignee of the entire interest of the applicant.

(c) A power of attorney may only name as representative:

(1) One or more joint inventors (§ 1.45);

(2) Those registered patent practitioners associated with a Customer Number;

(3) Ten or fewer registered patent attorneys or registered patent agents (*see* § 10.6 of this subchapter) (patent practitioners). Except as provided in paragraph (c)(1) or (c)(2) of this section, the Office will not recognize more than ten patent practitioners as being of record in an application or patent. If a power of attorney names more than ten patent practitioners, such power of attorney must be accompanied by a separate paper indicating which ten patent practitioners named in the power of attorney are to be recognized by the Office as being of record in application or patent to which the power of attorney is directed.

■ 6. Amend § 1.33 by revising paragraphs (a) introductory text, (b) introductory text, (b)(1), (b)(2) and (c) to read as follows:

§ 1.33 Correspondence respecting patent applications, reexamination proceedings, and other proceedings.

(a) *Correspondence address and daytime telephone number.* When filing an application, a correspondence address must be set forth in either an application data sheet (§ 1.76), or elsewhere, in a clearly identifiable manner, in any paper submitted with an application filing. If no correspondence address is specified, the Office may treat the mailing address of the first named inventor (if provided, *see* §§ 1.76(b)(1) and 1.63(c)(2)) as the correspondence address. The Office will direct all notices, official letters, and other communications relating to the application to the correspondence address. The Office will not engage in double correspondence with an applicant and a registered patent attorney or patent agent, or with more than one registered patent attorney or patent agent except as deemed necessary by the Director. If more than one correspondence address is specified in a single document, the Office will establish one as the correspondence address and will use the address associated with a Customer Number, if given, over a typed correspondence address. For the party to whom correspondence is to be addressed, a daytime telephone number should be supplied in a clearly identifiable manner and may be changed by any party who may change the correspondence address. The correspondence address may be changed as follows:

* * * * *

(b) *Amendments and other papers.* Amendments and other papers, except for written assertions pursuant to § 1.27(c)(2)(ii) of this part, filed in the application must be signed by:

(1) A registered patent attorney or patent agent of record appointed in compliance with § 1.32(b);

(2) A registered patent attorney or patent agent not of record who acts in a representative capacity under the provisions of § 1.34;

* * * * *

(c) All notices, official letters, and other communications for the patent owner or owners in a reexamination proceeding will be directed to the patent attorney or patent agent of record (*see* § 1.32(b)) in the patent file at the address listed on the register of patent attorneys and patent agents maintained pursuant to § 10.5 and § 10.11 or, if no patent attorney or patent agent is of record, to the patent owner or owners at the address or addresses of record. Amendments and other papers filed in a reexamination proceeding on behalf of the patent owner must be signed by the patent owner, or if there is more than one owner by all the owners, or by a patent attorney or patent agent of record in the patent file, or by a registered patent attorney or patent agent not of record who acts in a representative capacity under the provisions of § 1.34. Double correspondence with the patent owner or owners and the patent owner's patent attorney or patent agent, or with more than one patent attorney or patent agent, will not be undertaken. If more than one patent attorney or patent agent is of record and a correspondence address has not been specified, correspondence will be held with the last patent attorney or patent agent made of record.

* * * * *

■ 7. Revise § 1.34 to read as follows:

§ 1.34 Acting in a representative capacity.

When a registered patent attorney or patent agent acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a patent case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that under the provisions of this subchapter and the law, he or she is authorized to represent the particular party in whose behalf he or she acts. In filing such a paper, the registered patent attorney or patent agent must specify his or her registration number and name with his or her signature. Further proof of authority to act in a representative capacity may be required.

■ 8. Revise § 1.36 to read as follows:

§ 1.36 Revocation of power of attorney; withdrawal of patent attorney or patent agent.

(a) A power of attorney, pursuant to § 1.32(b), may be revoked at any stage in the proceedings of a case by an applicant for patent (§ 1.41(b)) or an assignee of the entire interest of the applicant. A power of attorney to the patent practitioners associated with a Customer Number will be treated as a request to revoke any powers of attorney previously given. Fewer than all of the applicants (or by fewer than the assignee of the entire interest of the applicant) may only revoke the power of attorney upon a showing of sufficient cause, and payment of the petition fee set forth in § 1.17(h). A registered patent attorney or patent agent will be notified of the revocation of the power of attorney. Where power of attorney is given to the patent practitioners associated with a Customer Number (§ 1.32(c)(2)), the practitioners so appointed will also be notified of the revocation of the power of attorney when the power of attorney to all of the practitioners associated with the Customer Number is revoked. The notice of revocation will be mailed to the correspondence address for the application (§ 1.33) in effect before the revocation. An assignment will not of itself operate as a revocation of a power previously given, but the assignee of the entire interest of the applicant may revoke previous powers of attorney and give another power of attorney of the assignee's own selection as provided in § 1.32(b).

(b) A registered patent attorney or patent agent who has been given a power of attorney pursuant to § 1.32(b) may withdraw as attorney or agent of record upon application to and approval by the Director. The applicant or patent owner will be notified of the withdrawal of the registered patent attorney or patent agent. Where power of attorney is given to the patent practitioners associated with a Customer Number, a request to delete all of the patent practitioners associated with the Customer Number may not be granted if an applicant has given power of attorney to the patent practitioners associated with the Customer Number in an application that has an Office action to which a reply is due, but insufficient time remains for the applicant to file a reply. *See* § 1.613(d) for withdrawal in an interference.

§ 1.53 [Amended]

■ 9. Amend § 1.53 by removing paragraph (d)(9) and redesignating paragraph (d)(10) as paragraph (d)(9).

■ 10. Revise § 1.363 by adding paragraph (c) as follows:

§ 1.363 Fee address for maintenance fee purposes.

* * * * *

(c) A fee address must be an address associated with a Customer Number.

PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE

■ 11. The authority citation for 37 CFR part 3 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 2(b)(2).

■ 12. Revise § 3.1 to read as follows:

§ 3.1 Definitions.

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

Application means a national application for patent, an international patent application that designates the United States of America, or an application to register a trademark under section 1 or 44 of the Trademark Act, 15 U.S.C. 1051 or 15 U.S.C. 1126, unless otherwise indicated.

Assignment means a transfer by a party of all or part of its right, title and interest in a patent, patent application, registered mark or a mark for which an application to register has been filed.

Document means a document which a party requests to be recorded in the Office pursuant to § 3.11 and which affects some interest in an application, patent, or registration.

Office means the United States Patent and Trademark Office.

Recorded document means a document which has been recorded in the Office pursuant to § 3.11.

Registration means a trademark registration issued by the Office.

■ 13. Revise § 3.21 to read as follows:

§ 3.21 Identification of patents and patent applications.

An assignment relating to a patent must identify the patent by the patent number. An assignment relating to a national patent application must identify the national patent application by the application number (consisting of the series code and the serial number, *e.g.*, 07/123,456). An assignment relating to an international patent application which designates the United States of America must identify the international application by the international application number (*e.g.*, PCT/US90/01234). If an assignment of a patent application filed under § 1.53(b) is executed concurrently with, or subsequent to, the execution of the patent application, but before the patent application is filed, it must identify the

patent application by the name of each inventor and the title of the invention so that there can be no mistake as to the patent application intended. If an assignment of a provisional application under § 1.53(c) is executed before the provisional application is filed, it must identify the provisional application by the name of each inventor and the title of the invention so that there can be no mistake as to the provisional application intended.

■ 14. Revise § 3.24 to read as follows:

§ 3.24 Requirements for documents and cover sheets relating to patents and patent applications.

(a) *For electronic submissions:* Either a copy of the original document or an extract of the original document may be submitted for recording. All documents must be submitted as digitized images in Tagged Image File Format (TIFF) or another form as prescribed by the Director. When printed to a paper size of either 21.6 by 27.9 cm (8½ by 11 inches) or 21.0 by 29.7 cm (DIN size A4), the document must be legible and a 2.5 cm (one-inch) margin must be present on all sides.

(b) *For paper or facsimile submissions:* Either a copy of the original document or an extract of the original document must be submitted for recording. Only one side of each page may be used. The paper size must be either 21.6 by 27.9 cm (8½ by 11 inches) or 21.0 by 29.7 cm (DIN size A4), and in either case, a 2.5 cm (one-inch) margin must be present on all sides. For paper submissions, the paper used should be flexible, strong white, non-shiny, and durable. The Office will not return recorded documents, so original documents must not be submitted for recording.

■ 15. Revise § 3.25 to read as follows:

§ 3.25 Recording requirements for trademark applications and registrations.

(a) *Documents affecting title.* To record documents affecting title to a trademark application or registration, a legible cover sheet (*see* § 3.31) and one of the following must be submitted:

(1) A copy of the original document;

(2) A copy of an extract from the document evidencing the effect on title; or

(3) A statement signed by both the party conveying the interest and the party receiving the interest explaining how the conveyance affects title.

(b) *Name changes.* Only a legible cover sheet is required (*See* § 3.31).

(c) *All documents.* (1) *For electronic submissions:* All documents must be submitted as digitized images in Tagged Image File Format (TIFF) or another form as prescribed by the Director. When printed to a paper size of either 21.6 by 27.9 cm (8½ by 11 inches) or 21.0 by 29.7 cm (DIN size A4), a 2.5 cm (one-inch) margin must be present on all sides.

(2) *For paper or facsimile submissions:* All documents should be submitted on white and non-shiny paper that is either 8½ by 11 inches (21.6 by 27.9 cm) or DIN size A4 (21.0 by 29.7 cm) with a one-inch (2.5 cm) margin on all sides in either case. Only one side of each page may be used. The Office will not return recorded documents, so original documents should not be submitted for recording.

■ 16. Revise § 3.27 to read as follows:

§ 3.27 Mailing address for submitting documents to be recorded.

Documents and cover sheets submitted by mail for recordation should be addressed to Mail Stop Assignment Recordation Services, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, unless they are filed together with new applications.

■ 17. Amend § 3.31 by revising paragraphs (a)(7) and (c)(1) and adding a paragraph (f) to read as follows:

§ 3.31 Cover sheet content.

(a) * * *

(7) The signature of the party submitting the document. For an assignment document or name change filed electronically, the person who signs the cover sheet must either:

(i) Place a symbol comprised of letters, numbers, and/or punctuation marks between forward slash marks submission (*e.g.*/Thomas O'Malley III/) in the signature block on the electronic submission; or

(ii) Sign the cover sheet using some other form of electronic signature specified by the Director.

* * * * *

(c) * * *

(1) Indicate that the document relates to a Government interest; and

* * * * *

(f) Each trademark cover sheet should include the citizenship of the party conveying the interest and the citizenship of the party receiving the interest. In addition, if the party receiving the interest is a partnership or joint venture, the cover sheet should set forth the names, legal entities, and national citizenship (or the state or country of organization) of all general partners or active members that compose the partnership or joint venture.

■ 18. Revise § 3.34 to read as follows:

§ 3.34 Correction of cover sheet errors.

(a) An error in a cover sheet recorded pursuant to § 3.11 will be corrected only if:

(1) The error is apparent when the cover sheet is compared with the recorded document to which it pertains, and

(2) A corrected cover sheet is filed for recordation.

(b) The corrected cover sheet must be accompanied by a copy of the document originally submitted for recording and by the recording fee as set forth in § 3.41.

■ 19. Revise § 3.41(b)(2) to read as follows:

§ 3.41 Recording fees.

* * * * *

(b) * * *

(2) The document and cover sheet are either: Faxed or electronically submitted as prescribed by the Director, or mailed to the Office in compliance with § 3.27.

■ 20. Revise § 3.81 to read as follows:

§ 3.81 Issue of patent to assignee.

(a) *With payment of the issue fee:* An application may issue in the name of the assignee consistent with the application's assignment where a request for such issuance is submitted with payment of the issue fee, provided the assignment has been previously recorded in the Office. If the assignment has not been previously recorded, the request must state that the document has been filed for recordation as set forth in § 3.11.

(b) *After payment of the issue fee:* Any request for issuance of an application in the name of the assignee submitted after the date of payment of the issue fee, and any request for a patent to be corrected to state the name of the assignee, must state that the assignment was submitted for recordation as set forth in § 3.11 before issuance of the patent, and must include a request for a certificate of correction under § 1.323 of this chapter (accompanied by the fee set forth in § 1.20(a)) and the processing fee set forth in § 1.17(i) of this chapter.

(c) *Partial assignees.* (1) If one or more assignee, together with one or more inventor, holds the entire right, title, and interest in the application, the patent may issue in the names of the assignee and the inventor.

(2) If multiple assignees hold the entire right, title, and interest to the exclusion of all the inventors, the patent may issue in the names of the multiple assignees.

PART 5—SECRECY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES

■ 21. The authority citation for 37 CFR part 5 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 41, 181–188, as amended by the Patent Law Foreign Filing Amendments Act of 1988, Pub. L. 100–418, 102 Stat. 1567; the Arms Export Control Act, as amended, 22 U.S.C. 2751 *et seq.;* the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.;* the Nuclear Non Proliferation Act of 1978, 22 U.S.C. 3201 *et seq.;* and the delegations in the regulations under these Acts to the Director (15 CFR 370.10(j), 22 CFR 125.04, and 10 CFR 810.7).

■ 22. Revise 5.1(a) to read as follows:

§ 5.1 Applications and correspondence involving national security.

(a) All correspondence in connection with this part, including petitions, should be addressed to: Mail Stop L&R, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313–1450.

* * * * *

Dated: May 18, 2004.

Jon W. Dudas,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. 04–11761 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 040–0448a; FRL–7662–2]

Revisions to the California State Implementation Plan, El Dorado County Air Pollution Control District, Feather River Air Quality Management District, Kern County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Bernardino County Air Pollution Control District, Santa Barbara County Air Pollution Control District, and Yolo-Solano Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the El Dorado County Air Pollution Control District (EDCAPCD), Feather River Air Quality Management District (FRAQMD), Kern County Air Pollution Control District (KCAPCD), Sacramento Metropolitan Air Quality Management District (SMAQMD), San Bernardino County Air Pollution Control District (now Mojave Desert Air Quality Management District) (MDAQMD), Santa Barbara County Air Pollution Control District (SBCAPCD), and Yolo-Solano Air Pollution Control District (YSAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving local rules that address emission statements.

DATES: This rule is effective on July 26, 2004, without further notice, unless EPA receives adverse comments by June 25, 2004. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901 or e-mail to *steckel.andrew@epa.gov,* or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted SIP revisions, EPA's technical support documents (TSDs), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted SIP revisions by appointment at the following locations:

Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

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

El Dorado County Air Pollution Control District, 2850 Fairlane Court, Building C, Placerville, CA 95667–4100.

Feather River Air Quality Management District, 938—14th Street, Marysville, CA 95901–4149.

Kern County Air Pollution Control District, 2700 ''M'' Street, Suite 302, Bakersfield, CA 93301–2370.

Mojave Desert Air Quality Management District, 14306 Park Avenue, Victorville, CA 92392–2310.

Sacramento Metropolitan Air Quality Management District, 777—12th Street, Third Floor, Sacramento, CA 95814–1908.

Santa Barbara County Air Pollution Control District, 26 Castilian Drive, Suite B–23, Goleta, CA 93117–3027.

Yolo-Solano Air Quality Management District, 1947 Galileo Court, Suite 103, Davis, CA 95616–4882.

Copies of the rules may also be available via the Internet at the following site, *http://www.arb.ca.gov/drdb/drdbltxt.htm.* Please be advised that this is not an EPA Web site and may not contain the same version of the rules that were submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Julie A. Rose, EPA Region IX, (415) 947–4126, *rose.julie@epa.gov.*

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

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I. The State's Submittal

A. What Rules Did the State Submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED RULES

Local agency	Rule #	Rule title	Adopted	Submitted
EDCAPCD	1000	Emission Statement	09/21/92	11/12/92
FRAQMD	4.8	Further Information	09/14/92	11/12/92
KCAPCD	108.2	Emission Statement Requirements	07/13/92	11/12/92
MDAQMD	107	Certification and Emission Statements	09/17/92	11/12/92
SMAQMD	105	Emission Statements	04/20/93	11/18/93
SBCAPCD	212	Emission Statements	10/20/92	11/12/92

TABLE 1.—SUBMITTED RULES—Continued

Local agency	Rule #	Rule title	Adopted	Submitted
YSAPCD	3.18	Emission Statements	11/15/92	11/18/93

On March 26, 1993, and December 23, 1993, the rules submitted on November 12, 1992, and November 18, 1993, respectively were found to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are There Other Versions of These Rules?

There are no previous versions of these rules with the exception of FRAPCD Rule 4.8, Further Information. We approved Sutter County Air Pollution Control District (SCAPCD) Rule 4.8, Public Information and Yuba County Air Pollution Control District (YCAPCD) Rule 4.8, Further Information into the California SIP on April 12, 1982. SCAPCD and YCAPCD joined together to form the FRAPCD on September 3, 1991. FRAPCD Rule 4.8 has now been revised to include emission statement requirements.

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

Section 182(a)(3)(B)(i) of the CAA requires that States with areas designated as nonattainment for ozone require emission statement data from sources of volatile organic compounds or oxides of nitrogen in the nonattainment areas. This requirement applies to all ozone nonattainment areas regardless of the classification (Marginal, Moderate, *etc.*). Emission statements were required to be submitted by November 15, 1993, and annually thereafter. Section 182(a)(3)(B)(ii) of the CAA allows the States and Districts to waive the requirement for emission statements for classes or categories of sources with less than 25 tons per year if the class or category is included in the base year and periodic inventories and emissions are calculated using emission factors established by EPA or other methods acceptable to EPA.

Section 110(a) of the CAA requires States to submit regulations that control volatile organic compounds and oxides of nitrogen, particulate matter, and other air pollutants which harm human health and the environment. These rules were developed as part of the local agency's program to control these pollutants and meet the requirements of sections 110 and 182 of the CAA.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Rules?

These rules require owners or operators of sources which emit oxides of nitrogen (NO_X), volatile organic compounds (VOC), or reactive organic gas (ROG) to provide the Air Pollution Control Officer (APCO) and CARB with a statement showing actual emissions of NO_X, VOC, and ROG annually. The statement must contain a certification by a responsible official of the company that the information contained in the statement is accurate. The statement must contain the same information required in CARB's Emission Inventory Turn Around Document. The CARB's Emission Inventory Turn Around Document complies with the suggested contents of an emission statement found in EPA's draft Guidance on the Implementation of an Emission Statement Program. In combination with the other requirements, these rules must be enforceable (*see* section 110(a) of the Act) and must not relax existing requirements (*see* sections 110(l) and 193). EPA policy that we used to help evaluate enforceability requirements consistently includes the Bluebook (''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988) and the Little Bluebook (''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001).

B. Do the Rules Meet the Evaluation Criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. The TSDs have more information on our evaluation.

C. EPA Recommendations To Further Improve the Rules

The TSDs recommend that the CARB's most current emission inventory document, the ''California Emission Inventory and Development And Reporting System II (CEIDARSII),'' be referenced in the rules the next time the local agencies modify their rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by June 25, 2004, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 26, 2004. This will incorporate these rules into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism

implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 26, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: May 3, 2004.

Wayne Nastri,

Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(190)(i)(C) to (G) and (c)(194)(i)(I) and (J) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(190) * * *

(i) * * *

(C) El Dorado County Air Pollution Control District.

(*1*) Rule 1000 adopted on September 21, 1992.

(D) Feather River Air Pollution Control District.

(*1*) Rule 4.8 adopted on September 14, 1992.

(E) Kern County Air Pollution Control District.

(*1*) Rule 108.2 adopted on July 13, 1992.

(F) San Bernardino County Air Pollution Control District (now Mojave Desert Air Quality Management District).

(*1*) Rule 107 adopted on September 14, 1992.

(G) Santa Barbara County Air Pollution Control District.

(*1*) Rule 212 adopted on October 20, 1992.

* * * * *

(194) * * *

(i) * * *

(I) Sacramento Metropolitan Air Quality Management District.

(*1*) Rule 105 adopted on April 20, 1993.

(J) Yolo-Solano Air Quality Management District.

(*1*) Rule 3.18 adopted on July 28, 1993.

* * * * *

[FR Doc. 04–11769 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0093; FRL–7355–8]

Isoxadifen-Ethyl; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes three tolerances for the combined residues of the herbicide safener isoxadifen-ethyl in or on rice, grain; rice, straw; and rice, hulls. Bayer CropScience (formerly Aventis CropScience) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective May 26, 2004. Objections and requests for hearings must be received on or before July 26, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION**. EPA has established a docket for this action under Docket ID number OPP–2004–0093. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy 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.

FOR FURTHER INFORMATION CONTACT: James Parker, Registration Division

(7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0371; e-mail address: *parker.james@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, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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 Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background and Statutory Findings

In the **Federal Registers** of June 9, 1999 (64 FR 30997) (FRL–6082–6), and June 30, 2000 (65 FR 40632) (FRL–6592–6), EPA issued notices pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E5060) by Aventis CropScience, formerly AgrEvo USA, now doing business as Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. That notice included a summary of the petition prepared by the petitioner.

The petition requested that 40 CFR 180.570 be amended by establishing tolerances for the combined residues of the herbicide safener isoxadifen-ethyl, (ethyl 5,5-diphenyl-2-isoxazoline-3-carboxylate) (CAS No. 163520–33–0) and its metabolites: 4,5-dihydro-5,5-diphenyl-3-isoxazolecarboxylic acid and β-hydroxy-β-benezenepropanenitrile, in or on the following rice commodities: rice, grain; rice, straw; rice hulls; and rice bran at 0.10, 0.25, 0.50, and 0.80 parts per million (ppm), respectively. There were no comments received in response to the notice of filing.

In the **Federal Register** of June 21, 2001 (66 FR 33179) (FRL–6786–1), EPA established time-limited tolerances (expiring June 21, 2004) for isoxadifen-ethyl in or on rice commodities. Submission of the following data was required: Confined/field accumulation in rotational crops study; rice processed commodity study; successful petition method validation of the analytical enforcement method; and adequate storage stability data.

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance for combined residues of isoxadifen-ethyl (CAS No. 163520–33–0) and its metabolites: 4,5-dihydro-5,5-diphenyl-3-isoxazolecarboxylic acid and β-hydroxy-β-benezenepropanenitrile on rice commodities. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by isoxadifen ethyl as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies reviewed by the Agency are discussed in the **Federal Register** of June 21, 2001 (66 FR 33179) (FRL–6786–1). At that time the Agency considered the toxicity database to be complete. No additional toxicity studies have been submitted by the petitioner.

B. Toxicological Endpoints

The dose at which the NOAEL from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the LOAEL is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

Three other types of safety or uncertainty factors may be used: ''Traditional uncertainty factors;'' the ''special FQPA safety factor;'' and the

''default FQPA safety factor.'' By the term ''traditional uncertainty factor,'' EPA is referring to those additional uncertainty factors used prior to FQPA passage to account for database deficiencies. These traditional uncertainty factors have been incorporated by the FQPA into the additional safety factor for the protection of infants and children. The term ''special FQPA safety factor'' refers to those safety factors that are deemed necessary for the protection of infants and children primarily as a result of the FQPA. The ''default FQPA safety factor'' is the additional 10X safety factor that is mandated by the statute unless it is decided that there are reliable data to choose a different additional factor (potentially a traditional uncertainty factor or a special FQPA safety factor).

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by an UF of 100 to account for interspecies and intraspecies differences and any traditional uncertainty factors deemed appropriate (RfD = NOAEL/UF). Where a special FQPA safety factor or the default FQPA safety factor is used, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of safety factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

A summary of the toxicological endpoints for isoxadifen-ethyl used for human risk assessment is shown in Table 1. of this unit:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR ISOXADIFEN-ETHYL FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, Interspecies and Intraspecies and any Traditional UF	Special FQPA SF and LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (females 13–50 years of age)	NOAEL = 15 milligrams/kilograms/day (mg/kg/day) UF = 100 Acute RfD = 0.15 mg/kg/day	Special FQPA SF = 1X aPAD = acute RfD ÷ Special FQPA SF = 0.15 mg/kg/day	Rat developmental study LOAEL = 120 mg/kg/day based on bent scapula in rat fetuses
Chronic dietary (all populations)	NOAEL = 3.3 mg/kg/day UF = 100 Chronic RfD = 0.033 mg/kg/day	Special FQPA SF = 1X cPAD = chronic RfD ÷ Special FQPA SF = 0.033 mg/kg/day	1–Year dog feeding study, (co-critical) 90–day dog feeding study LOAEL = 6.1 mg/kg/day based on kidney histopathology in both sexes of dogs in both studies
Short-term dermal, inhalation, and incidental oral (1 to 7 days) (Residential)	Dermal (or oral) study NOAEL = 13.8 mg/kg/day (dermal absorption rate = 14%) (inhalation absorption rate = 100%)	LOC for MOE = <100% (Residential)	90–day rat feeding study LOAEL = 137.9 mg/kg/day based on decreased body weight and weight gain at Day 8
Intermediate-term dermal, inhalation, and incidental oral (1 week to several months) (Residential)	Dermal (or oral) study NOAEL = 3.3 mg/kg/day (dermal absorption rate = 14%) (inhalation absorption rate = 100%)	LOC for MOE = <100% (Residential)	1-Year dog feeding study (co-critical) 90–day dog feeding study LOAEL = 6.1 mg/kg/day based on kidney histopathology in both sexes of dogs in both studies
Cancer (oral, dermal, inhalation)	Cancer classification ''not likely to be a human carcinogen''	Risk assessment not required	No evidence of carcinogenicity

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Permanent tolerances on corn commodities and time-limited tolerances on rice commodities are established (40 CFR 180.570) for the combined residues of isoxadifen-ethyl. The time-limited tolerances will expire on June 21, 2004. To convert these time-limited tolerances to permanent tolerances, risk assessments were conducted by EPA to assess dietary exposures from isoxadifen-ethyl.

At this time there is a time-limited tolerance for rice, bran at 0.80 ppm. The Agency's review of residue chemistry data indicated that residues of isoxadifen-ethyl do not concentrate in rice, bran. Therefore, the rice, grain tolerance will cover this processed commodity. The existing time-limited tolerance for rice, bran is therefore not needed and will be removed. Hence, a permanent tolerance for rice, bran is not established in this final rule.

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. In conducting the acute dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™), which incorporates food consumption data as reported by respondents in the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments: Tolerance level

residues, 100% crop treated and DEEM (version 7.76) default concentration factors for all commodities. No anticipated residues were used.

The Agency estimated the acute dietary food exposure for females (ages 13–49 years old) to be 0.000511 mg/kg/day. The Agency's LOC for acute dietary risk is greater than 100% of the aPAD. When compared to the aPAD of 0.15 mg/kg/day for isoxadifen-ethyl, the dietary risk is less than 1.0% of the aPAD and therefore less than the Agency's LOC.

ii. *Chronic exposure*. In conducting the chronic dietary risk assessment EPA used the DEEM-FCID™, which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 nationwide CSFII, and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: Tolerance level residues, 100% crop treated and DEEM (version 7.76) default processing factors. No anticipated residues were used. The chronic dietary exposure estimates were all less than or equal to 1.5% of the cPAD for all population subgroups and are therefore less than the LOC (greater than 100% of the cPAD). The chronic dietary exposure estimates for representative population subgroups are presented below in Table 2:

TABLE 2.—SUMMARY OF CHRONIC DIETARY EXPOSURE FOR ISOXADIFEN-ETHYL

Subgroup	Exposure (mg/kg/day)	% cPAD
U.S. population (total)	0.000216	<1.0
All infants (<1–year old)	0.000339	1
Children (1–2 years old)	0.000427	1.3
Children (3–5 years old)	0.000486	1.5
Children (6–12 years old)	0.000373	1.1
Youth (13–19 years old)	0.000294	<1.0
Adults (20–49 years old)	0.000182	<1.0
Adults (50+ years old)	0.000099	<1.0
Females (13–49 years old)	0.000177	<1.0

iii. *Cancer*. After consideration of the Agency's ''Proposed Guidelines for Carcinogen Risk Assessment (April 10, 1996),'' EPA has classified isoxadifen-ethyl as ''not likely to be a human carcinogen.'' This classification is based on the lack of evidence of carcinogenicity in mice and rats. Therefore, a cancer risk analysis is not necessary.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for isoxadifen-ethyl in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of isoxadifen-ethyl.

The Agency uses the Generic Estimated Environmental Concentration (GENEEC) or the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) to estimate pesticide concentrations in surface water and Screening Concentration in Ground Water (SCI-GROW), which predicts pesticide concentrations in ground water. In general, EPA will use GENEEC (a Tier I model) before using PRZM/EXAMS (a Tier II model) for a screening-level assessment for surface water. The GENEEC model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. GENEEC incorporates a farm pond scenario, while PRZM/EXAMS incorporates an index reservoir environment in place of the previous pond scenario. The PRZM/EXAMS model includes a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a screen for sorting out pesticides for which it is unlikely that drinking water concentrations would exceed human health LOCs.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs), which are the model estimates of a pesticide's concentration in water, used to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOC) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and from residential uses. Since DWLOCs address total aggregate exposure to isoxadifen-ethyl, they are further discussed in the aggregate risk sections in Unit III.E.

Based on the GENEEC, FQPA Index Reservoir Screening Tool (FIRST) and SCI-GROW models, the EECs of isoxadifen-ethyl for acute exposures are estimated to be 80 parts per billion (ppb) for surface water and 5 ppb for ground water. The EECs for chronic exposures are estimated to be 40 ppb for surface water and 5 ppb for ground water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). The petitioner has requested to use isoxadifen-ethyl on turf, which could result in residential exposures.

The proposed turf use is intended for professional application to Bermudagrass on golf courses, sod farms, residential and commercial site

lawns, parks, recreational facilities, and similar sites. It is not intended for use by homeowners or other non-professional applications. Therefore, residential mixer/loader and applicator exposures are not anticipated. The following short-term post-application residential exposures are anticipated: Adult (dermal - golf course and residential lawn), children (dermal - residential lawn), and toddler (dermal and incidental oral - residential lawn). However, dermal exposures for golfers are considered to be less than those resulting from a residential turf application, and were therefore not assessed.

Hand to mouth (HTM), object to mouth (OTM), and soil hand to mouth short-term incidental oral exposures may occur as a result of the proposed turf use. However, the soil hand to mouth exposure is considered to be very small in comparison to the other exposures. MOEs were estimated to be 790 (for a 15 kg child) and 1,500 (for an adult). MOEs greater than 100 are not of concern.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to isoxadifen-ethyl and any other substances and isoxadifen-ethyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that isoxadifen-ethyl has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. A summary of the developmental toxicity studies for isoxadifen-ethyl which have been reviewed and evaluated by the Agency published in the **Federal Register** of June 21, 2001 (66 FR 33179) (FRL–6786–1).

3. *Conclusion*. Based on the following considerations, the Agency concluded that the special FQPA safety factor is reduced to 1X.

- No neurotoxicity studies are available. However, no clinical signs of neurotoxicity were observed in the available toxicity studies conducted with isoxadifen-ethyl in rats, rabbits, or dogs, other than those neurotoxic clinical signs associated with agonal toxicity in these species.
- There was no evidence of enhanced susceptibility in the rabbit developmental study or the 2–generation rat reproduction study.
- In the developmental rat study, quantitative susceptibility was evidenced as increased fetal incidences of bent scapula at (120 mg/kg/day) a dose lower than that evoking maternal toxicity (mortality, reduced body weights, body weight gains, and food consumption at 1,000 mg/kg/day). The overall toxicity profile and the doses and endpoints selected for risk assessment for isoxadifen-ethyl, characterize the degree of concern for the effects observed in this study as low. There is a clear NOAEL and well-characterized dose response for the developmental effects observed. No residual uncertainties were identified. The NOAEL for developmental effects in this study (15 mg/kg/day) is used as the basis for the aRfD for the females 13–50 population subgroup. For all other toxicity endpoints established for isoxadifen-ethyl, a NOAEL lower than this developmental NOAEL is used.
- The residue chemistry and environmental fate databases are complete.
- The acute and chronic dietary food exposure assessments assumed tolerance level residues and 100% crop treated for all crops. Therefore dietary exposures/risks are unlikely to be underestimated.
- The drinking water assessment utilizes water concentration values generated by models and associated modeling parameters which are designed to provide conservative, health protective, high-end estimates of drinking water concentrations.
- The residential assessment is considered a Tier I assessment. Therefore residential exposures/risks are unlikely to be underestimated.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water (e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + residential exposure)). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. For isoxadifen-ethyl DWLOCs are calculated for: Acute, short-term, and chronic scenarios.

When EECs for surface water and ground water are less than the

calculated DWLOCs, EPA concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because EPA considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, EPA will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. Using the exposure assumptions previously discussed in this unit for acute exposure, the acute dietary exposure from food to isoxadifen-ethyl will occupy <1.0% of the aPAD for females ages 13 and 50 years old. In addition, there is potential for acute dietary exposure to isoxadifen-ethyl in drinking water. The DWLOC is much greater than the EECs. Therefore, EPA does not expect acute aggregate exposure to exceed 100% of the aPAD, as shown in Table 3 of this unit:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO ISOXADIFEN-ETHYL

Population Subgroup	aPAD (mg/kg)	% aPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Acute DWLOC (ppb)
Females (13–50 years old)	0.15	<1.0	80	5	4,500

2. *Chronic risk*. Using the chronic dietary exposure analysis discussed previously, EPA has concluded that exposure to isoxadifen-ethyl from food will utilize <1.0% of the cPAD for the U.S. population, 1.0% of the cPAD for all infants (<1 year old), and 1.5% of the cPAD for children 3–5 years old. Based on the use pattern, chronic residential exposure to residues of isoxadifen-ethyl is not expected. But, there is potential for chronic dietary exposure to isoxadifen-ethyl in drinking water. For each population subgroup, the DWLOC is much greater than the estimated EEC. Therefore, EPA does not expect the aggregate exposure to exceed 100% of the cPAD. Thus, there is no concern for chronic aggregate exposure to isoxadifen-ethyl, as shown in Table 4. below:

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO ISOXADIFEN-ETHYL

Population Subgroup	cPAD mg/kg/day	% cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
U.S. population	0.033	<1.0	40	5	1,100
All infants (< 1 year old)	0.033	1.0	40	5	330
Children (1–2 years old)	0.033	1.3	40	5	330
Children (3–5 years old)	0.033	1.5	40	5	330
Children (6–12 years old)	0.033	1.1	40	5	330
Youth (13–19 years old)	0.033	<1.0	40	5	980
Adults (20–49 years old)	0.033	<1.0	40	5	1,100
Adults (50+ years old)	0.033	< 1.0	40	5	1,200
Females (13–49 years old)	0.033	<1.0	40	5	980

3. *Short-term risk*. Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Isoxadifen-ethyl is proposed for a use that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic food and water, and short-term exposures for isoxadifen-ethyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that aggregated food and residential exposures result in the following aggregate MOEs: U.S. population (1,450), all infants <1 year old (780), children 1–2 years old (776), children 3–5 years old (774), children 6–12 years old (779), youth 13–19 years old (1,438), adults 20–49 years old (1,455), adults 50+ years old (1,468) and females 13–49 years old (1,456). These aggregate MOEs do not exceed the Agency's LOC (<100) for aggregate exposure to food and residential uses. In addition, short-term DWLOCs were calculated and compared to the chronic EECs of isoxadifen-ethyl in ground water and surface water. DWLOCs were calculated and then compared to the EECs for surface water and ground water. All DWLOCs are greater than the EECs. Therefore, EPA does not expect short-term aggregate exposure to exceed the Agency's LOC, as shown in Table 5 below:

TABLE 5.—AGGREGATE RISK ASSESSMENT FOR SHORT-TERM EXPOSURE TO ISOXADIFEN-ETHYL

Population Subgroup	Aggregate MOE (Food + Residential)	Aggregate LOC	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Short-Term DWLOC (ppb)
U.S. population	1450	100	40	5	4,500
All Infants (<1 year old)	780	100	40	5	1,200
Children (1–2 years old)	776	100	40	5	1,200
Children (3–5 years old)	774	100	40	5	1,200
Children (6–12 years old)	779	100	40	5	1,200
Youth (13–19 years old)	1,438	100	40	5	3,900
Adults (20–49 years old)	1,455	100	40	5	4,500
Adults (50+ years old)	1,468	100	40	5	4,500
Females (13–49 years old)	1,456	100	40	5	3,900

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Isoxadifen-ethyl is not used or proposed for use on any sites that would result in intermediate-term residential exposure. Therefore an intermediate-term risk assessment is not needed.

5. *Aggregate cancer risk for U.S. population.* The Agency has classified isoxadifen-ethyl as ''not likely to be a carcinogen.'' Therefore, isoxadifen-ethyl is not expected to pose a cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to isoxadifen-ethyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

The Agency has reviewed the analytical method validation data submitted by Bayer CropScience and the data submitted with the Independent Laboratory Validation (ILV). The ILV reported that the method worked well. The Agency believes the method is suitable for enforcement.

Adequate enforcement methodology (example—gas chromotography) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no CODEX, Canadian, or Mexican tolerances/maximum residue levels for isoxadifen-ethyl residues.

V. Conclusion

Therefore, tolerances are established for combined residues of isoxadifen-ethyl, ethyl 4,5-dihydro-5,5-diphenyl-3-isoxazolecarboxylate (CAS 163520–33–0) and its metabolites: 4,5-dihydro-5,5-diphenyl-3-isoxazolecarboxylic acid and β-hydroxy-β-benezenepropanenitrile, in or on rice commodities: Rice, grain; rice, straw; and rice, hulls at 0.10, 0.25, and 0.50 ppm, respectively.

VI. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0093 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 26, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm. 104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open

from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0093, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, 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). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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 rule 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.

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346(a) and 371.

■ 2. Section 180.570 is amended by revising paragraph (a)(2) to read as follows:

§ 180.570 Isoxadifen-ethyl; tolerances for residues.

(a) * * *

(2) Tolerances are established for the residues of isoxadifen-ethyl (3-isoxazolecarboxylic acid, 4,5-dihydro-5,5-diphenyl-, ethyl ester (CAS No. 163520–33–0)), and its metabolites 4,5-dihydro-5,5-diphenyl-3-isoxazolecarboxylic acid and β-hydroxy-β-benezenepropanenitrile when used as an inert ingredient (safener) in or on the following raw agricultural commodities, when applied at an annual application rate of 0.17 pounds isoxadifen-ethyl/acre.

Commodity	Parts per million
Rice, grain	0.10
Rice, hulls	0.50
Rice, straw	0.25

* * * * *

Dated: May 11, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–11561 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0056; FRL–7357–6]

Ultramarine Blue; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of ultramarine blue when used as an inert ingredient in pesticide products. Holliday Pigments Limited submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of ultramarine blue.

DATES: This regulation is effective May 26, 2004. Objections and requests for hearings must be received on or before July 26, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under docket ID number OPP–2004–0056. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy 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.

FOR FURTHER INFORMATION CONTACT: James Parker, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0371; e-mail address: *parker.james@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, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

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 Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.* A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/.*

II. Background and Statutory Findings

In the **Federal Register** of March 12, 2003 (68 FR 11843) (FRL–7295–3), EPA issued a notice pursuant to section 408 of the FFDCA, 21 U.S.C. 346a, as amended by the FQPA (Public Law 104–170), announcing the filing of a pesticide petition (3E6549) by Holliday Pigments Limited, Morley Street, Hull, East Yorkshire, England, HU88DN. That notice included a summary of the petition prepared by the petitioner.

The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of ultramarine blue, which is also known as C.I. Pigment Blue 29 (CAS Reg. No. 57455–37–5). There were no comments received in response to the notice of filing.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe '' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of the FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene ploymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Toxicological Profile

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by ultramarine blue are discussed in this unit. Ultramarines are inorganic pigments that are used as dyes. The color of ultramarine (blue, pink, green, red, or violet) is determined by the ratios of the materials used to manufacture the ultramarine pigment.

Ultramarine blue is the manufactured or synthetic form of naturally occurring Lapis Lazuli. It was first manufactured in the early 1800s. The pigment is a complex sulfurized sodium aluminum silicate material having an approximate chemical formula of $Na_7Al_6Si_6O_{24}S_3$. Ultramarine blue is obtained by calcining (thoroughly roasting or burning in the presence of oxygen) a mixture of kaolin, sulfur, sodium carbonate, and a source of carbon at temperatures above 700 °C. The material obtained from this process is crushed, washed, purified, and ground.

Ultramarine blue is known to form a rigid tetrahedra alumino-silicate framework. Ultramarine blue is insoluble in water and organic solvents. Ultramarine blue is stable in alkali (pH 7 or greater) environments but decomposes and releases hydrogen sulfide in acidic environments. When used as a dye, it is non-migratory and bleed-resistant, having excellent light fastness and heat stability.

A. Toxicology Studies

The information available to the Agency consisted of detailed information concerning various pre-1981 studies conducted using ultramarine blue. The summaries provided sufficient detail for Agency evaluation. The available information consisted of the following:

- The acute oral lethal dose $(LD)_{50}$ for ultramarine blue is equal to or greater than 10 grams/kilogram in both rats and mice.
- Ultramarine blue was found to be a non-sensitizer in guinea pigs and non-irritating in rabbits.
- In a short-term (15–day) study, mice were fed ultramarine blue at dose levels of 10,000 milligrams/kilogram/day (mg/kg/day) which resulted in no physiological changes or deaths.
- In a 90–day feeding study of rats and mice to ultramarine blue at levels up to 10,000 mg/kg/day, there were no adverse effects.
- In another 90–day feeding studying, rats were fed 100, 1,000, 10,000, and 100,000 parts per million (ppm) (equivalent to 0.01, 0.1, 1, or 10% of the diet) ultramarine blue, which showed inflammation of the GI (gastrointestinal) tract and the presence of siliceous stones in kidney and bladder at all dose levels were observed. Histologically, no pathological effects were observed in rats after ingestion of 100 or 1,000 ppm ultramarine blue. At higher concentrations, 10,000 and 100,000 ppm, there were increased excretion of silica and sodium, and pathological effects in the kidneys, stomach, intestine and bladder which could be associated with high and prolonged intake of siliceous earth.
- A developmental toxicity study showed no maternal deaths at any of the administered doses (0, 100, 1,000, 10,000, or 100,000 ppm which would be equivalent to 0, 0.01, 0.1, 1, or 10% of the diet). Histologically, no pathological effects were observed at 100 or 1,000 ppm. At higher concentrations (10,000 and 100,000 ppm), there were pathological effects in the kidneys, stomach, intestine and bladder which could be associated with high and prolonged intake of siliceous earth. There was no significant difference in litter size, fetal weights, or resorptions between controls and dose level groups. No malformations were observed in controls or the highest dose group (100,000 ppm). At the 100, 1,000, and 10,000 ppm dose groups, malformations in the hind limbs were observed at a ratio of 2/177, 2/146, and 1/159 fetuses, respectively. These malformations are not statistically significant. In both cases where 2 pups had malformations, they were from the same mother.
- Ultramarine blue was also shown to be non-mutagenic (via Ames assay) using two strains each of *Salmonella typhimurium* and *Escherichia coli.*

Taken together, all of the studies indicate that ultramarine blue is of low or no toxicological concern. This is consistent with the fact that ultramarine blue is insoluble; therefore, it is likely that ultramarine blue would be poorly absorbed by any route. The only effect of concern occurred in those groups of animals that were fed a diet that contained 1% or 10% ultramarine blue. The effects that occurred are consistent with those of the body's being over-whelmed by being fed large amounts of a siliceous earth material, which describes ultramarine blue, a sulfurized sodium aluminum silicate.

B. FDA Evaluation

Ultramarine blue is approved by the Food and Drug Administration as a color additive in cosmetics (21 CFR 73.2725), food contact materials (21 CFR 178.3297), and salts intended for animal feed (21 CFR 73.50) when used in

accordance with the following conditions.

1. *Cosmetics.* Ultramarine pigments including ultramarine blue may be safely used for coloring externally applied cosmetics, including cosmetics intended for use in the area of the eye. These pigments are exempt from certification.

2. *Food contact materials.* Ultramarine blue can be used as ''colorants in the manufacture of articles or components of articles intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food.'' In this context ''colorant means a dye, pigment, or other substance that is used to impart color or to alter the color of a food-contact material, but that does not migrate to food in amounts that will contribute to that food any color apparent to the naked eye.''

3. *Animal feeds.* Ultramarine blue can be used to color salt intended for ''animal feed subject to the restriction that the quantity of ultramarine blue does not exceed 0.5% by weight of the salt.'' Ultramarine blue is exempt from certification.

V. Aggregate Exposures

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Ultramarine blue has been used world-wide for many years as a colorant. It is used to color food-contact plastics and rubber (packaging materials), toys, cosmetics including eye shadows and eye pencils, wallpaper, paints including children's fingerpaints, modeling clays, tile, cement, animal eartags, and salt intended for animal feed. Given its use as a colorant the amount of ultramarine blue that would be incorporated into any product is limited by the need for a certain shade or hue of blue.

A. Dietary Exposure

1. *Food.* Due to the insolubility of ultramarine blue, it is not likely to be absorbed by any route. The available toxicity information indicates that ultramarine blue is of low or no toxicological concern.

2. *Drinking water exposure.* Ultramarine blue is likely to absorb tightly to soil and not migrate to bodies of water. Due to the insolubility of ultramarine blue, it is highly unlikely that it would be found in drinking water.

B. Other Non-Occupational Exposure

Ultramarine blue has many non-food uses including use in: Food-contact plastics and rubber (packaging materials), toys, cosmetics including eye shadows and eye pencils, wallpaper, paints including children's fingerpaints, modeling clays, tile, cement, animal eartags, and salt intended for animal feed.

VI. Cumulative Effects

Section 408 (b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance or tolerance exemption, the Agency consider ''available information'' concerning the cumulative effects of a particular chemical's residues and ''other substances that have a common mechanism of toxicity.'' Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to ultramarine blue and any other substances and ultramarine blue does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that ultramarine blue has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/.*

VII. Additional Safety Factor for Infants and Children

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. In a developmental toxicity study, female rats were fed ultramarine blue before and during pregnancy which resulted in no statistically significant malformations and no difference between fetuses in the control and highest dose group. Due to the lack of absorption by all routes of exposure and the expected low toxicity of ultramarine blue, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VIII. Determination of Safety

The available information indicates that ultramarine blue is insoluble in water and is not readily absorbed by any route of exposure. The only effects noted in any of the studies were effects consistent to those of other siliceous earth materials. The available toxicity information indicates that ultramarine blue is of low or no toxicological concern. Additionally, given its use as a colorant, the amount of ultramarine blue that would be incorporated into any pesticide product is limited by the need for a certain shade or hue of blue. Therefore, EPA concludes that use of ultramarine blue in pesticide products as a colorant is not likely to pose a dietary risk under reasonably foreseeable circumstances. There is a reasonable certainty of no harm to the general population, including infants and children, from aggregate exposure to residues of ultramarine blue.

IX. Other Considerations

A. Analytical Method(s)

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. Existing Exemptions

There is an existing tolerance exemption in 40 CFR 180.930, formerly 180.1001(e), for ultramarine blue when used as a dye in animal ear tags.

C. International Tolerances

The Agency is not aware of any country requiring a tolerance for ultramarine nor have any CODEX maximum residue levels been established for any food crops at this time.

D. List 4A (Minimal Risk) Classification

The Agency established 40 CFR 180.950 (see the rationale in the proposed rule published January 15, 2002 (67 FR 1925) (FRL–6807–8)), to collect the tolerance exemptions for those substances classified as List 4A, i.e., minimal risk substances. As part of evaluating an inert ingredient and establishing the tolerance exemption, the Agency determines the chemical's list classification. Given the available information which indicates that ultramarine blue is insoluble in water and is not readily absorbed by any route of exposure, ultramarine blue (CAS Reg. No. 57455–37–5) is to be classified as a List 4A inert ingredient.

X. Conclusions

Based on the information in this preamble, EPA concludes that there is a reasonable certainty of no harm from aggregate exposure to residues of ultramarine blue (CAS Reg. No. 57455–37–5). Accordingly, EPA finds that exempting ultramarine blue from the requirement of a tolerance will be safe.

Since the tolerance exemption is established under 40 CFR 180.950, the existing tolerance exemption in 40 CFR 180.930 is a duplication, and will be removed.

XI. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. EPA's procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0056 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 26, 2004.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm.104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.1. Mail your copies, identified by docket ID number OPP–2004–0056, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.1. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

XII. Statutory and Executive Order Reviews

This final rule establishes an exemption from the tolerance

requirement under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, 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). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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 rule 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.

XIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.950 is amended by adding alphabetically to the table in paragraph (e) the following insert ingredient to read as follows:

§ 180.950 Tolerance exemptions for minimal risk active and inert ingredient.

(e) * * *

Chemical Name	CAS No.
* * * * *	
Ultramarine blue (C.I. Pigment Blue 29)	57455–37–5
* * * * *	

* * * * *

§ 180.930 [Amended]

■ 3. Section 180.930 is amended by removing from the table the entry for ultramarine blue.

Dated: May 14, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–11672 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 25, 63 and 64

[DA 04–671]

International Bureau Filing System (IBFS)

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) codifies the use of the International Bureau Filing System (IBFS) as an official method of filing applications related to satellite and international telecommunications services with the Commission. In addition, this document modifies the Commission Rules to reflect mandatory electronic filing

requirements adopted in the First Space Station Reform Order and the Third Space Station Reform Order. In doing so, we amend the Commission's rules to accommodate electronic filing via IBFS. Electronic filing has proven to improve the speed and efficiency of application processing and also to expedite the availability of application information for public use and inspection.

DATES: Effective May 19, 2004.

FOR FURTHER INFORMATION CONTACT: Jacqueline Ponti, 202–418–0436 or Mary Jane Solomon, 202–418–0593.

SUPPLEMENTARY INFORMATION: In incorporating IBFS into the Code of Federal Regulations, applicants now have assurance in the viability of their online filings through IBFS.

Applicants may voluntarily file the following applications through IBFS.

- International Accounting Rate Change Filings.
- Submarine Cable Landing License Applications.
- Requests for Assignment of Data Network Identification Codes
- Foreign Carrier Affiliation Notification Filings.
- International Section 214 Applications.
- International Section 214 Special Temporary Authority.
- International Signaling Point Code Filings.
- Recognized Operating Agency Filings.
- Renewal of Radio License in Specific Services (except as noted in paragraph 6).
- Space and Earth Station Applications (except as noted in paragraph 6).

—Earth Station Authorizations–Form 312
—Earth Station Special Temporary Authority
—Space Station Authorizations–Form 312
—Space Station Special Temporary Authority
—Modifications of Authorization–Form 312
—Amendments to Pending Applications–Form 312
—Transfers of Control of License–Form 312
—Assignments of License–Form 312

Applicants are required to file the following applications electronically through IBFS.

- Space Station Applications except for Digital Broadcast Service (DBS) and Digital Audio Radio Service (DARS).
- Earth Station Applications to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States.
- Routine Earth Station Applications.

The International Bureau wrote the new and amended rules in plain language pursuant to Executive Order 12866.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Reporting and recordkeeping requirements.

47 CFR Parts 25, 63 and 64

Reporting and recordkeeping requirements.

Federal Communications Commission.

Andrew S. Fishel,

Managing Director.

Rule Changes

■ For the reasons stated above, the Federal Communications Commission amends 47 CFR Parts 1, 25, 63 and 64 as set forth below:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Section 1.767(a) is revised to read as follows:

§ 1.767 Cable landing licenses.

(a) Applications for cable landing licenses under 47 U.S.C. 34–39 and Executive Order No. 10530, dated May 10, 1954, should be filed in accordance with the provisions of that Executive Order. These applications should contain the information below. You may file your application electronically on the Internet through the International Bureau Filing System (IBFS) or by paper. For information on filing your application through IBFS, see part 1, subpart Y and the IBFS homepage at *http://www.fcc.gov/ibfs*. Paper applications should be filed in duplicate.

* * * * *

■ 3. A new Subpart Y is added to read as follows:

Subpart Y—International Bureau Filing System

Sec.

1.9000 What is the purpose of these rules?
1.9001 Definitions.
1.9002 What happens if the rules conflict?
1.9003 When can I start operating?
1.9004 What am I allowed to do if I am approved?
1.9005 What is IBFS?
1.9006 Is electronic filing mandatory?
1.9007 What applications can I file electronically?
1.9008 What are IBFS file numbers?
1.9009 What are the steps for electronic filing?
1.9010 Do I need to send paper copies with my electronic applications?
1.9011 Who may sign applications?
1.9012 When can I file on IBFS?
1.9013 How do I check the status of my application after I file it?
1.9014 What happens after officially filing my application?
1.9015 Are there exceptions for emergency filings?
1.9016 How do I apply for special temporary authority?
1.9017 How can I submit additional information?
1.9018 May I amend my application?

Subpart Y—International Bureau Filing System

§ 1.9000 What is the purpose of these rules?

(a) These rules are issued under the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, and the Submarine Cable Landing License Act, 47 U.S.C. 34–39.

(b) These rules allow you to file many International and Satellite Services applications electronically via the Internet using the International Bureau Filing System.

(c) These rules require electronic filing of all Satellite Space Station applications, except Digital Broadcast Service (DBS) and Digital Audio Radio Service (DARS) applications.

(d) These rules require electronic filing of applications for routine earth station applications.

(e) These rules require electronic filing of applications for Earth Stations to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States.

(f) This section describes requirements and conditions pertaining to electronic filing.

(g) More licensing and application descriptions and directions are in parts 1 (§ 1.767), 25, 63 (§ 63.18), and 64 of this chapter.

§ 1.9001 Definitions.

Application. A request for an earth or space station radio station license, an international cable landing license, or an international service authorization, or a request to amend a pending application or to modify or renew licenses or authorizations. The term also includes the other requests that may be filed in IBFS such as transfers of control and assignments of license applications, earth station registrations, and foreign carrier affiliation notifications.

Authorizations. Generally, a written document or oral statement issued by us

giving authority to operate or provide service.

International Bureau Filing System. The International Bureau Filing System (IBFS) is a database, application filing system, and processing system for all International and Satellite services. IBFS supports electronic filing of many applications and related documents in the International Bureau, and provides public access to this information.

International Services. All international services authorized under parts 1, 63 and 64 of this chapter.

Official Filing Date.

Satellite Space Station Applications (other than DBS and DARS) and Applications for Earth Stations to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States. We consider a Satellite Space Station application (other than DBS and DARS) and an Application for an Earth Station to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States officially filed the moment you file them through IBFS. The system tracks the date and time of filing (to the millisecond). For purposes of the queue discussed in § 25.158 of this chapter, we will base the order of the applications in the queue on the date and time the applications are filed, rather than the ''Official Filing Date'' as defined here.

All Other Applications. We consider all other applications officially filed once you file the application in IBFS and applicable filing fees are received and approved by the FCC, unless the application is determined to be fee-exempt. We determine your official filing date based on one of the following situations:

1. You file your Satellite Space Station Application (other than DBS and DARS) or your Application for Earth Stations to Access a Non-U.S. Satellite Not Currently Authorized to provide the Proposed Service in the Proposed Frequencies in the United States in IBFS.	Your official filing date is the date and time (to the millisecond) you file your application and receive a confirmtion of filing and submission ID.
2. You file all other applications in IBFS and then do one of the following:.	Your official filing date is:
Send your payment (via check, bank draft, money order, credit card, or wire transfer) and FCC Form 159 to Mellon Bank.	The date Mellon Bank stamps your payment as received.
Pay by online credit card (through IBFS).	The date your online credit card payment is approved. (Note: you will receive a remittance ID and an authorization number if your transaction is successful).
Determine your application type is fee-exempt or your application qualifies for exemption to charges as provided in Part 1 of the Commission's Rules.	The date you file in IBFS and receive a confirmation of filing and submission ID.

Satellite Services. All satellite services authorized under part 25 of this chapter.

Submission ID. The Submission ID is the confirmation number you receive from IBFS once you have successfully filed your application. It is also the number we use to match your filing to your payment. Your IBFS Submission ID will always start with the letters ''IB'' and include the year in which you file as well as a sequential number, (*e.g.*, IB2003000123).

Us. In this subpart, ''us'' refers to the Commission.

We. In this subpart, ''we'' refers to the Commission.

You. In this subpart, ''you'' refers to applicants, licensees, your representatives, or other entities authorized to provide services.

§ 1.9002 What happens if the rules conflict?

The rules concerning parts 1, 25, 63 and 64 of this chapter govern over the electronic filing in this subpart.

§ 1.9003 When can I start operating?

You can begin operating your facility or providing services once we grant your application to do so, under the conditions set forth in your license or authorization.

§ 1.9004 What am I allowed to do if I am approved?

If you are approved and receive a license or authorization, you must operate in accordance with, and not beyond, your terms of approval.

§ 1.9005 What is IBFS?

(a) The International Bureau Filing System (IBFS) is a database, application filing system, and processing system for all International and Satellite Services. IBFS supports electronic filing of many applications and related documents in the International Bureau, and provides public access to this information.

(b) We maintain applications, notifications, correspondence, and other materials filed electronically with the International Bureau in IBFS.

§ 1.9006 Is electronic filing mandatory?

Electronic filing is mandatory for:

(a) Satellite license applications other than DBS and DARS applications,

(b) Applications for earth stations to access a non-U.S. satellite not currently authorized to provide the proposed service in the proposed frequencies in the United States, and

(c) Routine earth station applications. Except for these applications, electronic filing is voluntary at this time. However, we encourage you to use IBFS to increase time-savings and efficiency.

§ 1.9007 What applications can I file electronically?

(a) You can file most International and Satellite applications electronically. In cases where a paper form exists, we attempted to keep the same format for the online version of the form. In some cases (such as International Section 214 applications filed under § 63.18), although a paper form does not exist, there is an electronic form to facilitate filing.

(b) The following applications are available on IBFS for electronic filing:

(1) International Accounting Rate Change Filings,

(2) Submarine Cable Landing License Applications,

(3) Requests for Assignment of Data Network Identification Codes,

(4) Foreign Carrier Affiliation Notification Filings,

(5) International Section 214 Applications,

(6) International Section 214 Special Temporary Authority,

(7) International Signaling Point Code Filings,

(8) Recognized Operating Agency Filings,

(9) Renewal of Radio License in Specific Services, and

(10) Space and Earth Station Applications

(i) Earth Station Authorizations—Form 312

(ii) Earth Station Special Temporary Authority

(iii) Space Station Authorizations—Form 312

(iv) Space Station Special Temporary Authority

(v) Modifications of Authorization—Form 312

(vi) Amendments to Pending Applications—Form 312

(vii) Transfers of Control of License—Form 312

(viii) Assignments of License—Form 312

(c) Many applications require exhibits or attachments. If attachments are required, you must attach documentation to your electronic application before filing. We accept attachments in the following formats: Word, Adobe Acrobat, Excel and Text.

(d) For paper filing rules and procedures, see parts 1, 25, 63 or 64.

§ 1.9008 What are IBFS file numbers?

(a) We assign file numbers to electronic applications in order to facilitate processing.

(b) We only assign file numbers for administrative convenience; they do not mean that an application is acceptable for filing.

(c) For a description of file number information, see The International Bureau Filing System File Number Format Public Notice, DA–04–568 (released February 27, 2004).

§ 1.9009 What are the steps for electronic filing?

(a) *Step 1: Register for an FCC Registration Number (FRN). (See Subpart W, §§ 1.8001 through 1.8004.)*

(1) If you already have an FRN, go to Step 2.

(2) In order to process your electronic application, you must have an FRN. You may obtain an FRN either directly from the Commission Registration System (CORES) at *http://www.fcc.gov/e-file/,* or through IBFS as part of your filing process. If you need to know more about who needs an FRN, visit CORES at *http://www.fcc.gov/e-file/.*

(3) If you are a(n):

(i) Applicant,

(ii) Transferee and assignee,

(iii) Transferor and assignor,

(iv) Licensee/Authorization Holder, or

(v) Payer, you are required to have and use an FRN when filing applications and/or paying fees through IBFS.

(4) We use your FRN to give you secured access to IBFS and to pre-fill the application you file.

(a) *Step 2: Register with IBFS.*

(1) If you are already registered with IBFS, go to Step 3.

(2) In order to complete and file your electronic application, you must register in IBFS, located at *http://www.fcc.gov/ibfs.*

(3) You can register your account in:

(i) Your name,

(ii) Your company's name, or

(iii) Your client's name.

(4) IBFS will issue you an account number as part of the registration process. You will create your own password.

(5) If you forget your password, send an e-mail to the IBFS helpline at *ibfsinfo@fcc.gov* or contact the helpline at (202) 418–2222 for assistance.

(c) *Step 3: Log into IBFS, select the application you want to file, provide the required FRN(s) and password(s) and fill out your application.* You must completely fill out forms and provide all requested information as provided in parts 1, 25, 63 and 64 of this chapter.

(1) You must provide an address where you can receive mail delivery by the United States Postal Service. You are also encouraged to provide an e-mail address. This information is used to contact you regarding your application and to request additional documentation, if necessary.

(2) *Reference to material on file.* You must answer questions on application forms that call for specific technical data, or that require yes or no answers or other short answers. However, if documents or other lengthy showings are already on file with us and contain the required information, you may incorporate the information by reference, as long as:

(i) The referenced information is filed in IBFS or, if manually filed, the information is more than one ''8½ inch by 11 inch'' page.

(ii) The referenced information is current and accurate in all material respects; and

(iii) The application states where we can find the referenced information as well as:

(A) The application file number, if the reference is to previously-filed applications

(B) The title of the proceeding, the docket number, and any legal citation, if the reference is to a docketed proceeding.

(a) *Step 4. File your application.* If you file your application successfully through IBFS, a confirmation screen will appear showing you the date and time of your filing and your submission ID. Print this verification for your records as proof of online filing.

(b) *Step 5: Pay for your application.*

(1) Most applications require that you pay a fee to us before we can begin processing your application. You can determine the amount of your fee in three ways:

(i) You can refer to § 1.1107,

(ii) You can refer to the International and Satellite Services fee guide located at *http://www.fcc.gov/fees/appfees.html,* or

(iii) You can run a draft Form 159 through IBFS, in association with a filed application, and the system will automatically enter your required fee on the form.

(2) A complete FCC Form 159 must accompany all fee payments. You must provide the FRN for both the applicant and the payer. You also must include your IBFS Submission ID number on your FCC Form 159 in the box labeled ''FCC Code 2.'' In addition, for applications for transfer of control or assignment of license, call signs involved in the transaction must be entered into the ''FCC Code 1'' box on the FCC Form 159. (This may require the use of multiple rows on the FCC Form 159 for a single application where more than one call sign is involved.)

(i) You may use a paper version of FCC Form 159, or

(ii) You can generate a pre-filled FCC Form 159 from IBFS using your IBFS Submission ID. For specific instructions on using IBFS to generate your FCC Form 159, go to the IBFS Web site (*http://www.fcc.gov/ibfs*) and click on the ''Getting Started'' button.

(3) You have 3 payment options:

(i) Pay by credit card (through IBFS or by regular mail),

(ii) Pay by check, bank draft or money order, or

(iii) Pay by wire transfer or other electronic payments.

(4) You have 14 calendar days from the date you file your application in IBFS to submit your fee payment to Mellon Bank. Your FCC Form 159 must be stamped ''received'' by Mellon Bank by the 14th day. If not, we will dismiss your application.

(5) If you send your Form 159 and payment to Mellon Bank in paper form, you should mail your completed Form 159 and payment to the address specified in § 1.1107 of the Commission's rules. If you file electronically, do not send copies of your application with your payment and Form 159.

(6) For more information on fee payments, refer to Payment Instructions found on the IBFS Internet site at *http://www.fcc.gov/ibfs.*

(7) Step 5 is not applicable if your application is fee exempt.

§ 1.9010 Do I need to send paper copies with my electronic applications?

(a) If you file electronically through IBFS, the electronic record is the official record.

(b) If you file electronically, you do not need to submit paper copies of your application.

(c) If you submit paper copies of your application with your payment, we will consider them as copies and may not retain them.

§ 1.9011 Who may sign applications?

(a) ''Signed'' in this section refers to electronically filed applications. An electronic application is ''signed'' when there is an electronic signature. An electronic signature is the typed name of the person ''signing'' the application, which is then electronically transmitted via IBFS.

(b) For all electronically filed applications, you (or the signor) must actually sign a paper copy of the application, and keep the signed original in your files for future reference.

(c) You only need to sign the original of applications, amendments, and related statements of fact.

(d) Sign applications, amendments, and related statements of fact as follows (either electronically or manually):

(1) By you, if you are an individual;

(2) By one of the partners, if you are a partnership;

(3) By an officer, director, or duly authorized employee, if you are a corporation; or

(4) By a member who is an officer, if you are an unauthorized association.

(e) If you file applications, amendments, and related statements of fact on behalf of eligible government entities, an elected or appointed official who may sign under the laws of the applicable jurisdiction must sign the document. Eligible government entities are:

(1) States and territories of the United States,

(2) Political subdivisions of these states and territories,

(3) The District of Columbia, and

(4) Units of local government.

(f) If you are either physically disabled or absent from the United States, your attorney may sign applications, amendments and related statements of facts on your behalf.

(1) Your attorney must explain why you are not signing the documents.

(2) If your attorney states any matter based solely on his belief (rather than knowledge), your attorney must explain his reasons for believing that such statements are true.

(g) It is unnecessary to sign applications, amendments, and related statements of fact under oath. However, willful false statements are punishable by a fine and imprisonment, 18 U.S.C. 1001, and by administrative sanctions.

§ 1.9012 When can I file on IBFS?

IBFS is available 24 hours a day, seven (7) days a week for filing.

§ 1.9013 How do I check the status of my application after I file it?

You can check the status of your application through the ''Search Tools'' on the IBFS homepage. The IBFS homepage is located at *www.fcc.gov/ibfs.*

§ 1.9014 What happens after officially filing my application?

(a) We give you an IBFS file number.

(b) We electronically route your application to an analyst who conducts an initial review of your application. If your application is incomplete, we will either dismiss the application, or contact you by telephone, letter or email to ask for additional information within a specific time. In cases where we ask for additional information, if we do not receive it within the specified time, we will dismiss your application. In either case, we will dismiss your application without prejudice, so that you may file again with a complete application.

(c) If your application is complete, and we verify receipt of your payment, it will appear on an ''Accepted for Filing'' Public Notice, unless public notice is not required. An ''Accepted for Filing'' Public Notice gives the public a certain amount of time to comment on your filing. This period varies depending upon the type of application.

(1) Certain applications do not have to go on an ''Accepted for Filing'' Public Notice prior to initiation of service, but instead are filed as notifications to the Commission of prior actions by the carriers as authorized by the rules. Examples include pro forma notifications of transfer of control and assignment and certain foreign carrier notifications.

(2) Each ''Accepted for Filing'' Public Notice has a report number. Examples of various types of applications and their corresponding report number (the ''x'' represents a sequential number) follow.

Type of application	Report No.
325–C Applications	325–xxxxx
Accounting Rate Change	ARC–xxxxx
Foreign Carrier Affiliation Notification	FCN–xxxxx
International High Frequency	IHF–xxxxx
International Public Fixed	IPF–xxxxx
Recognized Operating Agency	ROA–xxxxx
Satellite Space Station	SAT–xxxxx
Satellite Earth Station	SES–xxxxx
International Telecommunications:	
Streamlined	TEL–xxxxxS
Non-streamlined	TEL–xxxxxNS and/or DA
Submarine Cable Landing:	
Streamlined	SCL–xxxxxS
Non-streamlined	SCL–xxxxxNS and/or DA

(d) After the Public Notice, your application may undergo legal, technical and/or financial review as deemed necessary. In addition, some applications require coordination with other government agencies.

(e) After review, we decide whether to grant or deny applications or whether to take other necessary action. Grants, denials and any other necessary actions are noted in the IBFS database. Some filings may not require any affirmative action, such as some Foreign Carrier Affiliation Notification Filings. Other filings, such as some International Section 214 Applications, International Accounting Rate Change Filings and Requests for assignment of Data Network Identification Codes, may be granted automatically on a specific date unless the applicant is notified otherwise prior to that date, as specified in the rules.

(f) We list most actions taken on public notices. Each ''Action Taken'' Public Notice has a report number. Examples of various types of applications and their corresponding report number (the ''x'' represents a sequential number) follow.

Type of application	Report No.
325–C Applications	325–xxxxx
Accounting Rate Change	No action taken PN released
Foreign Carrier Affiliation Notification	No action taken PN released
International High Frequency	IHF–xxxxx
International Public Fixed	IPF–xxxxx
Recognized Operating Agency	No action taken PN released
Satellite Space Station	SAT–xxxxx (occasionally)
Satellite Earth Station	SES–xxxxx
International Telecommunications	TEL–xxxxx and DA
Submarine Cable Landing	TEL–xxxxx and DA

(g) Other actions are taken by formal written Order, oral actions that are followed up with a written document, or grant stamp of the application. In all cases, the action dates are available online through the IBFS system.

(h) *Issuing and Mailing Licenses for Granted Applications.* Not all applications handled through IBFS and granted by the Commission result in the issuance of a paper license or authorization. A list of application types and their corresponding authorizations follows.

Type of application	Type of license/authorization issued
325–C Application	FCC permit mailed to permittee or contact, as specified in the application.
Accounting Rate Change	No authorizing document is issued by the Commission. In some cases, a Commission order may be issued related to an Accounting Rate Change filing.
Data Network Identification Code Filing	Letter confirming the grant of a new DNIC or the reassignment of an existing DNIC is mailed to the applicant or its designated representative.
Foreign Carrier Affiliation Notification	No authorizing document is issued by the Commission. In some cases, a Commission order may be issued related to a Foreign Carrier Affiliation Notification.
International High Frequency:	
Construction Permits, Licenses, Modifications, Renewals, and Transfers of Control/Assignment of License	For all applications, an original, stamped authorization is issued to the applicant and a copy of the authorization is sent to the specified contact.
International Public Fixed:	
1. Construction Permits	1. Once the operating license is granted, the construction period therein is specified as a condition on the license.
2. Request for Special Temporary Authority	2. Letter, grant-stamped request, or short order.
3. New Authorization	3. License issued and mailed to applicant (original) and specified contact (copy).
4. Amendment	4. If granted, the action is incorporated into the license for the underlying application.
5. Modification	5. License issued and mailed to applicant (original) and specified contact (copy).
6. Renewal	6. License issued and mailed to applicant (original) and specified contact (copy).
7. Transfer of Control/Assignment of License	7. If granted, Form A–732 authorization issued and mailed to applicant (original), parties to the transaction, and the applicant's specified contact (copy).
Recognized Operating Agency	The FCC sends a letter to the Department of State requesting grant or denial of recognized operating agency status. (The applicant is mailed a courtesy copy.) The Department of State issues a letter to both the Commission and the Applicant advising of their decision.
Satellite Space Station:	
1. Request for Special Temporary Authority	1. Letter, grant-stamped request, or short order.
2. New Authorization	2. Generally issued by Commission Order.
3. Amendment	3. Generally issued as part of a Commission Order acting upon the underlying application.
4. Modification	4. Generally issued by Commission Order.
5. Transfer of Control/Assignment of License	5. Generally issued by Commission Order or Public Notice. Also, Form A–732 authorization issued and mailed to applicant (original), parties to the transaction, and the applicant's specified contact (copy).
Satellite Earth Station:	
1. Request for Special Temporary Authority	1. Letter, grant-stamped request, or short order.

Type of application	Type of license/authorization issued
2. New Authorization	2. License issued and mailed to applicant (original) and specified contact (copy).
3. Amendment	3. If granted, the action is incorporated into the license for the underlying application.
4. Modification	4. License issued and mailed to applicant (original) and specified contact (copy).
5. Renewal	5. License issued and mailed to applicant (original) and specified contact (copy).
6. Transfer of Control/Assignment of License	6. If granted, Form A–732 authorization issued and mailed to applicant (original), parties to the transaction, and the applicant's specified contact (copy).
International Telecommunications—Section 214:	
1. Streamlined (New, Transfer of Control, Assignment)	1. Action Taken Public Notice serves as the authorization document. This notice is issued weekly and is available online both at IBFS (*http://www.fcc.gov/ibfs*) and the Electronic Document Management System (EDOCS) (*http://www.fcc.gov/e-file/*).
2. Non-streamlined (New, Transfer of Control, Assignment)	2. Decisions are generally issued by PN; some are done by Commission Order.
3. Request for Special Temporary Authority	3. Letter, grant-stamped request issued to applicant.
International Signaling Point Code Filing	Letter issued to applicant.
Submarine Cable Landing License Application:	
1. Streamlined (New, Transfer of Control, Assignment)	1. Action Taken Public Notice serves as the authorization document. This notice is issued weekly and is available online both at IBFS, which can be found at *http://www.fcc.gov/ibfs*, and the Electronic Document Management System (EDOCS), which can be found at *http://www.fcc.gov/e-file/.*
2. Non-Streamlined (New, Transfer of Control, Assignment)	2. Decisions are generally issued by PN; some are done by Commission Order.

§ 1.9015 Are there exceptions for emergency filings?

(a) Sometimes we grant licenses, modifications or renewals even if no one files an application. Instances where this may occur include:

(1) If we find there is an emergency involving danger to life or property, or because equipment is damaged;

(2) If the President proclaims, or if Congress declares, a national emergency;

(3) During any war in which the United States is engaged and when grants, modifications or renewals are necessary for national defense, security or in furtherance of the war effort; or

(4) If there is an emergency where we find that it is not feasible to secure renewal applications from existing licensees or to follow normal licensing procedures.

(b) Emergency authorizations stop at the end of emergency periods or wars. After the emergency period or war, you must submit your request by filing the appropriate form either manually or electronically.

(c) The procedures for emergency requests, as described in this section, are as specified in §§ 25.120 and 63.25 of this chapter.

§ 1.9016 How do I apply for special temporary authority?

(a) Requests for Special Temporary Authority (STA) may be filed via IBFS for most services. We encourage you to file STA applications through IBFS as it will ensure faster receipt of your request.

(b) For specific information on the content of your request, refer to §§ 25.120 and 63.25 of this chapter.

§ 1.9017 How can I submit additional information?

In response to an official request for information from the International Bureau, you can submit additional information electronically directly to the requestor, or by mail to the Office of the Secretary, Attention: International Bureau.

§ 1.9018 May I amend my application?

(a) If the service rules allow, you may amend pending applications.

(b) If an electronic version of an amendment application is available in IBFS, you may file your amendment electronically through IBFS.

PART 25—SATELLITE COMMUNICATIONS

■ 4. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

■ 5. Section 25.110 is revised to read as follows:

§ 25.110 Filing of Applications, fees, and number of copies.

(a) You can obtain application forms for this part by:

(1) Going online at *http://www.fcc.gov/ibfs*, where you may complete the form prior to submission via IBFS, the IB electronic filing system;

(2) Going online at *http://www.fcc.gov* and clicking the Forms link to download and print the form prior to completion;

(3) Writing to the Federal Communications Commission, Forms Distribution Center, 9300 E. Hampton Drive, Capital Heights, MD 20743; or

(4) Calling 1 (800) 418–3676.

(b) *Submitting your application*—(1) *Electronic filing.* All Satellite Space Station applications, with the exception of DBS and DARS, and applications for Earth Stations to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States, must be filed electronically in accordance with First Report and Order and Further Notice of Proposed Rulemaking (IB Docket No. 02–34) and First Report and Order (IB Docket No. 02–54) (FCC 03–102). All other satellite radio station applications may be filed electronically or manually.

(2) *Manual filing.* Manually filed satellite radio station applications requiring a fee, must be submitted to the address specified in part 1, subpart G of this chapter. You must submit all other applications to the Office of the

Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

(c) All your correspondence and amendments concerning your application must identify:

(1) The satellite radio service;

(2) The applicant's name;

(3) Station location;

(4) The call sign or other identification of the station; and

(5) The file number of the application involved.

(d) *Copies.* If you file electronically though IBFS, you do not need to submit any paper versions of your application (original or copies) with your payment.

(1) If you file Digital Broadcast Service and Digital Audio Radio Service paper applications, you must submit the original and nine (9) copies.

(2) If you file anything else on paper, including applications, exhibits, attachments, amendments and correspondence, you must submit the original and 3 copies.

(e) *Signing.* If you submit your application electronically, upon filing, you must print out the filed application, obtain the proper signatures, and keep the original for your files.

(1) If you submit a paper application, you must sign it in accordance with § 1.743 of this chapter.

(2) You may conform all other copies.

(f) You must pay the appropriate fee for your application and submit it in accordance with subpart G of part 1 of this chapter.

■ 6. Section 25.114 is amended by revising paragraph (b) to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(b) Each application for a new or modified space station authorization must constitute a concrete proposal for Commission evaluation. Each application must also contain the formal waiver required by Section 304 of the Communications Act, 47 U.S.C. 304. The technical information for a proposed satellite system specified in paragraph (c) of this section must be filed on FCC Form 312, Main Form and Schedule S. The technical information for a proposed satellite system specified in paragraph (d) of this section need not be filed on any prescribed form but should be complete in all pertinent details. Applications for new space station authorizations other than authorizations for the Direct Broadcast Service (DBS) and Digital Audio Radio Satellite (DARS) service must be filed electronically through the International Bureau Filing System (IBFS) in accordance with the applicable provisions of part 1, subpart Y of this chapter.

* * * * *

■ 7. Section 25.115 is amended by revising paragraph (a) to read as follows:

§ 25.115 Application for earth station authorizations.

(a) *Transmitting earth stations.* Except as provided under 25.113(b) of this chapter, Commission authorization must be obtained for authority to construct and/or operate a transmitting earth station. Applications shall be filed on FCC Form 312, Main Form and Schedule B, and include the information specified in § 25.130. In cases where an application is for a transmitting earth station facility that will transmit in the 3700–4200MHz and 5925–6425 MHz band, and/or the 11.7–12.2 GHz and 14.0–14.5 GHz band, and will meet all the applicable technical specifications set forth in part 25 of this chapter, the application must be filed electronically through the International Bureau Filing System (IBFS). Applications for Earth Stations to Access a Non-U.S. Satellite Not Currently Authorized to Provide the Proposed Service in the Proposed Frequencies in the United States also must be filed electronically through IBFS. Applications for other earth station applications are permitted but not required to be filed electronically. Any party choosing to file an earth station application electronically must file in accordance with the applicable provisions of part 1, subpart Y of this chapter.

* * * * *

■ 8. Section 25.119 is amended by revising paragraphs (a), (c), and (d) to read as follows:

§ 25.119 Assignment or transfer of control of station authorization.

(a) You must file an application for Commission authorization before you can transfer, assign, dispose of (voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity) your station license or accompanying rights. The Commission will grant your application only if it finds that doing so will serve the public interest, convenience and necessity.

* * * * *

(c) *Assignment of license.* You must submit an FCC Form 312, Main Form and Schedule A to voluntarily assign (*e.g.*, as by contract or other agreement) or involuntarily assign (*e.g.*, as by death, bankruptcy, or legal disability) your station authorization. You must file these forms electronically through IBFS.

(d) *Transfer of control of corporation holding license.* If you want to transfer control of a corporation, which holds one or more licenses voluntarily or involuntarily (*de jure* or *de facto*), you must submit an FCC Form 312, Main Form and Schedule A. You must file these forms electronically through IBFS. For involuntary transfers, you must file your application within 10 days of the event causing the transfer of control. You can also use FCC Form 312, Main Form and Schedule A for non-substantial (*pro forma*) transfers of control.

* * * * *

■ 9. Section 25.130 is amended by revising paragraph (a) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

(a) If you want to apply for a new or modified transmitting earth station facility, you must file FCC Form 312, Main Form, and Schedule B. *See* § 25.115 for the transmitting earth station applications which must be filed electronically through IBFS versus those that are permitted but not required to be filed electronically.

* * * * *

■ 10. Section 25.131 is amended by revising paragraph (a) to read as follows:

§ 25.131 Filing requirements for receive-only earth stations.

(a) If you want to apply for a license for a receive-only earth station, you must file FCC Form 312, Main Form and Schedule B. You can either file this application on paper or electronically through IBFS.

* * * * *

PART 63—EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

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

Authority: Sections 1, 4 (i), 4 (j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934 as amended, 47 U.S.C. 151, 154 (i), 154 (j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

■ 12. Section 63.11 is amended by redesignating paragraphs (g), (h), and (i) as paragraphs (h), (i), and (j) and adding a new paragraph (g) to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that are or proposed to become affiliated with a foreign carrier.

* * * * *

(g) You may file your notification by letter or by electronic form. If you choose to notify the Commission electronically, the International Bureau Filing System (IBFS) has a form that you can fill out and file on the Internet. For additional information on IBFS filing procedures, refer to the rules in part 1 of this chapter and the IBFS homepage at *http://www.fcc.gov/ibfs.*

* * * * *

■ 13. Section 63.18 is amended by revising the introductory text to read as follows:

§ 63.18 Contents of applications for international common carriers.

You may submit your formal application to the Commission either by filing an electronic form via the Internet in IBFS or by submitting a written request. The IBFS electronic form allows you to fill out required information online and attach any additional information required by this section. For information on filing your application through IBFS, *see* part 1, subpart Y and § 63.20 of this chapter, and the IBFS homepage at *http://www.fcc.gov/ibfs.* Whether you file your request through IBFS or in paper form, it must contain a statement explaining how grant of the authorization will serve the public interest, convenience and necessity. Such statement must consist of the following information, as applicable:

* * * * *

■ 14. Section 63.20 is amended by revising paragraph (a) to read as follows:

§ 63.20 Electronic filing; copies required; fees, and filing periods for international service providers.

(a) Electronic filing is voluntary at this time. However, applicants are encouraged to file applications electronically on the Internet through the International Bureau Filing System (IBFS). If you file an application for international facilities and services under Section 214 of the Communications Act of 1934, as amended, through IBFS you are not required to send the original or any copies with your fee payment. For information on filing your application through IBFS, *see* part 1, subpart Y of this chapter, and the IBFS homepage at *http://www.fcc.gov/ibfs.* If you file a paper application for international facilities and services under Section 214 of the Communications Act of 1934 as amended, you must file an original and 5 copies. Upon request by the Commission, additional copies of the application shall be furnished. Each application shall be accompanied by the fee prescribed in subpart G of part 1 of this chapter.

* * * * *

■ 15. Section 63.25 is amended by revising paragraphs (b) and (d)(2) to read as follows:

§ 63.25 Special provisions relating to temporary or emergency service by international carriers.

* * * * *

(b) Requests for immediate authority for temporary service or for emergency service may be made electronically on the Internet through the International Bureau Filing System (IBFS), by letter, or by telegram setting forth why such immediate authority is required, the nature of the emergency, the type of facilities proposed to be used, the route kilometers thereof, the terminal communities to be served, and airline kilometers between such communities; how these points are presently being served by the applicant or other carriers, the need for the proposed service, the cost involved including any rentals, the date on which the service is to begin, and where known, the date or approximate date on which the service is to terminate. For information on filing your request through IBFS, *see* part 1, subpart Y and § 63.20 of this chapter, and the IBFS homepage at *http://www.fcc.gov/ibfs.*

* * * * *

(d) * * *

(2) Such request may be made electronically on the Internet through the International Bureau Filing System (IBFS), by letter, or by telegram making reference to this paragraph and setting forth the points between which applicant desires to operate facilities of other carriers and the nature of the traffic to be handled. For information on filing your request through IBFS, *see* part 1, subpart Y and § 63.20 of this chapter, and the IBFS homepage at *http://www.fcc.gov/ibfs.*

* * * * *

■ 16. Section 63.51 is revised to read as follows:

§ 63.51 Additional information.

(a) You must provide additional information if the Commission requests you to do so after it initially reviews your application or request.

(b) If you do not respond to the request or other official correspondence, the Commission may dismiss your application without prejudice and you may file again with a completed application.

(c) You can submit additional information on paper or electronically via e-mail.

■ 17. Section 63.53 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), and adding a new paragraph (a) to read as follows:

§ 63.53 Form.

(a)(1) Applications for international service under Section 214 of the Communications Act may be filed electronically on the Internet through the International Bureau Filing System (IBFS). For applications filed through IBFS, you are not required to send the original or any copies with your fee payment. For information on filing your application through IBFS, see part 1, subpart Y of this chapter, and the IBFS homepage at *http://www.fcc.gov/ibfs.*

(2) Applications under section 214 of the Communications Act that are not filed through IBFS shall be submitted on paper not more than 21.6cm (8.5 in) wide and not more than 35.6 cm (14 in) long with a left-hand margin of 4 cm (1.5 in). This requirement shall not apply to original documents, or admissible copies thereof, offered as exhibits or to specifically prepared exhibits. The impression shall be on one side of the paper only and shall be double-spaced, except that long quotations shall be single-spaced and indented. All papers, except charts and maps, shall be typewritten or prepared by mechanical processing methods, other than letter press, or printed. The foregoing shall not apply to official publications. All copies must be clearly legible.

* * * * *

■ 18. Section 63.60 is amended by adding paragraph (d) to read as follows:

§ 63.60 Definitions.

* * * * *

(d) *You.* In this section, ''You'' refers to applicants and licensees.

■ 19. Section 63.701 is amended by revising the introductory text to read as follows:

§ 63.701 Contents of application.

Except as otherwise provided in this part, any party requesting designation as a recognized private operating agency within the meaning of the International Telecommunication Convention shall request such designation. Such designation may be requested electronically on the Internet through the International Bureau Filing System (IBFS) or by paper. For information on filing your notification through IBFS, see part 1, subpart Y, and the IBFS homepage at *http://www.fcc.gov/ibfs.* If you file a paper application, file the original and two copies, acknowledging that you must obey Article 6 of the ITU Constitution and that you will obey the

mandatory provisions of the ITU Convention and the international telecommunications regulations promulgated there under in all respects. You must also include a statement illustrating that you know that violations may result in the Commission issuing a cease and desist order for future violations, and it may result in revocation of your private operating agency status. This statement must include the following information where it is applicable:

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 20. The Authority citation for part 64 continues to read as follows: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

■ 21. Section 64.1001 is amended by revising paragraph (b) to read as follows:

§ 64.1001 International settlements policy and modification requests.

* * * * *

(b) If your international settlement arrangement in the operating agreement or amendment referred to in § 43.51(e)(1) or (e)(2) of this chapter differs from the arrangement in effect in the operating agreement of another carrier that provides service to or from the same foreign point, you must file a modification request under this section unless the international route is exempt from the international settlements policy under § 43.51 (e)(3) of this chapter. If you must file a modification request, you can either file electronically or on paper. The electronic form requires you to submit the same information that is required in the paper filing, specified in paragraphs (c) and (d) of this section. A modification request may be filed electronically on the Internet through the International Bureau Filing System (IBFS) or by paper. For information on filing your modification through IBFS, see part 1, subpart Y, and the IBFS homepage at *http://www.fcc.gov/ibfs.*

* * * * *

[FR Doc. 04–11790 Filed 5–25–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 192

[Docket No. RSPA–00–7666; Amendment 192–95]

RIN 2137–AD54

Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)

AGENCY: Office of Pipeline Safety (OPS), Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule published in the **Federal Register** on December 15, 2003, (68 FR 69778) and a correction document to that rule published in the **Federal Register** on April 6, 2004 (69 FR 18228). The final rule of December 15, 2003, requires operators to develop integrity management programs for gas transmission pipelines located where a leak or rupture could do the most harm, *i.e.,* where a gas transmission pipeline could impact a high consequence area (HCA). This document makes minor corrections to the rule.

DATES: *Effective Date:* The effective date is May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Mike Israni by phone at (202) 366–4571, by fax at (202) 366–4566, or by e-mail at *mike.israni@rspa.dot.gov,* regarding the subject matter of the final rule.

SUPPLEMENTARY INFORMATION:

Background

On December 15, 2003, RSPA/OPS published a final rule (68 FR 69778) that requires operators of gas transmission pipelines to develop and implement a comprehensive integrity management program for pipeline segments located in areas where a failure would have the greatest impact to the public or property. On April 6, 2004, RSPA/OPS published a correction rule that made editorial and typographical corrections to the final rule and addressed a petition for reconsideration filed by the Interstate Natural Gas Association of America.

Purpose for This Document

The April 6, 2004, correction rule contained errors. This correction document corrects those errors and corrects additional errors identified in the December 15, 2003, final rule.

Corrections and Clarifications

In the April 6, 2004, correction rule, RSPA/OPS amended the definition of ''high consequence areas'' by clarifying that an operator using Method (1) to identify these areas would have to calculate and evaluate potential impact circles on any transmission line in a Class 1 or Class 2 location. RSPA/OPS removed the phrase ''outside a Class 3 or Class 4 location'' to clarify that an operator does not have to evaluate segments that have already been classified as ''high consequence areas.'' However, RSPA/OPS erroneously used the term ''potential impact radius'' in paragraph (1)(iv) instead of the term ''potential impact circle.'' In this correction rule, RSPA/OPS is replacing the word ''radius'' with ''circle.''

Section 192.925 sets forth the requirements for external corrosion direct assessment. This was change number 9 in the April 6, 2004 correction rule. In that document, RSPA/OPS revised the introductory text in paragraph (b) to clarify what an operator is required to do if the External Corrosion Direct Assessment detects pipeline coating damage. RSPA/OPS has since become aware that the **Federal Register** read this instruction as revising paragraph (b) and as deleting the further requirements in subparagraphs (b)(1) through (b)(4). RSPA/OPS did not intend for the revision to delete these requirements. This correction rule adds back to the final rule the missing requirements of paragraphs (b)(1) through (b)(4). This correction rule presents § 192.925(b) in its entirety, with the revised language in the introductory paragraph.

In the April 6, 2004, correction rule, we revised paragraph (d) of § 192.935 to include requirements for additional preventive and mitigative measures for a pipeline operating below 30% SMYS located in a Class 3 or Class 4 area. In the requirements, we referenced the reassessment requirements of §§ 192.941(b) and 192.941(c). RSPA/OPS did not mean to add these references as they only add confusion to the final rule. In this correction rule, RSPA/OPS is removing the references to the reassessment requirements of §§ 192.941(b) and 192.941(c) to avoid further confusion.

Section I of Appendix E provides additional guidance on determining a high consequence area. The second sentence in this section erroneously states that an operator must use method (a) or (b) from the definition in § 192.903 to identify a ''high consequence area.'' The sentence is now corrected to state that an operator must

use method (1) or (2) from the definition in § 192.903 to identify a ''high consequence area.''

List of Subjects in 49 CFR Part 192

High consequence areas, Incorporation by reference, Integrity management, Pipeline safety, Potential impact areas, Reporting and recordkeeping requirements.

■ Accordingly, 49 CFR Part 192 is corrected by making the following correcting amendments:

PART 192—[AMENDED]

■ 1. The authority citation for part 192 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, and 60118; and 49 CFR 1.53.

§ 192.903 [Amended]

■ 2. In § 192.903 the definition of ''high consequence area'' is amended by removing the word ''radius'' from paragraph (1)(iv) and adding the word ''circle'' in its place.

■ 3. Section 192.925 is amended by revising paragraph (b) to read as follows:

§ 192.925 What are the requirements for using External Corrosion Direct Assessment (ECDA)?

* * * * *

(b) *General requirements.* An operator that uses direct assessment to assess the threat of external corrosion must follow the requirements in this section, in ASME/ANSI B31.8S (ibr, see § 192.7), section 6.4, and in NACE RP 0502–2002 (ibr, see § 192.7). An operator must develop and implement a direct assessment plan that has procedures addressing preassessment, indirect examination, direct examination, and post-assessment. If the ECDA detects pipeline coating damage, the operator must also integrate the data from the ECDA with other information from the data integration (§ 192.917(b)) to evaluate the covered segment for the threat of third party damage, and to address the threat as required by § 192.917(e)(1).

(1) *Preassessment.* In addition to the requirements in ASME/ANSI B31.8S section 6.4 and NACE RP 0502–2002, section 3, the plan's procedures for preassessment must include—

(i) Provisions for applying more restrictive criteria when conducting ECDA for the first time on a covered segment; and

(ii) The basis on which an operator selects at least two different, but complementary indirect assessment tools to assess each ECDA Region. If an operator utilizes an indirect inspection method that is not discussed in Appendix A of NACE RP0502–2002, the operator must demonstrate the applicability, validation basis, equipment used, application procedure, and utilization of data for the inspection method.

(2) *Indirect examination.* In addition to the requirements in ASME/ANSI B31.8S section 6.4 and NACE RP 0502–2002, section 4, the plan's procedures for indirect examination of the ECDA regions must include—

(i) Provisions for applying more restrictive criteria when conducting ECDA for the first time on a covered segment;

(ii) Criteria for identifying and documenting those indications that must be considered for excavation and direct examination. Minimum identification criteria include the known sensitivities of assessment tools, the procedures for using each tool, and the approach to be used for decreasing the physical spacing of indirect assessment tool readings when the presence of a defect is suspected;

(iii) Criteria for defining the urgency of excavation and direct examination of each indication identified during the indirect examination. These criteria must specify how an operator will define the urgency of excavating the indication as immediate, scheduled or monitored; and

(iv) Criteria for scheduling excavation of indications for each urgency level.

(3) *Direct examination.* In addition to the requirements in ASME/ANSI B31.8S section 6.4 and NACE RP 0502–2002, section 5, the plan's procedures for direct examination of indications from the indirect examination must include—

(i) Provisions for applying more restrictive criteria when conducting ECDA for the first time on a covered segment;

(ii) Criteria for deciding what action should be taken if either:

(A) Corrosion defects are discovered that exceed allowable limits (Section 5.5.2.2 of NACE RP0502–2002), or

(B) Root cause analysis reveals conditions for which ECDA is not suitable (Section 5.6.2 of NACE RP0502–2002);

(iii) Criteria and notification procedures for any changes in the ECDA Plan, including changes that affect the severity classification, the priority of direct examination, and the time frame for direct examination of indications; and

(iv) Criteria that describe how and on what basis an operator will reclassify and reprioritize any of the provisions that are specified in section 5.9 of NACE RP0502–2002.

(4) *Post assessment and continuing evaluation.* In addition to the requirements in ASME/ANSI B31.8S section 6.4 and NACE RP 0502–2002, section 6, the plan's procedures for post assessment of the effectiveness of the ECDA process must include—

(i) Measures for evaluating the long-term effectiveness of ECDA in addressing external corrosion in covered segments; and

(ii) Criteria for evaluating whether conditions discovered by direct examination of indications in each ECDA region indicate a need for reassessment of the covered segment at an interval less than that specified in § 192.939. (See Appendix D of NACE RP0502–2002.)

* * * * *

■ 4. Section 192.935 is amended by revising the introductory text of paragraph (d) to read as follows:

§ 192.935 What additional preventive and mitigative measures must an operator take?

* * * * *

(d) *Pipelines operating below 30% SMYS.* An operator of a transmission pipeline operating below 30% SMYS located in a high consequence area must follow the requirements in paragraphs (d)(1) and (d)(2) of this section. An operator of a transmission pipeline operating below 30% SMYS located in a Class 3 or Class 4 area but not in a high consequence area must follow the requirements in paragraphs (d)(1), (d)(2) and (d)(3) of this section.

* * * * *

Appendix E to Part 192—[Amended]

■ 5. In Appendix E to Part 192, the introductory text of Section I is amended by removing the words ''method (a) or (b)'' from the second sentence and adding the words ''method (1) or (2)'' in its place.

Issued in Washington, DC, on May 20, 2004.

Samuel G. Bonasso,

Deputy Administrator.

[FR Doc. 04–11789 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 031216314–4118–03; I.D. 052004B]

RIN 0648–AR54

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Temporary Closure for the Shore-Based Whiting Sector

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

ACTION: Fishing restrictions; request for comments.

SUMMARY: NMFS announces a temporary closure of the primary season for Pacific whiting (whiting) south of 42° N. lat. at noon local time (l.t.) May 22, 2004. ''Per trip'' limits for whiting will be reinstated until 0001 hours June 15, 2004, at which time the primary season south of 42° N. lat. will re-open. This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California. This action is intended to keep the harvest of whiting at the 2004 allocation levels.

DATES: Effective from noon l.t. May 22, 2004, until 0001 hours June 15, 2004. Comments will be accepted through June 10, 2004.

ADDRESSES: You may submit comments, identified by (docket number and/or RIN number), by any of the following methods:

- E-mail: *WhitingCAclosure.nwr@noaa.gov*. Include (docket number and/or RIN number) in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 206–526–6736, Attn: Becky Renko.
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Becky Renko.

FOR FURTHER INFORMATION CONTACT: Becky Renko at 206–526–6110.

SUPPLEMENTARY INFORMATION: The regulations at 50 CFR 660.323(a) (3) and (4) establish separate allocations for the catcher/processor, mothership, and shore-based sectors of the whiting fishery. For 2004, the 215,500 mt commercial OY for whiting is divided with the catcher/processor sector receiving 73,270 mt (34 percent); the mothership sector receiving 51,720 mt (24 percent); and the shore-based sector receiving 90,510 mt (42 percent). The regulations further divide the shore-based allocation so that no more than 5 percent (4,526 mt) of the shore-based allocation may be taken in waters off the State of California before the primary season begins north of 42° N. lat.

The primary season for the shore-based sector is the period(s) when the large-scale target fishery is conducted, and when ''per trip'' limits are not in effect. Because whiting migrate from south to north during the fishing year, the shore-based primary season begins earlier south of 42° N. lat. than north. For 2004, the primary season for the shore-based sector between 42°-40°30' N. lat. began on April 1; south of 40°30' N. lat. the primary season began on April 15; and the fishery north of 42° N. lat. is scheduled to begin June 15.

Because the 4,526–mt allocation for the early season fishery off California is estimated to be reached, NMFS is announcing the closure of the primary whiting season south of 42° N. lat. The 20,000–lb (9,072–kg) trip limit that was in place before the start of the southern primary season is being reinstated and will remain in effect until the primary season north of 42° N. lat. opens on June 15. A trip limit of 10,000 lb (4,536 kg) of whiting is in effect year-round (unless landings of whiting are prohibited) for vessels that fish in the Eureka area shoreward of the 100–fm (183–m) contour at any time during a fishing trip. This smaller limit is intended to minimize incidental catch of chinook salmon which are more likely to be caught shallower than 100 fm (183 m) in the Eureka area.

The best available information on May 20, 2004, indicates that 3,999 mt of whiting have been taken by the shore-based fishery south of 42° N. lat. through May, 16, 2004 and that the 4,526 mt allocation is projected to be taken by noon May 22, 2004. Therefore, the 20,000–lb (9,072–kg) per-trip limits announced in the 2004 specifications and management measures (69 FR 11064, March 9, 2004 as amended at 69 FR 23667, April 30, 2004) will resume until the primary season begins north of 42° N. lat.

NMFS Action

For the reasons stated above, and in accordance with the regulations at 50 CFR 660.323 (a)(4)(i)(B) and (a)(4)(iii)(D), NMFS revises paragraph B. of Section IV. of the 2004 harvest specification and management measures (69 FR 11064, March 9, 2004, as amended at 69 FR 23667 (April 30, 2004), by adding a new paragraph.

IV. NMFS Actions

* * * * *

B. * * *

(3) * * *

(b) * * *

(iv) Closure of shore-based sector south of 42° N. lat. Effective noon May 22, 2004, to 0001 hours June 15, 2004 l.t. the primary whiting season south of 42° N. lat is closed. Landing and frequency limits imposed under paragraph (b) of this section are in effect until the primary whiting season reopens on June 15, 2004.

* * * * *

Classification

This action is authorized by the regulations implementing the FMP. The determination to take these actions is based on the most recent data available. The aggregate data upon which the determinations are based are available for public inspection at the office of the Regional Administrator (see **ADDRESSES**) during business hours.

The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for comment on this action pursuant to 5 U.S.C. 553 (b)(B), because providing prior notice and opportunity would be impracticable and contrary to the public interest. It would be impracticable and contrary to the pubic interest because if this closure were delayed in order to provide prior notice and opportunity for public comment, the fishery would exceed the early season sector allocation for whiting south of 42° N. lat. Similarly, the AA finds good cause to waive the 30–day delay in effectiveness requirement of 5 U.S.C. 553 (d)(3) as such a delay would cause the fishery south of 42° S. lat. to exceed its allocation. Allowing the early season fishery to continue would result in a disproportionate shift in effort which could result in greater impacts on Endangered Species Act listed chinook salmon and overfished groundfish species that had been considered when the 2004 Pacific Coast groundfish harvest specifications were established. This action is taken under the authority of 50 CFR 660.323(a)(4)(i)(B) and (a)(4)(iii)(D), and is exempt from review under Executive Order 12866.

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

Dated: May 21, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–11924 Filed 5–21–04; 2:35 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 102
Wednesday, May 26, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1150, 1160, 1205, 1207, 1209, 1210, 1215, 1216, 1218, 1219, 1220, 1230, 1240, 1250, 1260, and 1280

[Docket No. PY–02–006 Ext.]

RIN 0581–AC15

Proposed Rule To Exempt Organic Producers From Assessment by Research and Promotion Programs

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; extension of comment period.

SUMMARY: Notice is hereby given that the comment period on the proposal to exempt producers and marketers of solely 100 percent organic products from paying assessments to any research and promotion program administered by the Agricultural Marketing Service (AMS) is extended.

DATES: Comments must be received by June 25, 2004.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule to Angela C. Snyder, Office of the Deputy Administrator, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 0256, Room 3932-South, Washington, DC 20250. Comments should be submitted in duplicate. Comments may also be submitted electronically to: organicassessment@usda.gov or *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. All comments received will be made available for public inspection at Poultry Programs, AMS, USDA, Room 3932-South, 1400 Independence Avenue, SW., Washington, DC 20250 during regular business hours. A copy of the proposed rule may be found at: *http://www.ams.usda.gov/2002farmbill/organicexempt.*

Pursuant to the Paperwork Reduction Act (PRA), send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information to the above address. Comments concerning the information collection under the PRA should also be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Angela C. Snyder, Office of the Deputy Administrator, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 0256, Room 3932-South, Washington, DC 20250; (202) 720–4476; (202) 720–5631 (fax); or e-mail at *organicassessment@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposed rule on the exemption of organic producers and marketers from assessment under research and promotion programs was published in the **Federal Register** on April 26, 2004 (69 FR 22690). The proposed rule invited comments through May 26, 2004. Also, pursuant to the Paperwork Reduction Act, comments on the information collection burden were to be received by June 25, 2004.

An attorney representing several organic dairy companies requested that the comment period be extended by thirty days to provide ample time for a thorough review and to ensure that those most likely to be affected by the proposed rule have the opportunity to review and understand it before submitting comments. This request was submitted in consideration of the organic industry's most significant annual tradeshow and the most recent National Organic Standards Board meeting, both of which coincided with the pending comment period.

An extension would provide interested persons more time to review and assess the proposed rule's impacts. Therefore, USDA is extending the period in which to file written comments until June 25, 2004. This notice is issued pursuant to the Farm Security and Rural Investment Act (Pub. L. 107–171); the Beef Promotion and Research Act of 1985; Commodity Promotion, Research, and Information Act of 1996; Cotton Research and Promotion Act; Dairy Production Stabilization Act of 1983; Egg Research and Consumer Information Act; Fluid Milk Promotion Act of 1990; Hass Avocado Promotion, Research, and Information Act of 2000; Honey Research, Promotion, and Consumer Information Act; Mushroom Promotion, Research, and Consumer Information Act of 1990; Popcorn Promotion, Research, and Consumer Information Act; Pork Promotion, Research, and Consumer Information Act of 1985; Potato Research and Promotion Act; Soybean Promotion, Research, and Consumer Information Act; and Watermelon Research and Promotion Act.

Dated: May 20, 2004.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 04–11878 Filed 5–25–04; 8:45 am]

BILLING CODE 3410–02–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 721 and 724

Health Savings Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NCUA is proposing to amend its regulations governing a federal credit union's (FCU) authority to act as trustee or custodian to authorize FCUs to serve as trustee or custodian for Health Savings Accounts (HSA). The NCUA is issuing this proposed rule so that FCUs and their members can take advantage of the authority granted in the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Medicare Act). The Medicare Act authorizes the establishment of HSAs by individuals who obtain a qualifying high deductible health plan and specifies that an HSA may be established and maintained at an FCU. The proposed rule would also make a conforming amendment to NCUA's incidental powers regulation to include trustee or custodial services for HSAs as a pre-approved activity.

DATES: Comments must be received on or before June 25, 2004.

ADDRESSES: You may submit comments by any of the following methods (please send comments by one method only):

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- NCUA Web Site: *http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- E-mail: Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Proposed Rule 721 and 724, Health Savings Accounts'' in the e-mail subject line.
- Fax: (703) 518–6319. Use the subject line described above for e-mail.
- Mail: Address to Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- Hand Delivery/Courier: Same as mail address.

FOR FURTHER INFORMATION CONTACT: Ross P. Kendall, Staff Attorney, at the above address, or telephone: (703) 518–6562.

SUPPLEMENTARY INFORMATION:

Background

The precursor to the HSA was the Medical Savings Account, a tax-advantaged savings plan that was available only to certain individuals who were either self-employed or employees of small companies. The law authorizing the creation of these accounts contained other limitations as well, including a ceiling on the number of persons nationwide who could establish such an account, as well as an expiration provision. 26 U.S.C. 220. The limitations raised doubt about whether these accounts would become a permanent, viable alternative for Americans seeking relief from the high cost of health insurance. For these reasons, the NCUA elected not to include Medical Savings Accounts in its 1998 amendment expanding the scope of part 724 to include Roth IRAs, Coverdell Education Savings Accounts and Savings Incentive Match Plans for Employees. 63 FR 14025 (March 24, 1998).

Title XII of the Medicare Act makes permanent and broadens the authority for individuals to establish tax-advantaged savings accounts at financial institutions to support their payment of medical expenses not covered by health insurance. Under the new law, anyone who has a qualifying high deductible health plan is eligible to establish and maintain an HSA. A health plan with a minimum deductible of at least $1,000 (for individual coverage) or $2,000 (for family coverage) may qualify under the HSA rules even where certain preventive care services, as well as coverage for accidents, disability, dental care, vision care, and long-term care, are not subject to the deductible.

Contributions to an HSA qualify for an ''above the line'' tax deduction, whether or not the taxpayer itemizes other expenses on Schedule A. Income earned on funds in the account accrues tax-free, and withdrawals for qualified medical expenses are not taxable. Contributions to an HSA may be made by the individual or his or her employer, and employer contributions are not taxable as income to the individual. Contributions to the account for 2004 may not exceed the lesser of the annual deductible under the health plan or $2,600 (for individuals) or $5,150 (for family coverage). Contribution limits are indexed annually, and special ''catch up'' rules apply for individuals between ages 55 and 65. Funds in the account may be withdrawn tax-free if used to pay for qualified medical expenses. Unlike Flexible Spending Accounts, any unused balance in an HSA may be rolled over and accumulated from year to year, and the account is portable. After retirement but before eligibility for Medicare, an account owner may use funds in the account to purchase health insurance, including long-term care insurance. After an individual reaches age 65 and is qualified for Medicare coverage, any funds remaining in the account may be used for any purpose, although such withdrawals are taxed as ordinary income. Non-qualified withdrawals before age 65 are taxable as income, and are also assessed a 10% penalty. Upon death, HSA ownership may transfer to the spouse of the account owner on a tax-free basis.

Additional information about HSAs, including important details concerning the type of high deductible health plan an individual must obtain to qualify for an HSA, is available from the Public Affairs Office of the U.S. Department of the Treasury. The information is directly accessible from the Treasury Web site, *http://www.ustreas.gov.*

FCUs as Trustees or Custodians for HSAs

Title XII of the Medicare Act will be codified as new section 223 of the Internal Revenue Code (IRC). The proposed rule would amend § 724.1 of NCUA's regulations by inserting a reference to section 223 of the IRC into its text, to go along with the other IRC references that authorize retirement, pension and education savings accounts. The proposed rule would also make changes to the section heading and the caption of this part to reflect that trustee and custodial authority for FCUs is no longer limited to pension and retirement plans. In this respect, the NCUA proposes to use the term ''tax-advantaged savings plans'' as a more descriptive and inclusive way to refer to the types of accounts and savings plans that members may establish and for which FCUs may fulfill trustee or custodial responsibilities.

As with an IRA, an individual who maintains an HSA has an option to direct the investment choices. At present, however, both the text and the heading for § 724.2 refer only to retirement plans in describing the role that an FCU may fulfill in assisting a member who elects to make investment choices outside the credit union. Therefore, NCUA proposes to delete the reference to retirement from both the section heading and the first sentence of § 724.2, to clarify that members may determine investment options for HSAs as well. The amendment would not alter any of the procedural limitations and safeguards presently in the rule concerning either the extent of the actions an FCU may take or the notice requirements relating to the absence of share insurance for investment choices outside of share or share certificate accounts the FCU maintains.

The proposed rule would also amend NCUA's incidental powers regulation by adding language to § 721.3, describing those activities that are pre-approved for FCUs. Subsection (l) discusses the role an FCU may fulfill as trustee or custodian. The proposed rule would simply add HSAs to the types of plans for which an FCU may fulfill trustee or custodian responsibilities. A conforming amendment is proposed for the first sentence in this subsection, substituting ''tax-advantaged savings plans'' for the current reference to pension and profit-sharing plans, to describe more clearly the types of accounts for which an FCU may serve as trustee or custodian.

The proposed rule would authorize FCUs to serve as trustee or custodian for member HSAs. Whether similar authority exists for State chartered, federally insured credit unions is a matter of applicable State law.

Obligations of Trustee or Custodian

NCUA understands that the Internal Revenue Service (IRS) will prepare and distribute comprehensive guidelines for HSA trustees or custodians, including model forms, in the near future. The

Department of the Treasury has already issued some guidance, including that an HSA trustee will not be responsible for monitoring or determining if a withdrawal from an HSA is for a qualified medical purpose. *See* U.S. Treasury Notice 2004–2—Guidance on Health Savings Accounts. NCUA anticipates that HSA trustees and custodians will be required to provide initial disclosures and monitor deposits made to the account to assure they do not exceed permissible annual contribution limitations, and we expect the guidelines will also require certain reporting to the IRS and to the account owner.

NCUA anticipates and expects that FCUs will comply with all applicable guidelines once established by the IRS. NCUA does not anticipate that the obligations will be burdensome. NCUA notes that FCUs have been providing IRA trustee and custodial services for over 25 years. In its examination and supervision of FCUs during this time, NCUA has seen no indication of regulatory problems or safety and soundness concerns arising from this activity. This historical performance suggests that FCUs can safely provide the same services for HSAs.

Separate Share Insurance Coverage for HSAs

The Board notes that, although it is set up as a trust account, an HSA is an account a member maintains for his or her own benefit. In view of the statutory limits on maximum annual contributions, as well as the likelihood of frequent withdrawals from the HSA to pay for medical expenses, the Board does not anticipate that substantial balances in HSAs will accumulate in the short term. Also, the Federal Deposit Insurance Corporation, with which the NCUA has traditionally maintained parity on matters involving the scope of account insurance coverage, has indicated it does not consider HSAs to be a separate category for insurance coverage purposes. As with other types of revocable trust accounts, the interests of person(s) designated by the owner of an HSA to receive any balance in the account remaining after the owner's death may qualify for separate insurance coverage under existing rules. To qualify for separate insurance, the designated beneficiary must be the spouse, child, grandchild, parent or sibling of the account owner and the other requirements in our rule must be satisfied. 12 CFR 745.4. For these reasons, the Board is not proposing an amendment to NCUA's share insurance rules at present. The Board intends to monitor developments in this area and may reconsider its position at a later time if circumstances warrant.

Request for Comments

The Board's standard policy is to issue proposed regulations with a 60-day comment period. *See* NCUA Interpretative Ruling and Policy Statement 87–2 (52 FR 35231, Sept. 18, 1987; as amended by IRPS 03–2, 68 FR 31949, May 29, 2003). In this case, however, the Board finds that a shorter comment period is warranted. The Medicare Act is already effective, and the Board anticipates the IRS will produce and distribute model forms and related guidance for institutions acting as trustee or custodian on or before the end of June 2004. A shorter comment period will minimize delays for FCUs seeking to offer this service to their members.

Regulatory Procedures

Regulatory Flexibility Act

This proposed rule conforms current regulations to recent changes in the federal tax law and implements authority for FCUs to offer HSAs to their members. The Board has determined and certifies that the proposed rule would not have a significant economic impact on a substantial number of small credit unions. Accordingly, the NCUA Board has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that the proposed rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effects on the states, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

The NCUA has determined that this final rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 721

Incidental Powers.

12 CFR Part 724

Pensions, Reporting and recordkeeping, Trusts and trustees.

By the National Credit Union Administration Board, this 20th day of May, 2004.

Becky Baker,

Secretary, NCUA Board.

For the reasons stated in the preamble, NCUA proposes to amend 12 CFR chapter VII as follows:

PART 721—INCIDENTAL POWERS

1. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

2. Amend § 721.3 by revising paragraph (l) to read as follows:

§ 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(l) *Trustee or custodial services.* Trustee or custodial services are services in which you are authorized to act under any written trust instrument or custodial agreement created or organized in the United States and forming part of a tax-advantaged savings plan, as authorized under the Internal Revenue Code. These services may include acting as a trustee or custodian for member retirement, education and health savings accounts.

PART 724—TRUSTEES AND CUSTODIANS OF PENSION PLANS

3. The authority citation for part 724 continues to read as follows:

Authority: 12 U.S.C. 1757, 1765, 1766 and 1787.

4. Revise the part heading for part 724 to read as follows:

PART 724—TRUSTEES AND CUSTODIANS OF CERTAIN TAX-ADVANTAGED SAVINGS PLANS

5. Amend § 724.1 by revising the section heading and first two sentences to read as follows:

§ 724.1 Federal credit unions acting as trustees and custodians of certain tax-advantaged savings plans.

A federal credit union is authorized to act as trustee or custodian, and may receive reasonable compensation for so acting, under any written trust instrument or custodial agreement created or organized in the United States and forming part of a tax-advantaged savings plan which qualifies or qualified for specific tax treatment under sections 223, 401(d), 408, 408A and 530 of the Internal Revenue Code (26 U.S.C. 223, 401(d), 408, 408A and 530), for its members or groups of its members, provided the funds of such plans are invested in share accounts or share certificate accounts of the Federal credit union. Federal credit unions located in a territory, including the trust territories, or a possession of the United States, or the Commonwealth of Puerto Rico, are also authorized to act as trustee or custodian for such plans, if authorized under sections 223, 401(d), 408, 408A and 530 of the Internal Revenue Code as applied to the territory or possession under similar provisions of territorial law. * * *

6. Amend § 724.2 by revising the section heading and introductory text to read as follows:

§ 724.2 Self-Directed Plans.

A federal credit union may facilitate transfers of plan funds to assets other than share and share certificates of the credit union, provided the conditions of § 724.1 are met and the following additional conditions are met: * * *

[FR Doc. 04–11903 Filed 5–25–04; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

Proposed Changes and Advisory Circular 25.1322

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of Aviation Rulemaking Advisory Committee (ARAC) recommendations.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of the ARAC-recommended proposed flight crew alerting, and the proposed Advisory Circular (AC) 25.1322, ''Flight Crew Alerting,'' for potential use, upon request, in the certification of applicable airplane systems. The FAA has not yet adopted these ARAC recommendations.

FOR FURTHER INFORMATION CONTACT: Mr. Loran Haworth, Federal Aviation Administration, Transport Airplane Directorate, Transport Standards Staff, Airplane and Flight Crew Interface Branch, ANM–111, 1601 Lind Avenue SW., Renton, WA 98055–4056; telephone (425) 227–1133; fax (425) 227–1320; e-mail: *Loran.Haworth@faa.gov.*

SUPPLEMENTARY INFORMATION: *Reference:* FAA policy memorandum 00–113–1034 ''Use of ARAC (Aviation Rulemaking Advisory Committee) Recommended Rulemaking not yet formally adopted by the FAA, as a basis for equivalent level of safety or exemption to Part 25.''

This policy memorandum describes a standardized, streamlined approach for the use of draft FAA/Joint Aviation Authorities (JAA) harmonized regulations as a basis for an equivalent level of safety finding or an exemption to part 25. It may be found on the Internet at the following Web site address: *http://www.airweb.faa.rgl.*

Background

After a multi-year review of the current § 25.1322 and creation of the proposed AC 25.1322, the ARAC submitted to the FAA their recommendations for a rule change and the proposed advisory circular in May 2004. The ARAC-recommended proposed changes to 14 CFR 25.1322 and the newly proposed AC 25.1322 are available on the Internet at the following Web site address: *http://www.faa.gov/avr/arm/arac/aractasks/aracavsysrecommendation4.cfm?nav=6&task=2.* If you do not have access to the Internet, you can obtain a copy of the policy by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.**

The procedure for using ARAC recommendations for rule changes that are not yet adopted by the FAA is described in the FAA policy memorandum 00–113–1034 referenced above. The memorandum describes the process for requesting an equivalent safety finding, as well as petitioning for an exemption.

Issued in Renton, Washington, on May 18, 2004.

Kevin Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–11896 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–CE–11–AD]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company Model B100 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Raytheon Aircraft Company (Raytheon) Model B100 airplanes. This proposed AD would require you to drill holes in the hot lip tube ''B'' nuts; tighten the ''B'' nuts to specified torque ranges; and secure the ''B'' nuts with safety wire. This proposed AD is the result of reports of loose ''B'' nuts on the engine inlet that may loosen and permit a leak in the engine inlet anti-ice system. We are issuing this proposed AD to detect and correct loose ''B'' nuts on the engine inlet, which could result in failure of the engine inlet anti-ice system and consequent ice buildup. This failure and ice buildup could lead to an engine's ingestion of ice with loss of engine power or loss of engine.

DATES: We must receive any comments on this proposed AD by July 26, 2004.

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

- *By mail:* FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2004–CE–11–AD, 901 Locust, Room 506, Kansas City, Missouri 64106.
- *By fax:* (816) 329–3771.
- *By e-mail: 9–ACE–7–Docket@faa.gov.* Comments sent electronically must contain ''Docket No. 2004–CE–11–AD'' in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII.

You may get the service information identified in this proposed AD from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085;

telephone: (800) 429–5372 or (316) 676–3140.

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2004–CE–11–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jeff Pretz, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone: (316) 946–4153; facsimile: (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include ''AD Docket No. 2004–CE–11–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it. We will date-stamp your postcard and mail it back to you.

Are there any specific portions of this proposed AD I should pay attention to? We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

Discussion

What events have caused this proposed AD? The FAA has received six reports of loose ''B'' nuts on the Raytheon Model B100 engine inlet anti-ice system found during routine maintenance. These loose ''B'' nuts may permit a leak in the engine inlet anti-ice system that would result in failure of the system with consequent ice buildup on the engine inlet.

What is the potential impact if FAA took no action? Failure of the engine inlet anti-ice system and consequent ice buildup could lead to an engine's ingestion of ice with loss of engine power or loss of engine.

Is there service information that applies to this subject? Raytheon has issued Service Bulletin No. SB 30–3143, dated September 2001.

What are the provisions of this service information? The service bulletin includes procedures for:

—Drilling a 0.035-inch hole in each of the hot lip tube ''B'' nuts (part numbers (P/N) AN818–6D and AN818–8D);

—tightening P/N AN818–6D ''B'' nuts to a torque range of 75 to 125 inch-pounds and P/N AN818–8D ''B'' nuts to a torque range of 150 to 250 inch-pounds; and

—securing the ''B'' nuts (P/N AN818–6D and P/N AN818–8D) with safety wire.

FAA's Determination and Requirements of This Proposed AD

What has FAA decided? We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing AD action.

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

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

Costs of Compliance

How many airplanes would this proposed AD impact? We estimate that this proposed AD affects 96 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 this proposed inspection and modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operations
4 workhours × $65 per hour = $260.	Not applicable.	$260	$24,960

Regulatory Findings

Would this proposed AD impact various entities? We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

Would this proposed AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this proposed AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposed AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''AD Docket No. 2004–CE–11–AD'' in your request.

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 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Raytheon Aircraft Company: Docket No. 2004–CE–11–AD

When Is the Last Date I Can Submit Comments on This Proposed AD?

(a) We must receive comments on this proposed airworthiness directive (AD) by July 26, 2004.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects Models B100, serial numbers BE–1 through BE–136, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of reports of loose ''B'' nuts on the engine inlet that may loosen and permit a leak in the engine inlet anti-ice system. The actions specified in this AD are intended to detect and correct loose ''B'' nuts on the engine inlet, which could result in failure of the engine inlet anti-ice system and consequent ice buildup. This failure and ice buildup could lead to an engine's ingestion of ice with loss of engine power or loss of engine.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Drill a 0.035-inch hole in each of the hot lip tube ''B'' nuts (part number (P/N) AN818–6D and AN818–8D).	Within the next 150 hours time-in-service (TIS) or 6 calendar months after the effective date of this AD, whichever occurs first.	Follow Raytheon Aircraft Mandatory Service Bulletin No. SB 30–3143, dated September 2001. The applicable airplane maintenance manual also addresses this issue.
(2) Tighten the hot lip tube ''B'' nuts to a specified torque range:. (i) Tighten hot lip tube ''B'' nuts P/N AN818–6D to a torque range of 75 to 125 inch-pounds. (ii) Tighten hot lip tube ''B'' nuts P/N AN818–8D to a torque range of 150 to 250 inch-pounds.	Before further flight after the actions required by paragraph (e)(1) of this AD.	Follow Raytheon Aircraft Mandatory Service Bulletin No. SB 30–3143, dated September 2001. The applicable airplane maintenance manual also addresses this issue.
(3) Secure the hot lip tube ''B'' nuts (P/N AN818–6D and AN818–8D) with safety wire.	Before further flight after the actions required by paragraph (e)(2) of this AD.	Follow Raytheon Aircraft Mandatory Service Bulletin No. SB 30–3143, dated September 2001. The applicable airplane maintenance manual also addresses this issue.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Wichita Aircraft Certification Office (ACO), FAA. For information on any already approved alternative methods of compliance, contact Jeff Pretz, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone: (316) 946–4153; facsimile: (316) 946–4407.

May I Get Copies of the Documents Referenced in This AD?

(g) You may get copies of the documents referenced in this AD from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140. 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 May 20, 2004.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–11877 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 59

[Docket No. 2004N–0184]

RIN 0910–AB96

Requirements Pertaining to Sampling Services and Private Laboratories Used in Connection With Imported Food; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a proposed rule that appeared in the **Federal Register** of April 29, 2004 (69 FR 23460). The document proposed new regulations for persons who use sampling services (services that collect samples for another party) and private laboratories used in connection with imported food. The document was published with inadvertent errors. This document corrects those errors.

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

SUPPLEMENTARY INFORMATION: In FR Doc. 04–9699, appearing on page 23460 in the **Federal Register** of Thursday, April 29, 2004, the following corrections are made:

1. On page 23460, in the second column, in the heading of the document, ''[Docket No. 2002N–0085]'' is corrected to read ''[Docket No. 2004N–0184]''.

2. On page 23460, in the second column, in the **ADDRESSES** section, in the line beginning with ''identified by Docket No. 2002N–0085,'', ''[Docket No. 2002N–0085]'' is corrected to read ''[Docket No. 2004N–0184]''.

3. On page 23460, in the third column, in the **ADDRESSES** section, in the seventh line beginning with ''Include Docket No. 2002N–0085'', ''[Docket No. 2002N–0085]'' is corrected to read ''[Docket No. 2004N–0184]''

Dated: May 19, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–11827 Filed 5–25–04; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 040–0448b; FRL–7662–1]

Revisions to the California State Implementation Plan, El Dorado County Air Pollution Control District, Feather River Air Quality Management District, Kern County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Bernardino County Air Pollution Control District, Santa Barbara County Air Pollution Control District, and Yolo-Solano Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the El Dorado County Air Pollution Control District (EDCAPCD), Feather River Air Quality Management District (FRAQMD), Kern County Air Pollution Control District (KCAPCD), Sacramento Metropolitan Air Quality Management District (SMAQMD), San Bernardino County Air Pollution Control District (now Mojave Desert Air Quality Management District) (MDAQMD), Santa Barbara County Air Pollution Control District (SBCAPCD), and Yolo-Solano Air Pollution Control District (YSAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that address emission statements.

DATES: Any comments on this proposal must arrive by June 25, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, or e-mail to *steckel.andrew@epa.gov,* or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted SIP revisions, EPA's technical support documents (TSDs), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted SIP revisions by appointment at the following locations:

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

El Dorado County Air Pollution Control District, 2850 Fairlane Court, Building C, Placerville, CA 95667–4100.

Feather River Air Quality Management District, 938–14th Street, Marysville, CA 95901–4149.

Kern County Air Pollution Control District, 2700 ''M'' Street, Suite 302, Bakersfield, CA 93301–2370.

Mojave Desert Air Quality Management District, 14306 Park Avenue, Victorville, CA 92392–2310.

Sacramento Metropolitan Air Quality Management District, 777–12th Street, Third Floor, Sacramento, CA 95814–1908.

Santa Barbara County Air Pollution Control District, 26 Castilian Drive, Suite B–23, Goleta, CA 93117–3027.

Yolo-Solano Air Quality Management District, 1947 Galileo Court, Suite 103, Davis, CA 95616–4882.

Copies of these rules may also be available via the Internet at the following sites respectively, *http://www.arb.ca.gov/drdb/drdbltxt.htm.* Please be advised that this is not an EPA Web site and may not contain the same version of the rules that were submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Julie A. Rose, EPA Region IX, (415) 947–4126, *rose.julie@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules:

TABLE 1.—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
EDCAPCD	1000	Emission Statement	09/21/92	11/12/92
FRAQMD	4.8	Further Information	09/14/92	11/12/92
KCAPCD	108.2	Emission Statement Requirements	07/13/92	11/12/92
MDAQMD	107	Certification and Emission Statements	09/17/92	11/12/92
SMAQMD	105	Emission Statement	04/20/93	11/18/93
SBCAPCD	212	Emission Statements	10/20/92	11/12/92
YSAPCD	3.18	Emission Statements	11/15/92	11/18/93

In the rules and regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: May 3, 2004.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 04–11770 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CC Docket No. 02–53, FCC 04–96]

Presubscribed Interexchange Carrier Charges

AGENCY: Federal Communications Commission.

ACTION: Further notice of proposed rulemaking.

SUMMARY: This document seeks further comment on the Commission's presubscribed interexchange carrier (PIC)-change charge policies. PIC-change charges are federally-tariffed charges imposed by incumbent local exchange carriers on end-user subscribers when these subscribers change their presubscribed long distance carriers. In light of recent cost information filed by BellSouth in support of an increase to its PIC-change charge, the further notice of proposed rulemaking seeks comment on creating separate PIC-change charges based on the method used to process the request. The further notice of proposed rulemaking also seeks comment on whether, to encourage interexchange carriers to utilize electronic processing, the charge should be assessed on the

entity submitting the change request to the local exchange carrier, either the end user or the interexchange carrier. The charge currently is imposed on the end user.

DATES: Comments due June 15, 2004 and reply comments due June 25, 2004.

FOR FURTHER INFORMATION CONTACT: Jennifer McKee, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (NPRM) in CC Docket No. 02–53 released on April 23, 2004. The full text of this document is available on the Commission's website Electronic Comment Filing System and for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC 20554.

Background

In this Further Notice of Proposed Rulemaking, adopted April 14, 2004 and released April 23, 2004 in CC Docket No. 02–53, FCC 04–96, the Commission is seeking to refresh the record and specifically to seek comment on cost support information recently filed by BellSouth in support of its PIC-change charge increase. On March 20, 2002, the Commission released a Notice of Proposed Rulemaking, 67 FR 34665, May 15, 2002, in this proceeding seeking comment on the Commission's PIC-change charge policies, and on the $5 PIC-change charge safe harbor. At the time the Notice of Proposed Rulemaking was released, BellSouth charged a PIC-change charge of $1.49, substantially below the $5 safe harbor. BellSouth's $1.49 PIC-change charge was supported by a cost study that had been filed in 1990. In the Notice of Proposed Rulemaking, the Commission sought comment on whether BellSouth's $1.49 charge should be used in establishing a lower or upper bound on any future PIC-change charge safe harbor. Comments on the Notice of Proposed Rulemaking were due on June 14, 2002 and reply comments were due on July 1, 2002. Since the record closed on the Notice of Proposed Rulemaking, BellSouth has filed with the Commission a tariff revision, with the requisite cost support, that increased its PIC-change charge from $1.49 per change to $3.07 per change.

Discussion

BellSouth's tariff filing highlights the significant disparity in costs for manual and electronic (mechanized) processing of PIC-change charges. BellSouth's analysis submitted in support of its tariff filing reflects that the percentage of manual processing has increased in recent years. This filing raises questions about the incentives that are created by a PIC-change charge that does not differentiate between electronic and manual processing. Therefore, as set forth below, we seek comment on BellSouth's filing, and whether and how we should take account of the information in that filing in analyzing our PIC-change charge policies and safe harbor. We also take this opportunity to refresh the record in this proceeding.

BellSouth's recently filed cost study indicates that manually processed PIC changes cost substantially more than mechanized PIC changes. BellSouth's filing indicates that the costs of manual PIC changes are cross-subsidized to some degree by the lower cost mechanized PIC changes because end users pay a single rate regardless of how the PIC-change request is submitted. Such subsidization will reduce carriers' incentives to invest in the equipment necessary to submit mechanized PIC change requests to the local exchange carriers (LECs). We therefore seek comment on whether there should be a separate PIC-change charge (and associated safe harbor) for orders that require manual processing by a LEC and for orders that are submitted to a LEC in a mechanized format. We also seek comment on whether manual versus mechanized processing of PIC changes is the correct categorization for any multiple safe harbors, or whether other classifications of PIC-change charges should be adopted. We also seek comment on how small entities may be affected by changes to our existing PIC-change charge policies.

To date, the PIC-change charge has been assessed on end users. This removes, to some extent, the incentive for interexchange carriers (IXCs) to reduce the costs of PIC changes because the charge is passed on to end users. Should the charge instead be assessed on the entity that submits the order to the LEC, *i.e.*, if an IXC submits the order, the LEC would assess the charge on the IXC, and if an end user submits the order to the LEC directly, the LEC would assess the charge on the end user?

If there are separate charges for electronic and manual processing, or if the charge or charges are assessed on the entity placing the order, customers will need to be made aware of their options regarding PIC changes and what they can do to pay a lower PIC-change charge. For example, if an end-user customer calls a LEC requesting a PIC change, the LEC will have to enter the request manually, possibly resulting in a higher charge to the end user. If the end user instead requested the change through an IXC, however, either the lower mechanized PIC-change rate could potentially apply, or the customer could avoid paying a PIC-change charge at all if the charge was instead assessed on the IXC. If different PIC-change charge rates are adopted, how should end-user customers be made aware of the different rates when they request a PIC change? Would different PIC-change charge rates improve or hinder consumers' ability to understand how charges are incurred? Would any benefit from adopting separate charges for electronic and manual processing outweigh potential consumer confusion over the charges to be incurred when switching providers?

Consideration of separate charges raises the question of whether all entities placing PIC-change orders will be able to submit orders using a mechanized process. Can an end-user customer currently change its PIC electronically through the LECs' Web sites, or must a PIC change be processed by a LEC (manually) or through an IXC (manually or mechanized)? Should carriers that do not make available to end-user customers an option to submit PIC changes directly through a mechanized system be precluded from assessing a higher manual charge on its end-user customers?

Do separate charges for manual and electronic processing raise anti-competitive issues that should be addressed if the LEC is also providing long distance service? How much, if any, of the increase in the manual-to-electronic processing ratio as set out in the BellSouth filing may be attributed to the entrance of incumbent LECs in the long distance market? How do incumbent LEC long distance entities handle PIC-change requests? Are the requests processed by the long distance entities, or are customers referred to the local exchange entities to make the change? Will these processes change when incumbent LEC local and long distance operations are integrated after the sunset of the separate affiliate requirements of section 272 of the Act, 47 U.S.C. 272?

BellSouth's recent PIC-change charge tariff filing reflects weighted costs of $2.45 for a manual PIC change and $0.48 for a mechanized PIC change. These costs, multiplied by a common cost factor of 1.0497, yield BellSouth's total PIC change cost of $3.07. Should we adopt a PIC-change charge safe harbor (or harbors) based on the BellSouth cost study? Is the cost information submitted by BellSouth in

its tariff filing typical for similarly situated carriers? If the BellSouth cost study is used as a basis for setting a PIC-change charge safe harbor (or harbors), should the study be revised in any way? For example, customers are entitled to one initial free PIC preselection. Therefore, is it appropriate to recover costs for new installations in the PIC-change charge?

Some customers request a ''PIC freeze'' from their LEC. A PIC freeze prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent. Should the additional costs of processing PIC changes to customers with PIC freezes be recovered through the PIC-change charge, or through a separate PIC-freeze charge? What entity should be responsible for paying any additional charges associated with changing PIC-freeze customers' PICs?

Finally, given the passage of time since the record in this proceeding closed, parties may refresh the record with any new information or arguments that they believe to be relevant to deciding the issues raised in this proceeding.

Procedural Matters

Ex Parte Requirements

This matter shall be treated as a ''permit-but-disclose'' proceeding i006n accordance with the Commission's *ex parte* rules, 47 CFR 1.1200 *et seq.* 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 generally is required. *See* 47 CFR 1.1206(b)(2). Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 603, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this FNPRM. The RFA, *see* 5 U.S.C. 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104–121, Title II, 110 Stat. 857 (1996). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

In this FNPRM, the Commission seeks additional comment on its policies for regulating PIC-change charges. Specifically, we seek comment on whether there should be separate PIC-change charges for manual and electronic processing of change requests, and on whether the charge should be assessed on the entity that places the order. We also seek comment on recent PIC-change charge cost information filed by BellSouth. We seek comment on these issues, as well as any alternative means of ensuring the reasonableness of PIC-change charges.

Legal Basis

This FNPRM is adopted pursuant to sections 1, 4(i), 4(j), 201–205, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j), 201–205, and 303.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. 5 U.S.C. 603(b)(3). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 601(6). For the purposes of this NPRM, the RFA defines a ''small business'' to be the same as a ''small business concern'' under the Small Business Act, 15 U.S.C. 632, unless the Commission has developed one or more definitions that are appropriate to its activities. 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 5 U.S.C. 632). Under the Small Business Act, a ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA. 15 U.S.C. 632.

We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' 5 U.S.C. 601(3). The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. 13 CFR 121.102(b). We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

Wired Telecommunications Carriers. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. 13 CFR 121.201, NAICS code 513310 (changed to 517110 in October 2002). According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.'' Thus, under this size standard, the majority of firms can be considered small.

Local Exchange Carriers. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 513310 (changed to 517110 in October 2002). According to Commission data, 1,337 carriers reported that they were incumbent local exchange service

providers. *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Table 5.3 (Aug. 2003) (*Trends in Telephone Service*). Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. *Trends in Telephone Service,* Table 5.3. In addition, according to Commission data, 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. *Trends in Telephone Service*, Table 5.3. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. *Trends in Telephone Service*, Table 5.3. In addition, 35 carriers reported that they were ''Other Local Exchange Carriers.'' *Trends in Telephone Service*, Table 5.3. Of the 35 ''Other Local Exchange Carriers,'' an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. *Trends in Telephone Service*, Table 5.3. Consequently, the Commission estimates that most providers of local exchange service, competitive local exchange service, competitive access providers, and ''Other Local Exchange Carriers'' are small entities that may be affected by the rules and policies adopted herein.

Interexchange Carriers. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 513310 (changed to 517110 in October 2002). According to Commission data, 261 companies reported that they were interexchange carriers. *Trends in Telephone Service*, Table 5.3. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. *Trends in Telephone Service*, Table 5.3. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

As described in the previous Initial Regulatory Flexibility Analysis in this proceeding, 67 FR 34665, May 15, 2002, we are seeking comment on whether we can rely on market forces to set reasonable PIC-change charges, or whether these charges must be regulated. If we find that the market reasonably sets these charges, there will be no additional reporting or recordkeeping burden on incumbent LECs with respect to these charges. If we determine that the market will not successfully constrain PIC-change charges, we must determine whether to establish a safe harbor below which PIC-change charges are to be deemed reasonable, or whether these charges should be cost-based. If we adopt a safe harbor, incumbent LECs will be in the same situation as under the current rules, *i.e.*, PIC-change charges tariffed at rates below the safe harbor are deemed reasonable, and LECs have the option of charging more if they can demonstrate that their costs for PIC changes exceed that rate. If we decide not to adopt a safe harbor and require incumbent LECs to set PIC-change charges at cost, incumbent LECs will be required to file information demonstrating the costs of providing PIC changes.

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

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 5 U.S.C. 603(c)(1)–(c)(4).

We are seeking comment on alternative methods of setting a PIC-change charge, including whether market forces will successfully constrain these charges, and whether to adopt a safe harbor below which rates are presumed reasonable. These proposals would reduce the reporting and recordkeeping burden on all incumbent LECs, including small LECs. We also are seeking comment on whether to assess the PIC-change charge on the entity making the change request, which could be the IXC. We also are seeking comment on whether to create separate PIC-change charges for manual and electronic processing of PIC changes. This would allow IXCs to control whether they paid a higher manual processing charge or a lower electronic processing charge based on how they submit the order to the LEC. We also are seeking comment on how small entities may be affected by changes to our existing PIC-change charge policies.

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

None.

Filing of Comments and Reply Comments

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before June 15, 2004, and reply comments on or before June 25, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of a proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.

—The filing hours at this location are 8 a.m. to 7 p.m.
—All hand deliveries must be held together with rubber bands or fasteners.
—Any envelopes must be disposed of before entering the building.
—Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
—U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.
—All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Parties shall also serve one copy with Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 863–2893, or via e-mail to <*qualexint@aol.com*>.

Parties are strongly encouraged to file comments electronically using the Commission's Electronic Comment Filing System (ECFS). Parties are also requested to send a courtesy copy of their comments via e-mail to *jennifer.mckee@fcc.gov.* If parties file paper copies, parties are requested to send two (2) copies of the comments and reply comments to Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–A221, Washington, DC 20554.

Documents in CC Docket No. 02–53 are available for public inspection and copying during business hours at the Federal Communications Commission Reference Information Center, Portals II, 445 12th St. SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from Qualex International, telephone (202) 863–2893, facsimile (202) 863–2898.

Ordering Clauses

It is ordered that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j), 201–205, and 303, the further notice of proposed rulemaking *is adopted.*

It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–11657 Filed 5–25–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–1198, MB Docket No. 04–164, RM–10548]

Radio Broadcasting Services; Corning, Quincy and Susanville, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Corey J. McCaslin proposing the allotment of Channel 262A at Susanville, California, as its fourth FM broadcast aural transmission service. Channel 262A can be allotted to Susanville, consistent with the minimum distance separation requirements of the Commission's Rules using city reference coordinates. The reference coordinates for Channel 262A at Susanville are 40–24–59 North Latitude and 120–39–07 West Longitude. Additionally, to accommodate the proposed allotment of Channel 262A at Susanville, Corey J. McCaslin requests the substitution of Channel 265A for Channel 262A at Quincy, California, and modification of the license for Station KHGQ(FM) at its current transmitter site. An *Order to Show Cause* is issued to Keily Miller, licensee of Station KHGQ(FM), as requested. To accommodate the allotment of Channel 265A at Quincy, Corey J. McCaslin also proposes the downgrade of Station KTHU(FM), Channel 264C1, Corning, California to Channel 264B. The FM Table of Allotments was recently changed to reflect Channel 264B at Corning, California. *See* 68 FR 60043, published October 21, 2003.

DATES: Comments must be filed on or before June 25, 2004, and reply comments on or before July 12, 2004.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Corey J. McCaslin, P.O. Box 7612, Chico, California 95927.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 04–164, adopted April 30, 2004, and released May 4, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

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

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

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 265A and removing Channel 262A at Quincy; and by adding Channel 262A at Susanville.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–11919 Filed 5–25–04; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 69, No. 102

Wednesday, May 26, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collection Requirements Submitted to OMB for Review

SUMMARY: U.S. Agency for International Development (USAID) has submitted the following information collection to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Comments should be addressed to: Desk Officer for USAID, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. Copies of submission may be obtained by calling (202) 712–1365.

SUPPLEMENTARY INFORMATION:

OMB Number: OMB 0412–0506.

Form Number: AID 1420–50.

Title: Vendor Data Base (formerly known as USAID Consultant Registry Information System (ACRIS)) Instruction Books for the Organization Profile.

Type of Submission: Renew.

Purpose: USAID procuring activities are required to establish bidders mailing lists to assure access to sources and to obtain meaningful competition (41 CFR 1–2.205). In compliance with this requirement, USAID's Office of Small and Disadvantaged Business Utilization/Minority Resource Center has responsibility for developing and maintaining a Contractor's Index of bidders/offerors capable of furnishing services for use by the USAID procuring activities. (AIDAR 719.271–2(b)(4)).

Annual Reporting Burden:

Respondents: 1,000.

Total annual responses: 1,000.

Total annual hours requested: 250 hours.

Dated: May 19, 2004.

Joanne Paskar,

Chief, Information and Records Division, Office of Administrative Services, Bureau for Management.

[FR Doc. 04–11870 Filed 5–25–04; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Special Comprehensive License.

Agency Form Number: BIS–748P, BIS–752.

OMB Approval Number: 0694–0089.

Type of Request: Extension of a currently approved collection of information.

Burden: 1,017 hours.

Average Time Per Response: 50 minutes to 40 hours per response.

Number of Respondents: 176 respondents.

Needs and Uses: The SCL Procedure authorizes multiple shipments of items from the U.S. or from approved consignees abroad who are approved in advance by BIS to conduct the following activities: servicing, support services, stocking spare parts, maintenance, capital expansion, manufacturing, support scientific data acquisition, reselling and reexporting in the form received, and other activities as approved on a case-by-case basis.

Affected Public: Individuals, businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–3129, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: May 20, 2004.

Madeleine Clayton,

Management Analyst, Office of Management and Organization.

[FR Doc. 04–11826 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

[I.D. 052104B]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Socio-economic Assessment of Marine Protected Areas Management Preferences.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Regular submission.

Burden Hours: 700.

Number of Respondents: 700.

Average Hours Per Response: 1.

Needs and Uses: Several studies have shown that the haphazard placement of traps damages hard corals and gorgonians. In addition, to physically damaging hard corals and gorgonians traps target various over-exploited reef fish species, which further threaten the health and stability of coral reef habitats. In order to protect coral reef habitats and ensure the sustainable use reef fish resources, the Caribbean Fishery Management Council (CFMC) is considering limiting the total number of traps in the fishery. The goal of the proposed survey is to gather socioeconomic information on the Caribbean (Puerto Rico, St. Thomas, St. John, and St. Croix) trap fishery to support the management and conservation efforts of the CFMC. The information collected will be used to satisfy regulatory objectives and analytical requirements, and to assist the CFMC in selecting policies that meet conservation and management goals and

minimize to the extent possible any adverse economic impacts on fishery participants.

Affected Public: Business or other for-profit organizations.

Frequency: One-time survey.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number 202–395–7285, or *David__Rostker@omb.eop.gov*.

Dated: May 19, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11908 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

[I.D. 052104D]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for emergency clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Reporting of Sea Turtle Entanglement in Pot Gear Fisheries.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Emergency.

Burden Hours: 30.

Number of Respondents: 15.

Average Hours Per Response: 60 minutes for a telephone call.

Needs and Uses: This collection of information involves Sea turtles becoming accidentally entangled in active or discarded fixed fishing gear. These entanglements may prevent the recovery of endangered and threatened sea turtle populations. NOAA Fisheries has established the Sea Turtle Disentanglement Network to promote reporting and increase successful disentanglement of sea turtles. Since there is limited to no observer coverage of pot gear fisheries, NOAA Fisheries relies on the U.S. Coast Guard, fishing industry, stranding network, federal , state, and local authorities, and the public for this information.

The information provided will help NOAA Fisheries better assess pot gear fisheries (lobster, whelk/conch, crab, fish trap) and their impact on sea turtle populations in the northeast region (Maine to Virginia).

Affected Public: Business or other for-profit organizations; Individuals or households; Not-for-profit institutions; Federal Government; and State, Local or Tribal Government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent by May 27, 2004 to David Rostker, OMB Desk Officer, FAX number 202–395–7285, or *David__Rostker@omb.eop.gov*.

Dated: May 19, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11910 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Census Bureau

Current Population Survey (CPS) School Enrollment Supplement

AGENCY: Census Bureau, Department of Commerce.

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 26, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Karen Woods, Census Bureau, FOB 3, Room 3340, Washington, DC 20233–8400, (301) 763–3806.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request clearance for the collection of data concerning the School Enrollment Supplement to be conducted in conjunction with the October 2004 CPS. Title 13, United States Code, Section 182, and Title 29, United States Code, Sections 1–9, authorize the collection of the CPS information. The Census Bureau and the Bureau of Labor Statistics (BLS) sponsor the basic annual school enrollment questions, which have been collected annually in the CPS for 40 years.

This survey provides information on public/private elementary school, secondary school, and college enrollment, and on characteristics of private school students and their families, which is used for tracking historical trends, policy planning, and support. This year's supplement will also contain questions that were last asked in October 1999. These questions concern language proficiency, disabilities, and grade retention for persons 3–24 years of age. This survey is the only source of national data on the age distribution and family characteristics of college students and the only source of demographic data on preprimary school enrollment. As part of the federal government's efforts to collect data and provide timely information to local governments for policymaking decisions, the survey provides national trends in enrollment and progress in school.

II. Method of Collection

The school enrollment information will be collected by both personal visit and telephone interviews in conjunction with the regular October CPS interviewing. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Number: 0607–0464.

Form Number: There are no forms. We conduct all interviews on computers.

Type of Review: Regular.

Affected Public: Households.

Estimated Number of Respondents: 57,000.

Estimated Time Per Response: 8 minutes.

Estimated Total Annual Burden Hours: 7,600.

Estimated Total Annual Cost: The only cost to respondents is that of their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, U.S.C., Section 182, and Title 29, U.S.C., Sections 1–9.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for the Office of Management and Budget approval of this information collection; they also will become a matter of public record.

Dated: May 20, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11824 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Five-Year Record Retention Period

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 26, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Office of the Chief Information Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Stephen Baker, BIS ICB Liaison, Projects and Planning Division, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW, Washington, DC, 20230.

SUPPLEMENTARY INFORMATION:

I. Abstract

The record retention period corresponds with the five year statute of limitations for criminal actions brought under the Export Administration Act of 1979 and predecessor acts, and the five year statute for administrative compliance proceedings. Without this authority, potential violators could discard records demonstrating violations of the EAR prior to the expiration of the five-year statute of limitations.

II. Method of Collection

Recordkeeping.

III. Data

OMB Number: 0694–0096.

Form Number: Not applicable.

Type of Review: Regular submission for extension of a currently approved collection.

Affected Public: Individuals, businesses or other for-profit and not-for-profit institutions.

Estimated Number of Respondents: 201,177.

Estimated Time Per Response: .01 seconds to 1 minute per response.

Estimated Total Annual Burden Hours: 253.

Estimated Total Annual Cost: No start-up capital expenditures.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: May 20, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11825 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–846]

Brake Rotors From the People's Republic of China: Initiation of Eleventh New Shipper Antidumping Duty Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce received one request on December 15, 2003, to conduct a new shipper review of the antidumping duty order on brake rotors from the People's Republic of China (''PRC''). In accordance with 19 CFR 351.214(d), we are initiating a new shipper review for the company that requested such a review: Longkou Jinzheng Machinery Co., Ltd., a producer and exporter of brake rotors from the PRC.

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Brian Smith, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1766.

SUPPLEMENTARY INFORMATION:

Background

The Department received a timely request in December 2003 from Longkou Jinzheng Machinery Co., Ltd. (''Longkou Jinzheng'') in accordance with 19 CFR 351.214(c), for a new shipper review of the antidumping duty order on brake rotors from the PRC, which has an April anniversary month.

Longkou Jinzheng identified itself as the producer of the brake rotors it

exports. As required by 19 CFR 351.214(b)(2)(i) and (iii)(A), Longkou Jinzheng has certified that it did not export brake rotors to the United States during the period of investigation (''POI''), and that it has never been affiliated with any exporter or producer which did export brake rotors during the POI (*see* December 15, 2003, submission). Longkou Jinzheng has further certified that its export activities are not controlled by the central government of the PRC, satisfying the requirements of 19 CFR 351.214(b)(2)(iii)(B). Pursuant to 19 CFR 351.214(b)(2)(iv)(A), Longkou Jinzheng provided the date of the first sale to an unaffiliated customer in the United States. Longkou Jinzheng submitted documentation establishing the date on which it first shipped the subject merchandise to the United States and the volume and date of entry of that shipment.

In accordance with section 751(a)(2)(B) of the Tariff Act of 1930 (''the Act''), as amended, and 19 CFR 351.214(b), and based on our analysis of the information and documentation provided with the new shipper review request, as well as our analysis of proprietary import data from U.S. Customs and Border Protection (''CBP''), we find that Longkou Jinzheng has met the requirements for the Department to initiate a new shipper review (for more details, *see* New Shipper Initiation Checklist for Longkou Jinzheng). Therefore, we are initiating a new shipper review for Longkou Jinzheng.

In cases involving non-market economies, it is the Department's normal practice to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate provide *de jure* and *de facto* evidence of an absence of government control over the company's export activities (*see Natural Bristle Paintbrushes and Brush Heads from the People's Republic of China*, 68 FR 57875 (October 7, 2003)). Accordingly, we will issue a questionnaire to Longkou Jinzheng (including a complete separate rates section), allowing approximately 37 days for response. If the response from Longkou Jinzheng provides sufficient indication that it is not subject to either *de jure* or *de facto* government control with respect to its exports of brake rotors, the review will proceed. If the respondent does not demonstrate its eligibility for a separate rate, then it will be deemed to be affiliated with other companies that exported during the POI and that it did not establish entitlement to a separate rate, and the review of that respondent will be rescinded.

Initiation of Review

In accordance with section 751(a)(2)(B)(ii) of the Act and 19 CFR 351.214(d)(1), we are initiating a new shipper review of the antidumping duty order on brake rotors from the PRC. Normally, we would issue the preliminary results of this review not later than 180 days after the date on which the review is initiated. However, on May 7, 2004, Longkou Jinzheng agreed to waive the time limits in order that the Department, pursuant to 19 CFR 351.214(j)(3), may conduct this review concurrent with the seventh administrative review of this order for the period April 1, 2003, through March 31, 2004, which is being conducted pursuant to section 751(a)(1) of the Act. Therefore, we intend to issue the final results of this review not later than 245 days after the last day of the anniversary month.

Antidumping duty new shipper review	Period to be reviewed
PRC: Brake Rotors, A–570–846: Longkou Jinzheng Machinery Co., Ltd	04/01/03–03/31/04

We will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from Longkou Jinzheng. This action is in accordance with section 751(a)(2)(B)(iii) of the Act, as amended, and 19 CFR 351.214(e). Because Longkou Jinzheng has certified that it both produces and exports the subject merchandise, the sale of which was the basis for its new shipper review request, we will apply the bonding privilege only to entries of subject merchandise for which it is both the producer and exporter.

Interested parties that need access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a)(2)(B) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.214(d).

Dated: May 20, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–11916 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit for Final Results of New Shipper Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce is extending the time limit for the final results of the new shipper review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China until no later than July 23, 2004. The period of review is September 1, 2002 through February 28, 2003. This extension is made pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Thomas Gilgunn or Addilyn Chams-Eddine, AD/CVD Enforcement Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4236 or (202) 482–0648, respectively.

SUPPLEMENTARY INFORMATION:

Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Act requires the Department to issue the final results of a new shipper review within 90 days after the date on which the preliminary results were issued. However, if the Department determines the issues are extraordinarily complicated, section 751(a)(2)(B)(iv) of the Act allows the Department to extend the deadline for the final results to up to 150 days after the date on which the preliminary results were issued.

Background

On March 31, 2003, the Department received a timely request for a new shipper review under the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China in accordance with § 751(a)(2)(B) of the Act and § 351.214(c) of the Department's regulations from Shanghai Ocean Flavor International Trading Co., Ltd. (Shanghai Ocean Flavor). On April 30, 2003, the Department initiated this new shipper review for the period September 1, 2002 through February 28, 2003. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review,* 68 FR 23962 (May 6, 2003).

On September 15, 2003, the Department extended the preliminary results of this new shipper review by 120 days until February 24, 2004. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit of Preliminary Results of New Shipper Review,* 68 FR 53960 (September 15, 2003).

On February 24, 2004, the Department issued the preliminary results of this review. *See Notice of the Preliminary Results of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat From the People's Republic of China,* 69 FR 9800 (March 2, 2004). On April 5, 2004, the petitioners and respondent each submitted a case brief for the Department's consideration prior to the final determination in this new shipper review. On April 12, 2004, petitioners and respondent submitted a rebuttal brief to the Department. On April 26, 2004, the Department sent a supplemental questionnaire to the respondent. On May 3, 2004, respondent submitted its response to the Department's supplemental questionnaire. At the request of petitioners, the Department held a hearing on May 5, 2004. A portion of the hearing was conducted in closed session in accordance with § 351.310(f) of the Department's regulations.

Extension of Time Limit for Final Results

Pursuant to section 751(a)(2)(B)(iv) of the Act, the Department may extend the deadline for completion of the final results of a new shipper review if it determines that the case is extraordinarily complicated. The Department has determined that this case is extraordinarily complicated because of the issues that must be addressed regarding the *bona fides* of the new shipper sales. Therefore, the final results of this new shipper review cannot be completed within the statutory time limit of 90 days. Because the Department issued an additional supplemental questionnaire on April 26, 2004, and the response to this supplemental questionnaire was filed on May 3, 2004, there is new information relating to the *bona fides* of the new shipper sales. Thus, the Department must analyze the information submitted by Shanghai Ocean Flavor in its supplemental questionnaire response and any comments or additional factual information which the petitioners may submit. Additionally, the Department may find it necessary to request further information regarding the *bona fides* from the respondent in this new shipper review. Therefore, in accordance with § 751(a)(2)(B)(iv) of the Act and § 351.214(i)(2) of the regulations, the Department is extending the time limit for the completion of final results to 150 days from the date on which the preliminary results were issued. The final results will now be due no later than July 23, 2004.

This notice is published pursuant to sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: May 20, 2004.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 04–11917 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–836]

Notice of Extension of Time Limit of Final Results of New Shipper Review: Glycine from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the final results of the new shipper review of the antidumping duty order on glycine from the People's Republic of China (PRC) until no later than July 23, 2004. The period of review is March 1, 2002, through February 28, 2003. This extension is made pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Christian Hughes or Matthew Renkey, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone: (202) 482–0190 or (202) 482–2312, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 1995, the Department published in the **Federal Register** an antidumping duty order on glycine from the PRC. *See Antidumping Duty Order: Glycine from the People's Republic of China*, 60 FR 16116 (March 29, 1995). In accordance with section 351.214(b) of the Department's regulations, on March 26, 2003, the Department received a timely request for a new shipper review from Hebei New Donghua Amino Acid Co. Ltd. (New Donghua). On April 30, 2003, the Department initiated this new shipper review for the period March 1, 2002, through February 28, 2003. *See Glycine from the People's Republic of China: Initiation of Antidumping New Shipper Review*, 68 FR 23962 (May 6, 2003). The Department completed the preliminary results of this new shipper review on February 24, 2004. *See Notice of Preliminary Results of Antidumping Duty New Shipper Review: Glycine from the People's Republic of China*, 69 FR 9804 (March 2, 2004).

Extension of Time Limits for Final Results

Section 351.214(i)(1) of the Department's regulations requires the Department to issue final results of a new shipper review within 90 days after the date on which the preliminary results were issued. However, if the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 90–day period to 150 days under section 351.214(i)(2) of the Department's regulations.

The Department finds that this new shipper review is extraordinary complicated, and the final results of this new shipper review cannot be completed within the normal time limit because of the issue surrounding the *bona fide* nature of the sales under review, and information presented to the Department for the first time at verification. Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the Department's regulations, the Department is extending the time limit for the completion of final results to 150 days. The final results will now be due no later than July 23, 2004.

This notice is published pursuant to sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: May 20, 2004.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 04–11914 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Postponement of Preliminary Determination of Antidumping Duty Investigation: Outboard Engines From Japan (A–588–865)

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is postponing the preliminary determination in the antidumping duty investigation of outboard engines from Japan until no later than July 16, 2004. This postponement is made pursuant to section 733(c)(1)(B) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: James Kemp at (202) 482–5346 or Shane Subler at (202) 482–0189, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Postponement of Due Date for Preliminary Determination

On January 28, 2004, the Department initiated an antidumping duty investigation of outboard engines from Japan. *See Notice of Initiation of Antidumping Duty Investigation: Outboard Engines from Japan*, 69 FR 5316 (February 4, 2004). The notice of initiation stated that we would issue our preliminary determination no later than 140 days after the date of initiation. *See Id.* Currently, the preliminary determination in this investigation is due on June 16, 2004.

On April 30, 2004, the petitioner [1] made a timely request pursuant to 19 CFR 351.205(e) for a thirty-day postponement of the preliminary determination until July 16, 2004. The petitioner requested postponement of the preliminary determination because it believes additional time is necessary to allow the petitioner to review the responses to the questionnaire and other materials submitted in this investigation, to submit comments to the Department, and to allow the Department time to thoroughly analyze the respondent's data and to seek additional information, if necessary.

For the reasons identified by the petitioner, and because there are no compelling reasons to deny the request, we are postponing the preliminary determination under section 733(c)(1) of the Act. Therefore, the preliminary determination is now due no later than July 16, 2004. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination. This notice is issued and published pursuant to sections 733(f) and 777(i) of the Act.

[1] The petitioner in this investigation is Mercury Marine, a division of Brunswick Corporation.

Dated: May 20, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–11915 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–533–808)

Stainless Steel Wire Rods From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of final results and partial rescission of antidumping duty administrative review of stainless steel wire rods from India.

SUMMARY: On December 19, 2003, the Department of Commerce (''the Department'') published in the **Federal Register** the preliminary results of its administrative review of the antidumping duty order on stainless steel wire rods from India. *See Stainless Steel Wire Rods From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 70765 (December 19, 2003) (''*Preliminary Results*''). This review covers Viraj Alloys Limited (''VAL'') and VSL Wires Ltd. (''VSL'')(collectively ''Viraj''), Isibars Limited (''Isibars''), and Mukand Limited (''Mukand''), manufacturers and exporters of subject merchandise to the United States. Panchmahal Steel Limited (''Panchmahal'') was originally a respondent in this review, but the Department rescinded the review of Panchmahal based on the timely withdrawal of the only request for review of the company. *See Preliminary Results*. The period of review is December 1, 2001 through November 30, 2002.

Based on our analysis of the comments received regarding Viraj, we have made changes from the preliminary results of review. Therefore, the final results differ from the *Preliminary Results* with respect to the weighted–average dumping margin for Viraj. The final weighted–average dumping margin for the reviewed firms is listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Jonathan Herzog (Mukand), Kit Rudd (Viraj), Eugene Degnan (Isibars), and Jon Freed (Panchmahal), Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: 202–482–1102, or 202–482–4271, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 2003, the Department published in the **Federal Register** the preliminary results and partial rescission of its administrative review of the antidumping duty order on stainless steel wire rods from India. *See Preliminary Results*. We invited parties to comment on our preliminary results of review. We received Viraj's case briefs on January 27, 2004. We received Mukand's and Isibars' case briefs on January 28, 2004. We received a brief from the petitioner alleging new factual information contained in Mukand's, Isibars' and Viraj's case briefs on February 2, 2004. We received rebuttal briefs to all three of the respondent's briefs from petitioner, dated February 6, 2004. Pursuant to 19 CFR 351.309(c)(ii), the Department directed Mukand, Isibars and Viraj to resubmit their briefs and omit certain new factual information that was not raised in a timely manner. *See* the Department's letter dated February 24, 2004, rejecting Mukand, Viraj and Isibars' case briefs. Mukand, Isibars and Viraj resubmitted new case briefs redacting the new information on February 26, 2004. We received a letter from the petitioner on March 5, 2004, requesting the Department to complete and clarify the official record of the review by bringing additional information into the official record. We received Viraj's submission containing this new information on March 30, 2004. We received the complete public version of Viraj's submission on April 7, 2004. We have now completed the administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (''the Act'').

Scope of Review

The merchandise under review is certain stainless steel wire rods (''SSWR''), which are hot–rolled or hot–rolled annealed and/or pickled rounds, squares, octagons, hexagons or other shapes, in coils. SSWR are made of alloy steels containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. These products are only manufactured by hot–rolling and are normally sold in coiled form, and are of solid cross section. The majority of

SSWR sold in the United States are round in cross–section shape, annealed and pickled. The most common size 5.5 millimeters in diameter.

The SSWR subject to this review are currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0030, 7221.00.0045, and 7221.00.0075 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes (as of March 1, 2003, renamed the U.S. Bureau of Customs and Border Protection), the written description of the merchandise under review is dispositive of whether or not the merchandise is covered by the review.

Facts Available

In the instant review, for the preliminary results, the Department applied adverse facts available in accordance with section 776(a) of the Act to Isibars because Isibars failed to provide or withheld information the Department requested. *See Preliminary Results*, 68 FR at 70767. The Department received inadequate responses to the questionnaire and multiple supplemental questionnaires from Isibars and could not verify the incomplete information that Isibars did provide, which is necessary for the margin analysis. *See Preliminary Results*, 68 FR at 70767. Further, in accordance with sesction 776(a) of the Act, the Department applied partial adverse facts available to certain Mukand sales because Mukand failed to provide or withheld information requested by the Department. *See Preliminary Results*, 68 FR at 70773. Since we have received no new information since the preliminary results that contradicts the decision made in the preliminary results of review, we continue to apply adverse facts available with respect to Isibars and partial adverse facts available with respect to certain Mukand sales.

Corroboration of Adverse Facts Available

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is defined in the Statement of Administrative Act (''SAA'') as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See* SAA at 870. The SAA provides that to ''corroborate'' means simply that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *Id.* As noted in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

We have corroborated to the extent practicable, the adverse facts available rate we have applied in this review. *See Corroboration Memorandum for the Final Results of the 2001–2002 Administrative Review of Stainless Steel Wire Rods from India*, dated May 17, 2004, (''*Corroboration Memo*''). In order to corroborate this rate, the Department compared the petition's quoted and adjusted export prices (''EP'') and home market price quotes, which serve as the basis for normal value (''NV''), to U.S. Customs data, and the Sections B and C databases provided in this administrative review by Mukand and Viraj, where appropriate. *See Corroboration Memo* at 2 and 3. Comparing the U.S. Customs data and Mukand, we found that the EP prices in the petition were higher than the EP prices provided in the U.S. Customs data and the EP prices provided by Mukand. Further, the NV price per pound as reported in the petition was similar to the home market prices reported by Mukand. *See Corroboration Memo* at 3.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated).

There is no information on the record indicating that the rate used would be inappropriate Further, the rate used is currently applicable to all exporters subject to the ''All Others'' rate.

As the petition rate is both reliable and relevant, we determine that it has probative value. As a result, the Department determines that the petition rate is corroborated for the purposes of this administrative review and may reasonably be applied to Isibars and certain Mukand sales as a total adverse facts available rate. Accordingly, we determine that the petition rate is in accord with section 776(c)'s requirement that secondary information be corroborated (*i.e.*, have probative value).

Consequently, we are applying a single antidumping rate the highest rate from any segment of this administrative proceeding to Isibars' exports based on Isibars' failure to provide information and reconciliations as requested by the Department, and certain Mukand sales. *See, e.g., Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People's Republic of China*, 65 FR 25706, 25707 (May 3, 2000).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (''*Decision Memorandum*'') from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated May 17, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the *Decision Memorandum*, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in the *Decision Memorandum*, which is on file in the Central Records Unit, Room B–099 of the main Department building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at http://

ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Sales Below Cost

We disregarded sales that failed the cost test for Mukand and Viraj during the course of the review. We initiated a sales below the cost of production investigation with respect to Isibars. *See* the Department's June 3, 2003 letter to Isibars initiating sales below cost of production investigation. However, because Isibars did not provide the Department with a complete cost database, the Department could not conduct the dumping analysis, including the sales below cost investigation. For a complete discussion of Isibars' incomplete cost information see Comment 1 of the Decision Memorandum.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made changes in the margin calculations for Viraj. The changes to the margin calculations are listed below:

Viraj

• The Department has revised the general and administrative and net interest expense ratios based on the 2002–2003 financial statements. *See* Comment 5.

• The Department has revised Viraj's brokerage and handling expenses as partial adverse facts available due to Viraj's inability to substantiate these expenses. *See* Comment 6.

• The Department has revised the U.S. direct selling expenses to account for an exchange rate conversion. *See* Comment 8.

• The Department has revised Viraj's cost of production (''COP'') calculation to account for rolling labor charges. *See* Comment 9.

• The Department has revised the calculation of home market imputed credit expenses to account for sales transactions with multiple pay dates. *See* Comment 12.

• The Department has revised the U.S. credit rate used to calculate U.S. imputed credit in accordance with Import Administration Policy Bulletin 98–2. *See* Comment 13.

Final Results of Review

We determine that the following percentage margins exist for the period December 1, 2001, through November 30, 2002:

Producer/Manufacturer/Exporter	Weighted–Average Margin
Viraj	0.0%
Mukand	18.67%
Isibars	48.80%

The Department shall determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated exporter/importer (or customer)-specific assessment rates for merchandise subject to this review. The Department will issue appraisement instructions directly to CBP within 15 days of publication of these final results of review. We will direct CBP to assess the resulting assessment rates against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. For duty–assessment purposes, we calculated importer–specific assessment rates by dividing the dumping margins calculated for each importer by the total entered value of sales for each importer during the period of review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel wire rods from India entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for Viraj, Mukand, and Isibars will be the rates shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these or any previous reviews conducted by the Department, the cash deposit rate will be the ''all others'' rate, which is 48.80 percent.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 17, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix 1

Issues in the Decision Memorandum

A. Issues with regard to Isibars

Comment 1: Facts Available

B. Issues with regard to Mukand

Comment 2: Collapsing of Grades

Comment 3: Agency Sales

Comment 4: Use of Partial Facts Available

C. Issues with regard to Viraj

Comment 5: New Information

Comment 6: Brokerage and Handling Expenses

Comment 7: Difference in Merchandise Adjustment

Comment 8: U.S. Direct Selling Expenses

Comment 9: Direct Labor

Comment 10: Net Interest Expenses

Comment 11: Home Market Credit Expense

Comment 12: Home Market Interest Rate

Comment 13: U.S. Credit Expense

Comment 14: Duty Drawback

[FR Doc. 04–11913 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 052104C]

Proposed Information Collection; Comment Request; NOAA Research International Technical Assistance Program (ITAP)

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 26, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Bruce Travis Creighton, 301–713–2469, ext. 124; email: *bruce.creighton@noaa.gov*; or Jill Hepp, 301–713–2469, ext. 210; email: *jill.hepp@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The International Technical Assistance Program (ITAP) for NOAA Research is intended to stimulate the development of new collaborative relationships, foster exchanges of scientific personnel and information between NOAA Research and other countries and secure outside resources to promote international research and projects. To facilitate this, an online survey has been developed. The survey will act as a mechanism to catalog the products, services, technical and language expertise of NOAA Research and its affiliated personnel. This database will be used by NOAA Research to enable potential users to link specific areas of expertise and capabilities with funding for emerging international projects and initiatives. NOAA Research and its partners will then serve as a bridge between users (donor organizations) and experts to help facilitate and coordinate the resulting collaboration.

II. Method of Collection

The information will be collected via an online web survey.

III. Data

OMB Number: None.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Federal Government, State, Local or Tribal Government.
Estimated Number of Respondents: 1,500.
Estimated Time Per Response: 20 minutes.
Estimated Total Annual Burden Hours: 500 hours.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 19, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11909 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–KD–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 052104E]

Proposed Information Collection; Comment Request; Dr. Nancy Foster Scholarship Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 26, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Ruth Moore, N/MB3, SSMC4, Room 13108, 1305 East-West Highway, Silver Spring, MD 20910-3282 (phone 301–713–3050, ext. 169).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Dr. Nancy Foster Scholarship Program recognizes outstanding scholarship by providing financial support to graduate students pursuing masters and doctoral degrees in the areas of marine biology, oceanography, and maritime archaeology. The applicants must submit documentation that NOAA uses to select candidates, including three letters of recommendation. Persons receiving scholarships will be required to submit certain reports and other information detailed below.

II. Method of Collection

Respondents meet solicitation or award requirements with paper submissions. Electronic submissions are being considered. Applicants submit form CD-346 if they are chosen for the program.

III. Data

OMB Number: 0648–0432.
Form Number: CD–346.
Type of Review: Regular submission.
Affected Public: Individuals or households.
Estimated Number of Respondents: 1,000.
Estimated Time Per Response: 5 hours per application; 45 minutes for a letter of recommendation; 15 minutes for an employment/non-employment certification; 15 minutes for a Selective Service Statement from a male awardee;

30 minutes for an academic progress report from the applicant; 30 minutes for an annual progress report from the awardee's school advisor; 30 minutes for an annual financial request; and 90 minutes for a biography and photo from each awardee.

Estimated Total Annual Burden Hours: 1,766.

Estimated Total Annual Cost to Public: $1,300.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 19, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–11911 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–NK–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 060303D]

Atlantic Highly Migratory Species (HMS); Issues and Options Paper for Amendment 2 to the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks (HMS FMP) and Amendment 2 to the Atlantic Billfish Fishery Management Plan (Billfish FMP); Additional Public Scoping Meeting and Extension of Comment Period

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

ACTION: Notice of additional public scoping meeting; extension of comment period.

SUMMARY: In a previously published notice, NMFS announced the availability of an issues and options paper and the schedule of nine scoping meetings to discuss the issues described in the paper. In this notice, NMFS announces one additional scoping meeting and extends the comment period on the issues and options paper. Comments received on the issues and options paper and in the scoping meetings will assist NMFS in developing Amendment 2 to the HMS FMP and Amendment 2 to the Billfish FMP.

DATES: The additional public scoping meeting will be held on: Thursday, June 17, 2004, from 6:30 - 8:30 p.m.

The July 14, 2004, comment period on the issues and options paper has been extended to July 23, 2004.

ADDRESSES: The additional public scoping meeting will be held in: Pier House Hotel, 1 Duval Street, Key West, FL 33040.

Written comments on the issues and options paper 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 may also be submitted by e-mail: *060303D.issues@noaa.gov*.

Copies of the issues and options paper or the HMS and Billfish FMPs can be obtained from the HMS website at: *http://www.nmfs.noaa.gov/sfa/hms*, by contacting Karyl Brewster-Geisz at (301) 713–2347, or by writing to the address above.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz at (301) 713–2347, Mark Murray-Brown at (978) 281–9260, or Russell Dunn at (727) 570–5447.

SUPPLEMENTARY INFORMATION: Atlantic tuna, swordfish, shark and billfish fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act and regulated pursuant to the Atlantic Tunas Convention Act (ATCA), which authorizes the promulgation of rulemakings to implement recommendations of the International Convention for the Conservation of Atlantic Tunas (ICCAT). Implementing regulations for both the HMS FMP and the Billfish FMP are at 50 CFR part 635. On April 30, 2004 (69 FR 23730), NMFS published in the **Federal Register** a notice of availability of an issues and options paper that examines possible alternatives for amending some of the regulations in the HMS and Billfish FMPs. That notice included the schedule for nine scoping meetings in Gloucester, MA; Ocean City, MD; New Orleans, LA; Manteo, NC; San Juan, PR; Destin, FL; Montauk, NY; Port Aransas, TX; and Cocoa Beach, FL. Complete schedule information of those public scoping meetings along with information pertaining to the issues and options paper are contained in the April 30, 2004, notice of availability and are not repeated here.

Since the publication of the notice of availability, NMFS has scheduled one additional scoping meeting in Key West, FL, to allow interested parties an additional chance to comment on and discuss the issues included in the issues and options paper.

Additionally, to help ensure that all interested parties have adequate time to prepare their written comments, NMFS is extending the July 14, 2004, public comment period on the issues and options paper to July 23, 2004.

The public is reminded that NMFS expects participants at the public meetings to conduct themselves appropriately. At the beginning of each public scoping meeting, an NMFS representative will explain the ground rules (e.g., alcohol is prohibited from the hearing room; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; and attendees should not interrupt one another). An NMFS representative will attempt to structure the meeting so that all attendees will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and, if they do not, they will be asked to leave the meeting.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Heather Stirratt, (301) 713–2347, at least seven days prior to the meeting date.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: May 20, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–11912 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Technology Administration

Undersecretarial Business Development Mission for Technology Industries to Northern Ireland and the Republic of Ireland October 17–22, 2004

AGENCY: Technology Administration, U.S. Department of Commerce.

ACTION: Notice; request for applications by U.S. technology-based companies representing the information and communications technology (ICT) sector.

SUMMARY: Department of Commerce technology-sector leaders will organize a senior-level business development mission to Belfast and Derry, Northern Ireland (N.I.) and Dublin, Republic of Ireland (R.O.I.).

The focus of the mission is to help U.S. companies explore business opportunities in both Northern Ireland and the Republic of Ireland and the newly expanded EU marketplace. The delegation will include U.S. based senior executives representing the information and communications technology (ICT) sector. Technology products and services have become an increasingly important part of U.S. trade with Northern Ireland and the Republic of Ireland, with both regions possessing highly skilled technology workers and end users.

Therefore, emphasis will also be placed on advancing market awareness, development of strategic alliances in high-technology services and building networks that can further the collaboration of business opportunities in technology related markets.

DATES: Applications for the business development mission to Northern Ireland and the Republic of Ireland will be made available on or about June 1, 2004 (*See* Timeframe for Applications) and must be completed and received at the address below by no later than August 2, 2004.

ADDRESSES: Please submit applications to Nancy Hesser, Sector Manager, U.S. Commercial Service, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 2119, Washington, DC 20230. Applications may also be submitted via fax or e-mail to Nancy Hesser, Sector Manager at (202) 482–2718 or e-mail *nancy.hesser@mail.doc.gov.*

FOR FURTHER INFORMATION CONTACT: Saul Summerall, International Office of Technology Policy, Technology Administration, U.S. Department of Commerce, telephone: (202) 482–6809; fax: (202) 501–6849; e-mail: *saul.Summerall@technology.gov.*

Commercial Setting for the Mission

The Republic of Ireland

With 3.9 million people, a vibrant economy, and a young and highly educated workforce, the Republic of Ireland represents an ideal market for U.S. companies seeking to find agents, distributors, and strategic partners for business opportunities in the expanding EU marketplace. For several years, the Republic of Ireland has been the fastest-growing economy in the European Union. For the first time, after years of double-digit growth fueled in part by a rapidly expanding labor force, in 2002 Ireland experienced single-digit real economic growth of 6.9 percent. Due primarily to the appreciation of the euro, growth in the Irish economy dropped further in 2003 to 2.5 percent, slightly below that of the U.S. and Japan, but still keeping Ireland in the lead in Europe. Most economists believe that a maturing Irish economy is well poised to achieve stable annual growth rates over the medium-term of 4 to 5 percent. This is predicated on the Irish investing significantly in infrastructure, especially in transport, energy, and telecommunications.

A member of the European Union (EU) since 1973, the Irish economic model reflects an emphasis on open markets, less government regulation, flexible labor markets, and fiscal incentives to business (including low corporate taxes). As a small-island economy, the Republic of Ireland is dependent on international trade and open access to overseas markets. With a total trade surplus of approximately $24 billion in 2003, Ireland is a net exporting nation. International trade (imports and exports of goods and services) totaled $238 billion in 2003—the equivalent of 150 percent of GDP. In 2003, merchandise exports from Ireland were $93 billion—representing 60 percent of Ireland's Gross Domestic Product (GDP)—while merchandise imports were some $54 billion.

The U.S. and Ireland have strong and deepening economic and commercial links. Total two-way merchandise trade is about $27 billion. The United States is Ireland's second largest trading partner after the United Kingdom. The U.S. share of Ireland's import market is around 15 percent, or $8 billion annually while approximately 15 percent of total Irish exports annually are to the United States. With some $42 billion invested by 570 U.S. firms who employ over 90,000 people, the United States is the largest source of foreign direct investment in the Republic of Ireland. Exports from Ireland by U.S. subsidiaries over the past ten years have accounted for upwards of 30 percent of total Irish exports annually.

The ICT sector has been a key driver to Ireland's remarkable economic growth over the past 15 years, and the Irish government is endeavoring to ensure the sector will continue to play an important role in maintaining strong economic growth in the future. There is also general recognition and appreciation that U.S. foreign direct investment has helped stimulate the ICT sector during this period of rapid economic growth.

This maturing ICT sector with its inherent expertise and acumen of international business principles offers new and exciting opportunities for U.S. ICT firms interested in the Irish and EU markets. Specifically, Ireland offers the prospect of strategic business relationships between U.S. and Irish companies such as joint ventures, licensing arrangements, technology transfer agreements, agent/distributorships, and logistics & valued added services relationships. These linkages allow U.S. companies to capitalize on the skills and knowledge of Irish partners to access and penetrate the Irish and European marketplaces more effectively and efficiently.

Northern Ireland

Geographically, Northern Ireland is the UK's smallest region, being slightly smaller than Connecticut. In recent years, Northern Ireland has enjoyed one of the faster regional growth rates within the United Kingdom, all together it accounts for about 2 percent of the UK economy. Economic growth has been fueled by the province's knowledge revolution, where the high tech sector has benefited from significant support from the EU and the Northern Ireland government in the form of direct incentives and massive investment in education and R&D. The information and communication technology market is one of the fastest growing sectors in Northern Ireland and has been a driving force behind the province enjoying the fastest growth rate of any UK region. The North has also benefited significantly from the dynamic ROI economy. With overall economic growth in the UK now expected to be in excess of 3.5 percent in 2004, the province's economy should continue to be strong.

Northern Ireland has gone through an industrial transformation with over 85 percent of the GDP now generated in the services and high-tech manufacturing sectors. More than 90 percent of jobs generated in recent years have been in

the telecommunications, software, and information sectors.

The key investors in Northern Ireland have been U.S. firms, having injected over $4 billion in the last few years. The firms have responded to the fact that Northern Ireland's universities (Queens and University of Ulster) produce a higher percentage of IT qualified students than any other UK region. More than 13 percent of all students graduate with engineering degrees in software, robotics, telecommunications, digital signal processing, biomedical and microelectronics.

There are over 100 American companies invested in Northern Ireland. These investors have created more than 4,000 new jobs in Northern Ireland. Significant investors include Nortel Networks, Allstate, Skillsoft, Seagate Technology, Liberty Mutual, Raytheon, and Allen Systems Group. Software firms are buoyed by access to and support from many research centers including the Northern Ireland Knowledge Engineering Laboratory, the Digital Signal Processing and System-on-Chip laboratories, and the Northern Ireland Center for e-Business. Communications firms are supported by the Institute for Electronic Communications and Information Technology, the Advanced Telecommunications Laboratory, the Center for Advanced Materials, the Semiconductor Research Center and the Bio-Engineering Center.

Although the message from Northern Ireland is good, it must be understood that Northern Ireland is not a significant location for agents/distributors. Firms located in either the Republic of Ireland and Great Britain have historically performed that function. While the small Northern Ireland population indicates there is only a minor market for U.S. sales, the provinces' high-tech expertise offers abundant potential for strategic alliances and other two-way relationships; *e.g.,* exchanging software, contracting services and prospective business development opportunities.

Goals for the Mission

The business development mission will further both U.S. commercial policy objectives and advance specific business interests. The mission is focused on:

- Introducing U.S. companies to the Northern Ireland and Republic of Ireland markets and furthering commercial relationships.
- Assisting small and new-to-market U.S. firms in evaluating the market potential for their products and to gain an understanding of how to operate successfully in the Northern Ireland and Republic of Ireland markets, and the recently expanded EU marketplace.
- Highlighting market accessibility and successes of U.S. businesses in these markets.
- Fostering dialog between policy makers and academics in the technology arena of the U.S., Northern Ireland, and the Republic of Ireland.
- Providing access to senior government officials and potential business partners for U.S. firms.

Scenario for the Mission

The Business Development Mission is a two and three day business program designed to provide participants with exposure to business, academic, and government contacts with an understanding of market and technology trends and the commercial environment of Northern Ireland and the Republic of Ireland.

Senior officials from two of the Department of Commerce's leading bureaus, charged with advancing the interests of the technology and telecommunication sectors, will lead the mission. The Technology Administration (TA) and the National Telecommunications and Information Administration (NTIA) are well suited to facilitate policy discussions with their Irish counterparts.

Further, U.S. Embassy and Consulate General officials will provide detailed briefings on the economic, commercial and political climates, and participants will receive individual counseling on their specific interests from U.S. Commercial Service industry specialists. Meetings will be arranged as appropriate with senior government decision makers, academic/technical institutions and relevant businesses. Representational events also will be organized to provide mission participants with opportunities to meet senior business and government representatives, as well as resident U.S. business people.

The tentative trip itinerary will be as follows:

Sunday, October 17—Arrive Belfast, Northern Ireland, evening events and briefing.

Monday, October 18—One-on-One Business Meetings in Belfast, Group policy meetings.

Tuesday, October 19—Business and Policy Meetings in Derry, Travel to Dublin, Republic of Ireland.

Wednesday, October 20—One-on-One Business Meetings; Group policy meetings, mission events, and briefings in Dublin.

Thursday, October 21—One-on-One Business Meetings, Group policy meetings, mission events, and briefings in Dublin.

Friday, October 22—Departure.

The precise schedule will depend in part on the availability of local government and business officials and the specific goals of the mission participants.

Criteria for Participation of Companies

Eligibility

Participating companies must be incorporated in the United States. A company is eligible to participate only if the products and/or services that it will promote (a) are manufactured or produced in the United States; or (b) if manufactured or produced outside the United States, are marketed under the name of a U.S. firm and have U.S. content representing at least 51 percent of the value of the finished good or service.

Selection Criteria

Company participation will be determined on the basis of:

- Relevance of the company's business line to the mission scope and goals.
- Potential for business activity in Northern Ireland and the Republic of Ireland as applicable.
- Level of seniority of the designated company representatives and consistency of company's goals with the scope and desired outcome of the mission as described herein.
- Timely receipt of a completed application and participation agreement signed by a company officer and the participation fee.
- Provision of adequate information on the company's products and/or services, and communication of the company's primary objectives to facilitate appropriate matching with potential business partners.

In addition, the Department may consider whether the company's overall business objectives, including those of any U.S. or overseas affiliates, are fully consistent with the mission's objectives. Any partisan political activities of an applicant, including political contributions, will be entirely irrelevant to the selection process.

Time Frame for Applications

Applications for the business development mission to Northern Ireland and the Republic of Ireland will be made available on or about June 1, 2004. The fee to participate in the mission will be between $2,500.00 and $3,500.00 (depending on the size of the business delegation) and will not cover travel or lodging expenses. For

additional information on the business development mission or to obtain an application, respondents should refer to the contacts listed below. Completed applications should be submitted to the address below by August 2, 2004 to ensure timely arrangements for in-country appointments for applicants selected to participate in the mission.

Nancy Hesser, Sector Manager, U.S. Commercial Service, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 2119, Washington, DC 20230. Telephone (202) 482–4663, e-mail: *nancy.hesser@mail.doc.gov.*

Applications may also be submitted via fax to (202) 482–2718 by August 2, 2004. Applications received after that date will be considered only if space and scheduling constraints permit.

The name, telephone number, and address for the contact person for the business development mission is:

Saul Summerall, International Office of Technology Policy, Technology Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4817, Washington, DC 20230, Telephone: (202) 482–6809, Fax: (202) 501–6849, e-mail: *Saul.Summerall@technology.gov.*

Dated: May 18, 2004.

Benjamin Wu,

Deputy Under Secretary for Technology.

[FR Doc. 04–11929 Filed 5–25–04; 8:45 am]

BILLING CODE 3510–GN–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

New Information Collection; Submission for OMB Review; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted a proposed new public information collection request (ICR) entitled Parent Corps Evaluation to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13), (44 U.S.C. chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Kelly Arey, (202) 606–5000, ext. 197. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

DATES: Comments must be received on or before June 25, 2004.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, by any of the following two methods:

(1) By fax to: (202) 395–6974, Attention: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to: *Katherine_Astrich@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: Parent Corps Evaluation.

OMB Number: None.

Agency Number: None.

Affected Public: Individuals and households.

Total Respondents: 3,700.

Frequency: Annually.

Average Time per Response: 15 minutes.

Estimated Total Burden Hours: 1,654 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description

Parent Corps Evaluation: The Corporation proposes to conduct an evaluation of the Parent Corps program. The Parent Corps is a three-year effort to create a national training system and network of volunteer parents engaged in a nationwide substance abuse prevention effort. Using a ''training the trainer'' model, organizations will work with volunteer coordinators to train and support volunteer parents of children aged 18 or younger in providing drug prevention training.

The specific aims of this evaluation are to describe the implementation of the Parent Corps program (implementation evaluation) and to evaluate its impact on desired outcomes (experimental impact evaluation). The implementation evaluation will include all 20 schools to be targeted by the Parent Corps. The randomized experiment impact evaluation will include parents and children at 18 schools (9 schools targeted by the Parent Corps and 9 control schools). These 18 treatment and control schools will be selected via the Parent Corps' request for applications process.

Key research questions include changes in the following outcomes: perceived risk/harm from youth substance use (tobacco, alcohol, or illicit drug use), accuracy of perceptions about youth substance use, parents' perceived susceptibility of their own youth to substance use, parents' self-efficacy to influence their youth's substance use, intervention activities among parents aware of their youth's substance use, treatment-seeking for their youth's substance use, and parenting skills. In addition, information will be collected from youths aged 12 to 18 living with surveyed parents about involvement in drug-free activities, their parents' parenting skills, parent-child communication, perceived risk/harm from youth substance use, accuracy of perceptions about youth substance use, association with drug-using peers, perceived susceptibility to substance use and intentions to use substances, substance use, exposure to prevention program activities, and demographic characteristics. Implementation evaluation data will be collected primarily through questionnaires mailed to parent leaders and parent volunteers delivering the program, and impact evaluation data will be collected via computer-assisted telephone interview (CATI) with parents and their children aged 12 to 18 who attend treatment or control schools.

Dated: May 19, 2004.

David Reingold,

Director, Research and Policy Development.

[FR Doc. 04–11868 Filed 5–25–04; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Department of the Navy

Record of Decision for Proposed Future Military Operational Increases and Implementation of Associated Comprehensive Land Use Management Plan and Integrated Natural Resources Management Plan, China Lake, CA

AGENCY: Department of the Navy, DOD.

ACTION: Notice of record of decision.

SUMMARY: The Department of the Navy announces its decision to support future military operational increases and implementation of the associated Comprehensive Land Use Management Plan (CLUMP) and Integrated Natural Resources Management Plan (INRMP) at Naval Air Weapons Station (NAWS) China Lake, CA.

FOR FURTHER INFORMATION CONTACT: Commander, NAWS-Code N45NCW, 429 East Bowen Road, MS 4014, China Lake, CA 93555–6108 (Attn: Mr. John O'Gara); phone (760) 939–3213; facsimile (760) 939–2980; or E-Mail: *john.ogara@navy.mil.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. § 4321 *et seq.*); Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500–1508); and Department of the Navy regulations (32 CFR 775), the Department of the Navy (Navy) announces its decision to support future military operational increases and implementation of the associated CLUMP and INRMP at NAWS China Lake, CA. This will be accomplished as set out in the Moderate Expansion Alternative as described in the Final Environmental Impact Statement (EIS). This decision will enable the Navy to meet its established mission to support state-of-the-art air warfare weapons systems testing and evaluation and the operational readiness of the military services on both existing facilities and infrastructure and safe, operationally realistic, and thoroughly instrumented land ranges.

Background and Issues: As the Navy's full-spectrum Research, Development, Test, and Evaluation (RDT&E) center for weapons systems associated with air warfare, aircraft weapons integration, missiles and missile subsystems, and assigned airborne electronic warfare systems, NAWS China Lake is host to the Naval Air Warfare Center Weapons Division (NAWCWD) and other DOD activities. To support NAWCWD's RDT&E mission and military readiness training, NAWS China Lake schedules, controls, and maintains 1.1 million acres of fully instrumented land ranges.

Continued use of these land ranges requires compliance with the California Desert Protection Act of 1994 and the Sikes Act, as amended in 1997. Implementation of the CLUMP and the INRMP will enable NAWS China Lake to beneficially manage environmental, land, and cultural resources such that there is no net loss in the capability of the installation to support its existing military mission. These plans will also facilitate environmentally sound resource management decisions when responding to planned increases in and emerging military readiness needs.

Alternatives Considered: A screening process, based upon criteria set out in the Final EIS, was conducted to identify a reasonable range of alternatives that would satisfy the Navy's purpose and need. Two operational alternatives and the no action alternative were analyzed in detail in the Final EIS.

The preferred alternative is the Moderate Expansion Alternative, which provides NAWS China Lake with the greatest flexibility to accommodate evolving Navy and DOD Test and Evaluation (T&E) and operational readiness needs. This alternative involves phasing future military operational increases over a five-year period, according to operational needs. These operational increases would include: a 25-percent increase over the type and tempo of current range flight operations, airfield flight operations, range ground operations; and, an increase in range supersonic flights from 36 to 100 operations per year. An increase in ground troop training exercises from 22 to 42 events per year is also proposed. Nonmilitary activities would continue according to current patterns of use. The implementation of the CLUMP and INRMP would provide for the sound management of land use and environmental resources to accommodate future moderate operational increases.

The Limited Expansion Alternative also provides for a five-year phase-in of increased military operations at NAWS China Lake, in accordance with operational needs. However, military operational increases would be less than those proposed under the Moderate Expansion Alternative, and would include: a 15-percent increase over the type and tempo of current range flight operations, airfield flight operations, range ground operations; and, an increase in range supersonic flights from 36 to 100 operations per year. An increase in ground troop training exercises from 22 to 41 events per year is also proposed. Nonmilitary activities would continue according to current patterns of use. The implementation of the CLUMP and INRMP would provide for the sound management of land use and environmental resources to accommodate future limited operational increases.

Under the No Action Alternative, existing operating conditions at NAWS China Lake would be maintained at current levels as set forth in the Final EIS. Nonmilitary activities would continue according to current patterns of use. As required by law, the CLUMP and INRMP would be implemented under this alternative to provide for the management of land use and environmental resources to accommodate the type, tempo, and location of military T&E and training operations currently conducted at NAWS China Lake. The No Action Alternative is the environmentally preferred alternative because it involves the least amount of change to the physical environment.

Environmental Impacts: Potential environmental impacts associated with the three alternatives were analyzed in the Final EIS. Because on-going and future operational increases will continue to occur in range areas that have been previously disturbed (including those areas that may have been underutilized in the recent past), and the objectives of the CLUMP and INRMP are to institute land use and environmental management practices that minimize the potential for adverse effects, no significant environmental impacts were identified to any of the resource areas. Consequently, no mitigation measures are proposed.

The CLUMP will be implemented in accordance with the 1994 Memorandum of Agreement between the Secretary of the Interior and the Secretary of the Navy regarding the management of withdrawn lands at NAWS China Lake. Implementation of the CLUMP and INRMP will result in beneficial impacts at NAWS by standardizing baseline data for land use patterns and environmental resources using electronic mapping technology (Geographic Information Systems), and formalizing and integrating the station's environmental review process with facility, infrastructure, and operational planning processes. CLUMP implementation will facilitate the environmental reviews of on-going and proposed military test and training activities, potential facilities construction, operation and maintenance efforts and related support activities, and nonmilitary uses. Information regarding other Federal regulatory processes associated with this action is presented below.

The Navy initiated formal consultation under Section 7 of the Endangered Species Act with the U.S. Fish and Wildlife Service (USFWS) in 1990, 1995, and 1997, respectively, for each of the three protected wildlife species occurring at China Lake: the Inyo California towhee, the desert tortoise, and the Mojave tui chub. The USFWS issued Biological Opinions (BOs) for the three species that cover a range of actions from habitat maintenance and enhancement, to a programmatic BO for the desert tortoise encompassing established military operations conducted in tortoise habitat on NAWS. The Navy has determined that the preferred alternative is consistent with the terms and conditions of the existing BOs and would not adversely affect Federally listed species. USFWS has confirmed this conclusion through informal consultation with NAWS throughout the NEPA process.

NAWS China Lake employs a phased approach to compliance with Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470). The California State Historic Preservation Officer (SHPO) has concurred that the NAWS approach is consistent with NHPA regulations. In addition, a draft Programmatic Agreement (PA) has been developed to facilitate the protection of cultural resources. This PA will be finalized through formal consultation in accordance with comments received from the California SHPO and area Tribes. NAWS China Lake will continue to implement appropriate management plans and procedures to ensure compliance with the NHPA, and to consult and coordinate (as appropriate) with the California SHPO and area Tribes.

Response To Comments Received Regarding the Final EIS: The Final EIS was distributed to government agencies and the public on March 05, 2004, for a 30-day public review period. During this period only two comment letters were received, both from private landowners in the vicinity of NAWS China Lake. The comments identified concerns related to air quality, range safety, potential seismic events, off-station land uses, access to station property, airspace management, and aircraft operations. Some of the comments are not related to the proposed action or the Final EIS and would be more appropriately directed toward local civil authorities or the NAWS China Lake Public Affairs Office. No new substantive issues concerning the proposed action were raised in the comments received. All of the issues raised in comment letters were thoroughly analyzed and discussed in the Final EIS.

Conclusions: After carefully considering the purpose and need for the proposed action, the analyses contained in the Final EIS, and the comments received on the Draft and Final EIS from Federal, state, and local agencies, non-governmental organizations, and individual members of the public, I have determined that the preferred alternative, the Moderate Expansion Alternative, will best meet the needs of the Navy.

Implementation of the Moderate Expansion Alternative will enhance the existing assets and capabilities of NAWS China Lake; provide for meeting current and evolving Navy and DOD operational, testing, and training requirements; and achieve Navy compliance with the California Desert Protection Act of 1994 and the Sikes Act, as amended in 1997.

Dated: May 19, 2004.

Donald R. Schregardus,

Deputy Assistant Secretary of the Navy (Environment).

[FR Doc. 04–11906 Filed 5–25–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 25, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Alice Thaler, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: May 20, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title: Assurances for the Protection and Advocacy for Assistive Technology (PAAT) Program.

Frequency: Periodically.

Affected Public: Not-for-profit institutions; State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1.

Burden Hours: 9.

Abstract: This document will be used by grantees to request funds to carry out the PAAT program. PAAT is mandated by the Assistive Technology Act of 1998, to provide protection and advocacy services to individuals with disabilities for the purposes of assisting in the acquisition, utilization, or maintenance of assistive technology or assistive technology services.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2471. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at her e-mail address *Sheila Carey@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–11866 Filed 5–25–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 26, 2004.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 20, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: New.

Title: The Professional Development Impact Study—Participating District and School Screening Protocols.

Frequency: One time.

Affected Public: Not-for-profit institutions (primary).

Reporting and Recordkeeping Hour Burden:

Responses: 179.

Burden Hours: 179.

Abstract: The current OMB package requests clearance for the instruments to be used in screening districts and schools for eligibility to participate in the Professional Development Impact Study. To be eligible for the full study, districts and schools must meet a list of criteria that are designed to ensure that the study sample is relevant to the purposes of the study (*e.g.*, are implementing one of two scientifically based reading programs of interest in the study) and are relevant to current legislation such as the NCLB Act (*e.g.*, districts and schools serve high poverty students).

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2557. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–11867 Filed 5–25–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket Nos. EA–261–A and EA–263–A]

Applications To Export Electric Energy; UBS AG, London Branch

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of applications.

SUMMARY: Under separate applications, UBS AG, London Branch (UBS) has applied to renew its authority to transmit electric energy from the United States to Mexico and from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before June 25, 2004.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. § 824a(e)).

On June 3, 2002, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued Order No. EA–261 authorizing UBS to transmit electric energy from the United States to Mexico as a power marketer using existing international electric transmission facilities. That two-year authorization will expire on June 3, 2004. On June 4, 2002, FE issued Order No. EA–263 authorizing UBS to transmit electric energy from the United States to Canada as a power marketer using existing international electric transmission facilities. That two-year authorization will expire on June 4, 2004.

On April 30, 2004, the FE received applications from UBS to renew its authorizations to transmit electric energy from the United States to Mexico and from the United States to Canada for terms of five years. UBS, a Swiss corporation formed in 1998 by the merger of Union Bank of Switzerland

and Swiss Bank Corporation, is a power marketer that does not own or control any electric generation or transmission facilities nor does it have any franchised service territory in the United States.

In FE Docket No. EA–261–A, UBS proposes to export electric energy to Mexico and to arrange for the delivery of those exports to Mexico over the international transmission facilities owned by San Diego Gas and Electric Company, El Paso Electric Company, Central Power and Light Company, and Comision Federal de Electricidad (CFE), the national electric utility of Mexico.

In FE Docket No. EA–263–A, UBS proposes to export electric energy to Canada and to arrange for the delivery of those exports over the international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power, Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company.

The construction of each of the international transmission facilities to be utilized by UBS, as more fully described in the applications, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to these applications should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the dates listed above.

Comments on the UBS applications to export electric energy to Mexico and/or Canada should be clearly marked with Docket EA–261–A and/or Docket EA–263–A, respectively. Additional copies are to be filed directly with Andrea M. Settanni, Bracewell & Patterson, L.L.P., 2000 K Street, NW., Suite 500, Washington, DC 20006–1872 *AND* Suzanne Calcagno, Director, Regulatory Compliance, UBS Energy LLC, 677 Washington Blvd., 8th Floor, Stamford, CT 06901.

Copies of these applications will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://www.fe.doe.gov*. Upon reaching the Fossil Energy Home page, select ''Electricity Regulation,'' and then ''Pending Proceedings'' from the options menus.

Issued in Washington, DC, on May 20, 2004.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 04–11905 Filed 5–25–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket Nos. PP–234 & PP–235]

Notice Extending Comment Period and Rescheduling Public Hearings on the Draft EIS for the Imperial-Mexicali 230-kV Transmission Lines; Baja California Power, Inc. and Sempra Energy Resources

AGENCY: Department of Energy (DOE).

ACTION: Notice of hearings.

SUMMARY: The Department of Energy (DOE), with the Department of the Interior's Bureau of Land Management (BLM) as a cooperating agency, announces the extension of the public comment period for the ''Imperial-Mexicali 230-kV Transmission Lines Draft Environmental Impact Statement'' (DOE/EIS–0365). In addition, the public hearings to receive comments on the Draft EIS, originally scheduled for June 17, 2004, have been rescheduled for July 14, 2004.

DATES: The comment period on the Draft EIS is extended until July 30, 2004.

Dates for the public hearings are:

1. July 14, 2004, 11 a.m. to 1 p.m., El Centro, California.
2. July 14, 2004, 6 p.m. to 8 p.m., Calexico, California.

ADDRESSES: Requests to speak at the public hearings should be addressed to: Mrs. Ellen Russell, Office of Fossil Energy (FE–27), U.S. Department of Energy, Washington, DC 20585, or transmitted by phone: 202–586–9624, by facsimile: 202–287–5736, or by electronic mail at *Ellen.Russell@hq.doe.gov*.

The locations of the public hearings are:

1. El Centro City Hall, 1275 W. Main Street, El Centro, California.
2. Calexico City Hall, 608 Heber Street, Calexico, California.

Printed copies of the Draft EIS may be obtained by contacting Mrs. Russell through one of the means provided above. The Draft EIS is also available at the offices of the Bureau of Land Management, 1661 South Fourth Street, El Centro, CA 92243, (telephone 760–337–4400), and on the Internet at *http://web.ead.anl.gov/bajatermoeis* and *http://www.eh.doe.gov/nepa*, under ''What's New.''

SUPPLEMENTARY INFORMATION:

The Draft EIS evaluates the environmental impacts of DOE's proposed Federal actions of issuing Presidential permits to either Baja California Power, Inc. or Sempra Energy Resources (also known as Intergen and Sempra, respectively), or to both, for the construction, operation, maintenance, and connection of two double-circuit, 230,000-volt electric transmission lines that would cross the United States international border in the vicinity of Calexico, California, and connect to separate natural gas-fired electric power plants that have been constructed in Mexico. BLM's proposed Federal actions are the issuance of right-of-way grants to allow the transmission lines to cross Federal lands within BLM's management responsibility.

On May 11, 2004, DOE published a notice in the **Federal Register** (69 FR 26089) announcing the availability of the Draft EIS and a schedule for public hearings. The Environmental Protection Agency published its notice of availability of the Draft EIS (EPA Document No. 040222) on May 14, 2004 (69 FR 26817) that began a 45-day comment period which was to end on June 30, 2004. However, at the request of the Border Power Plant Working Group, DOE is extending the comment period until July 30, 2004. In addition, the public hearings originally scheduled for June 17, 2004, have been rescheduled to July 14, 2004. Further information on this proceeding is contained in the DOE Notice of Availability previously referenced.

Issued in Washington, DC, on May 20, 2004.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 04–11904 Filed 5–25–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–808–000]

Ameren Services Company; Notice of Filing

May 11, 2004.

Take notice that on May 3, 2004, Ameren Services Company (ASC) tendered for filing an executed Network Integration Transmission Service and a Network Operating Agreement between ASC and EnerStar Power Corp. ASC requests an effective date of April 1, 2004.

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: May 24, 2004.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1212 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–336–000]

Dominion Transmission, Inc.; Notice of Application

May 19, 2004.

Take notice that on May 13, 2004, Dominion Transmission, Inc. (DTI), having its principal place of business at 120 Tredegar Street, Richmond, Virginia 23219, filed a prior notice request pursuant to 18 CFR 157.205 and 157.208 of the Commission's regulations under the Natural Gas Act, and DTI's authorization in Docket CP82–537–000, 21 FERC ¶ 62,171 (1982), to reroute a 3,000-foot segment of its existing transmission pipeline designated as TL–263, and to replace in total approximately eight miles of 12″ pipe between Wyoming, WV and Cheylan, WV. DTI states that the project is necessary due to deteriorated segments of pipeline that have been identified through field testing. This filing may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this request should be directed to Lorraine Cote, Dominion Transmission, Inc. 120 Tredegar Street, Richmond, VA 23219 (toll-free) 866–319–3382.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 385.214 or 385.211) and the regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: June 9, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1211 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–179–003]

National Fuel Gas Supply Corporation; Notice of Compliance Filing

May 19, 2004.

Take notice that on May 13, 2004, National Fuel Gas Supply Corporation (National Fuel) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Fifth Revised Sheet No. 478, to become effective July 1, 2004.

National Fuel states that the instant filing is being made in compliance with the letter order issued by the Commission on March 31, 2004, in Docket No. RP04–179–000. National Fuel states that in compliance with that directive, it submits Fifth Revised Sheet No. 478 and a red-lined copy of Service Agreement No. F10706.

National Fuel states that copies of this filing were served upon its customers and interested State commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's rules and regulations. All such protests must be filed in accordance with § 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1214 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–335–000]

Questar Pipeline Company; Notice of Request Under Blanket Authorization

May 19, 2004.

Take notice that on May 11, 2004, Questar Pipeline Company (Questar), 180 East 100 South, Salt Lake City, Utah 84111, filed in Docket No. CP04–335–000 a request pursuant to sections 157.208(b) and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.208) for authorization to construct and operate a 13.4 mile, 20-inch diameter delivery lateral, a measurement and control station and appurtenances in Utah and Juab Counties, Utah, under the authorization issued in Docket No. CP82–491–000 pursuant to section 7 of the Natural Gas Act, all as more fully described in the request.

Questar states that copies of this request are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions concerning this request may be directed to Lenard G. Wright, Director of Federal Regulation, Questar Pipeline Company, 180 East 100 South, Salt Lake City, Utah 84111 at (801) 324–2459 or *lenard.wright@questar.com*.

Questar asserts that the delivery lateral would extend from the western terminus of Questar's Main Line No. (ML) 104 to PacifiCorp's Currant Creek Power Project (PacifiCorp's Project).

Questar states that its proposed delivery lateral, to be known as Jurisdictional Tap Line (JTL) 113, would extend approximately 13.4 miles from the west end of Questar's ML 104 pipeline, near Elberta, in Utah County, Utah, to PacifiCorp's Project, located approximately two miles west of the city of Mona in Juab County, Utah. Questar explains that JTL 113 would provide transportation service to PacifiCorp's Project under a long-term Firm Transportation Service Agreement listed as Exhibit A to the Precedent Agreement for Firm Transportation Service between Questar and PacifiCorp.

Questar maintains that the estimated project cost would be $13.5 million.

Any person or the Commission's Staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to rule 214 of the Commission's procedural rules (18 CFR 385.214) a motion to intervene or notice of intervention and, pursuant to section 157.205 of the Commission's regulations under the Natural Gas Act (NGA) (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1210 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–312–138]

Tennessee Gas Pipeline Company; Notice of Negotiated Rates

May 19, 2004.

Take notice that on May 14, 2004, Tennessee Gas Pipeline Company, (Tennessee) tendered for filing certain exhibits to two amendments to two Gas Transportation Agreements, dated November 1, 2002, between Tennessee and Calpine Energy Services L.P. pursuant to Tennessee's Rate Schedule FT–A (Negotiated Rate Agreements). Tennessee states that its filing is made in compliance with the Commission's April 30, 2004, Letter Order in the referenced docket.

In accordance with the Letter Order, Tennessee requests the amendments to the Negotiated Rate Agreements to be effective on April 1, 2004.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or § 385.211 of the Commission's rules and

regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1209 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–298–000]

Trailblazer Pipeline Company; Notice of Revenue Report

May 19, 2004.

Take notice that on May 14, 2004, Trailblazer Pipeline Company (Trailblazer) tendered for filing its report to inform the Commission of penalty revenues it has received in the quarter ended March 31, 2004.

Trailblazer states that copies of the filing are being mailed to its customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or § 385.211 of the Commission's rules and regulations. All such motions or protests must be filed on or before the date as indicated below. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Comment Date: May 25, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1215 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–180–000, et al.]

Tejas Energy NS, LLC, et al.; Electric Rate and Corporate Filings

May 18, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Tejas Energy NS, LLC, Tejas Coral Energy, LLC, Tenaska Gateway Partners, Ltd., Osaka Gas Gateway Power, LLC, and Osaka Rusk Gateway Power, LLC

[Docket No. EC04–108–000]

Take notice that on May 14, 2004, Tejas Energy NS, LLC, Tejas Coral Energy, LLC (together, the Tejas Parties), Tenaska Gateway Partners, Ltd. (Tenaska Gateway), Osaka Gas Gateway Power, LLC and Osaka Gas Rusk Power, LLC (together, the Osaka Parties) (collectively, Applicants) filed with the Federal Energy Regulatory Commission a joint application requesting authorization under section 203 of the Federal Power Act for the Tejas Parties to transfer all of their respective partnership interests in Tenaska Gateway, an 845 MW natural gas-fired combined cycle power plant located in Rusk County, Texas, to the Osaka Parties.

Applicants state that copies of the application were served upon the Public Utility Commission of Texas and Coral Power L.L.C.

Comment Date: June 4, 2004.

2. NM Colton Genco LLC, NM Mid-Valley Genco LLC, NM Milliken Genco LLC

[Docket No. EC04–109–000]

Take notice that on May 14, 2004, NM Colton Genco LLC, NM Mid-Valley Genco LLC, and NM Milliken Genco LLC filed with the Commission an application pursuant to section 203 of the Federal Power Act for authorization for the change in control of jurisdictional facilities resulting from the upstream change in ownership of NM Colton Genco LLC, NM Mid-Valley Genco LLC and NM Milliken Genco LLC.

Comment Date: June 4, 2004.

3. Soyland Power Cooperative, Inc.

[Docket No. ER04–629–001]

Take notice that on May 14, 2004, Soyland Power Cooperative, Inc. (Soyland) tendered for filing revised rate sheets in compliance with the Commission's April 22, 2004, letter order in Docket No. ER04–629–000.

Comment Date: June 4, 2004.

4. Western Systems Power Pool, Inc.

[Docket No. ER04–777–000]

Take notice that on May 17, 2004, the Western Systems Power Pool, Inc. (WSPP) requested amendment of the WSPP Agreement to include Citigroup Energy, Inc. (CEI) and Direct Energy Marketing, Inc. (DEM) as participants. The WSPP seeks an effective date of January 26, 2004, for DEM's membership and February 18, 2004, for CEI's membership.

WSPP states that copies of this filing will be served upon Mark Sickafoose, Director of Global Commodities for CEI; Margaret Moore and Vincenzo Franco of Van Ness Feldman, P.C., counsel to CEI; and John Messenger, Power Trader for DEM. In addition, WSPP states that copies will be e-mailed to WSPP members who have supplied e-mail addresses for the Contract Committee and Contacts lists and that the filing has been posted on the WSPP home page (*http://www.wsp.org*).

Comment Date: June 4, 2004.

5. PPL Electric Utilities Corporation

[Docket No. ER04–843–000]

Take notice that on May 14, 2004, PPL Electric Utilities Corporation (PPL Electric) filed an Interchange Scheduling Agreement between PPL Electric and Waymart Wind Farm L.P. (Waymart) that sets forth the terms and conditions with respect to the scheduling of the output of the Waymart Wind Farm Generating Station. PPL Electric requests an effective date of January 1, 2004.

PPL Electric states that a copy of this filing has been provided to Waymart.

Comment Date: June 4, 2004.

6. Conservation Services Group

[Docket No. ER04–844–000]

Take notice that on May 14, 2004, Conservation Services Group (CSG) filed an Agreement for Supplemental Installed Capacity Southwest Connecticut (C&LM Resources) between ISO New England, Inc. and CSG pursuant to the Commission's order issued February 27, 2004, in Docket No. ER04–335–000, New England Power Pool, 106 FERC ¶ 61,190 (2004). CSG states that the Agreement was entered pursuant to ISO New England's issuance of a Gap Request for Proposal to provide load response and load management in southwestern Connecticut, and CSG shall provide such service beginning June 1, 2004.

Comment Date: June 4, 2004.

7. Western Electricity Coordinating Council

[Docket No. ER04–845–000]

Take notice that on May 14, 2004, the Western Electricity Coordinating Council (WECC) filed with the Commission (1) an amendment to the Reliability Criteria Agreement under the WECC's Reliability Management System adding Puget Sound Energy as a Participating Transmission Owner and (2) a Reliability Management System Agreement dated April 27, 2004, between WECC and Puget Sound Energy (collectively the Agreements). The WECC requests that the Commission issue an order by June 25, 2004, approving the Agreements with a July 1, 2004, effective date.

Comment Date: June 4, 2004.

8. EnerNOC, Inc.

[Docket No. ER04–846–000]

Please take notice that on May 14, 2004, EnerNOC, Inc. (EnerNOC) petitioned the Commission for an order: (1) Accepting for filing EnerNOC's Rate Schedule FERC No. 1; (2) accepting for filing Service Agreement No. 1 to EnerNOC's Rate Schedule FERC No. 1; (3) granting waiver of certain requirements of the Commission's regulations; and (4) granting the blanket approvals normally accorded to sellers permitted to sell at market-based rates. EnerNOC also requests that the Commission grant waiver of the 60-day prior notice requirement to allow an effective date of June 1, 2004.

Comment Date: June 4, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1217 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–223–000 and CP04–293–000]

KeySpan LNG, L.P.; Notice of Site Visit

May 19, 2004.

On June 4, 2004, the Office of Energy Projects (OEP) staff will conduct a pre-certification site visit of KeySpan LNG, L.P.'s (KeySpan LNG) liquefied natural gas storage facility in Providence, Rhode Island. We will view the site of the proposed facility upgrade and a planned pipeline route. Examination will be by automobile and on foot. Representatives of KeySpan LNG will be accompanying the OEP staff.

All interested parties may attend. Those planning to attend must provide their own transportation. Those interested in attending should meet at 9 a.m. (e.s.t.) at the KeySpan LNG facility at 121 Terminal Road, Providence.

For additional information contact David Swearingen at (202) 502–6173 or e-mail *david.swearingen@ferc.gov.*

Magalie R. Salas,

Secretary.

[FR Doc. E4–1216 Filed 5–25–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the Record Communications; Public Notice

May 19, 2004.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or prohibited off-the-record communication relevant to the merit's of a contested on-the-record proceeding, to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of prohibited and exempt communications recently received in the Office of the Secretary. The communications listed are grouped by docket numbers. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

PROHIBITED

Docket No.	Date filed	Presenter or requester
1. CP04–58–000	5–10–04	Robert & Virginia Ilardi, *et al.*[1]

[1] This communication is one among numerous form letters sent to the Commission by the Greenpeace, USA organization. Only representative samples of these prohibited non-decisional documents are posted in this docket on the Commission's eLibrary system (*http://www.ferc.gov*).

EXEMPT

Docket No.	Date filed	Presenter or requester
1. ER04–691–000	5–15–04	Marshall Johnson
2. Project No. 2082–000	5–12–04	Michael Carrier
3. Project No. 2082–000	5–12–04	Toby Freeman
4. Project No. 2082–000	5–12–04	Leaf G. Hillman
5. Project No. 2082–000	5–12–04	Thomas F. King
6. Project No. 2082–000	5–12–04	Todd Olson[2]
7. Project No. 2114–000	5–13–04	Leon Hoepner

[2] Three communications from Todd Olson were filed 5–12–04 in Project No. 2082–000.

Magalie R. Salas,
Secretary.
[FR Doc. E4–1213 Filed 5–25–04; 8:45 am]
BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2004–0093; FRL–7358–8]

National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: A meeting of the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances (NAC/AEGL Committee) will be held on June 14–16, 2004, in The Netherlands. At this meeting, the NAC/AEGL Committee will address, as time permits, the various aspects of the acute toxicity and the development of Acute Exposure Guideline Levels (AEGLs) for the following chemicals: Acetone; acrolein; adamsite; carbon disulfide; chloroacetone; chloroform; 1,4-dioxane; diphenylchloroarsine; epichlorohydrin; ethyl dichloroarsine; hexane; Lewisite 1: (2-chlorovinyl) dichloroarsine; Lewisite 2: bis(2-chlorovinyl)chloroarsine; Lewisite 3: tris(2-chlorovinyl)arsine; methyl dichloroarsine; methylene chloride; methyl mercaptan; N,N-dimethylformamide; nitric acid; nitric oxide; nitrogen dioxide; oleum; peracetic acid; phenyl dichloroarsine; sulfur dioxide; sulfur trioxide; sulfuric acid; trichloroethylene; and trimethylchlorosilane.

DATES: A meeting of the NAC/AEGL Committee will be held from 9 a.m. to 5:30 p.m. on June 14, 2004; 8:30 a.m. to 5:30 p.m. on June 15, 2004, and from 8 a.m. to noon on June 16, 2004.

ADDRESSES: The meeting will be held at the Movenpick Hotel Voorburg, The Netherlands (located in the outskirts of The Hague), Stationsplein 8, NL–2275 AZ Voorburg (Den Haag). Telephone: + 31 70 337 37 37; Fax +31 70 337 37 00; E-mail: *hotel.den-haag@moevenpick.com*; Internet: *www.movenpick-voorburg.com.*

FOR FURTHER INFORMATION CONTACT: Colby Linter, Regulatory Coordinator, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number (202) 554–1404; *e-mail address: TSCA-hotline@epa.gov.*

For technical information contact: Paul S. Tobin, Designated Federal Officer (DFO), Economics, Exposure, and Technology Division (7406M), Office of Pollution Prevention and Toxics, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8557; e-mail address: *tobin.paul@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may be of particular interest to anyone who may be affected if the AEGL values are adopted by government agencies for emergency planning, prevention, or response programs, such as EPA's Risk Management Program under the Clean Air Act and Amendments Section 112r. It is possible that other Federal agencies besides EPA, as well as State agencies and private organizations, may adopt the AEGL values for their programs. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO 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 ID number OPPT–2004–0093. 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 EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

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.

II. Meeting Procedures

For additional information on the scheduled meeting, the agenda of the NAC/AEGL Committee, or the submission of information on chemicals to be discussed at the meeting, contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

The meeting of the NAC/AEGL Committee will be open to the public. Oral presentations or statements by interested parties will be limited to 10 minutes. Interested parties are encouraged to contact the DFO to schedule presentations before the NAC/AEGL Committee. Since seating for outside observers may be limited, those wishing to attend the meeting as observers are also encouraged to contact the DFO at the earliest possible date to ensure adequate seating arrangements. Inquiries regarding oral presentations and the submission of written statements or chemical-specific information should be directed to the DFO.

III. Future Meetings

Another meeting of the NAC/AEGL Committee is scheduled for September 21–23, 2004, in Washington, DC.

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Health.

Dated: May 17, 2004.

Charles M. Auer,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 04–11671 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0119; FRL–7357–4]

Mepanipyrim, N-(4-methyl-6-prop-1-ynlypyrimidin-2-yl) aniline]; 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–2004–0119, must be received on or before June 25, 2004.

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: Mary Waller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address: *waller.mary@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, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop Production (NAICS code 111)
- Animal Production (NAICS code 112)
- Food Manufacturing (NAICS code 311)
- Pesticide Manufacturing (NAICS code 32532)

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–2004–0119. 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.1. 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 on 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 restricted 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–2004–0119. 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–2004–0119. 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–2004–0119.

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–2004–0119. 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: May 6, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by K-I Chemical U.S.A., Inc. 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.

K-I Chemical U.S.A., Inc.

PP 8E5017

EPA has received a pesticide petition PP 8E5017 from K-I Chemical U.S.A., Inc., 11 Martine Ave., 9th Floor, White Plains, NY, 10606 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, by establishing import tolerances for residues of menpanipyrim N- (4-methyl-6-prop-1-ynlypyrimidin-2-yl) aniline in or on the raw agricultural commodities grape at 2.0 parts per million (ppm); grape, raisin at 4.0 ppm; strawberry at 1.5 ppm; and tomato at 0.5 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of FFDCA; 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.

A. Residue Chemistry

1. *Plant metabolism*. The nature of the residues of mepanipyrim in plants is adequately understood. Metabolism studies on apples, grapes, and tomatoes have been conducted. The major residue is comprised of unchanged parent compound with small amounts of the metabolite 1 (2-anilino-6-methylpyrimidin-4-yl)-2-propanol and other metabolites. Parent compound and 1(2-anilino-6-methylpyrimidin-4-yl)-2-propanol are the only residues of concern.

2. *Analytical method*. An analytical method for measuring residues of mepanipyrim and the metabolite 1(2-anilino-6-methylpyrimidin-4-yl)-2-propanol has been submitted to EPA. The analytical method utilizes gas chromatography with a thermionic nitrogen specific detector (NPD). A confirmatory method utilizes an alternate chromatographic column. The confirmatory method is also, quantitative. These methods can be used for gathering residue data and for enforcement purposes.

3. *Magnitude of residues*. Residue field trials were conducted in representative countries that will export the majority of the treated commodities to the United States.

Grape residue field trials were conducted in Austria, France, Germany, Italy, Portugal, and Spain. Combined residues of mepanipyrim and its regulated metabolite were all less than the proposed 2.0 ppm tolerance for grapes.

Strawberry residue field trials were conducted in Belgium, France and Spain. Combined residues of mepanipyrim and its regulated metabolite were all less than the proposed 1.5 ppm tolerance.

Tomato residue field trials were conducted in Italy and Spain. Combined residues of mepanipyrim and its regulated metabolite were all less than the proposed 0.5 ppm tolerance. Grape and tomato crops both have processed commodities. Grape processed commodities are grape, juice; grape, raisin; and grape, wine. Tomato processed commodities are tomato paste and tomato puree. These processed commodities could be imported into the United States. Grape and tomato processing studies indicate that mepanipyrim residues concentrate in grape, raisin but do not concentrate in other processed commodities of grape or in the processed commodities of tomato. Tolerances are not required for grape, juice derived from mepanipyrim treated grape or from tomato, paste and tomato, puree derived from mepanipyrim treated tomato. A tolerance of 4.0 ppm is needed for the processed commodity grape, raisin.

No livestock feed items are associated with the crops for which tolerances are proposed in this petition. Therefore, no livestock residue tolerances are being proposed.

B. Toxicological Profile

1. *Acute toxicity*. Mepanipyrim has a very-low order of acute toxicity demonstrated by an acute oral LD_{50} in rats (both sexes) greater than 5,000 milligrams/kilogram/body weight (mg/kg/bwt).

2. *Genotoxicity*. A battery of *in vitro* and *in vivo* tests were conducted to determine the genotoxic potential of mepanipyrim. Mepanipyrim did not produce lethal DNA damage in three strains of *E. coli*: WP2, WP67, and CM871. Mepanipyrim was active in the Ames reverse gene mutation assay, with or without metabolic activation, employing five strains of *Salmonella typhimurium* (TA 98, TA 100, TA 1538, TA 1535, and TA 1537) and one strain of *E.coli* (WP2). Mepanipyrim did not produce unscheduled DNA synthesis in cultured human cells (HeLa S-3) either in the presence or absence of S-9 metabolic activation. *In vivo* chromosomal aberration assays (CD-1 mouse micronucleus and CD rat clastogenicity) were both negative when compared to the positive control, chlorambucil. *In vitro* chromosomal aberrations were assayed in Chinese hamster ovary (CHO-K1) cells, with and without metabolic activation S-9 mixture. Mepanipyrim did not show clastogenic activity in the activated assay; however, a questionable increase in aberrant cell frequency was produced in the non-activated assay. This increase of aberrant cell frequency occurred only

where the number of analyzable metaphases was significantly reduced. Mepanipyrim was negative in an *in vitro* specific locus gene mutation assay in cultured Chinese hamster (V79) cells as the hypoxanthine-guanine-phosphoribosyl transferase locus. In summary, mepanipyrim was not genotoxic and did not induce heritable effects in the assays conducted.

3. *Reproductive and developmental toxicity*. A developmental toxicity study was conducted in rabbits at doses of 0, 10, 30, and 90 mg/kg bwt/day. Doses of 30, and 90 mg/kg bwt/day produced marginal reductions in body weight gain and an increased incidence of premature delivery or abortion on days 28 and 29 of gestation. There was an increased percentage of small and extra small anterior fontanelle, an increased percentage of anomalous interparietal bones fissured or reduced, and an increased percentage of incompletely ossified and unossified centrales in all dosed groups. However, there was also an increased incidence of enlarged medium anterior fontanelle and posterior fontanelle in control fetuses. All indices were within the range of historical controls reported for 15 studies. In view of the percentage of variations that were evident across all groups, including controls, these sporadic increased incidences are not considered to be compound related. The developmental no adverse effects level (NOAEL) is considered to be 90 mg/kg bwt/day; the NOAEL for the study is 10 mg/kg bwt/day based on maternal toxicity at higher doses.

A developmental toxicity study was conducted in pregnant Charles River CD rats at doses of 0, 30, 150, and 750 mg/kg bwt/day, administered from day 6 though day 15 of gestation. There were no adverse effects on body weight gain, fetal growth, or morphological development at any dose. The only marginal non-dose related effects were slight increases in unilateral hydronephrosis and hydroureter at 150 and 750 mg/kg. However, these are not considered compound-related based upon the incidence in bilateral hydronephrosis and hydroureter which were increased in controls relative to all treated groups. At 750 mg/kg bwt/day there was a non-significant increase in intramuscular hemorrhage of the hind limb and subcutaneous hemorrhage of the lower jaw. The effect observed in the hind limb, although, not statistically significant, was outside the historical control range, whereas all other effects were within the historical control range of 137 studies reported. The developmental NOAEL is considered to be 750 mg/kg bwt. The NOAEL for the study is 750 mg/kg bwt/day.

A range-finding reproduction study was conducted at 200; 1,000; 2,500; and 5,000 ppm using 6 male and 6 female Charles River rats and evaluating the effects on a single litter per mating. Adult body weight gain was decreased at doses of 1,000; 2,500; and 5,000 ppm in the diet. No adverse effects on reproductive parameters were determined. A NOAEL of 200 ppm was assessed for this study.

A 2-generation reproduction study was conducted in Charles River CD rats using 28 males/females per dose. No reproductive effects were evident at doses up to and including 2,000 ppm. Liver weights were increased in parent and offspring, as well as histopathological changes at 1,000 ppm (i.e., hepatocytic fatty vacuolation). Tubular germinal epithelial degeneration was observed in F_2A and F_2B males at 1,000 ppm, with interstitial cell hyperplasia at 150 ppm. An overall NOAEL for the study was not demonstrated due to adverse effects on the liver at 150 ppm.

In a second 2-generation reproduction study in Charles River CD rats, 32 males/females were given 0, 50, or 150 ppm in the diet. The fertility index was low in control and low-dose groups (i.e., 69%), with 88% pregnant in the high dose group. All reproductive parameters which were evaluated were unaffected at all dose levels. Liver weights were increased in male and female F_1 and F_2 offspring at 150 ppm, as well as hepatocytic periacinar vacuolation in males. A NOAEL for general toxicity is considered to be 50 ppm, with 150 ppm a NOAEL for reproductive parameters.

4. *Subchronic dietary toxicity*. Short-term exposure of rats and dogs to mepanipyrim technical resulted in the following effects.

In a 13–week oral study with rats dosed at 0, 50, 100, 200, and 800 ppm, there were increased absolute and relative liver weights in both sexes. Pathological examination revealed no specific lesions. In a second 13–week dietary study in specific pathogen free rats dosed at 0; 1,600; and 4,000 ppm, decreased body weight gain was observed in both sexes at 4,000 ppm. Hematological examinations conducted at 13 weeks revealed decreased hematocrit (Hct), hemoglobin levels (Hgb), mean cell volume (MCV), and mean cell hemoglobin (MCH) in both sexes which were significantly less than controls at 4,000 ppm. Reticulocyte count, however, was increased at 4,000 ppm. There were also, significant increases in absolute and relative liver and kidney weights in both sexes at 4,000 ppm. The livers of both sexes at the 4,000 ppm level had a yellow pigment, showed fatty changes and granulation of the liver cells. The NOAEL in the 13–week oral rat studies is 13.8 mg/kg bwt/day in males and 15.3 mg/kg bwt/day in females (200 ppm).

In a 13–week oral study with mice dosed at 0; 100; 1,000; 3,000; and 7,000 ppm pathological examination revealed no abnormal gross findings in liver and kidney, although, absolute and relative liver and kidney weights were significantly increased in both sexes at 3,000 ppm. Histologic observations were limited to few organs and compound-related effects were not demonstrated. The NOAEL in the mouse is 18.8 mg/kg bwt/day in males and 22 mg/kg bwt/day for females.

In a 13–week oral study with beagle dogs dosed at 0, 15, 50, or 150 mg/kg bwt/day, body weight gain for high dose females was significantly decreased ($p<0.001$). Relative organ weight increases were observed at the highest dose, as well as alanine amino-transferase (ALT), which was increased in both sexes. Hematological examination revealed no treatment related effects. A brown pigment positively identified as lipofuscin by Schmorl's stain was seen in liver cells of both sexes at the 15 mg/kg bwt/day dose. A NOAEL was not demonstrated in this study. The study was repeated at 7.5 and 15 mg/kg bwt/day and the NOAEL was determined to be 7.5 mg/kg bwt/day based on the formation of lipofuscin in the liver.

5. *Chronic toxicity—i. Chronic toxicity/oncogenicity in rat*. Rats were administered mepanipyrim in the diet for 104 weeks at doses of 0; 50; 150; 2,000; and 4,000 ppm. Males and females at 2,000 ppm had significant decreases in body weight gain, Hct, Hgb, MCV, and MCH, also, cholesterol, triglyceride, phospholipids, and non-esterified fatty acid. Significant increase in relative and absolute liver, kidney, and spleen weights were determined in males and females at 2,000 ppm. Yellowish enlarged livers occurred in males and females at 2,000 ppm, as well as fatty changes which were increased. There was an increased incidence of transitional cell hyperplasia in kidneys of males at 2,000 ppm. The incidence of hepatocellular adenoma was significantly increased in females at the high dose. The NOAEL for the study was 50 ppm (2.45 mg/kg bwt in males and 3.07 mg/kg bwt in females).

ii. *Chronic toxicity in the dog*. Mepanipyrim was administered to dogs for 52–weeks at doses of 0, 2.5, 7.5, and 50 mg/kg bwt/day. Body weight gain was decreased in high-dose females.

Animals receiving 50 mg/kg bwt/day demonstrated significantly increased relative liver weights in both sexes and hepatocellular enlargement in females. Alkaline phosphatase (AP) and ALT were also significantly increased in high-dose male and females. Hematologic examination revealed a significant increase in neutrophils and lymphocytes manifested as a ''left-shift'' in the M:E ratio of males and females. Pigmentation in hepatocytes and Kupffer cells, identified as lipofuscin, was increased in high-dose males and females. The NOAEL for the study was 7.5 mg/kg bwt/day.

iii. *Chronic toxicity/oncogenicity in the mouse.* B6C3F1 mice were administered mepanipyrim in the diet continuously for 2 years at dose levels of 0; 70; 350, 3,500; and 7,000 ppm. Males and females showed increased relative liver weights at 3,500 ppm. Male mice also had decreased body weights at 7000 ppm. Hematocrit and hemoglobin were decreased in males at 7,000 ppm. Several effects were observed in the liver, including: Increased hepatic nodules (both sexes) at 3,500 ppm; increased swelling of liver cells in males at 3,500 ppm and in females at 7,000 ppm; and increased foci/hyperplasia in males and females at 3,500 ppm. Incidences of hepatocellular adenoma and carcinoma were increased in both sexes at 3,500 ppm. A NOAEL was demonstrated for non-neoplastic effects in both males and females at 350 ppm, equal to 56 mg/kg bwt/day in males and 68 mg/kg bwt/day in females.

Ancillary (non-good labotatory practice) studies were conducted to explore the compound-related effects on the liver in rodents.

''Studies on fatty liver induced by mepanipyrim in rats.'' Young adult Fischer 344 rats were dosed at 4,000 and 8,000 ppm for 3 weeks. Various blood and liver examinations were conducted. The results indicate that serum lipid concentrations decreased in conjunction with the induction of fatty liver by mepanipyrim treatment.

''*Study on the possible oxidative damage to DNA by mepanipyrim.*'' Mepanipyrim was administered to rats and mice in a single-oral dose, and in the diet for 3 and 6 weeks. Livers were removed at pre-determined times after each compound administration regimen, and the DNA extracted. Individual samples were assayed for 8-hydroxyquanine (8-OHdG) by high performance liquid chromatography and enzyme-linked immunosorbant assay. No significant increase in the 8-OHdG (an indicator of oxidative DNA damage) was observed in rat livers or in the 3 and 6 week exposure periods in mice.

''*Microsomal mixed function oxidase activity in liver of rats and mice administered with mepanipyrim.*'' Mepanipyrim was administered for 3 weeks to rats at dose levels of 150 and 4,000 ppm and to mice at 350 and 7,000 ppm. The study revealed that at the 4,000 and 7,000 ppm dose levels the microsomal drug-metabolizing enzyme aminopyrine N-demethylase increased slightly in the rat and mouse livers. Aniline hydroxylase activity was unchanged in both species.

''*Promoting activities of mepanipyrim liver carcinogenesis initiated with dimethylnitrosamine in rats.*'' Rats were fed a diet containing 1,000 and 5,000 ppm mepanipyrim for 6 weeks after having been injected with nitrosodiethylamine. Mepanipyrim has a weak promoting effect evidenced by the induction of gamma-glutamyl transpeptidase foci in the liver.

6. *Animal metabolism.* A rat metobolism study was conducted with 106 rats divided into 13 dose groups. No radioactivity was noted in expired CO_2 or other expired volatiles. The majority of radioactivity was excreted in the feces. Urine was the other major route of excretion. The same residues, parent and metabolites, were found in both urine and feces. Most of the radioactivity had been excreted by 24 hours after dosing. The majority of the radioactivity in blood was acetonitrile extractable at 5–8 hours after dosing and declined to zero at 120 hours. In bile duct cannulated rats, a significant amount (50–70%) of the dose was excreted in bile. The percentage of dose excreted in feces was reduced to 3–4% at 120 hours.

7. *Metabolite toxicology.* No toxicologically significant metabolites were detected in plant and rat metabolism studies.

8. *Endocrine disruption.* No specific tests have been conducted with mepanipyrim to determine whether mepanipyrim may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects. There is no evidence at this time that mepanipyrim causes endocrine effects, and no reason to suspect that it does based upon the information available and mode of action of this class of compounds.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food* The Theoretical Maximum Residue Concentration (TMRC) of mepanipyrim in or on grape, strawberry, tomato, and their processed commodities (grape, juice; grape, wine; grape, raisin; tomato, paste; and tomato, puree) are as follows: 0.000936 mg/kg bodyweight/day for the general U.S. population; 0.000429 mg/kg bodyweight/day for non-nursing infants; 0.00178 mg/kg body weight/day of children 1–6 years of age; and 0.00118 mg/kg bodyweight/day of children 7–12 years of age.

The TMRC values are based on the assumption that all of the grape, strawberry, and tomato and their processed commodities will bear residues at the proposed tolerance levels for the raw agricultural commodities. These chronic dietary exposure estimates are very conservative because they assume that 100% of all grape, strawberry, and tomato are imported. Imported grapes, strawberry, and tomato actually comprise less than 10% of these commodities consumed in the United States. The estimates also assume that all imported grape, strawberry, and tomato and their processed products are treated with mepanipyrim and that residue levels on all of the imported commodities are at the proposed tolerance level.

Dietary exposure to residues of mepanipyrim will be from grape, strawberry, tomato, and their processed products and also, from grape, and wine. There are no livestock or poultry feed items associated with these raw commodities. Thus, there will be no dietary exposure to mepanipyrim residues in meat, milk, poultry, and eggs. There are no other tolerances or exemptions from a tolerance for mepanipyrim in the United States.

ii. *Drinking water.* There are neither tolerances nor registration for the use of this chemical in the United States. Therefore, there will be no exposure to mepanipyrim from residues in drinking water.

2. *Non-dietary exposure.* This petition is for a tolerance on imported grape, strawberry, and tomato. There is no approved registered use for mepanipyrim in the United States, and none is being sought. Therefore, the potential for non-dietary exposure is not pertinent to this petition.

D. Cumulative Effects

This chemical is in the anilinopyrimidine class. EPA consideration of a common mechanism of toxicity is not appropriate at this time because EPA has not made a determination that mepanipyrim and other substances may have a common mechanism of toxicity that would have a cumulative effect. K-I Chemical U.S.A., Inc., is considering only the potential risk of mepanipyrim in its cumulative-exposure assessment.

Evidence from rodent studies indicate that mepanipyrim may be oncogenic at

high doses in rodent livers. In the 2–year mouse study, at doses of 3,500 and 7,000 ppm, hepatocellular adenoma and hepatocellular carcinoma of the liver of both sexes were statistically significantly increased above those seen in the controls. A slight increase in hepatocellular adenomas was observed in female rats dosed at 4,000 ppm in the 2–year rat study. No increase was noted at lower doses or in the male rats. Additionally, the tumors did not lead to a shortening of the lifespan of affected animals and there was no decrease in the time-to-tumor versus the concurrent control animals. In the chronic toxicity portion of the rat study, there was also, the observation of hepatic perilobular lipogenesis.

A complete battery of *in vitro* and *in vivo* mutagentcity studies were performed to evaluate mepanipyrim's ability to induce gene mutations, structural chromosomal aberrations, or other genotoxic effects. Mepanipyrim showed no evidence of genotoxic activity in any of the investigations performed.

While mepanipyrim is not genotoxic, mepanipyrim demonstrated an ability to induce gamma glutamyl transferase (GGT) positive liver cell foci and to induce the liver's metabolizing enzymes. Therefore, mepanipyrim may be a non-genotoxic carcinogen suggested by its ability to induce a proliferative effect in the liver which results in increases in spontaneously occurring liver neoplasia in both mice and rats. A threshold would exist in this case and no oncogenic response would be anticipated below such a threshold level. In the current studies, no hepatocellular tumors or liver toxicity were observed in mice at 350 ppm (56.0 mg/kg/day mepanipyrim) and in rats at 50 ppm (2.45 mg/kg/day mepanipyrim).

Based on the total information examined, mepanipyrim is considered a Group C carcinogen not requiring quantitative risk assessment.

E. Safety Determination

1. *U.S. population*. The reference dose (RfD) represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. For mepanipyrim, the RfD of 0.0245 mg/kg bwt/day is based on a NOAEL of 50 ppm or 2.45 mg/kg bwt/day from the chronic toxicity/oncogenicity study. Considering the extremely conservative estimates of exposure in comparison to the RfD of 0.0245 mg/kg, the chronic dietary exposure of the U.S. population will only utilize 3.8% of the RfD. This exposure is much less than 100% of the RfD and K-I Chemical U.S.A., Inc., concludes that there is a ''reasonable certainty to no harm'' from aggregate exposure to mepanipyrim residues.

2. *Infants and children*. The chronic dietary exposure estimates will utilize approximately 1.8% of the RfD for non-nursing infants less than 1–year of age, and approximately 7.3% of the RfD for children 1–6 years of age, and approximately 4.8% for children 7–12 years of age. The conservative exposure estimates for the infant and children populations are all well below the RfD for mepanipyrim.

F. International Tolerances

Registration of mepanipyrim is in progress in the European Union (EU). A provisional registration has been granted in several countries with temporary maximum residue levels (tMRL) set. These countries and tMRLs are: Austria, strawberry and grape (2 mg/kg); Belgium, strawberry (2); France, strawberry and grape (2), wine (0.2); Italy, strawberry (2), grape (3), wine and tomato (1); Luxembourg, strawberry (2), grape (3); Netherlands, strawberry (2); Portugal, strawberry and grape (2); Spain, strawberry and grape (2), tomato (1); and United Kingdom, strawberry (2).

Mepanipyrim is registered for crop uses in Switzerland, Japan, and Israel.

[FR Doc. 04–11562 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0353; FRL–7356–1]

Di-n-propylisocinchomeronate (MGK® Repellent 326); Availability of Reregistration Eligibility Decision Document for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces availability and starts a 30–day public comment period on the Reregistration Eligibility Decision (RED) document for the insect repellent di-n-propylisocinchomeronate (MGK® Repellent 326). The RED represents EPA's formal regulatory assessment of the human health and environmental data base of the subject chemical and presents the Agency's determination regarding which pesticidal uses are eligible for reregistration.

DATES: Comments, identified by docket ID number OPP–2003–0353, must be received on or before June 25, 2004.

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: Tawanda Spears, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8050; e-mail address: *spears.tawanda@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or the Federal Food, Drug, and Cosmetic Act (FFDCA); environmental, human health, and agricultural advocates; pesticides users; and members of the public interested in the use of pesticides. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. 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–2003–0353. 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/. To access RED documents and RED fact sheets electronically, go directly to the REDs table on EPA's Office of Pesticide Programs Home Page, at *http://www.epa.gov/pesticides/reregistration/status.htm*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA's 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.1. 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 restricted 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–2003–0353. 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–2003–0353. 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–2003–0353.

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–2003–0353. 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. Offer alternative ways to improve the notice or collection activity.
7. Make sure to submit your comments by the deadline in this document.
8. 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. Background

A. What Action is the Agency Taking?

The Agency has issued a RED for the insect repellent MGK® Repellent 326. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of MGK® Repellent 326 is substantially complete and the insect repellent's risks have been mitigated so that MGK® Repellent 326 will not pose unreasonable risks to people or the environment when used according to its approved labeling.

In addition, EPA is reevaluating existing pesticides and reassessing tolerances under the Food Quality Protection Act (FQPA) of 1996. Therefore, the RED also presents the Agency's tolerance reassessment decision for MGK® Repellent 326, which included the consideration of risks to infants and children.

All registrants of pesticide products containing the active ingredient di-n-propyl isocinchomeronate will be sent a copy of the RED, and must respond to labeling requirements and product-specific data requirements (if applicable) within 8 months of receipt.

The reregistration program is being conducted under Congressionally mandated time frames, and EPA recognizes both the need to make timely reregistration decisions and to involve the public. Therefore, EPA is issuing this RED as a final document with a 30–day comment period. Although the 30–day public comment period does not affect the registrant's response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. Unless adverse comments are received, at the end of the coment period, the Agency will consider this action a final decision. If any comment significantly affects a RED, EPA will amend the RED by publishing the amendment in the **Federal Register**.

B. What is the Agency's Authority for Taking this Action?

The legal authority for these REDs falls under FIFRA. Section 4(g)(2)(A) of FIFRA directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product-specific data on individual end-use products, and either reregistering products or taking ''other appropriate regulatory action.''

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: May 14, 2004.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 04–11778 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants:

Best International Shipping, Inc., 129 Selandia Lane, Carson, CA 90746. Officers: Eung-Hee Cho, Secretary/C.F.O., (Qualifying Individual), Yoon Jung Cho, President.

American Transport Logistics, Inc., 12 Blackfoot Drive, Manalapan, NJ 07726. Officer: Isaac M. Eddi, Director, (Qualifying Individual).

Apex Maritime Co. (LAX), Inc., 20418 East Walnut Drive North, Walnut, CA 91789. Officer: Vicky Cheung, President, (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicant:

Ni Midstar, LLC, 8228 50th Street, SW., Byron, MN 55920. Officers: Chris Heinz, President, (Qualifying Individual), Kazuo Hondo, Director.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicant:

Maharlika Forwarders Travel & Tours, 1545 W. Willow Street, Suite A, Long Beach, CA 90810, Grace Menez, Sole Proprietor.

Dated: May 21, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–11920 Filed 5–25–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
003568NF	CTSI Logistics, Inc., 600 Sylvan Avenue, 24th Floor, Englewood Cliffs, NJ 07632	April 22, 2004.
003110NF	International Freight Transport Inc., 88 South Avenue, Fanwood, NJ 07023	November 6, 2003.
003286F	Rialto International, Inc., 4636 East Marginal Way South, Suite 201, Seattle, WA 98134	April 14, 2004.
003718F	Sunship International Inc., 6815 W. 95th Street, Suite #1, NE., Oak Lawn, IL 60453	April 23, 2004.
003874NF	World Project Services, International, Inc., 650 E. North Sam Houston, Parkway, Suite 231, Houston, TX 77060.	April 28, 2004.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 04–11922 Filed 5–25–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number: 002652NF.
Name: IFF, Inc.
Address: 452–A Plaza Drive, P.O. Box 45505, Atlanta, GA 30320.
Date Revoked: May 13, 2004.
Reason: Failed to maintain valid bonds.

License Number: 018007F.
Name: LCL America, Inc.
Address: 29 Burgess Drive, Glendale Heights, IL 60139.
Date Revoked: April 30, 2004.
Reason: Failed to maintain a valid bond.

License Number: 004179NF.
Name: Lilly & Associates-International Freight Forwarders, Inc.
Address: 9601 NW 33rd Street, Miami, FL 33172.
Date Revoked: April 30, 2004.
Reason: Failed to maintain valid bonds.

License Number: 016297NF.
Name: Multitrans, Inc.
Address: 2103 NW. 79th Avenue, Miami, FL 33122.
Date Revoked: April 30, 2004.
Reason: Failed to maintain valid bonds.

License Number: 004672F.
Name: National Bonded Warehouse, Inc. dba National Freight Express.
Address: 11451 NW. 36th Avenue, Miami, FL 33167.
Date: April 30, 2004.
Reason: Failed to maintain a valid bond.

License Number: 004290F.
Name: Neal Brothers, Inc.
Address: 1255 Necessary Lane, Charleston, SC 29405.
Date Revoked: April 21, 2004.
Reason: Surrendered license voluntarily.

License Number: 018072N.
Name: Oceanair Freight International, Inc.
Address: 4280 NW. 147th Terrace, Opalocka, FL 33054.
Date Revoked: May 5, 2004.
Reason: Failed to maintain a valid bond.

License Number: 018075F.
Name: Rapidus, LLC.
Address: 3345 NW. 116th Street, Miami, FL 33167.
Date Revoked: December 2, 2003.
Reason: Surrendered license voluntarily.

License Number: 004405F.
Name: Robert William Cisco dba Robert W. Cisco Customhouse Broker.
Address: 200 Box 32 Bldg. 14 B–1, 200 Crofton Road, Kenner, LA 70062.
Date Revoked: May 1, 2004.
Reason: Failed to maintain a valid bond.

License Number: 001199N.
Name: Suarez Shipping Services, Inc.
Address: 7819 W. 18th Lane, Hialeah, FL 33014.
Date Revoked: March 23, 2004.
Reason: Surrendered license voluntarily.

License Number: 017206NF.
Name: Trade Impact, LLC dba Tacoma Logistics.
Address: 1127 Broadway, Suite 203, Tacoma, WA 98402.
Date Revoked: May 7, 2004.
Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 04–11921 Filed 5–25–04; 8:45 am]

BILLING CODE 6730–01–P

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 June 18, 2004.

A. Federal Reserve Bank of Cleveland (Nadine W. Wallman, Assistant Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. Camco Financial Corporation, Cambridge, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of London Financial Corporation, and thereby indirectly acquire The Citizens Bank of London, both of London, Ohio.

B. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Piedmont Bancshares, Inc., Atlanta, Georgia; to become a bank holding company by acquiring 100 percent of the voting shares of Piedmont Bank of Georgia, Atlanta, Georgia.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Central Texas Bankshare Holdings, Inc., Columbus, Texas, and Colorado County Investment Holdings, Inc., Wilmington, Delaware; to acquire 45.33 percent of the voting shares of Hill Bancshares Holdings, Inc., Weimar, Texas, and thereby indirectly acquire voting shares of Hill Bancshares, Inc., Wilmington, Delaware, and Hill Bank & Trust Company, Weimar, Texas.

Board of Governors of the Federal Reserve System, May 20, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–11846 Filed 5–25–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 9, 2004.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Hopkins Financial Corporation, Mitchell, South Dakota; to engage *de novo* in lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, May 20, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.04–11845 Filed 5–25–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

[Program Announcement No. AoA–04–03]

Fiscal Year 2004 Program Announcement; Availability of Funds and Notice Regarding Applications

AGENCY: Administration on Aging, HHS.

ACTION: Announcement of availability of funds and request for applications to support regional projects under the Pension Counseling and Information Program.

SUMMARY: The Administration on Aging announces that under this program announcement it will hold a competition for grant awards for up to three (3) projects at a federal share of approximately $150,000 per year for a project period of up to three years. It is estimated that approximately $450,000 will be available for this competition.

Legislative authority: The Older Americans Act, Public Law 106–501.

(Catalog of Federal Domestic Assistance 93.048, Title IV and Title II, Discretionary Projects).

Purpose of grant awards: The purpose of these projects is to assist individuals in understanding and enforcing their pension rights.

Eligibility for grant awards and other requirements: Eligibility for grant awards is limited to public and/or nonprofit agencies and organizations, including faith-based organizations and community-based organizations, with a proven record of advising and representing individuals who have been denied employer or union-sponsored pensions or other retirement savings plan benefits.

Grantees are required to provide at least 25 percent of the total program costs from non-federal cash or in-kind resources in order to be considered for the award.

Executive Order 12372 is not applicable to these grant applications.

Screening criteria: All applications will be screened to assure a level playing field for all applicants. Applications that fail to meet the screening criteria described below will not be reviewed and will receive no further consideration:

1. *Postmark Requirements*—Applications must be postmarked by midnight of the deadline date indicated below, or hand-delivered by 5:30 p.m., Eastern Time, on that date, or submitted electronically by midnight on that date.

2. *Organizational Eligibility*—Public and/or nonprofit agencies and organizations, including faith-based organizations and community-based organizations, with a proven record of advising and representing individuals who have been denied employer or union-sponsored pensions or other retirement savings plan benefits, are eligible to apply under this program announcement.

3. *Responsiveness to Priority Area Description*—Applications will be screened on whether the application is responsive to the priority area description.

4. *Project Narrative*—The Project Narrative section of the application must not exceed 20 pages.

Review of applications: Applications will be evaluated against the following criteria: Purpose and Need for Assistance (20 points); Approach, Work Plan and Activities (30 points); Project Outcomes, Evaluation and Dissemination (30 points); and Level of Effort (20 points).

DATES: The deadline date for the submission of applications is July 12, 2004.

ADDRESSES: Application kits are available by writing to the U.S. Department of Health and Human Services, Administration on Aging, Office of Consumer Choice and Protection, Washington, DC 20201, by calling 202/357–3531, or online at *http://www.grants.gov*.

Applications may be mailed to the U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, Washington, D.C. 20201, attn: Margaret Tolson (AoA–04–03).

Applications may be delivered to the U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, One Massachusetts Avenue, NW., Room 4604, Washington, DC 20001, attn: Margaret Tolson (AoA–04–03). If you elect to mail or hand deliver your application you must submit one original and two copies of the application; an acknowledgement card will be mailed to applicants. Instructions for electronic mailing of

grant applications are available at *http://www.grants.gov/*.

SUPPLEMENTARY INFORMATION: All grant applicants must obtain a D–U–N–S number from Dun and Bradstreet. It is a nine-digit identification number, which provides unique identifiers of single business entities. The D–U–N–S number is free and easy to obtain from *http://www.dnb.com/US/duns_update/*.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, Washington, DC 20201, telephone: (202) 357–3440.

Dated: May 20, 2004.

Josefina G. Carbonell,

Assistant Secretary for Aging.

[FR Doc. 04–11823 Filed 5–25–04; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Spina Bifida Information and Resource Development Center

Announcement Type: New.

Funding Opportunity Number: 04215.

Catalog of Federal Domestic Assistance Number: 93.283.

Dates:

Letter of Intent Deadline: June 10, 2004.

Application Deadline: June 25, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 317(k)(2) of the Public Health Service Act, (42 U.S.C. 247b(k)(2)), as amended.

Purpose: The purpose of the program is to prevent the recurrence of pregnancies affected by Neural Tube Defects (NTDs), expand local programs for those affected by spina bifida, promote research proposal development (not implementation), and expand information resources.

This program addresses the ''Healthy People 2010'' focus area(s) of Maternal, Infant and Child Health and Disability and Secondary Conditions.

Measurable outcomes of the program will be in alignment with one (or more) of the following performance goal(s) for the National Center on Birth Defects and Developmental Disabilities: increasing consumption of folic acid among women of reproductive age to prevent serious birth defects, improving care, and improving the lives of people with spina bifida.

Activities: Awardee activities for this program are as follows: Applicants should provide evidence of the capacity to effectively address the following activities:

a. Evaluate the effectiveness of education materials previously developed for supplementation by assessing reported knowledge, consumption and subsequent pregnancy outcomes of the target audience.

b. Develop training for health care providers (HCP) designed to increase the number of women receiving counseling about consuming adequate levels of folic acid.

c. Develop and implement a plan to evaluate the efficacy and effectiveness of this project.

d. Implement a pilot program to support the development of competencies among professionals in developing proposals for submission to Federal and other funding agencies to further spina bifida research consistent with evidence-based research priorities.

e. Evaluate the effectiveness of the pilot development program designed to develop competency in professionals related to proposal development for research in spina bifida.

f. Implement and evaluate a program for self-determination to improve the quality of life of individuals with spina bifida and their families.

g. Expand a national resource center for spina bifida information and dissemination.

h. Develop an evaluation plan for tracking the volume, kinds of requests, and responses to requests and inquiries made to the Resource Center for use in enhancing the effectiveness and responsiveness of the Center.

II. Award Information

Type of Award: Grant.

Fiscal Year Funds: Fiscal Year 2004.

Approximate Total Funding: $950,000.

Approximate Number of Awards: One.

Approximate Average Award: $950,000. This amount is for the first 12-month budget period, and includes both direct and indirect costs.

Floor of Award Range: Minimum award $900,000.

Ceiling of Award: $950,000.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Two years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal government.

III. Eligibility Information

III.1. Eligible Applicants

Assistance will be provided only to applicants that are well-established national, nonprofit organizations with state chapters that have expertise in: (1) Developing health education messages for women at risk of having a NTD-affected pregnancy; (2) developing State chapters to improve the health of individuals with spina bifida and their families; and (3) developing a central resource information and education center about spina bifida.

To be eligible, applicants must:

1. Demonstrate that the organization's mission is explicitly committed to the prevention of NTDs specifically spina bifida, and the health and well being of individuals with spina bifida and their families as demonstrated by submission of the charter, articles of incorporation, or other governing documents.

2. Demonstrate that the organization is a nonprofit and recognized as tax exempt under section 501(c)(3) of the Internal Revenue Code, and this may be demonstrated through inclusion of your Internal Revenue Service determination letter.

3. Demonstrate the organization has capacity and experience in providing health education to women who are at risk of having a NTD-affected pregnancy, and this may be demonstrated through letters of support.

4. Demonstrate that the organization has a national membership and a national network of State and local chapters; this may be done through a letter from the organization's leadership which describes the national network.

5. Demonstrate the presence and functions of a national information and resource center that is capable of expansion.

This information should be placed directly behind the face page (first page) of your application. Applications that do not include the above information will be determined as non-responsive and will be returned without review.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application

did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Note: Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: (770) 488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI): CDC requests that you send a LOI if you intend to apply for this program. Your LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review. Your LOI must be submitted in the following format:

- Maximum number of pages: Two.
- Font size: 12-point unreduced.
- Single-spaced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Written in plain language, avoid jargon.

Content: Your LOI must contain the following information: Name, address, and telephone number of the Principal Investigator; names of other key personnel; participating institutions; number and title of the program announcement.

Application: You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 35. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page, double spaced.
- Held together only by rubber bands or metal clips; not bound in any other way.

Your narrative should address activities to be conducted over the entire project period, and must include the following items which correspond to the evaluation criteria: Plan, Methods, Objectives, Timeline, Staff, Understanding, Need, Performance Measures, Budget Justification, etc. The budget justification will not be counted against the stated page limit.

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information may include: curriculum vitae, resumes, organizational charts, letters of support, graphic presentations of time-bounded work plans, etc.

Applicants must submit a separate typed abstract of their proposal consisting of no more than two single-spaced pages. Applicants should also include a table of contents for the project narrative and related attachments.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy, and there is no charge.

To obtain a DUNS number, access the following Web site: *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, *see* the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

IV.3. Submission Dates and Times

LOI Deadline Date: June 10, 2004.

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review.

Application Deadline Date: June 25, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: (770) 488–2700. Before calling, please wait three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Your application is subject to Intergovernmental Review of Federal Programs, as governed by Executive Order (EO) 12372. This order sets up a system for State and local governmental review of proposed Federal assistance applications. You should contact your State single point of contact (SPOC) as early as possible to alert the SPOC to prospective applications, and to receive instructions on your State's process. Click on the following link to get the current SPOC list: *http://www.whitehouse.gov/omb/grants/spoc.html.*

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows: Grant funds may be used to

support personnel services, supplies, equipment, travel, subcontracts, and other services directly related to project activities consistent with the approved scope of work. Grant funds cannot be used to supplant other available applicant or collaborating agency funds, for construction, for purchase of facilities or space, or for patient care. Grant funds cannot be used for individualized services (direct patient support) such as for wheelchairs, medical appliances, or assistive technology unless specifically approved by the funding agency. Grant funds cannot be used for the conduct of research.

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

LOI Submission Address: Submit your LOI by express mail, delivery service, fax, or e-mail to: Lisa T. Garbarino, Public Health Analyst, National Center on Birth Defects, and Developmental Disabilities, 1600 Clifton Road, Mailstop: E–87, Atlanta, GA 30333. Telephone (404) 498–3979, fax (404) 498–3060, e-mail: *lgt1@cdc.gov.*

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA#04215, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the identified objectives of the grant. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Each application will be evaluated individually against the following criteria by an independent review group appointed by CDC.

1. Scope of Proposal (30 Points)

This addresses the applicant's capacity to fully and effectively carry out project activities on a national scale as noted in the Announcement. This includes how well the activities proposed will achieve project goals and how the applicant anticipates and utilizes innovative and valued approaches in meeting all requirements of the Announcement. This also includes how well the applicant accounts for working with collaborating entities and partners toward meeting the purpose of the project.

2. Description of Objectives (25 Points)

This assesses whether the proposed goals and objectives are clearly stated, realistic, time-phased, adequately detailed, capable of tracking, and related to the purpose of the project. It includes how well the goals and objectives encompass all relevant components of the work required under the Announcement with attention to individual, interdependent, and synergistic relationships among all elements of the Program Requirements.

3. Project Personnel (20 Points)

This includes an evaluation as to whether all personnel proposed to be involved in this project are fully qualified, with evidence of experience and evidence in past activities and achievements appropriate to a project of this magnitude and scope. It also includes whether the stated responsibilities for requested personnel and the proposed staffing functions will assure adequate progress toward meeting all goals and objectives.

4. Understanding of the Problem (15 Points)

This includes how well the applicant demonstrates full understanding of the range of work requirements, potential problems, and complexities of the project. It also covers how well the applicant provides background information for the tasks envisioned such that framework and foundation described directly demonstrates that the plan proposed to conduct the project will be effective and successful.

5. Evaluation (10 Points)

This includes the review of the applicant's evaluation plan for the design and management of the individual and multiple initiatives proposed in the conduct of the project. This includes the funding agency's review of the applicant's planning protocol for new activities as well as the applicant's capacity to assess and monitor the performance and success of ongoing activities implemented over the life of the project.

6. Budget (Not Scored)

How well does the applicant provide justification for budget expenditures as well as appropriateness to activities proposed in the application? The budget will be evaluated for the extent that it is reasonable, clearly justified, and consistent with the intended use of the grant funds.

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by the National Center on Birth Defects and Developmental Disabilities. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the ''V.1. Criteria'' section above.

V.3. Anticipated Award Date

September 1, 2004.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Part 74 and Part 92

For more information on the Code of Federal Regulations, *see* the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1 Human Subjects Requirements.
- AR–2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research.
- AR–7 Executive Order 12372.

• AR–8 Public Health System Reporting Requirements.
• AR–10 Smoke-Free Workplace Requirements.
• AR–11 Healthy People 2010.
• AR–12 Lobbying Restrictions.
• AR–14 Accounting System Requirements.
• AR–15 Proof of Non-Profit Status.
• AR–22 Research Integrity.
• AR–24 Health Insurance Portability and Accountability Act Requirements.
• AR–25 Release and Sharing of Data.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:
a. Current Budget Period Activities Objectives.
b. Current Budget Period Financial Progress.
c. New Budget Period Program Proposed Activity Objectives.
d. Budget.
e. Additional Requested Information.
f. Measures of Effectiveness.
2. Financial status report and annual progress report, no more than 90 days after the end of the budget period.
3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the ''Agency Contacts'' section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341. Telephone: (770) 488–2700.

For program technical assistance, contact: Lisa T. Garbarino, Public Health Analyst, National Center on Birth Defects and Developmental Disabilities, CDC, 1600 Clifton Road, Mailstop E–87, Atlanta, GA 30333. Telephone: (404) 498–3979, e-mail: *lgt1@cdc.gov.*

For financial, grants management, or budget assistance, contact: Sylvia Dawson, Grants Management Specialist, Procurement and Grants Office, CDC, 2920 Brandywine Road, Suite 300, Atlanta, GA 30341. Telephone: (770) 488–2771, e-mail: *snd8@cdc.gov.*

Dated: May 20, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–11871 Filed 5–25–04; 8:45 am]

BILLING CODE 4183–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Study Effect of West Nile Virus Infection on Outcomes of Pregnancy in Humans

Announcement Type: New.
Funding Opportunity Number: 04213.
Catalog of Federal Domestic Assistance Number: 93.283.
Key Dates:
Letter of Intent Deadline: June 15, 2004.
Application Deadline: July 6, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 317(k)(2) of the Public Health Service Act, (42 U.S.C. 247b(k)(2)), as amended.

Purpose and Research Objectives: The purpose of the program is to determine whether West Nile Virus (WNV) infection of pregnant women has adverse effects on the outcomes of pregnancy and to measure and describe the effects, if any, on the health of children born to women who were infected with WNV during their pregnancy.

This program addresses the ''Healthy People 2010'' focus area of Immunization and Infectious Diseases.

Measurable outcomes of the program will be in alignment with the following performance goal for the National Center on Birth Defects and Developmental Disabilities: To improve the understanding and find the causes and risk factors for birth defects and developmental disabilities in order to develop prevention strategies.

WNV, a single-stranded RNA flavivirus with antigenic similarities to Japanese encephalitis and St. Louis encephalitis viruses, is transmitted to humans primarily through the bite of infected mosquitoes. Flavivirus infection during pregnancy has been rarely associated with both spontaneous abortion and neonatal illness, and these viruses have not been known to cause birth defects in humans. In 2002, a 20-year old woman developed WNV encephalitis during the 27th week of pregnancy. At 38 weeks of gestation she delivered a live infant who appeared normal but on further examination had chorioretinitis and cystic cerebral tissue destruction. Tests for cytomegalovirus, rubella virus, herpes simplex virus, lymphocytic choriomeningitis virus, enterovirus, and toxoplasma provided no evidence that any of these agents had infected the infant. IgM antibody to WNV was found in cord blood and in the infant's serum and cerebrospinal fluid, indicating that the infant had acquired WNV infection in utero. WNV nucleic acid was found in the placenta and umbilical cord tissue. Although it is not possible to establish a direct link between WNV and the abnormalities seen in this infant, the abnormalities observed are consistent with those observed in intrauterine infections with other agents, suggesting that they may be related to WNV intrauterine infection. Three other instances of maternal WNV infection were investigated in 2002; in all three instances the infants were born at full term with normal appearance and without laboratory evidence of WNV infection, but cranial imaging studies and ophthalmologic examinations were not performed.

During 2002 a total of 4,156 cases of WNV illness in humans, including 2,942 cases of neuroinvasive disease, were reported to the Centers for Disease Control and Prevention (CDC) from state health departments. During 2003 over 9,100 cases of WN illness, including over 2,600 cases of neuroinvasive disease were reported to CDC. CDC is currently following over 70 women who were reported to have had WNV disease during pregnancy in 2003.

The proportion of WNV infections during pregnancy that result in congenital infection of the newborn is unknown. The spectrum of clinical abnormalities associated with intrauterine infections with other agents is wide and includes embryonic death and resorption, abortion and stillbirth, prematurity, intrauterine growth retardation and low birth weight, developmental anomalies and teratogenesis, congenital disease, and persistent postnatal infection. The case described above from 2002 suggests that intrauterine transmission of WNV in some instances may have deleterious consequences, but the spectrum of abnormalities and degree of risk of intrauterine transmission are currently unknown. Improved understanding of these issues is essential to allow appropriate counseling of women

exposed to WNV and to fully appreciate the impact of this emerging infection.

In December of 2003, the Division of Vector-Borne Infectious Diseases (DVBID) of the National Center for Infectious Diseases (NCID), and the Division of Birth Defects and Developmental Disabilities (DBDDD) of the National Center on Birth Defects and Developmental Disabilities (NCBDDD) sought the opinion of experts on the evaluation of congenital infections to develop interim guidelines for the evaluation of infants born to mothers who were infected with WNV during their pregnancy. These guidelines included careful evaluation of physical characteristics, growth, development, and hearing for these infants and ophthalmologic and dysmorphologic evaluations and imaging of the brain for infants with evidence of congenitally acquired WNV infection. Data obtained from these evaluations will need to be collected and carefully reviewed in order to better understand the effects of WNV on pregnancy and infant outcomes.

Activities: Recipient activities for this program are as follows:

(1) Develop a procedure for study subject enrollment. Collaborate with staff at DVBID and DBDDD to enroll women who have been infected with WNV during pregnancy into the study using the WNV pregnancy registry maintained by DVBID as a primary source for enrollment. Additional sources of enrollment may be used upon mutual agreement between the recipient and CDC.

(2) Develop a procedure for enrollment of pregnant women who have not been infected with WNV to serve as study controls.

(3) Develop a study protocol detailing the study design, sample size calculations, study timeline, and provisions to maintain confidentiality of study subjects.

(4) Ensure that all WNV-infected women enrolled in the study have been or are reported to the state health department for the state in which they reside.

(5) Evaluate outcomes of all pregnant women in the study to include documentation of complications of pregnancy, miscarriage, premature delivery and health of live-born infants according to the interim guidelines published in the Morbidity and Mortality Weekly Report, Volume 53, February 27, 2004, pages 154–157. Because of uncertainty regarding diagnostic tests for congenital WNV infection; for purposes of this project, all infants born to women who were suspected to be infected with WNV during the first trimester of their pregnancy should receive the evaluation recommended for infants suspected to have congenital WNV infection, subject to consent of the parents. Infants born to women suspected to have been infected with WNV during the second or third trimester of pregnancy should be evaluated as indicated in the interim guidelines mentioned above. More detailed evaluation may be proposed by the recipient subject to ethical human research review and approval of project staff at DVBID and DBDDD.

(6) Publish and disseminate program results.

CDC Responsibilities: In this cooperative agreement, CDC Scientists (Scientific Liaisons) within the DBDDD/NCBDDD and the DVBID/NCID are an equal partner with scientific and programmatic involvement during the conduct of the project through technical assistance, advice, and coordination. These Scientific Liaisons will:

(1) Participate in the development of the protocol.

(2) Participate in the analysis, interpretation, and reporting of findings in the scientific literature and other media to the community at large and the public policy community within the Federal government.

(3) Participate in data management, analysis of data, and interpretation and dissemination of findings.

(4) Provide scientific consultation and technical assistance in the design and conduct of the project, including protocol adherence, outcome measures, and analytical approaches in participation with the recipient organization.

CDC Scientific Program Administrator (SPA)

The CDC NCBDDD will appoint an SPA, apart from the NCBDDD and DVBID Scientific Liaisons who will:

(1) Serve as the Program Official for the funded research institutions.

(2) Carry out continuous review of all activities to ensure objectives are being met.

(3) Attend Coordination Committee meetings for purposes of assessing overall progress and for program evaluation purposes.

(4) Provide scientific consultation and technical assistance in the conduct of the project as requested.

(5) Conduct site visits to recipient institutions to determine the adequacy of the research and to monitor performance against approved project objectives.

Collaborative Responsibilities

The planning and implementation of the cooperative aspects of the study will be effected by a Coordination Committee consisting of the Principal Investigator from the participating institution and the CDC Scientific Liaisons. This Coordinating Committee will formulate a plan for cooperative research.

At periodic coordination committee meetings, the group will: (1) Make recommendations on the study protocol and data collection approaches; (2) discuss the target populations that have been or will be recruited; (3) identify and recommend solutions to unexpected study problems; and (4) discuss ways to efficiently coordinate study activities and best practices.

II. Award Information

Type of Award: Cooperative agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $350,000.

Approximate Number of Awards: One.

Approximate Average Award: $350,000. (This amount is for the first 12-month budget period, and includes both direct and indirect costs.)

Floor of Award Range: None.

Ceiling of Award Range: $350,000 in initial budget period. If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements. Based upon budget constraints, requests for financial assistance are subject to reduction in accordance with available resources.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Four years. Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public and private non-profit organizations and by governments and their agencies, such as:

- Public non-profit organizations.
- Private non-profit organizations.
- Universities.

- Colleges.
- Research Institutions.
- Hospitals.
- State and local governments or their *bona fide* agents (this includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau).
- Political subdivisions of States (in consultation with States).

A *bona fide* agent is an agency/organization identified by the State as eligible to submit an application under the State eligibility in lieu of a State application. If you are applying as a *bona fide* agent of a State or local government, you must provide a letter from the State as documentation of your status. Place this documentation behind the first page of the application form.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

Individuals Eligible to Become Principal Investigators: Any individual with the skills, knowledge, and resources necessary to carry out the proposed research is invited to work with their institution to develop an application for support. Individuals from under-represented racial and ethnic groups as well as individuals with disabilities are always encouraged to apply for CDC programs.

Other Eligibility Requirements: If your application is incomplete or non-responsive to the requirements listed below, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Applicants must: (1) Document their present infrastructure, capacity, expertise, and experience in conducting clinical and epidemiological evaluations of birth defects and/or infectious diseases with a national sample; and (2) have in the past shown their ability to identify and enroll women with West Nile Virus or related birth defects and/or infectious diseases in studies related to infections during pregnancy and with related case controls.

Applicants must provide specific evidence to substantiate this capacity, experience, and expertise. Through documentation of two pages in length, applicants must provide specific evidence that they can fully meet these eligibility criteria in order to be considered for formal review. This information must be included as part of the application and inserted immediately after the Face Page of the application.

Note: Title 2 of the United States Code Section 1611 states that an organization described in Section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity, use application form PHS 398 (OMB number 0925–0001 rev. 5/2001). Forms and instructions are available in an interactive format on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm*.

Forms and instructions are also available in an interactive format on the National Institutes of Health (NIH) Web site at the following Internet address: *http://grants.nih.gov/grants/funding/phs398/phs398.html*.

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI)

The LOI must be written in the following format:

- Maximum number of pages: Two.
- Font size: 12-point unreduced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One-inch margins.
- Printed only on one side of page.
- Single spaced.
- Written in plain language; avoid jargon.

The LOI must contain the following information: name, address, and telephone number of the proposed Principal Investigator, number and title of this program announcement, names of other key personnel, designations of collaborating institutions and entities, and an outline of the proposed work, recruitment approach, and expected outcomes.

Application: Follow the PHS 398 application instructions for content and formatting of your application. For further assistance with the PHS 398 application form, contact PGO–TIM staff at (770) 488–2700, or contact GrantsInfo, telephone (301) 435–0714, e-mail: *GrantsInfo@nih.gov*.

You must submit a signed original and five copies of your application form. The PHS 398 grant application form requires the applicant to enter the project title on page 1 (Form AA, ''Face Page'') and the project description (abstract on page 2).

The main body of the application narrative should not exceed 30 single-spaced pages. This narrative research plan should address activities to be conducted over the entire project period. Please note that this maximum number of pages allowed exceeds the maximum number of pages (25 pages) indicated in the PHS 398 grant application form (''Research Grant Table of Contents'').

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information may include curriculum vitae and resumes for key project staff, organizational charts, letters of support, etc.; and should be limited to those items relevant to the requirements of this announcement.

All material must be typewritten, with 10 characters per inch type (12 point) on 8½ by 11 inch white paper with one inch margins, no headers or footers (except for applicant-produced forms such as organizational charts, c. vitae, graphs and tables, etc). Applications must be held together only by rubber bands or metal clips, and not bound together in anyway (including attachments/appendices).

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. Your DUNS number must be entered on line 11 of the face page of the PHS 398 application form. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. For more information, *see* the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

IV.3. Submission Dates and Time

Letter of Intent (LOI) Deadline Date: June 15, 2004.

CDC requests that you send a LOI if you intend to apply for this program.

Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and will allow CDC to plan the application review.

Application Deadline Date: July 6, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carrier's guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget are that project funds cannot be used to supplant other available applicant or collaborating agency funds for construction or for lease or purchase of facilities or space.

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement must be less than 12 months from the application due date.

IV.6. Other Submission Requirements

LOI Submission Address

Lisa T. Garbarino, Public Health Analyst, National Center on Birth Defects and Developmental Disabilities, CDC, 1600 Clifton Road, Mailstop E–87, Atlanta, Georgia 30333. E-mail address: *lgt1@cdc.gov.*

Application Submission Address: Submit the original and five copies of your application by mail or express delivery service to: Technical Information Management—PA, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, Georgia 30341.

Applications may not be submitted by fax or e-mail at this time.

V. Application Review Information

V.1. Review Criteria

You are required to provide measures of outcome and effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

The goals of CDC-supported research are to advance the understanding of biological systems, improve the control and prevention of disease and injury, and enhance health. In the written comments, reviewers will be asked to evaluate the application in order to judge the likelihood that the proposed research will have a substantial impact on the pursuit of these goals. The scientific review group will address the application's overall score, weighting them as appropriate for each application. The application does not need to be strong in all categories to be judged likely to have major scientific impact and thus deserve a high priority score.

Under the evaluation criteria noted below, applicants must describe how they will address the program components as they relate to the Purpose and Research Objectives, and Recipient Activities as cited in this Announcement.

Your application will be evaluated against the following criteria:

1. Background/Understanding/Competency, including:

a. Identification of the problem and justification for the study, including accounts of understanding of West Nile Virus and its association with human illness, morbidity, and mortality;

b. Accounts as to the level of review of relevant literature undertaken and the discussion of the foundation in science being utilized in addressing the purpose of the research;

c. Description of the understanding of the implications and interrelationships between the vector and human host responses;

d. Accounts of the applicants understanding of the possible association between West Nile Virus infection and outcomes of pregnancy in humans;

e. Discussion of the unique capabilities residing in the applicant organization in conducting clinical and epidemiological evaluations of birth defects and/or infectious diseases on a national basis;

f. Description of the study goals, objectives and/or hypotheses, and

g. Intended use and applicability of study findings.

2. Research Approach and Organizational Capacity, including:

a. The overall strength and feasibility of the research design with an emphasis on pregnant women and the health of children born to women who were infected with West Nile Virus during pregnancy;

b. Presentation of how the applicant is fully able to identify and enroll women with West Nile Virus during pregnancy and related case controls;

c. Description and justification of the study population, including case definitions, number of participants, selection criteria, and methods for recruiting, enrolling, and sustaining participation;

d. Description of the consent process, including procedures for informing participants about the study and methods for obtaining consent;

e. The detailed description of the research design and all follow-up protocols, including access to a national sample;

f. Description of all study instruments including survey questionnaires, and a discussion of their reliability and validity;

g. Data handling and analysis plans, including statistical methodology, data entry, storage, and disposition; and

h. Plans for disseminating and reporting results to multiple (and applicant-identified) target audiences.

3. Investigators/Collaborators/and Management Plans, including:

a. Description of the major collaborators and their explicit contributions to project objectives;

b. Discussion of investigator(s) qualifications, roles, tasks, time commitments, and responsibilities; and

c. Detailed work plan with specific time frames for implementation of the project. This includes the presentation of overarching goals for the full four-year project period with a detailed work plan outlining monthly or quarterly objectives covering the first two budget years.

4. Evaluation Plan, including:

a. Description of how progress will be monitored and evaluated over the entire course of the research;

b. The extent to which project goals are to be attained and specific objectives accomplished; and

c. Description of expected outcomes and how the overall effectiveness of the research will be determined.

5. Budget Description and Justification: This includes the comprehensiveness and adequacy of the proposed budget in relation to program operations, collaborations, and services; and the extent to which the budget is reasonable, clearly justified, accurate, and consistent with the purposes of this research.

6. Protections: Does the application adequately address the requirements of title 45 CFR part 46 for the protection of human subjects? This criteria will not be scored; however, an application can be disapproved if the research risks are sufficiently serious and protection against risks is so inadequate as to make the entire application unacceptable.

7. Inclusion: Does the application adequately address the CDC policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research? This includes:

a. The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

b.The proposed justification when representation is limited or absent.

c. A statement as to whether the design of the study is adequate to measure differences when warranted.

d. A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

V.2. Application Review Process

Applications will be reviewed by CDC staff for completeness by the Procurement and Grants Office (PGO) and for responsiveness by NCBDDD as outlined in the ''Other Eligibility Requirements''. Incomplete applications and applications that are non-responsive will not advance through the review process. Applicants will be notified that their application did not meet submission requirements and will not receive further consideration.

Applications, which are complete and responsive, will be subject to a preliminary evaluation (triage) by the scientific review group (Special Emphasis Panel—SEP) to determine if the application is of sufficient technical and scientific merit to warrant further review by the SEP.

Applications that are determined to be non-competitive will not be considered, and the SEP will notify the investigator/program director and the official signing for the applicant organization. A dual review process will then evaluate those applications determined to be competitive.

V.3. Anticipated Award Date

September 1, 2004.

VI. Award Administration Information

VI.1. Award Notices

If your application is to be funded, you will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application. Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Parts 74 and 92

For more information on the Code of Federal Regulations, *see* the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1 Human Subjects Requirements.
- AR–2 Requirement for Inclusion of Women and Racial and Ethnic Minorities in Research.
- AR–9 Paperwork Reduction Act Requirements.
- AR–10 Smoke-Free Workplace Requirements.
- AR–11 Healthy People 2010.
- AR–12 Lobbying Restrictions.
- AR–14 Accounting Systems Requirements.
- AR–15 Proof of Non-Profit Status.
- AR–22 Research Integrity.
- AR–25 Release and Sharing of Data.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting

You must provide CDC with an original, plus two copies of the following reports:

1. Interim progress report, (PHS 2590, OMB Number 0925–0001, rev. 5/2001), on a date to be determined for your project for each subsequent budget year. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities and Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activities and Objectives.

d. Budget.

e. Additional Requested Information.

f. Measures of Effectiveness.

2. Financial status report and annual report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be sent to the Grants Management Specialist listed in the ''Agency Contacts'' section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section (PGO–TIM), CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, Georgia 30341. Telephone: 770–488–2700.

For program technical assistance, contact: Lisa T. Garbarino, Public Health Analyst, National Center on Birth Defects and Developmental Disabilities, CDC, 1600 Clifton Road, Mailstop E–87, Atlanta, Georgia 30333. E-mail address: *lgt1@cdc.gov;* telephone: 404–498–3979.

For financial, grant management, or budget assistance, contact: Sylvia Dawson, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, Georgia 30341. Telephone: 770–488–2771; e-mail: *snd8@cdc.gov.*

Dated: May 20, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–11872 Filed 5–25–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee; Correction of Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting: Correction.

ACTION: Notice; correction.

SUMMARY: The Department of Health and Human Services, Centers for Disease Control and Prevention published a document in the **Federal Register** of May 18, 2004, concerning the Healthcare Infection Control Practices Advisory Committee.

Correction

In the **Federal Register** of May 18, 2004, (Volume 69, Number 96) [Notices] Page 28132–28133—''Place: Swissotel, 3391 Peachtree Road, NE., Atlanta, Georgia 30033'' should read: Westin Buckhead Hotel, 3391 Peachtree Road, NE., Atlanta, Georgia 30033.

FOR FURTHER INFORMATION CONTACT: Michele L. Pearson, M.D., Executive Secretary, HICPAC, Division of Healthcare Quality Promotion, NCID, CDC, 1600 Clifton Road, NE., M/S A–07, Atlanta, Georgia 30333, telephone (404) 498–1182.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–11874 Filed 5–25–04; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Council for the Elimination of Tuberculosis

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following council meeting.

Name: Advisory Council for the Elimination of Tuberculosis (ACET).

Times and Dates: 8:30 a.m.–5 p.m., June 23, 2004. 8:30 a.m.–12 p.m., June 24, 2004.

Place: Corporate Square, Building 8, 1st Floor Conference Room, Atlanta, Georgia 30333. Telephone (404) 639–8008.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 100 people.

Purpose: This council advises and makes recommendations to the Secretary, Department of Health and Human Services; the Assistant Secretary for Health; and the Director, CDC, regarding the elimination of tuberculosis (TB). Specifically, the Council makes recommendations regarding policies, strategies, objectives, and priorities; addresses the development and application of new technologies; and reviews the extent to which progress has been made toward eliminating TB.

Matters To Be Discussed: Agenda items include issues pertaining to TB Vaccine, TB Therapeutics and other TB-related topics.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Paulette Ford-Knights, National Center for HIV, STD, and TB Prevention, 1600 Clifton Road, NE., M/S E–07, Atlanta, Georgia 30333, telephone (404) 639–8008.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–11873 Filed 5–25–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974; Computer Matching Program (Match No. 2001–04)

AGENCY: Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

ACTION: Notice of computer matching program.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, this notice announces the establishment of a computer-matching program that CMS plans to conduct with the Department of Defense (DoD). We have provided background information about the proposed matching program in the **SUPPLEMENTARY INFORMATION** section below. Although the Privacy Act requires only that CMS provide an opportunity for interested persons to comment on the proposed matching program, CMS invites comments on all portions of this notice. *See* **EFFECTIVE DATES** section below for comment period.

EFFECTIVE DATES: CMS filed a report of the Computer Matching Program with the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on April 30, 2004. We will not disclose any information under a matching agreement until 40 days after filing a report to OMB and Congress or 30 days after publication. We may defer implementation of this matching program if we receive comments that persuade us to defer implementation.

ADDRESSES: The public should address comments to: Director, Division of Privacy Compliance Data Development (DPCDD), Enterprise Databases Group, Office of Information Services (OIS), CMS, Mail stop N2–04–27, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m.–3 p.m., eastern time zone.

FOR FURTHER INFORMATION CONTACT: Maribel Franey, Health Insurance Specialist, DPCDD, Enterprise Databases Group, OIS, CMS, Mail stop N2–04–27, 7500 Security Boulevard, N2–04–06, Baltimore, Maryland 21244–1850. The telephone number is (410) 786–0757, or facsimile (410) 786–5636.

SUPPLEMENTARY INFORMATION:

I. Description of the Matching Program

A. General

The Computer Matching and Privacy Protection Act (CMPPA) of 1988 (Public Law (Pub. L.) 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the manner in which computer matching involving Federal agencies could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 100–508) further amended the Privacy Act regarding protections for such individuals. The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when

records in a system of records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

1. Negotiate written agreements with the other agencies participating in the matching programs;
2. Obtain the Data Integrity Boards (DIB) approval of the match agreements;
3. Furnish detailed reports about matching programs to Congress and OMB;
4. Notify applicants and beneficiaries that the records are subject to matching; and,
5. Verify match findings before reducing, suspending, terminating, or denying an individual's benefits or payments.

B. CMS Computer Matches Subject to the Privacy Act

CMS has taken action to ensure that all of the computer matches programs that this agency participates in comply with the requirements of the Privacy Act of 1974, as amended.

Dated: May 20, 2004.

Mark B. McClellan,

Administrator.

COMPUTER MATCH NO. 2001–04

NAME:

''Verification of TRICARE Eligibility''.

SECURITY CLASSIFICATION:

Level Three Privacy Act Sensitive.

PARTICIPATING AGENCIES:

Centers for Medicare & Medicaid Services (CMS); and Department of Defense (DoD).

AUTHORITY FOR CONDUCTING MATCHING PROGRAM:

This Computer Matching Agreement is executed to comply with the Privacy Act of 1974 (5 U.S.C. 552a), as amended, the Office of Management and Budget (OMB) Circular A–130, entitled ''Management of Federal Information Resources'' (61 FR 6435, February 20, 1996), and OMB guidelines pertaining to computer matching (54 FR 25818, June 19, 1989).

This agreement implements the information matching provisions of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2001 (Public Law (Pub. L.) 106–398) §§ 711 and 712; the NDAA for FY 1993 (Pub. L. 102–484) § 705, and the NDAA for FY 1992 (Pub. L. 102–190 §§ 704 and 713).

PURPOSE (S) OF THE MATCHING PROGRAM:

The purpose of this agreement is to establish the conditions, safeguards and procedures under which CMS will disclose Medicare Part A entitlement and Part B enrollment information to the Department of Defense (DoD), Defense Manpower Data Center (DMDC), Defense Enrollment and Eligibility Reporting System Office (DEERS), and the Office of the Assistant Secretary of Defense (Health Affairs) / TRICARE Management Activity (TMA). This disclosure will provide TMA with the information necessary to determine if an individual is eligible to receive extended TRICARE coverage.

Current law requires TMA to provide health care and medical benefits to Medicare eligible beneficiaries who are enrolled in the medical insurance program under Part B of the Medicare program. In order for TMA to meet these requirements, CMS agrees to disclose Part A entitlement and Part B enrollment data on this dual eligible population, which will be used to determine a beneficiary's eligibility for care under TRICARE. DEERS will receive the results of the computer match and provide the information provided to TMA for use in its program.

CATEGORIES OF RECORDS AND INDIVIDUALS COVERED BY THE MATCH:

DEERS will furnish CMS with an electronic file on a monthly basis extracted from DEERS' system of records identified as S322.50, entitled ''Defense Eligibility Records (DER),'' containing social security numbers (SSN) and date of birth for all DoD eligible beneficiaries whom may also be eligible for Medicare benefits. CMS will match the DEERS file against its ''Enrollment Database (EDB)'' system of records (formerly known as the Health Insurance Master Record), System No. 09–70–0502, and will validate the identification of the beneficiary by providing the Health Insurance Claims Number (HICN) that matches against the SSN and date of birth provided by DEERS. CMS will also provide the Medicare Part A entitlement and Part B enrollment status of the beneficiary. CMS's data will help TMA to determine a beneficiary's eligibility for care under TRICARE. DEERS will receive the results of the computer match and provide the information provided in the reply file to TMA for use in its program.

INCLUSIVE DATES OF THE MATCH:

The Computer Matching Program shall become effective no sooner than 40 days after the report of the Matching Program is sent to OMB and Congress, or 30 days after publication in the **Federal Register**, which ever is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. 04–11937 Filed 5–25–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2002D–0350]

Guidance for Industry on Handling and Retention of Bioavailability and Bioequivalence Testing Samples; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Handling and Retention of BA and BE Testing Samples.'' The guidance is intended to provide recommendations for study sponsors and/or drug manufacturers, contract research organizations, site management organizations, clinical investigators, and independent third parties on the procedure for handling reserve samples from bioavailability (BA) and bioequivalence (BE) studies. The guidance clarifies how to distribute test articles and reference standards to testing facilities, how to randomly select reserve samples, and how to retain reserve samples.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Martin Yau, Center for Drug Evaluation and Research (HFD–45), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–5458.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Handling and Retention of BA and BE Testing Samples.'' Following the generic drug crisis in the 1980s, FDA issued regulations to prevent possible bias and fraud in BA and BE testing by study sponsors and/or drug manufacturers (58 FR 25918, April 28, 1993). In the preamble to the final rule, the agency stated that the study sponsor should not separate out the reserve samples of the test article and reference standard prior to sending the drug product to the testing facility. This is to ensure that the reserve samples are in fact representative of the same batches provided by the study sponsor for the testing.

FDA's Division of Scientific Investigations and field investigators from the Office of Regulatory Affairs conduct inspections of clinical and analytical sites that perform BA and BE studies for sponsors and/or drug manufacturers seeking approval of generic and new drug products. A frequent finding from these inspections is the absence of reserve samples at the testing facility. In the **Federal Register** of August 21, 2002 (67 FR 54219), the agency issued a draft guidance entitled ''Handling and Retention of Bioavailability and Bioequivalence Testing Samples'' to clarify the responsibilities of the involved parties for retention of samples used in BA and BE studies. That draft guidance included recommendations for sampling techniques and responsibilities in various study settings. All comments received during the comment period have been carefully reviewed and changes were made to this final guidance where appropriate.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on retention of BA and BE testing samples. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the guidance at any time. Two copies of any mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default/htm.*

Dated: May 18, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–11828 Filed 5–25–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Maternal and Child Health Research Grants Review Committee; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Maternal and Child Health Research Grants Review Committee.

Dates and Times: June 15 , 2004, 8:30 a.m. to 9:30 a.m.—open, June 15, 2004, 9:30 a.m. to 5 p.m.—closed, June 16, 2004, 8:30 a.m. to 5 p.m.—closed, June 17, 2004, 8:30 a.m. to 5 p.m.—closed.

Place: Hilton Garden Inn, 815 14th Street, NW., Washington, DC 20005.

Status: The meeting will be open to the public on Tuesday, June 15, 2004, from 8:30 a.m. to 9:30 a.m. The remainder of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(6), title 5 U.S.C., and the Determination of the Acting Deputy Associate Administrator for Management and Program Support, Health Resources and Services Administration (HRSA), pursuant to section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463).

Purpose: To review research grant applications in the program areas of maternal and child health, administered by HRSA's Maternal and Child Health Bureau (MCHB).

Agenda: The open portion of the meeting will cover opening remarks by the Director, Division of Research, Training and Education, MCHB, HRSA, who will report on program issues, congressional activities, and other topics of interest to the field of maternal and child health. The closed portion of the meeting will involve the review, discussion, and evaluation of grant applications containing information of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

For further information contact: Anyone wishing to obtain a roster of members, minutes of meetings, or other relevant information should write or contact Stella Yu, Sc.D., M.P.H., Executive Secretary, Maternal and Child Health Research Grants Review Committee, Room 18A–55, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–0695.

Dated: May 19, 2004.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 04–11829 Filed 5–25–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 Eye Institute Special Emphasis Panel, Review of Conference Applications (R13s).

Date: May 24, 2004.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892.

Contact Person: Houmam H. Araj, PhD, Scientific Review Administrator, Division of Extramural Research, National Eye Institute, NIH, 5635 Fishers Lane, Suite 1300, Bethesda, MD 20892–9602, 301–451–2020, *haraj@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institute of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11836 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 Eye Institute Special Emphasis Panel, Review of Mentored Clinical Scientist Development Awards (K08s).

Date: May 21, 2004.

Time: 4:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5835 Fishers Lane, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Samuel Rawlings, PhD, Chief, Scientific Review Branch, Division of Extramural Research, National Eye Institute, Bethesda, MD 20892, 301–451–2020.

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 No. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11837 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Review of RFA–HL–04–010: Inter-Relationships of Sleep, Fatigue, and HIV/AIDS.

Date: June 24, 2004.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Arthur N Freed, PhD, Review Branch, Room 7186, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, MSC 7924, Bethesda, MD 20892, (301) 435–0280.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Review of RFA–HL–04–003: Cellular and Molecular Imaging of the Cardiovascular, Pulmonary and Hematopoietic Systems.

Date: June 24–25, 2004.

Time: 7 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Keith A. Mintzer, PhD, Scientific Review Administrator, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7186, MSC 7924, Bethesda, MD 20892, (301) 435–0280.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11831 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Initial Review Group.

Date: June 15–16, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: DoubleTree Hotel and Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Jeffrey M. Chernak, PhD, Scientific Review Administrator, Office of Review, National Institute of Nursing Research, 6701 Democracy Plaza, Suite 712, MSC 4870, Bethesda, MD 20817, (301) 402–6959, *chernak@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. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: May 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11832 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Initial Review Group,

Medication Development Research Subcommittee.

Date: June 7, 2004.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW, Washington, DC 20037.

Contact Person: Khursheed Asghar, PhD, Chief, Basic Sciences Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 443–2755.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Health Services Research Subcommittee.

Date: June 8–9, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact: Mark R. Green, PhD, Chief, CEASRB, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1431.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Treatment Research Subcommittee.

Date: June 8–9, 2004.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kesinee Nimit, MD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1432.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Training and Career Development Subcommittee.

Date: July 7–9, 2004.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Mark Swieter, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6101 Executive Boulevard, Suite 234, Bethesda, MD 20892–8401, (301) 435–1389.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Screening and Intervention for Youth in Primary Care Settings.

Date: July 7–8, 2004.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mark R. Green, PhD, Deputy Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1431.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Member Conflict Meeting.

Date: July 8, 2004.

Time: 5 p.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Eliane Lazar-Wesley, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–4530.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: May 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11833 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, ''Neuroimaging Branch Support Services.''

Date: June 9, 2004.

Time: 9:30 a.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: Radisson Plaza Lord Baltimore, 20 West Baltimore Street, Baltimore, MD 21201.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, ''Clinical Trials Network Clinical Laboratory Services.''

Date: June 9, 2004.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Richard C. Harrison, Chief, Contract Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–435–1437.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11834 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group, Neuroscience of Aging Review Committee.

Date: June 2–3, 2004.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Louise L. Hsu, PhD, The Bethesda Gateway Building, 7201 Wisconsin Avenue/Suite 2C212, Bethesda, MD 20892, (301) 4696–9666, *hsul@exmur.nia.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Initial Review Group, Biological Aging Review Committee.

Date: June 2, 2004.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Ave., 2C212, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Alessandra M. Bini, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7708.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Initial Review Group, Clinical Aging Review Committee.

Date: June 3–4, 2004.

Time: 6:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Alicja L. Markowska, PhD, DSC, Scientific Review Administrator, Scientific Review Office, National Institute on Aging, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7703, *markowsa@nia.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel, Socio-economic Status and Health.

Date: June 13–14, 2004.

Time: 4 p.m. to 5:10 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Alfonso R. Ratoni, PhD., Scientific Review Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Room 2C212, Bethesda, MD 20892, 301/496–9666, *latonia@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11835 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed 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 meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(b)(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 contract proposals, 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, SAMe-R01 Application Review.

Date: June 11, 2004.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIAAA/Fishers Building, 5635 Fishers Lane, Room 3041, MSC 9304, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mahadev Murthy, PhD, Scientific Review Administrator, Extramural Project Review Branch, Office of Scientific Affairs, National Institute on Alcohol Abuse and Alcoholism, 6000 Executive Blvd., Suite 409, Bethesda, MD 20892–7003, (301) 443–2860.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, P60 Application Review.

Date: June 11, 2004.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIAAA/Fishers Building, 5635 Fishers Lane, Room 3041, MSC 9304, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mahadev Murthy, PhD, Scientific Review Administrator, Extramural Project Review Branch, Office of Scientific Affairs, National Institute on Alcohol Abuse and Alcoholism, 6000 Executive Blvd., Suite 409, Bethesda, MD 20892–7003, (301) 443–2860.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, RFA–AA–04–002 SBIR Applications.

Date: July 15, 2004.

Time: 8 a.m. to 10 a.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Mahadev Murthy, PhD, Scientific Review Administrator, Extramural Project Review Branch, Office of Scientific Affairs, National Institute on Alcohol Abuse and Alcoholism, 6000 Executive Blvd., Suite 409, Bethesda, MD 20892–7003, (301) 443–2860.

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 Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11838 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Clinical Trials in Organ Transplantation.

Date: June 14–15, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Paul A. Armstad, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–402–7098, *pamstad@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 18, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–11839 Filed 5–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Funding Availability (NOFA) for a Grant for Networking and Certifying Suicide Prevention Hotlines

Announcement Type: Initial.

Funding Opportunity Number: SM 04–013.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.243.

Due Date for Applications: July 21, 2004.

(**Note:** Letters from State Single Point of Contact (SPOC) in response to E.O. 12372 are due September 20, 2004.)

SUMMARY: The Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Mental Health Services, announces the availability of FY 2004 grant funds for Networking and Certifying Suicide Prevention Hotlines. A synopsis of this funding opportunity, as well as many other Federal Government funding opportunities, is also available at the Internet site: *http://www.grants.gov*.

For complete instructions, potential applicants must obtain a copy of SAMHSA's standard Infrastructure Grants announcement (INF–04 PA (MOD)), and the PHS 5161–1 (Rev. 7/00) application form before preparing and submitting an application. The INF–04 PA (MOD) describes the general program design and provides instructions for applying for all SAMHSA Infrastructure Grants, including the Networking and Certifying Suicide Prevention Hotlines grant. Additional instructions and specific requirements for this funding opportunity are described below.

I. Funding Opportunity Description:

Authority: Section 520A of the Public Health Service Act, as amended and subject to the availability of funds.

Networking and Certifying Suicide Prevention Hotlines grant program is one of SAMHSA's Infrastructure Grants. In general, SAMHSA's Infrastructure Grants provide funds to increase the capacity of mental health and/or substance abuse service systems to support effective programs and services. This particular grant will provide funding to manage a toll-free national suicide prevention hotline network utilizing a life affirming number which routes calls from anywhere in the United States to a network of local crisis centers that can link callers to local emergency, mental health and social service resources. Grant funds must also be used to increase the number of crisis centers certified in suicide prevention.

The goals of the Networking and Certifying Suicide Prevention Hotlines grant program are to:

(1) Increase the number of crisis programs offering hotline services which are networked through a single, nationally accessible telephone number, utilizing telecommunications technology that links callers to their geographically nearest crisis center. It is expected that there will be at least one crisis program offering hotline services in all 50 states;

(2) Increase the number of crisis centers/hotlines certified in suicide prevention, *e.g.*, having achieved defined standards in crisis worker training, service delivery, lethality assessments, organizational administration and program evaluation; and

(3) Evaluate, collect and analyze data regarding such issues as: As the use of the national suicide prevention number (including variations by State and area code); reasons for callers' use of the service; the nature and appropriateness of services provided; outcomes of the intervention (*i.e.*, referrals made to emergency, mental health and social services resources); and the technical efficiency and effectiveness of the telephone service that is provided to callers. The evaluation must address the effectiveness of intervention services provided by crisis centers within the network as compared to crisis centers not in the network.

To achieve these goals, the applicant will be required to engage in the following activities:

(1) *Network Centers:* The applicant must demonstrate a capacity to network centers using telephone technology that permits national access to crisis centers or hotline services through a single toll-free number. This number will be selected by SAMHSA and maintained by the applicant. SAMHSA will choose a number that is easy to remember and is life affirming. The applicant will use this telephone number to establish and maintain the hotline network. At the end of the grant period, SAMHSA will determine whether if it will continue to retain the number or release it to the grantee. This determination will be made no later than six months prior to the end of the grant period. The technology utilized must permit calls to be directed immediately to a telephone suicide prevention worker who is within geographic proximity to the caller. The network must have the capacity to assist local crisis centers in identifying the telephone numbers of callers at imminent risk of suicide in need of emergency rescue who are unable or unwilling to provide a telephone number or location (*e.g.*, caller ID, ANI, or call tracing). The applicant must describe in their proposed approach the type of call routing system to be used (*i.e.*, carrier driven advanced business networking or a customized service hosted by a carrier but maintained through the applicant organization or through subcontracts). The applicant should clearly explain why they are proposing a particular approach. This discussion should include the following information: review literature that discusses determination of peak usage periods in order to determine the size of the network, average call drop rates and how the proposed approach seeks to reduce call drops, the cost benefits to the approach, and the specific features of the approach that will enhance the

hotline network, and provide crucial data to the individual crisis centers and to SAMHSA.

In addition to establishing the telephone network, the applicant must clearly demonstrate the capability to provide training and technical assistance to the individual crisis centers on utilizing the network technology, provide assistance to obtain or upgrade equipment at the local crisis centers in order to participate in the network, provide incentives to the local crisis centers to maintain their certification, continue participation in the network and provide call outcome data to the applicant who will then aggregate data from all centers, analyze and report it to SAMHSA.

(2) *Certification of Crisis Hotlines:* The applicant must increase the number of crisis hotlines certified in suicide prevention. Crisis centers participating in the network should be certified in suicide prevention by the American Association of Suicidology (AAS), or if not certified by AAS, have met accreditation standards accepted by AAS as equivalent, such as the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), the Commission on the Accreditation of Rehabilitation Facilities (CARF), or Contact USA. The applicant should have experience with, or partner with, an organization that has experience with certification of crisis centers in suicide prevention.

(3) *Resource Database Development:* The applicant must develop a Resource Database that can be accessed via the Internet by all crisis centers, regardless of their participation in the network. This resource database will quickly provide the hotline center with local information on emergency, mental health, and social service resources within 50 miles of the caller's geographical area. The applicant should either have, or partner with, an organization that has a documented history of developing such a comprehensive resource database. The applicant may also propose to use other currently existing databases.

(4) *Program Evaluation:* The applicant must conduct an evaluation of the grant project that accurately documents the population served by the toll-free crisis line service, including variations in usage by State and area code; the reason(s) for callers' use of the service; the nature and appropriateness of the service that was provided; the outcome(s) (*i.e.*, referrals made to emergency, mental health, and social service resources); and the technical efficiency and effectiveness of the telephone service that is provided to callers using the toll-free crisis service. The applicant should either have, or partner with, another organization that has a documented history of successful evaluation efforts.

(5) *Sustainability:* The applicant must propose a sustainability plan that ensures that the program can be self-supporting when Federal funding ends. The applicant must demonstrate experience in sustaining similar initiatives through blended public and private funding.

(6) *Financial Management:* The selected applicant must demonstrate existence of an adequate financial management system (reference 45 CFR part 74, subpart C), and be capable of administering Federal awards. Specifically, the applicant must maintain and follow adequate policies and procedures that safeguard assets and determine cost allowability, maintain an accounting system capable of segregating grant income and expenditures, maintain effective accountability and control over grant funds, maintain accounting records supported by source documentation, maintain an adequate procurement system (including ability to administer subcontracts, if applicable), and maintain property control.

The activities described above fall within the following categories of allowable activities listed in the INF–04 PA (MOD): provider/network development, development of interagency coordination mechanisms, data infrastructure development, and evaluation. Activity in the other categories of allowable activity defined in the INF–04 PA (MOD) are allowed only to the extent that the applicant can demonstrate that they are critical to the effective implementation of the activities that are required for this grant.

Background

There are currently estimated to be over 500 operating ''crisis centers'' in the United States, exclusive of military and employee assistance programs. Some are specialty centers focusing on crises related to domestic violence or rape. Others see their mission as responding to the needs of all types of personal and family crises. The primary objective of the crisis center is to diffuse the immediate crisis, ensure the caller's safety, and assist the caller to take the next immediate steps toward resolving the problem. In any type of serious personal crisis, the potential for suicidal thoughts and behaviors exist. In published surveys, 10 percent of calls to all types of crisis programs involve suicidality. Hotline crisis services represent one of many possible effective interventions for suicidality.

''Hotline'' crisis services may be directly associated with a single crisis center, which also offers face-to-face client services, or be a ''hotline-only'' service in which there are no associated face-to-face services. Such ''hotline-only'' centers may be hundreds or thousands of miles from the location of the caller and often maintain databases of crisis, mental health, and social services local to the caller to which that person can be referred if indicated. ''Suicide prevention hotlines'' are staffed with suicide prevention workers who establish and maintain contact with the individual while identifying and clarifying the problem, evaluating the potential for suicide, assessing the individual's strengths and resources, and mobilizing available resources including paramedic or police intervention and emergency psychiatric care as needed.

''Suicide prevention hotlines'' may be stand-alone ''hotline only'' services, may operate out of community agencies, or be part of organized health and mental health care delivery systems. While suicide prevention hotlines have been in existence for more than forty years, access to such services in many areas has been either highly variable or non-existent. The multiplicity of phone numbers for local hotlines made national, state or regional public education campaigns impossible. This led to support for a single, toll free, nationally accessible telephone number for suicide prevention, utilizing telecommunications technology that links callers to their geographically nearest crisis center.

Though not all crisis centers have widely publicized ''hotline'' services, it is generally believed that most, if not all, centers field crisis calls from suicidal individuals. While face-to-face assessment and counseling in the work of crisis centers are to a large degree done by health professionals, much of the important work of telephone crisis intervention is done by trained volunteers. The use of trained volunteers in the role of telephone crisis workers has existed for many years and spawned the development of standards to guide them in their work. Workers responding to suicidal callers should be trained in the use of clinical intervention techniques. The certification of crisis centers in suicide prevention is a crucial component of this grant. Many crisis centers do not operate out of organized health delivery systems, such as hospitals or community mental health centers. State laws and regulations governing the use

of terms such as ''crisis center'', ''crisis line'', or ''hotline'' either do not exist or vary widely. The majority of crisis center workers are volunteers who do not fall under any state licensing laws for mental health professionals. Thus, voluntary certification for meeting nationally recognized suicide prevention standards is virtually the only form of external, task specific quality control that exists for many crisis centers. The success of the network is ultimately tied to the adherence of participating crisis centers to nationally recognized standards for suicide prevention.

Definitions

Crisis center: A program that establishes immediate telephone communication between people who are emotionally distressed and individuals who have been trained to provide telephone assistance to diffuse the crisis, ensure the caller's safety, and assist the caller to take next steps toward resolving the problem.

Hotline crisis services: A telephone service directly associated with a single crisis center.

Suicide prevention hotline: A program that provides telephone crisis intervention services to individuals expressing suicidal thoughts or behavior, or to others calling on behalf of such persons in crisis, with the objective of exploring alternatives to self-harm.

II. Award Information

1. Estimated Funding Available/Number of Awards

It is expected that up to $2.2 million will be available to fund one award in FY 2004. It is expected that only one Category 2—Comprehensive Infrastructure Grant, as defined in the INF–04 PA (MOD), will be awarded. The maximum allowable award is $2.2 million in total costs (direct and indirect) per year for three years. Proposed budgets cannot exceed the allowable amount in any year of the proposed project. The actual amount available for the award may vary, depending on unanticipated program requirements and the quality of the applications received. Annual continuations will depend on the availability of funds, progress in meeting program goals and objectives, and timely submission of required data and reports.

2. Funding Instrument

Cooperative agreement.

Role of the Grantee:

- Comply with the terms of the award and all applicable grant rules and regulations, and satisfactorily perform activities to achieve the goals described below;
- Seek SAMHSA approval for key positions to be filled. The key positions include: project director, networking/telephony director, certification director, evaluation director, database director;
- Seek SAMHSA approval of proposed approach to networking of hotlines prior to implementing proposed design and accept SAMHSA-recommended modifications to approach;
- Consult with and accept guidance from CMHS staff on performance of activities to achieve goals described below;
- Respond to requests for information from CMHS;
- Agree to provide SAMHSA with data required for the Government Performance and Results Act (GPRA);
- Manage the toll free telephone number selected by SAMHSA through the end of the grant period and relinquish control of the telephone number to SAMHSA or to another organization, if required;
- Produce required SAMHSA reports.

Role of SAMHSA staff:

- Maintain overall responsibility for monitoring the conduct and progress of the suicide prevention hotline networking and certification program;
- Approve proposed key positions/personnel
- Review proposed approach and request modifications to approach and/or approve the approach;
- Make recommendations regarding continued funding;
- Provide guidance and technical assistance on project design;
- Approve all proposed subcontracts;
- Review quarterly reports and conduct a site visit, if warranted;
- Review and approve the evaluation plan, including the sites selected to participate in the evaluation;
- Approve data collection plans and institute policies regarding data collection;
- Recommend consultants for assisting with the resource database, evaluation, and data collection, if needed; and
- Provide technical assistance, as needed, on sustainability and to assist in disseminating the resource database to non-networked crisis centers.
- Provide a toll free number that is easy to remember, life affirming and test marketed.

III. Eligibility Information

1. Eligible Applicants

Eligible applicants are domestic public and private *nonprofit* entities. For example, State, local or tribal governments; public or private universities and colleges; community- and faith-based organizations; and tribal organizations may apply. The statutory authority for this program precludes grants to for-profit organizations.

2. Cost Sharing or Matching

Is not required.

3. Other

Applicants must also meet certain application formatting and submission requirements, or the application will be screened out and will not be reviewed. These requirements are described in Section IV–2 below, as well as in the INF–04 PA (MOD).

IV. Application and Submission Information

1. Address To Request Application Package

Complete application kits may be obtained from the National Mental Health Information Center at 1–800–789–2647. When requesting an application kit for this program, the applicant must specify the funding opportunity title (Networking and Certifying Suicide Prevention Hotlines) and the funding opportunity number (SM 04–013) for which detailed information is desired. All information necessary to apply, including where to submit applications and application deadline instructions, is included in the application kit. The PHS 5161–1 application form is also available electronically via SAMHSA's World Wide Web home page: *http://www.samhsa.gov* (Click on ''Grant Opportunities'') and the INF–04 PA (MOD) is available electronically at *http://www.samhsa.gov/grants/2004/standard/Infrastructure/index.asp*.

When submitting an application, be sure to type ''SM 04–013 Networking and Certifying Suicide Prevention Hotlines'' in Item Number 10 on the face page of the application form. Also, SAMHSA applicants are required to provide a DUNS Number on the face page of the application. To obtain a DUNS Number, access the Dun and Bradstreet Web site at *http://www.dunandbradstreet.com* or call 1–866–705–5711.

2. Content and Form of Application Submission

Appendices 3 and 5, referenced in the INF–04 PA (MOD) in Section IV–2, are

not required and should not be included in the application. Additional information including required documents, required application components, and application formatting requirements is available in the INF–04 PA (MOD) in Section IV–2.

Checklist for Formatting Requirements and Screenout Criteria for SAMHSA Grant Applications

SAMHSA's goal is to review all applications submitted for grant funding. However, this goal must be balanced against SAMHSA's obligation to ensure equitable treatment of applications. For this reason, SAMHSA has established certain formatting requirements for its applications. If you do not adhere to these requirements, your application will be screened out and returned to you without review.

• Use the PHS 5161–1 application.

• Applications must be received by the application deadline. Applications received after this date must have a proof of mailing date from the carrier dated at least 1 week prior to the due date. Private metered postmarks are not acceptable as proof of timely mailing. Applications not received by the application deadline or not postmarked at least 1 week prior to the application deadline will not be reviewed.

• Information provided must be sufficient for review.

• Text must be legible.

—Type size in the Project Narrative cannot exceed an average of 15 characters per inch, as measured on the physical page. (Type size in charts, tables, graphs, and footnotes will not be considered in determining compliance.)

—Text in the Project Narrative cannot exceed 6 lines per vertical inch.

• Paper must be white paper and 8.5 inches by 11.0 inches in size.

• To ensure equity among applications, the amount of space allowed for the Project Narrative cannot be exceeded.

—Applications would meet this requirement by using all margins (left, right, top, bottom) of at least one inch each, and adhering to the page limit for the Project Narrative stated in the specific funding announcement.

—Should an application not conform to these margin or page limits, SAMHSA will use the following method to determine compliance: The total area of the Project Narrative (excluding margins, but including charts, tables, graphs and footnotes) cannot exceed 58.5 square inches multiplied by the page limit. This number represents the full page less margins, multiplied by the total number of allowed pages.

—Space will be measured on the physical page. Space left blank within the Project Narrative (excluding margins) is considered part of the Project Narrative, in determining compliance.

• The page limit for Appendices stated in the specific funding announcement cannot be exceeded.

To facilitate review of your application, follow these additional guidelines. Failure to adhere to the following guidelines will not, in itself, result in your application being screened out and returned without review. However, the information provided in your application must be sufficient for review. Following these guidelines will help ensure your application is complete, and will help reviewers to consider your application.

• The 10 application components required for SAMHSA applications should be included. These are:

—Face Page (Standard Form 424, which is in PHS 5161–1)

—Abstract

—Table of Contents

—Budget Form (Standard Form 424A, which is in PHS 5161–1)

—Project Narrative and Supporting Documentation

—Appendices

—Assurances (Standard Form 424B, which is in PHS 5161–1)

—Certifications (a form in PHS 5161–1)

—Disclosure of Lobbying Activities (Standard Form LLL, which is in PHS 5161–1)

—Checklist (a form in PHS 5161–1)

• Applications should comply with the following requirements:

—Provisions relating to confidentiality, participant protection and the protection of human subjects, as indicated in the specific funding announcement.

—Budgetary limitations as indicated in Sections I, II, and IV–5 of the specific funding announcement.

—Documentation of nonprofit status as required in the PHS 5161–1.

• Pages should be typed single-spaced with one column per page.

• Pages should not have printing on both sides.

• Please use black ink, and number pages consecutively from beginning to end so that information can be located easily during review of the application. The cover page should be page 1, the abstract page should be page 2, and the table of contents page should be page 3. Appendices should be labeled and separated from the Project Narrative and budget Section, and the pages should be numbered to continue the sequence

• Send the original application and two copies to the mailing address in the funding announcement. Please do not use staples, paper clips, and fasteners. Nothing should be attached, stapled, folded, or pasted. Do not use heavy or lightweight paper, or any material that cannot be copied using automatic copying machines. Odd-sized and oversized attachments such as posters will not be copied or sent to reviewers. Do not include videotapes, audiotapes, or CD-ROMs.

3. Submission Dates and Times

Applications must be received by July 21, 2004. You will be notified by postal mail that your application has been received. Additional submission information is available in the INF–04 PA (MOD) in Section IV–3.

4. Intergovernmental Review

Applicants for this funding opportunity must comply with Executive Order 12372 (E.O. 12372). E.O. 12372, as implemented through Department of Health and Human Services (DHHS) regulation at 45 CFR part 100, sets up a system for State and local review of applications for Federal financial assistance. Instructions for complying with E.O. 12372 are provided in the INF–04 PA (MOD) in Section IV–4. A current listing of State Single Points of Contact (SPOCs) is included in the application kit and is available at *http://www.whitehouse.gov/omb/grants/spoc.html*.

5. Funding Restrictions

Funds for the Networking and Certification of Suicide Prevention Hotlines grant may not be used for implementation pilots, as stated in the INF–04 PA (MOD). Additional information concerning funding restrictions is available in the INF–04 PA (MOD) in Section IV–5.

V. Application Review Information

1. Evaluation Criteria

Applications will be reviewed against the Evaluation Criteria and requirements for the Project Narrative specified in the INF–04 PA (MOD). The following information describes exceptions or limitations to the INF–04 PA (MOD) and provides special requirements that pertain only to the grant for Networking and Certifying Suicide Prevention Hotlines.

Note that implementation pilots referenced in the INF–04 PA (MOD) may not be included in this grant program.

Applicants must discuss the following requirements in their applications, in addition to the requirements specified in the INF–04 PA (MOD):

1.1 In ''Section A: Statement of Need''

a. The target population for this program is the total potential number of suicidal persons who may seek help through hotline services in the United States. The applicant should address the needs of this target population in Section A of the Project Narrative.

b. Applicants may disregard the 4th bullet in Section A that requests applicants to show that the identified need for the proposed project is consistent with the State's priorities. This requirement does not apply because the scope of this grant program is nationwide.

1.2 In ''Section B: Proposed Approach''

Applicants must address the goals and activities of the grant for Networking and Certifying Suicide Prevention Hotlines identified in Section I of this NOFA when responding to the bullets in Section B of the INF–04 PA (MOD).

1.3 In ''Section D: Evaluation and Data''

All SAMHSA grantees are required to collect and report certain data, so that SAMHSA can meet its obligations under the Government Performance and Results Act (GPRA). The Networking and Certifying Suicide Prevention Hotlines grantee will be required to report on the increase in the number of hotline centers included in the network and the increase in the number certified in suicide prevention. Applicants must document their ability to collect and report on these measures in ''Section E: Evaluation and Data'' of their applications

2. Review and Selection Process

Information about the review and selection process is available in the INF–04 PA (MOD) in Section V–2.

VI. Award Administration Information

Award administration information, including award notices, administrative and national policy requirements, and reporting requirements are available in the INF–04 PA (MOD) in Section VI. SAMHSA's standard terms and conditions are available at *http://www.samhsa.gov/grants/2004/useful_info.asp*. Note that the Networking and Certifying Suicide Prevention Hotlines grantee will be required to provide quarterly progress/financial reports in addition to annual progress/financial reports. The quarterly reporting format, including crisis center call data, is under development by SAMHSA.

VII. Agency Contact for Additional Information

For questions about program issues, contact: Brenda Bruun, SAMHSA/CMHS, Division of Prevention, Traumatic Stress and Special Programs, 5600 Fishers Lane, Room 17C–26, Rockville, MD 20857; 301–443–4669; e-mail: *bbruun@samhsa.gov*. For questions on grants management issues, contact: Gwendolyn Simpson, SAMHSA/Division of Grants Management, 5600 Fishers Lane, Room 13–103, Rockville, MD 20857; 301–443–4456; e-mail: *gsimpson@samhsa.gov*.

Dated: May 20, 2004.

Daryl Kade,

Director, Office of Policy, Planning and Budget, Substance Abuse and Mental Health Services Administration.

[FR Doc. 04–11940 Filed 5–25–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Reports, Forms, and Recordkeeping Requirements: Agency Information Collection Activity Under OMB Review; Registered Traveler (RT) Pilot Program; Satisfaction and Effectiveness Measurement Data Collection Instruments

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice of emergency clearance request.

SUMMARY: The U.S. Department of Homeland Security, Transportation Security Administration, has submitted a request for emergency processing of a new information collection to the Office of Management and Budget (OMB) for review and immediate clearance by June 1, 2004, under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 35). This notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to OMB for review and comment. The ICR describes the nature of the information collection and its expected burden.

DATES: Send your comments by June 25, 2004. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Comments may be faxed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Conrad Huygen, Privacy Act Officer, Information Management Programs, Office of Finance and Administration, TSA–17, 601 South 12th Street, Arlington, Virginia 22202–4220; telephone (571) 227–1954; facsimile (571) 227–2906.

SUPPLEMENTARY INFORMATION:

Transportation Security Administration (TSA)

Title: Registered Traveler (RT) Pilot Program; Satisfaction and Effectiveness Measurement Data Collection Instruments.

Type of Request: Emergency processing request of a new collection.

OMB Control Number: Not yet assigned.

Form(s): Electronic enrollment application; satisfaction survey.

Affected Public: Applicants to the RT Pilot Program and lead stakeholders.

Abstract: TSA plans to conduct a pilot technology program in 2004, in a limited number of airports, to test and evaluate the merits of the Registered Traveler (RT) concept. This pilot program (RT Pilot) is designed to positively identify qualified, known travelers via advanced identification technologies for the purposes of expediting those passengers' travel experience at the airport security checkpoints and thereby enabling TSA to improve the allocation of its limited security resources.

TSA will collect and retain a minimal amount of personal information from individuals who volunteer to participate in the RT Pilot that will be used to verify an applicant's claimed identity, complete a security assessment, and, if applicable, issue an identification token prior to enrollment in the program. In addition, TSA will administer two instruments to measure customer satisfaction and to collect data on the effectiveness of the pilot technologies and business processes. The first instrument will be a survey of a representative percentage of the RT Pilot participants. The second instrument will be an interview conducted with the key stakeholders at sites participating in the RT Pilot. All surveys and interviews will be voluntary and anonymous.

Number of Respondents: 10,040.

Estimated Annual Burden Hours: 3,738.

TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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.

Issued in Arlington, Virginia, on May 20, 2004.

Susan T. Tracey,

Chief Administrative Officer.

[FR Doc. 04–11891 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Reports, Forms, and Record Keeping Requirements: Agency Information Collection Activity Under OMB Review; Airport Access Control Pilot Program (AACPP); Satisfaction and Effectiveness Measurement Data Collection Instruments

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice of emergency clearance request.

SUMMARY: The U.S. Department of Homeland Security, Transportation Security Administration, has submitted a request for emergency processing of a new information collection to the Office of Management and Budget (OMB) for review and immediate clearance by June 1, 2004, under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 35). This notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to OMB for review and comment. The ICR describes the nature of the information collection and its expected burden.

DATES: Send your comments by June 25, 2004. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Comments may be faxed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Conrad Huygen, Privacy Act Officer, Information Management Programs, Office of Finance and Administration, TSA–17, 601 South 12th Street, Arlington, Virginia 22202–4220; telephone (571) 227–1954; facsimile (571) 227–2906.

SUPPLEMENTARY INFORMATION:

Transportation Security Administration (TSA)

Title: Airport Access Control Pilot Program (AACPP); Satisfaction and Effectiveness Measurement Data Collection Instruments.

Type of Request: Emergency processing request of a new collection.

OMB Control Number: Not yet assigned.

Form(s): Enrollment and satisfaction surveys.

Affected Public: Participants in AACPP and lead stakeholders.

Abstract: TSA intends to test and evaluate certain new and emerging biometric and other technologies during the Airport Access Control Pilot Program (AACPP). TSA will gather biometric information, demographic information, and airport user identification from a select group of participants at 20 locations to test the use of emerging technologies for airport access control and then evaluate those technologies using two satisfaction instruments. The first instrument will be a survey given to a representative sample of airport users and the second instrument will be an interview conducted with the lead stakeholder at each site and a small percentage of persons participating in the project. Surveys and interviews will be voluntary and anonymous.

Number of Respondents: 2,620.

Estimated Annual Burden Hours: 780.

TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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.

Issued in Arlington, Virginia, on May 20, 2004.

Susan T. Tracey,

Chief Administrative Officer.

[FR Doc. 04–11892 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4907–M–20]

Notice of Proposed Information Collection: Comment Request; Single Family Property Disposition and Acquisition (Conveyance) of Mortgaged Properties

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:* July 26, 2004.

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: Joe McCloskey, Director, Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1672 (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: Single Family Property Disposition and Acquisition (Conveyance) of Mortgaged Properties.

OMB Control Number, if applicable: 2502–0306.

Description of the need for the information and proposed use: These information collections are needed to determine the condition of the property upon conveyance, to determine the results of the repair contracts, and to monitor the contractor's performance in maintaining the properties. The sales contracts will be used as binding contracts between the purchaser and HUD. Respondents are potential contractors, contractors who work for HUD, potential and actual purchasers of HUD-owned properties.

Agency form numbers, if applicable: HUD–9516A, 9519, 9519A, 9544, 9548, 9548A, 9548B, 9548C, and 9733.

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 estimated number of burden hours needed to prepare the information collection is 563,765 hours; the number of respondents is 105,798 generating approximately 1,127,580 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the response varies from 20 minutes to 30 minutes per response.

Status of the proposed information collection: Extension of currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: May 10, 2004.

Sean G. Cassidy,

General Deputy Assistant Secretary for Housing, Deputy Federal Housing Commissioner.

[FR Doc. 04–11847 Filed 5–25–04; 8:45 am]

BILLING CODE 4210–27–M

DEPARTMENT OF THE INTERIOR

Geological Survey

Patent, Trademark and Copyright Acts

AGENCY: Geological Survey, Interior.

ACTION: Notice of prospective intent to award exclusive license.

SUMMARY: The United States Geological Survey (USGS) is contemplating awarding an exclusive license to: Sequoia Scientific, Inc., of Bellevue, Washington 98005, on U.S. Patent No. 6,680,795 B2, entitled ''Underwater Microscope System.''

Inquiries: If other parties are interested in similar activities, or have comments related to the prospective award, please contact Neil Mark, USGS, 12201 Sunrise Valley Drive, MS 201, Reston, Virginia 20192, voice (703) 648–4344, fax (703) 648–4706, or e-mail *nmark@usgs.gov.*

SUPPLEMENTARY INFORMATION: This notice is submitted to meet the requirements of 35 U.S.C. 208 *et seq.*

Dated: March 1, 2004.

P. Patrick Leahy,

Associate Director for Geology.

[FR Doc. 04–11830 Filed 5–25–04; 8:45 am]

BILLING CODE 4310–Y7–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[INT–DES–04–3]

Platte River Recovery Implementation Program

AGENCY: Bureau of Reclamation, Interior.

ACTION: Extension of review and comment period for draft environmental impact statement (DEIS).

SUMMARY: The notice of availability for the DEIS was published in the **Federal Register** on January 26, 2004 (69 FR 3600), with the public review and comment period currently scheduled to end June 2, 2004. The public review and comment period is being extended to August 20, 2004, so that the public may have sufficient time to review the DEIS along with the recently released National Academy of Sciences (NAS) report entitled, ''Endangered and Threatened Species in the Platte River Basin.''

DATES: Submit comments on the DEIS on or before August 20, 2004. Public hearings on the DEIS will be held during late July and early August. Times and locations will be announced in the **Federal Register** and local media.

ADDRESSES: Written comments on, or requests for copies of, the DEIS should be addressed to the Platte River EIS Office (PL–100), PO Box 25007, Denver, Colorado, 80225–0007, telephone (303) 445–2096, or by sending an e-mail to *platte@prs.usbr.gov.* A copy of the DEIS Summary, and/or technical reports or appendices may also be obtained by calling (303) 445–2096. The DEIS and Summary is also accessible at *http://www.platteriver.org.*

FOR FURTHER INFORMATION, CONTACT: Lynn Holt, Platte River EIS Office (303) 445–2096, or by sending an e-mail to *platte@prs.usbr.gov.*

SUPPLEMENTARY INFORMATION: Reclamation and the Fish and Wildlife Service (Service) have prepared this DEIS to analyze the impacts of the First Increment (13 years) of a proposed Recovery Implementation Program (Program) to benefit the target species (whooping crane, interior least tern, piping plover, and pallid sturgeon) and their habitat in the Platte River Basin and to provide compliance with the Endangered Species Act (ESA) for certain historic and future water uses in the Platte River Basin in Colorado, Nebraska, and Wyoming. The habitat objectives of the proposed Program include: Improving flows in the Central Platte River through water re-regulation and conservation/supply projects; and protecting, restoring, and maintaining at least 10,000 acres of habitat in the Central Platte River area between Lexington and Chapman, Nebraska. The DEIS analyzes the impacts of four alternatives to implement the Program.

The programmatic DEIS focuses on impacts that the Program may have on hydrology, water quality, land, target species and their habitat, other species, hydropower, recreation, economics, and social and cultural resources. Subsequent National Environmental Policy Act and ESA documents required for implementation of specific Program actions will be tiered off of this document.

Public Disclosure Statement

Comments received in response to this notice will become part of the administrative record for this project and are subject to public inspection. Comments, including names and home addresses of respondents, will be available for public review. Individual respondents may request that Reclamation withhold their home address from public disclosure, which will be honored to the extent allowable by law. There also may be circumstances in which Reclamation would withhold a respondent's identity from public disclosure, as allowable by law. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comment. Reclamation will make all submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of

organizations or businesses available for public disclosure in their entirety.

Dated: May 19, 2004.

Willie R. Taylor,

Director, Environmental Policy & Compliance.

[FR Doc. 04–11938 Filed 5–25–04; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–494]

In the Matter of Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices; Notice of Commission Decision Not To Review Three Initial Determinations Terminating the Investigation as to Three Respondents on the Basis of Consent Orders; Issuance of Consent Orders

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review three initial determinations (''IDs'') issued by the presiding administrative law judge (''ALJ'') terminating the above-captioned investigation as to respondents GR Motorsports Inc., d/b/a Matrix GR Motorsports, Inc. of Commerce, California (''GR Motorsports''), Hiper Industries Inc. d/b/a R–1 Racing-Sports, Inc. of Garden Grove, California (''Hiper''), and J & P Hamilton Enterprises, Inc. of Winder, Georgia (''J & P'') (including two companies that J & P owns and does business as, PointZero Gauge Company (''PointZero'') and QuickCar Racing Products (''QuickCar'') of Winder, Georgia, which were listed among the respondents in the notice of investigation) on the basis of consent orders.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3115. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: The Commission issued a notice of investigation dated June 16, 2003, naming Auto Meter Products, Inc. (''Auto Meter'') of Sycamore, Illinois, as the complainant and several companies as respondents. On June 20, 2003, the notice of investigation was published in the **Federal Register**. 68 FR 37023. The complaint alleged violations of section 337 of the Tariff Act of 1930 in the importation and sale of certain automotive measuring devices, products containing same, and bezels for such devices, by reason of infringement of U.S. Registered Trademark Nos. 1,732,643 and 1,497,472, and U.S. Supplemental Register No. 1,903,908, and infringement of the complainant's trade dress. Subsequently, seven more firms were added as respondents based on two separate motions filed by complainant.

On April 21, 2004, the ALJ issued three IDs (Orders Nos. 20, 21, and 22) terminating the investigation as to respondents GR Motorsports, Hiper, and J & P (''terminated respondents'') (including two companies that J & P owns and does business as, PointZero and QuickCar of Winder, Georgia, which were listed among the respondents in the notice of investigation) on the basis of the settlement agreements and consent orders. With regard to the terminated respondents, the ALJ observed that each of them filed a joint (together with complainant Auto Meter) motion to terminate based on settlement agreements between each of the terminated respondents and Auto Meter, and proposed consent orders. The Commission investigative attorney filed responses in support of each of the joint motions. No petitions for review of the IDs were filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: May 19, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–11863 Filed 5–25–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–496]

In the Matter of Certain Home Vacuum Packaging Products Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation as to Two Respondents on the Basis of a Settlement Agreement and Withdrawal of the Complaint as to a Third Respondent; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ's'') initial determination (''ID'') granting a joint motion to terminate the above-captioned investigation on the basis of a settlement agreement and withdrawal of the complaint.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the public version of the ID and all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On August 18, 2003, the Commission instituted this investigation based upon a complaint filed by Tilia, Inc. and Tilia International (collectively, ''Tilia''). 68 FR 49521. In its complaint, Tilia alleges

that the accused imported products infringe claims 3, 4, 6, 24–25, and 34 of U.S. Patent No. 4,941,310. The notice of investigation named Applica, Inc., and Applica Consumer Products, Inc. (''Applica''); ZeroPack Co., Ltd., (''ZeroPack''); and The Holmes Group, Inc. and The Rival Company (collectively ''the Rival respondents'') as respondents.

On March 29, 2004, the Commission issued notice that it had determined not to review an ID granting the joint motion of Tilia and the Rival respondents to terminate the investigation as to the Rival respondents on the basis of a settlement agreement.

On April 22, 2004, the ALJ issued an ID (Order No. 59) granting the joint motion of complainant Tilia and respondents Applica and ZeroPack to terminate the investigation based on a settlement agreement between Tilia and Applica, and to terminate the investigation as to ZeroPack by withdrawal of the complaint, contingent on the termination of the Applica. The Commission investigative attorney supported the joint motion.

No party filed a petition to review the subject ID.

The authority for the Commission's action is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: May 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–11864 Filed 5–25–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–490]

In the Matter of Certain Power Amplifier Chips, Broadband Tuner Chips, Transceiver Chips, and Products Containing Same; Notice of Commission Determination Not To Review a Final Initial Determination Finding No Violation of Section 337; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on April, 2, 2004, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-captioned investigation. Accordingly, the Commission has terminated the investigation with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the public version of the ID and all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov.*) The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation, which concerns allegations of unfair acts in violation of section 337 in the importation and sale of certain power amplifier chips, broadband tuner chips, transceiver chips, and products containing same, on April 4, 2003, based on a complaint filed by Broadcom Corporation of Irvine, California (''Broadcom''). 68 FR 16551. The only respondent named in the investigation is Microtune, Inc. of Plano, Texas (''Microtune''). The complaint alleged that the imported products of Microtune infringe claim 1 of U.S. Patent No. 6,445,039, (''the '039 patent'') and claim 2 of U.S. Patent No. 5,682,379 (''the '379 patent''). The investigation was subsequently terminated as to the ''379 patent.

On April 2, 2004, the ALJ issued his final ID finding no violation of section 337 based on his findings that claim 1 of the '039 patent is anticipated by two patents and two prior art semiconductors, and invalid due to obviousness. The ALJ also found that the accused non-die paddle products of respondent Microtune infringe claim 1 of the '039 patent, but that Microtune's die paddle products do not infringe that claim. He also found that the '039 patent is not unenforceable due to inequitable conduct.

On April 15, 2004, Broadcom filed a petition for review of the final ID. On April 22, 2004, the Commission investigative attorney and Microtune filed responses.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission determined not to review (*i.e.*, to adopt) the ID in its entirety.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and section 210.42 of the Commission's Rules of Practice and Procedure, 19 CFR 210.42.

Issued: May 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–11865 Filed 5–25–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (''Commission'') has issued an annual report on the status of its practice with respect to violations of its administrative protective orders (''APOs'') in investigations under Title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than those under Title VII and violations of the Commission's rule on bracketing business proprietary information (''BPI'') (the ''24-hour rule''), 19 CFR 207.3(c). This notice provides a summary of investigations of breaches in proceedings under Title VII, sections 202 and 204 of the Trade Act of 1974, as amended, section 421 of the Trade Agreements Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, completed during calendar year 2003. There was one completed investigation of a 24-hour rule violation during that period. The Commission intends that this report educate representatives of parties to Commission proceedings as to some specific types of APO breaches

encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205–3088. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205–1810. General information concerning the Commission can also be obtained by accessing its Internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations conducted under Title VII of the Tariff Act of 1930, sections 202 and 204 of the Trade Act of 1974, as amended, section 421 of the Trade Agreements Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, may enter into APOs that permit them, under strict conditions, to obtain access to BPI (Title VII) or confidential business information (''CBI'') (sections 201–204, section 421 and section 337) of other parties. See 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34. The discussion below describes APO breach investigations that the Commission has completed, including a description of actions taken in response to breaches. The discussion covers breach investigations completed during calendar year 2003.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. See 56 FR 4846 (Feb. 6, 1991); 57 FR 12,335 (Apr. 9, 1992); 58 FR 21,991 (Apr. 26, 1993); 59 FR 16,834 (Apr. 8, 1994); 60 FR 24,880 (May 10, 1995); 61 FR 21,203 (May 9, 1996); 62 FR 13,164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999); 65 FR 30434 (May 11, 2000); 66 FR 27685 (May 18, 2001); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2001 a third edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. L. 3403). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, tel. (202) 205–2000.

I. In General

The current APO form for antidumping and countervailing duty investigations, which the Commission has used since March 2001, requires the applicant to swear that he or she will:

(1) Not divulge any of the BPI obtained under the APO and not otherwise available to him, to any person other than—

(i) personnel of the Commission concerned with the investigation,

(ii) the person or agency from whom the BPI was obtained,

(iii) a person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for an interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with the APO);

(2) Use such BPI solely for the purposes of the Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (*e.g.*, documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of the APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked ''Bracketing of BPI not final for one business day after date of filing,'' and

(iv) if by mail, within two envelopes, the inner one sealed and marked ''Business Proprietary Information—To be opened only by [name of recipient]'', and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.*, change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of the APO; and

(10) Acknowledge that breach of the APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate including the administrative sanctions and actions set out in this APO.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to BPI in the current or any future investigations before the Commission; and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the

Commission determines to be appropriate.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI, and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies implementing the statutes.

An important provision of the Commission's rules relating to BPI is the ''24–hour'' rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes —other than changes in bracketing—may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

II. Investigations of Alleged APO Breaches

Upon finding evidence of an APO breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of General Counsel (OGC) begins to investigate the matter. The OGC prepares a letter of inquiry to be sent to the possible breacher over the Secretary's signature to ascertain the possible breacher's views on whether a breach has occurred. If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. In some cases, the Commission determines that although a breach has occurred, sanctions are not warranted, and therefore has found it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. A warning letter is not considered to be a sanction.

Sanctions for APO violations serve two basic interests: (a) preserving the confidence of submitters of BPI that the Commission is a reliable protector of BPI; and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, ''[T]he effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation.'' H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI. The Commission considers whether there are prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit economists or consultants to obtain access to BPI under the APO if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3) (B) and (C). Economists and consultants who obtain access to BPI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, section 135(b) of the Customs and Trade Act of 1990, and 19 U.S.C. 1677f(g).

The breach most frequently investigated by the Commission involves the APO's prohibition on the dissemination of BPI to unauthorized persons. Such dissemination usually occurs as the result of failure to delete BPI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included: the failure to bracket properly BPI in proprietary documents filed with the Commission; the failure to report immediately known violations of an APO; and the failure to supervise adequately non-legal personnel in the handling of BPI.

Counsel participating in Title VII investigations have reported to the Commission potential breaches involving the electronic transmission of public versions of documents. In these cases, the document transmitted appears to be a public document with BPI omitted from brackets. However, the BPI is actually retrievable by manipulating codes in software. The Commission has found that the electronic transmission of a public document containing BPI in a recoverable form was a breach of the APO.

The Commission advised in the preamble to the notice of proposed rulemaking in 1990 that it will permit authorized applicants a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the BPI. However, the Commission cautioned authorized applicants that they would be held responsible for safeguarding the confidentiality of all BPI to which they are granted access and warned applicants about the potential hazards of storage on hard disk. The caution in that preamble is restated here:

> [T]he Commission suggests that certain safeguards would seem to be particularly useful. When storing business proprietary information on computer disks, for example, storage on floppy disks rather than hard disks is recommended, because deletion of information from a hard disk does not necessarily erase the information, which can

often be retrieved using a utilities program. Further, use of business proprietary information on a computer with the capability to communicate with users outside the authorized applicant's office incurs the risk of unauthorized access to the information through such communication. If a computer malfunctions, all business proprietary information should be erased from the machine before it is removed from the authorized applicant's office for repair. While no safeguard program will insulate an authorized applicant from sanctions in the event of a breach of the administrative protective order, such a program may be a mitigating factor.

Preamble to notice of proposed rulemaking, 55 FR 24100, 24103 (June 14, 1990).

The Commission has recently disposed of an APOB investigation concerning a section 337 investigation. In that case, to be summarized with other cases completed in 2004, attorneys failed to notify the Commission about their receipt of a subpoena from another government agency that would require the disclosure of BPI obtained under the APO. Counsel in section 337 investigations are reminded that Commission rule 210.34(d)(1) requires that the Commission be notified in writing immediately by anyone receiving such a subpoena or court or administrative order, discovery request, agreement, or other written request seeking disclosure to persons who are not permitted access to the information under either a Commission protective order or Commission rule 210.5(b). Commission rule 210.34(d)(2) provides that the Commission may impose sanctions upon any person who willfully fails to comply with section 210.34(d)(1). Failure to comply with that rule may also be considered an aggravating circumstance in determining an appropriate sanction for a breach connected with compliance with the subpoena or order.

III. Specific Investigations in Which Breaches Were Found

The Commission presents the following case studies to educate users about the types of APO breaches found by the Commission. The studies provide the factual background, the actions taken by the Commission, and the factors considered by the Commission in determining the appropriate actions. The Commission has not included some of the specific facts in the descriptions of investigations where disclosure of such facts could reveal the identity of a particular breacher. Thus, in some cases, apparent inconsistencies in the facts set forth in this notice result from the Commission's inability to disclose particular facts more fully.

Case 1: The Commission determined that two attorneys breached the APO when one of the attorneys failed to delete BPI from the public version of a prehearing brief. The attorney who was responsible for preparing the public version of the brief and who failed to delete the BPI was the lead attorney and the firm's APO Compliance Officer. However, this was his first title VII investigation before the Commission. The second attorney, a name partner and more senior attorney in the firm, participated substantially in the investigation and participated in the drafting of the confidential version of the brief. The Commission found that the senior attorney had also breached the APO because, despite the more junior attorney's inexperience and the lengthy series of APO breaches that had been caused by various members of his firm, he did not participate in the preparation of the public brief and/or supervise the junior attorney more closely to prevent a new breach.

Because he was the lead attorney and the firm's APO Compliance Officer, the Commission determined that the junior attorney would receive a private letter of reprimand, even though it was his first breach, no non-signatories had read the BPI, he took immediate corrective measures to cure the breach, and his firm changed its APO procedures to avoid future breaches of this type. Although the attorney claimed that his inexperience with bracketing BPI may have played a part in the errors, the Commission determined that he should be held to a higher standard of care because the purpose of his position as APO Compliance Officer was to prevent breaches like the one he failed to prevent in this matter. The Commission also considered the fact that the attorney took the APO Compliance position with the knowledge that several members of his firm had been investigated over a relatively short period of time for prior APO breaches, and that aggressive review of his firm's submissions was therefore necessary.

The Commission determined to sanction the senior attorney by publishing in the **Federal Register** a public letter of reprimand and to suspend him for a period of six months from access to APO information in any Commission investigation. In addition, the Commission ordered that at least two attorneys review all documents to be filed with the Commission by his law firm for APO compliance for a period of five years from the date of publication of the sanction in the **Federal Register**. The Commission decided to issue the public letter of reprimand and suspend the attorney because this was his fourth breach within a relatively short period of time. In addition, the attorney had been publicly sanctioned within the past two years, but not suspended. The Commission found that although none of the attorney's prior breaches was egregious enough to warrant a public reprimand when considered separately, the public reprimand was warranted for the series of breaches that demonstrated a disturbing and unacceptable pattern of overall failure to safeguard information released under APO.

Case 2: The Commission issued a private letter of reprimand to an attorney for failing to redact CBI from the public version of a prehearing brief. The brief was a joint brief with another law firm, but the Commission found that the attorney from the other law firm and a consultant and a second attorney from the breaching attorney's law firm were not responsible for the final review of the brief. A private letter of reprimand was issued even though this was the attorney's first breach of a Commission APO, the breach was inadvertent, the attorney's firm changed its APO procedures to avoid future breaches of this type, and the attorney took immediate corrective measures to cure the breach once he was informed that there was a possible breach. The Commission decided to issue a private letter of reprimand because the Commission received no assurance from the attorney that non-signatories had not read the CBI. The Commission sent the attorney two letters of inquiry and a letter seeking his comments on possible sanctions and mitigating circumstances. All of the letters asked for his comments on whether a non-signatory had read the CBI. The attorney did not address the question in the first or third letters; in the second letter he merely stated that he could not confirm with the recipients of the CBI that only APO signatories had viewed the CBI. The attorney never explained why he could not confirm the facts. The Commission noted that more than one firm which was a recipient of the brief were non-signatories of the APO. Thus, without sufficient followup or explanation from the attorney and because CBI was made available to several non-signatories, the Commission presumed that the CBI was viewed by a non-signatory of the APO.

Case 3: An economic consultant prepared and distributed an exhibit at a Commission hearing. The exhibit contained CBI that was taken from tables that were bracketed as confidential APO information in the Prehearing Staff Report. During the hearing, the consultant was informed of the possible breach and he took immediate steps to retrieve the exhibit.

All but one or two copies were retrieved. The consultant had argued that the information was not CBI because later in the investigation it was determined that the data itself was erroneous and corrected data was included in the Posthearing Staff Report. The Commission determined that the information was CBI since it was taken from a Commission document that was clearly marked as containing CBI. The Commission sanctioned the consultant with a private letter of reprimand because the breach was intentional; the Commission presumed that a non-signatory reviewed the CBI since one or two of the exhibits were not retrieved and non-signatories attended the hearing; and the consultant had previously been found to have breached an APO and was issued a warning letter within a reasonably short period before the occurrence of this breach. The Commission took into consideration the consultant's immediate attempts to retrieve the exhibit and the fact that his consulting firm modified its procedures to avoid similar breaches in the future.

The Commission also investigated whether attorneys in two law firms had breached the APO in this matter. One of the law firms had included the consultant on its APO application and the lead attorney for that firm had agreed to exercise direction and control over the consultant's handling of the APO materials. Another law firm also had hired the consultant to assist in the same investigation, but on a different product than that of the first law firm. That second firm gave the consultant the information on this second product and it was for this product that the exhibit had been prepared and concerning which the Commission hearing was held. The consultant was not included on the APO application of the second law firm, but was entitled to have the information on any product in this multiproduct investigation as long as he was included on one APO application. The Commission found that none of the attorneys in the second firm breached the APO because none was responsible for preparation of the exhibit and they had not signed an APO application agreeing to exercise direction and control over the consultant's handling of APO materials. The Commission issued a no violation breach to the lead attorney in the second firm, but admonished him to be more attentive in preventing breaches in the future.

The Commission determined that the lead attorney in the first law firm breached the APO by failing to provide adequate supervision over the handling of CBI and by permitting the release of CBI by an economic consultant under the attorney's direction and control, especially in light of the fact that the consultant in question previously had breached an APO in a prior case that also had involved the lead attorney and his firm. The Commission determined to issue the lead attorney in the first firm a warning letter, in spite of the aggravating circumstances that existed in this case, because of the unusual circumstances of the APO in this multiproduct investigation which permitted the consultant to receive CBI from another attorney and work separately from the attorneys in the first law firm.

Case 4: The Commission determined that two attorneys breached the APO by failing to return or destroy all copies of the CBI disclosed under the APO within 60 days of completion of the Commission's investigation and by using the retained documents for a purpose other than the Commission's investigation.

The attorneys represented a party in a section 201 investigation. They argued that the failure to return or destroy the documents on a timely basis was inadvertent as they were not sure when the Commission investigation had ended. They also argued that the documents, although retained by them, were not used for any other purpose than the Commission investigation.

The Commission found conflicting statements in the submissions from the attorneys. Relying primarily on the initial statements regarding the breaches, the Commission found that the breach was not inadvertent, and that the attorneys had retained the documents so they could review them in preparing their client's product exclusion submission to USTR. In reaching its decision, the Commission did not equate mere retention with use, but found that something more had occurred.

The Commission denied the attorneys' request for reconsideration of the finding that the documents were used for something other than the Commission's investigation because the arguments were made during the breach phase of the Commission's investigation or they could have been made.

There were several mitigating circumstances in this matter, including the facts that it was the first APO breach for both attorneys, there was no evidence that unauthorized persons gained access to the CBI, and the attorneys' law firm has instituted a written policy of checking the **Federal Register** on a daily basis for Commission notices. There were also aggravating circumstances that led the Commission to issue a private letter of reprimand to both attorneys. The breach was not inadvertent; the attorneys interpreted the APO, without seeking Commission guidance, to allow them to retain APO documents beyond the date set by the APO for return or destruction of APO documents; and the attorneys committed a second breach in their use of the APO documents for a purpose other than the Commission's investigation.

Case 5: The Commission found that an attorney and a legal assistant breached the APO by serving a document containing BPI upon individuals not authorized to view BPI. The Commission issued private letters of reprimand to both individuals.

The document had been prepared for filing and service by the legal assistant and signed by the attorney. The legal assistant mistakenly used the public service list instead of the APO service list to serve the document. Consequently, two law firms ineligible to receive BPI were served with the document. A lawyer in one of those firms opened the envelope and read the document long enough to determine that it contained BPI that he was ineligible to receive. At that point, the lawyer stopped reading and notified the attorney who signed the document about the possible breach. Once notified, the attorney was able to retrieve the document from both ineligible law firms, including from the second ineligible law firm which had not opened the sealed envelope.

The mitigating circumstances in this case included the fact that the breach was inadvertent, neither the attorney nor the legal assistant had any prior breaches within the recent past, they made prompt efforts to limit the possibility of disclosure to persons not on the APO, and they took steps to prevent breaches in the future. The aggravating circumstances that supported the issuance of private letters of reprimand were the facts that a person not subject to the APO viewed the BPI and that the breach was discovered by someone other than the attorney or legal assistant.

Case 6: The Commission determined that one attorney breached the APO by failing to ensure, as lead counsel in a Commission investigation, that all of the law firm personnel who would be working with BPI contained in documents received under APO were signatories to the APO. One other attorney in the firm had access to and used BPI under the APO notwithstanding that he was not a signatory to the APO. The Commission

found that this attorney had violated 19 CFR 201.15.

An attorney in the law firm discovered that one of the attorneys working on the investigation in the law firm was not on the APO service list after the investigation had been completed. He notified the Commission immediately about the possible breach. In determining that the lead attorney should receive a private letter of reprimand, the Commission considered the mitigating circumstances that the firm discovered the breach and notified the Commission immediately, the lead attorney voluntarily conducted classes for his firm concerning the handling of BPI, the breach was inadverent, and the non-signatory attorney handled the APO materials as if he were a signatory. However, the Commission also considered the aggravating circumstance that the lead attorney had received a warning letter in a previous breach investigation within the recent past.

In determining to issue a warning letter to the non-signatory attorney, the Commission stated that it considers ''good cause'' for imposition of a warning letter pursuant to 19 CFR 201.15 to be the equivalent of a breach of an APO. However, it decided not to issue any sanction for the attorney's conduct because this was the only breach-equivalent action in which he had been involved within the two-year period generally examined by the Commission for purposes of determining sanctions, his action was not willful, he treated BPI as if he had signed the APO, and he reported and remedied the objectionable conduct shortly after he had learned of it.

Case 7: The Commission issued a warning letter to an economist after finding he breached the APO by transmitting exhibits containing BPI to a non-signatory copy vendor. The economist had substantial experience handling APO material in Commission title VII investigations. He was working on the investigation under the direction and control of an attorney in a law firm. Prior to the economist taking the exhibits to the copy vendor, the attorney supervising him had reviewed the documents to be sure there was no BPI in them. After the attorney's review, the economist decided to add another document to the exhibits that included BPI. Although from earlier discussions with the attorney the economist had reason to question whether the vendor was a signatory to the APO, he handed the documents directly to the copy vendor without determining whether the vendor was a signatory to the APO.

The Commission considered whether the economist, the attorney, and the lead attorney on the investigation breached the APO. The Commission determined that the attorney did not breach the APO. Although he was, in general, responsible for the economist's actions, he could not reasonably have foreseen that the economist would have inserted an APO document into the exhibits. The attorney had approved the exhibits and did not anticipate any additions to them. The Commission determined that the lead attorney had not breached the APO because he had reasonably delegated his supervisory responsiblities over the economist to the attorney and that attorney was experienced and had no prior breaches that would have put the lead attorney on notice that more supervision was necessary.

The law firm and the economist had argued that a breach did not occur because there was no BPI in the exhibits. They argued that the information that was considered BPI was publicly available. The Commission found that, although a small part of the BPI had been made public during the preliminary phase of the investigation, the remainder was BPI and included questionnaire responses or clarification to questionnaire responses.

The Commission determined to issue a warning letter to the economist because the breach was unintentional, this was his first breach, and the copy vendor merely copied the documents and did not review the BPI. In addition, once the economist realized that a breach might have occurred, he immediately notified the attorney, who took prompt and effective action to stop any further dissemination of the BPI. The Commission noted in its letters to the economist and attorney that the Commission was not notified of the possible breach for 30 days after it was discovered. The Commission stated that it will expect more prompt notification by them with regard to any possible APO breaches in the future, in compliance with the APO which requires signatories to ''[r]eport promptly * * * any possible breach.''

Case 8: The Commission issued warning letters to three attorneys and two international trade analysts in one firm for permitting a legal secretary to have access to CBI even though he had not signed the APO Acknowledgment for Clerical Personnel and, therefore, his name was not included on the Secretary's confidential certificate of service. The attorneys and international trade analysts were all signatories to the APO and had worked on the Commission's investigation. The Commission decided to issue a warning letter instead of sanctions because the breach was inadvertent, it was the attorneys' and analysts' first breach, they reported the breach promptly to the Commission, and they took corrective measures to prevent similar breaches in the future.

The Commission did not issue a warning letter to the legal secretary, but cautioned him to ensure in future investigations that he has signed the Acknowledgement before accessing CBI.

Case 9: The Commission found that an attorney breached the APO by electronically transmitting a prehearing brief that contained both masked and not redacted BPI and BPI that had been neither masked nor redacted to two non-signatories of the APO. The Commission issued a private letter of reprimand because at least one of the non-signatories read the BPI that had neither been masked nor redacted and there was a delay in the attorney's notification of the Commission about the possible breach. In reaching this decision, the Commission considered the mitigating circumstances that the attorney had no prior breaches, he notified the Commission of the breach, and he immediately took appropriate corrective measures.

During the breach phase of the investigation, the attorney argued that the electronic ''whiting-out'' of the BPI was sufficient to protect it. In response, the Commission noted that it has consistently found that it is a breach of the APO to send an electronic document to persons not on the APO in which the BPI had been electronically masked or ''whited-out'' since the BPI can be retrieved by altering the software print codes. The Commission also dismissed the attorney's arguments that the BPI that had neither been masked nor redacted was not BPI. The Commission found that most of the data in question had been questionnaire responses that were bracketed as BPI in the prehearing report. Questionnaire responses are treated by the Commission as BPI in their entirety, unless the information is otherwise available from a public source, or is a non-numerical characterization of aggregate trends. The Commission considered certain public sources that the attorney claimed revealed the information, but found that the exact information was not publicly available.

Case 10: The Commission determined that an attorney breached the APO in a section 337 investigation by transmitting a confidential version of a brief filed in the appeal of the Commission investigation to persons who were not signatories to the APO. The Commission stated in the warning letter to the attorney that this finding

was consistent with prior determinations when the Commission determined that making CBI available to unauthorized persons constitutes a breach of the APO, regardless of whether the unauthorized persons actually viewed the CBI.

The Commission determined to issue the warning letter to the attorney instead of a sanction because the breach was unintentional, he had no prior warnings or sanctions regarding APO breaches within the recent past, he took prompt action to remedy the breach, and no non-signatory to the APO actually read the electronically transmitted brief.

Rule Violation: The Commission issued a warning letter to an attorney for violating the Commission's 24-hour rule, 19 CFR 207.3. On the day following the filing of a confidential prehearing brief in a Commission investigation, the attorney filed a public version of the brief and a revised confidential version. Both versions contained additions to and deletions of text on several pages and there were several pages missing from an exhibit. The Commission found that this violated the 24-hour rule because that rule specficially precludes changes other than bracketing changes and the deletion of confidential information during the 24-hour period after the original filing. The Commission noted that the rule allowed attorneys to seek leave to make other changes but, in this case, the attorney did not.

The Commission issued a warning letter instead of a sanction because the changes appeared to be inadvertent and the attorney had no record of a rule violation or APO breach within the recent past.

IV. Investigations in Which No Breach Was Found

There were two APOB investigations in which the Commission determined that the APO had not been breached. One involved testimony at a hearing that might have disclosed BPI. Through its investigation the Commission determined that the information disclosed was not BPI because it was publicly available. In the other investigation, the Commission's staff determined that no BPI was served on a party that was not on the APO service list because the data belonged to the attorney's own client and was not other company data received under the APO.

By order of the Commission.

Issued: May 20, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–11862 Filed 5–25–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day notice of information collection under review: Application for an Amended Federal Firearms License.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 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. Comments are encouraged and will be accepted for ''sixty days'' until July 26, 2004. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact David Adinolfi, ATF National Licensing Center, Room 400, 2600 Century Parkway, NE., Atlanta, Georgia 30345.

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:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for an Amended Federal Firearms License.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 5300.38. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individual or households. The form is used when a Federal firearms licensee makes application to change the location of the firearms business premises. The applicant must certify that the proposed new business premises will be in compliance with State and local law for that location.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 18,000 respondents will complete a 1 hour and 15 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 22,500 annual total burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: May 19, 2004.

Brenda E. Dyer,

Department Deputy Clearance Officer, PRA, Department of Justice.

[FR Doc. 04–11767 Filed 5–25–04; 8:45 am]

BILLING CODE 4410–FY–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(1)), the Attorney General shall, prior to issuing a registration under this Section to a

bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a registration under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on March 17, 2004, Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in Schedule II.

The firm plans to import Phenylacetone for the bulk manufacture of amphetamine.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of the basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Federal Register Representative, Office of Chief Counsel (CCD) and must be filed no later than June 25, 2004.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b),(c),(d),(e), and (f). As noted in a previous 1975 notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42(a),(b),(c),(d),(e), and (f) are satisfied.

Dated: May 5, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–11818 Filed 5–25–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 17, 2004, Boehringer Ingelheim Chemicals Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below.

Drug	Schedule
Amphetamine (1100)	II
Methylphenidate (1724)	II
Methadone (9250)	II
Methadone Intermediate (9254)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273)	II
Levo-alphacetylmethadol (9648)	II
Fentanyl (9801)	II

The firm plans to manufacture the listed controlled substances for formulation into finished pharmaceuticals.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Federal Register Representative, Office of Chief Counsel (CCD) and must be filed no later than July 26, 2004.

Dated: May 5, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–11820 Filed 5–25–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on February 24, 2004, Varian, Inc. Lake Forest, 25200 Commercentre Drive, Lake Forest, California 92630–8810, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below.

Drug	Schedule
Phencyclidine (7471)	II
1-Piperidinocyclohexanecarbonitrile (8603)	II
Benzoylecgonine (9180)	II

The firm plans to manufacture small quantities of controlled substances for use in diagnostic products. Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Federal Register Representative, Office of Chief Counsel (CCD) and must be filed no later than June 25, 2004.

Dated: May 5, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–11819 Filed 5–25–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

125th Plenary Meeting; Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 125th open meeting of the full Advisory Council on Employee Welfare and Pension Benefit Plans will be held on Tuesday, June 15, 2004.

The meeting will take place in Room S. 2508, U.S. Department of Labor Building, 200 Constitution Avenue, NW, Washington, DC 20210. The purpose of the meeting, which will begin at 1:30 p.m. and end at approximately 4 p.m., is to swear in the new members, introduce the Council Chair and Vice Chair, receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration, and determine the topics to be addressed by the Council in 2004.

Organizations or members of the public wishing to submit a written statement may do so by submitting 20 copies on or before June 4, 2004 to Debra Golding at the ERISA Advisory Council, U.S. Department of Labor, Room N–5656, 200 Constitution Avenue, NW, Washington, DC 20210. Statements received on or before June 4, 2004 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Advisory Council should forward their request to Debra Golding at the above address or via telephone at (202) 693–8664. Oral presentations will be limited to 10 minutes, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Debra Golding by June 4 at the address indicated in this notice.

Signed at Washington, DC, this 19th day of May, 2004.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 04–11821 Filed 5–25–04; 8:45 am]

BILLING CODE 4510–29–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Combined Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Combined Arts Advisory Panel, Theater/Musical Theater section (Access to Artistic Excellence category) to the National Council on the Arts will be held on June 28-July 2, 2004 in Room 730 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting, from 3 p.m. to 4:30 p.m. on July 1st, will be open to the public for policy discussion. The remaining portions of this meeting, from 9:30 a.m. to 6:30 p.m. on June 28th–30th, from 9:30 a.m. to 3 p.m. and 4:30 p.m. to 6:30 p.m. on July 1st, and from 9:30 a.m. to 5 p.m. on July 2nd, will be closed.

The closed portions of these meetings are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of April 14, 2004, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY-TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: May 20, 2004.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 04–11932 Filed 5–25–04; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Fellowships Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Fellowships Advisory Panel, Music section (NEA Jazz Masters category) to the National Council on the Arts will be held on June 15, 2004 from 9 p.m. to 5:30 p.m. in Room M–07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506.

This meeting will be open to the public on a space available basis. Discussion will include the Jazz Masters National Touring Initiative, the issue of Jazz Education, Touring, Broadcast, other activities, general policy issues and other business as necessary.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and, if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: May 20, 2004.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 04–11933 Filed 5–25–04; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Leadership Initiatives Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that two teleconference meetings of the Leadership Initiatives Advisory Panel, AccessAbility section, to the National Council on the Arts will be held from Room 724 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506 as follows:

June 7, 2004, (National Accessibility Award, Study of Careers in the Arts). This meeting, from 1:30 p.m. to 3 p.m., will be closed.

June 16, 2004, (Universal Design). This meeting, from 1:30 p.m. to 3 p.m., will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of April 14, 2004, these sessions will be closed to the public pursuant to subsection (c)(6) of 5 U.S.C. 552b.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for

the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: May 20, 2004.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 04–11934 Filed 5–25–04; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Leadership Initiatives Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Leadership Initiatives Advisory Panel, Music section, to the National Council on the Arts will be held from 12 p.m. to 1:30 p.m. on June 10, 2004 at the Omni William Penn Hotel, Parlor D, 530 William Penn Place, Pittsburgh, Pennsylvania. This meeting will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of April 14, 2004, these sessions will be closed to the public pursuant to subsection (c)(6) of 5 U.S.C. 552b.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: May 20, 2004.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 04–11935 Filed 5–25–04; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL INSTITUTE FOR LITERACY

National Institute for Literacy Advisory Board

AGENCY: National Institute for Literacy.

ACTION: Notice of a partially closed meeting.

SUMMARY: This notice sets forth the schedule and a summary of the agenda for an upcoming meeting of the National Institute for Literacy Advisory Board (Board). The notice also describes the functions of the Board. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend the meeting. Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.*, interpreting services, assistive listening devices, or materials in alternative format) should notify Liz Hollis at telephone number (202) 233–2072 no later than June 9, 2004. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

DATE AND TIME: *Open sessions*—June 16, 2004, from 8 a.m. to 5 p.m. *Closed sessions*—June 16, 2004, from 5 p.m. to 6:30 p.m., June 17, 2004, from 8:30 a.m. to 5:30 p.m. and June 18, 2004 from 8:30 a.m. to 2:30 p.m.

ADDRESSES: Washington, DC. The exact location will be posted on NIFL's Web site when confirmed. *http://www.nifl.gov*.

FOR FURTHER INFORMATION CONTACT: Liz Hollis, Special Assistant to the Director; National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006; telephone number: (202) 233–2072; email: *ehollis@nifl.gov*.

SUPPLEMENTARY INFORMATION: The Board is established under section 242 of the Workforce Investment Act of 1998, P.L. 105–220 (20 U.S.C. 9252). The Board consists of ten individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group, composed of the Secretaries of Education, Labor, and Health and Human Services, which administers the National Institute for Literacy (Institute). The Interagency Group considers the Board 's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The National Institute for Literacy Advisory Board will meet June 16–18, 2004. On June 16, an open meeting will be held from 8:30 a.m. to 5 p.m. The meeting will focus on the Institute's role in meeting the nation's literacy needs. The meeting will be composed of small group discussions between Board members and representatives of national organizations with an interest and investment in literacy, including education and workforce development organizations, foundations, and business, and learner organizations. During the small group discussions, the Board will also discuss the Institute's future work and conduct other Board business as necessary. On June 16, 2004, the meeting will be closed from 5 p.m. to 6:30 p.m. to review the applications of candidates for the position of permanent director for the Institute. On June 17, 2004 from 8:30 a.m. to 5:30 p.m. and June 18, 2004, from 8:30 a.m. to 2:30 p.m., the Board meeting will be closed to the public to interview candidates for the position of Executive Director. The review of candidates' applications, candidate interviews and subsequent discussions will touch upon matters that would likely disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personnel privacy. The discussion may therefore be held in closed session under exemptions 2 and 6 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (6). A summary of the activities at the closed session and related matters that are informative to the public and consistent with the policy of 5 U.S.C. 552b will be available to the public within 14 days of the meeting.

Records are kept of all Advisory Board proceedings and are available for public inspection at the National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006, from 8:30 a.m. to 5 p.m.

Dated: May 21, 2004.

Sandra L. Baxter,

Interim Director.

[FR Doc. 04–11931 Filed 5–25–04; 8:45 am]

BILLING CODE 6055–01–P

NATIONAL SCIENCE FOUNDATION

Business and Operations Advisory Committee: Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Business and Operations Advisory Committee (9556).

Date/Time: June 15, 2044; 1 p.m. to 5 p.m. (E.S.T.).

Place: Teleconference. Please contact Joan Miller (below) for a dial-in number National Science Foundation, 4201 Wilson Boulevard, Room 525–II, Arlington, VA.

Type of Meeting: Open.

Contact Person: Joan Miller, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 (703) 292–8200.

Purpose of Meeting: To review the NSF assessment of activities under the agency's Organizational Excellence strategic goal.

Agenda: June 15, 2004. Discussion of NSF's Organizational Excellence strategic goal.

Dated: March 21, 2004.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 04–11888 Filed 5–25–04;8:45am]

BILLING CODE 7555–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

Agenda; Sunshine Act Meeting

TIME: 9:30 a.m., Tuesday, June 8, 2004.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza, SW., Washington, DC 20594.

STATUS: The one item is open to the public.

MATTER TO BE CONSIDERED: 7501A Aircraft Accident Report—Collision with Trees on Final Approach, FedEx flight 1478, Boeing 727–232, N497FE, Tallahassee, Florida, July 26, 2002.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

Individuals requesting specific accommodations should contact Ms. Carolyn Dargan at (202) 314–6305 by Friday, June 4, 2004.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *http://www.ntsb.gov*.

FOR FURTHER INFORMATION CONTACT: Vicky D'Onofrio, (202) 314–6410.

Dated: May 21, 2004.

Vicky D'Onofrio,

Federal Register Liaison Officer.

[FR Doc. 04–11968 Filed 5–21–04; 5:10 pm]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No's. 50–413–OLA, 50–414–OLA; ASLBP No. 03–815–03–OLA]

Atomic Safety and Licensing Board; Duke Energy Corporation, (Catawba Nuclear Station, Units 1 and 2); Notice of Evidentiary Hearing and Opportunity To Make Limited Appearance Statements Before Administrative Judges: Ann Marshall Young, Chair, Anthony J. Baratta, Thomas S. Elleman

May 20, 2004.

This Atomic Safety and Licensing Board hereby gives notice that, beginning on Tuesday, June 15, 2004, it will convene an evidentiary hearing in Charlotte, North Carolina, to receive testimony and exhibits and allow the cross-examination of witnesses on certain matters at issue in this proceeding. In addition, the Board gives notice that, in accordance with 10 CFR 2.715(a), it will also entertain oral limited appearance statements from members of the public, as specified in section B below.

This proceeding involves certain challenges of Intervenor Blue Ridge Environmental Defense League (BREDL) to a request filed by Duke Energy Corporation (Duke) to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station. (MOX fuel contains a mixture of plutonium and uranium oxides, with plutonium providing the primary fissile isotopes; Duke has submitted its request as part of the ongoing U.S.-Russian Federation plutonium disposition program, a nuclear nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting the material into MOX fuel and using that fuel in nuclear reactors.) On September 17, 2003, this Licensing Board was established to preside over this proceeding. 68 FR 55,414 (Sept. 25, 2003). By Memorandum and Order dated March 5, 2004, the Licensing Board granted BREDL's request for hearing. LBP–04–04, 59 NRC__(2004).

At the June evidentiary hearing, the Board will receive evidence on BREDL's challenges to the adequacy of certain aspects of Duke's license amendment request, relating to asserted differences in the behavior of MOX fuel and typical low enriched uranium fuel and the impact of those differences on accident scenario analyses for the Catawba plant.

A. Timing and Location of Evidentiary Hearing

The evidentiary hearing will commence *the morning of Tuesday, June 15, 2004 at 9 a.m. in the Federal Courthouse, 401 West Trade Street, Charlotte, North Carolina.* The hearing of the above-described evidence will continue on June 16 and the morning of June 17, 2004, as necessary. At the conclusion of each day, the Board will announce when the hearing will reconvene, which will generally be at 9 a.m. each day. The Board may make changes in the schedule, lengthening or shortening each day's session or canceling a session as deemed necessary or appropriate to allow for witnesses' availability and other matters arising during the course of the proceeding.

Members of the public are encouraged to attend any and all sessions of this evidentiary hearing, but should note that these sessions are adjudicatory proceedings open to the public for observation only. Those who wish to participate are invited to offer limited appearance statements as provided in section B, below. There will be security screening for all sessions, and electronic devices may not be brought into the courthouse.

B. Participation Guidelines for Limited Appearance Session

On *the evening of June 15, 2004, beginning at 6 p.m. and continuing until 8 p.m. as necessary, in a portion of the Grand Ballroom (lobby level) of the Omni Charlotte Hotel (132 East Trade Street)*, any persons who are not parties to the proceeding will be permitted to make oral statements setting forth their positions on matters of concern relating to this proceeding. Although these statements do not constitute testimony or evidence, they may nonetheless help the Board and/or the parties in their consideration of the issues in this proceeding.

The time allotted for each statement will normally be no more than five minutes, but may be further limited depending on the number of written requests to make oral statements that are submitted in accordance with section C below, and/or on the number of persons present the evening of June 15, 2004, who wish to make unscheduled comments. Persons who submit timely written requests to make oral statements will be given priority over those who have not filed such requests. If all scheduled and unscheduled speakers present have made their oral statements prior to 8 p.m., the Licensing Board may terminate the session before 8 p.m.

C. Submitting Requests To Make an Oral Limited Appearance Statement

To be considered timely, a written request to make an oral statement must be mailed, faxed, or sent by e-mail so as to be received by close of business (4:30 p.m. e.s.t.) on *Monday, June 7, 2004.* Written requests should be submitted to:

Mail: Office of the Secretary, Rulemakings and Adjudications Staff, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Fax: (301) 415–1101 (verification (301) 415–1966).

E-mail: hearingdocket@nrc.gov.

In addition, using the same method of service, a copy of the written request to make an oral statement should be sent to the Chair of this Licensing Board as follows:

Mail: Administrative Judge Ann Marshall Young, Atomic Safety and Licensing Board Panel, Mail Stop T–3F23, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Fax: (301) 415–5599 (verification (301) 415–7550).

E-mail: AMY@nrc.gov.

D. Submitting Written Limited Appearance Statements

A written limited appearance statement may be submitted at any time. Such statements should be sent to the Office of the Secretary using any of the methods prescribed above, with a copy to the Licensing Board Chair by the same method.

E. Availability of Documentary Information Regarding the Proceeding

Documents relating to this proceeding are available for public inspection at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland; or electronically through the publicly available records component of the NRC Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible through the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html*. The PDR and many public libraries have terminals for public access to the Internet. Persons who do not have access to ADAMS or who encounter problems in obtaining access to the documents located in ADAMS may 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*.

For the Atomic Safety and Licensing Board.

Dated: Rockville, Maryland, May 20, 2004.

Ann Marshall Young,

Chair, Administrative Judge.

[FR Doc. 04–11853 Filed 5–25–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–263]

Nuclear Management Company, LLC; Monticello Nuclear Generating Plant; Revised Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Facility Operating License No. DPR–22, issued to Nuclear Management Company, LLC (NMC), for operation of the Monticello Nuclear Generating Plant (Monticello), located in Wright County, Minnesota. Therefore, as required by 10 CFR 51.21, the NRC is issuing this revised environmental assessment and finding of no significant impact.

Revised Environmental Assessment

Identification of the Proposed Action

The proposed action would revise the Monticello operating license to change the Monticello design bases and the Updated Safety Analysis Report (USAR). The proposed action would revise the existing analyses for the following:

- Long-term containment response to the design-basis loss-of-coolant accident (LOCA).
- Containment overpressure (the pressure above the initial containment pressure) required for adequate available net positive suction head (NPSH) for the low-pressure emergency core cooling system pumps following a LOCA, reactor vessel isolation, or Appendix R fire.

In addition, NMC intends to use these analyses to justify revising the service water temperature licensing basis. NMC administratively limits the service water temperature to 85 °F, instead of its current licensing basis value of 90 °F, because the results of analyses of a new scenario (reactor vessel isolation with high-pressure coolant injection unavailable) showed that the design temperature for the piping attached to the wetwell would be exceeded. A license amendment is required since NMC used different methods of evaluation in the updated containment analyses from those currently described in the Monticello USAR and previously approved by the NRC. NMC's submittal of December 6, 2002, demonstrates acceptable results for the long-term containment LOCA response with a service water temperature of 94 °F. The NPSH analyses were performed using a service water temperature of 90 °F. The lower service water temperature, 90 °F, would be operationally controlling. That is, exceeding a service water temperature of 90 °F would exceed the Monticello licensing basis since the NPSH calculations would no longer be valid.

The proposed action is in accordance with NMC's application of December 6, 2002, as supplemented September 24, 2003, and March 12, 2004.

The Need for the Proposed Action

NMC needs this license amendment because it has determined, in accordance with 10 CFR 50.59(c)(2)(viii), that the updated containment analyses involve different evaluation methods from those currently described in Monticello's USAR and previously approved by the NRC.

Environmental Impacts of the Proposed Action

The NRC staff reviewed NMC's amendment request and will issue a safety evaluation documenting its review. The NRC staff has reviewed NMC's calculation of the mass and energy releases that are used to determine containment pressure response, including the methods and key underlying input assumptions (*e.g.*, decay heat generation).

NMC used conservative assumptions in its reanalyses which underestimate the containment pressure and overestimate the suppression pool water temperature. Some overpressure is necessary to ensure sufficient available NPSH. The conservative assumptions used in NMC's calculations and the cautions in Monticello's emergency operating procedures are intended to ensure that this pressure will be available.

The NRC has completed its evaluation of the proposed action and concludes, as set forth below, that there are no significant environmental impacts associated with the proposed changes to the Monticello design basis and USAR. The details of the NRC staff's review of the amendment request will be provided in the related safety evaluation when it is issued by the NRC.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types or amounts of 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 potential nonradiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. 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.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*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

The action does not involve the use of any different resource than those previously considered in the Final Environmental Statement for Monticello dated November 1972.

Agencies and Persons Consulted

On January 6, 2004, the staff consulted with the Minnesota State official, Nancy Campbell of the Department of Commerce, regarding the environmental impact of the proposed action. The State official had no comments.

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 NMC's letter of December 6, 2002, as supplemented September 24, 2003, and March 12, 2004. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading 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 20th day of May 2004.

For the Nuclear Regulatory Commission.

L. Raghavan,

Chief, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–11854 Filed 5–25–04; 8:45 am]

BILLING CODE 7590–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

Agency Report Form Under OMB Review

AGENCY: Overseas Private Investment Corporation (OPIC).

ACTION: Request for comments.

SUMMARY: Under the provision of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the Federal Register notifying the public that the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. OPIC published its first **Federal Register** Notice on this information collection request on March 22, 2004, at FR 13339, at which time a 60-day comment period was announced.

This comment period ended May 21, 2004. No comments were received in response to this notice.

This information collection submission has now been submitted to OMB for review. Comments are again being solicited on the need for the information, the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review, OMB control number 3420–0019, is summarized below.

DATES: Comments must be received within 30 calendar days of publication of this Notice.

ADDRESSES: Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency submitting officer. Comments on the form should be submitted to the Agency submitting officer.

FOR FURTHER INFORMATION CONTACT: *OPIC Agency Submitting Officer:* Bruce I. Campbell, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; 202/336–8563.

OMB Reviewer: David Rostker, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503; 202/395–3897.

Summary Form Under Review

Type of Request: Revised form.

Title: Self Monitoring Questionnaire for Insurance & Finance Projects.

Form Number: OPIC–162.

Frequency of Use: Annually for duration of project.

Type of Respondents: Business or other institution (except farms); individuals.

Description of Affected Public: U.S. companies or citizens investing overseas.

Reporting Hours: 8.5 hours per project.

Number of Responses: 230 per year.

Federal Cost: $15,718.

Authority for Information Collection: Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 1961, as amended.

Abstract (Needs and Uses): The questionnaire is completed by OPIC-assisted investors annually. The questionnaire allows OPIC's assessment of effects of OPIC-assisted projects on the U.S. economy and employment, as well as on the environment and economic development abroad.

Dated: May 21, 2004.

Eli Landy,

Senior Counsel, Administrative Affairs, Department of Legal Affairs.

[FR Doc. 04–11850 Filed 5–26–04; 8:45 am]

BILLING CODE 3210–01–M

OVERSEAS PRIVATE INVESTMENT CORPORATION

Submission for OMB Review; Comment Request

AGENCY: Overseas Private Investment Corporation.

ACTION: Request for Comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to publish a notice in the **Federal Register**

notifying the public that the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. OPIC published its first **Federal Register** notice on this information collection request on March 22, 2004, in vol. 69, no. 55 FR 13340, at which time a 60-day comment period was announced. This comment period ended May 21, 2004. No comments were received in response to this notice.

This information collection submission has now been submitted to OMB for review. Comments are again being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form, OMB control number 3420–0023, under review is summarized below.

DATES: Comments must be received within 30 calendar days of this notice.

ADDRESSES: Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency submitting officer. Comments on the form should be submitted to the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

OPIC Agency Submitting Officer: Bruce I. Campbell, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

OMB Reviewer: David Rostker, Officer of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503; (202) 395–3897.

SUMMARY FORM UNDER REVIEW:

Type of Request: Revised form.

Title: Self-Monitoring Questionnaire for Investment Funds' Sub-Projects.

Form Number: OPIC–217.

Frequency of Use: Annually for duration of project.

Type of Respondents: Business or other institution (except farms); individuals.

Description of Affected Public: U.S. companies or citizens investing overseas.

Reporting Hours: 8.5 hours per project.

Number of Responses: 189 per year.

Federal Cost: $12,916.

Authority for Information Collection: Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 191, as amended.

Abstract (Needs and Uses): The questionnaire is completed by OPIC-assisted investors annually. The questionnaire allows OPIC's assessment of effects of OPIC-assisted projects on the U.S. economy and employment, as well as on the environment and economic development abroad.

Dated: May 21, 2004.

Eli Landy,

Senior Counsel, Administrative Affairs, Department of Legal Affairs.

[FR Doc. 04–11851 Filed 5–25–04; 8:45 am]

BILLING CODE 3210–01–M

OVERSEAS PRIVATE INVESTMENT CORPORATION

Sunshine Act Meeting; Africa Investment Advisory Council Meeting

TIME AND DATE: Monday, June 21, 2004, 9:30 a.m. (Open Portion); 9:45 a.m. (Closed Portion).

PLACE: Offices of the Corporation, Twelfth Floor Europe Room, 1100 New York Avenue, NW., Washington, DC.

STATUS: Meeting Open to the Public from 9:30 a.m. to 9:45 a.m. Closed portion will commence at 9:45 a.m. (approx.).

MATTERS TO BE CONSIDERED:

1. Welcome and Introductory Remarks.

FURTHER MATTERS TO BE CONSIDERED: (Closed to the Public 9:45 a.m.)

1. Administrative Issues.
2. Reports.

CONTACT PERSON FOR INFORMATION: Information on the meeting may be obtained form Marysue K. Shore at (202) 336–8630.

Dated: May 24, 2004.

Connie M. Downs,

Corporate Secretary.

[FR Doc. 04–12023 Filed 5–24–04; 12:55 pm]

BILLING CODE 3210–07–M

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of Atlas Pipeline Partners, L.P., To Withdraw Its Common Units (Representing Limited Partnership interests), From Listing and Registration on the American Stock Exchange LLC, File No. 1–14998

May 19, 2004.

On May 7, 2004, Atlas Pipeline Partners, L.P., a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common units (representing limited partnership interests) (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'' or ''Exchange'').

The Managing Board of the Issuer's general partner (''Board'') unanimously approved a resolution on May 3, 2004 to withdraw the Issuer's Security from listing on the Amex, and to list the Security on the New York Stock Exchange, Inc. (''NYSE''). The Board states that it is taking such action to avoid the direct and indirect costs, and the division of the market, resulting from dual listing on the Amex and NYSE. In addition, the Board determined that it is in the best interest of the Issuer to list the Security on the NYSE.

The Issuer stated in its application that it has met the requirements of Amex Rule l8 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex, and shall not affect its continued listing on the NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before June 11, 2004, comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic comments:

- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–14998 or;

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–14998. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–11841 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of Bentley Pharmaceuticals, Inc. To Withdraw Its Common Stock, $.02 Par Value, From Listing and Registration on the American Stock Exchange LLC File No. 1–10581

May 19, 2004.

On May 11, 2004, Bentley Pharmaceuticals Inc., a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $.02 par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'' or ''Exchange'').

The Board of Directors (''Board'') of the Issuer unanimously approved a resolution on March 26, 2004 to withdraw the Issuer's Security from listing on the Amex, and to list the Security on the New York Stock Exchange, Inc. (''NYSE''). The Board states that it is taking such action to avoid the direct and indirect costs, and the division of the market, resulting from dual listing on the Amex and NYSE. In addition, the Board determined that it is in the best interest of the Issuer to list the Security on the NYSE.

The Issuer stated in its application that it has met the requirements of Amex Rule l8 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex, and shall not affect its continued listing on the NYSE or its obligation to be registered under section 12(b) of the Act.[3]

Any interested person may, on or before June 11, 2004, comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic comments:

• Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–10581 or;

Paper comments:

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–10581. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–11840 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49736; File No. SR–CHX–2003–21]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 by the Chicago Stock Exchange, Inc., Relating to the Price Improvement of Orders Executed Automatically on the Exchange

May 19, 2004.

I. Introduction

On July 17, 2003, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend CHX Article XX, Rule 37, to revise the rules governing the CHX's SuperMAX 2000 program. The CHX filed Amendment Nos. 1 and 2 to the proposal on March 30, 2004,[3] and May 18, 2004,[4] respectively.

The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on April 12, 2004.[5] The Commission received no comments regarding the proposal. This order approves the proposed rule change, as amended. In addition, the Commission is publishing

[4] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* letter from Kathleen M. Boege, Vice President and Associate General Counsel, CHX, to Nancy J. Sanow, Division of Market Regulation (''Division''), Commission, dated March 29, 2004.

[4] *See* letter from Kathleen M. Boege, Vice President and Associate General Counsel, CHX, to Nancy J. Sanow, Division, Commission, dated May 18, 2004 (''Amendment No. 2''). Amendment No. 2 revises the proposal to: (1) Indicate that an order must receive the national best bid, or better, or the national best offer, or better, at the time the order was received; and (2) clarify that the CHX is deleting CHX Article XX, Rule 37(d)(1)(d) because the CHX intends for CHX Article XXXI to govern the execution prices due odd-lot orders. In addition, Amendment No. 2 states that it replaces an earlier version of Amendment No. 2 that the CHX filed with the Commission on May 12, 2004.

[5] *See* Securities Exchange Act Release No. 49530 (April 6, 2004), 69 FR 19253.

notice to solicit comments on and is simultaneously approving, on an accelerated basis, Amendment No. 2.

II. Description of the Proposal

The CHX proposes to amend CHX Article XX, Rule 37, to revise its rules governing the SuperMAX 2000 program. SuperMAX 2000 is a program within the CHX's MAX® execution system that uses a computerized algorithm to provide automated price improvement to orders executed automatically within the MAX system. SuperMAX 2000 is a voluntary price improvement program, and CHX specialists may elect to engage SuperMAX 2000 on an issue-by-issue basis.[6]

Currently, the CHX's rules provide that in securities for which SuperMAX 2000 has been enabled: (1) An order for at least 100 shares will be executed at the ITS Best Offer or NBO (for a buy order) or the ITS Best Bid or NBB (for a sell order) if the spread in the security at the time the order is received is less than $.02; (2) an order for 100 shares will be executed at a price at least $.01 lower than the ITS Best Offer or NBO (for a buy order) or at least $.01 higher than the ITS Best Bid or the NBB (for a sell order) if the spread in the security at the time the order is received is $.02 or more; and (3) an order for more than 100 shares will be executed at the ITS Best Offer or NBO, or better, (for a buy order) or the ITS Best Bid or NBB, or better, (for a sell order) as the specialist may designate and as is approved by the CHX.[7] Thus, for orders of more than 100 shares, CHX specialists may establish price improvement algorithms to provide varying levels of price improvement for each issue, based on factors including order size, the bid/offer spread at the time the order is received, and other objective market factors.

The CHX proposes to revise SuperMAX 2000 to: (1) Change the name of the program to ''SuperMAX;'' (2) provide that any order of 100 shares or more will receive the ITS Best Bid or ITS Best Offer in effect at the time the order was received,[8] or better, or the NBB or NBO in effect at the time the order was received, or better, as the specialist may designate and as is approved by the CHX; and (3) delete CHX Article XX, Rule 37(d)(1)(d), which concerns odd-lot orders for which SuperMAX 2000 has been enabled.[9] In lieu of CHX Article XX, Rule 37(d)(1)(d), CHX Article XXXI, ''Execution of Odd-Lot Orders during the Primary Market Trading,'' will govern the execution prices due odd-lot orders.[10]

According to the CHX, SuperMAX 2000, which was adopted in 2000,[11] combined five different price improvement programs formerly contained in the CHX's rules. Each of the programs was based on factors including order size and best bid or offer spread. Largely for marketing reasons, SuperMAX 2000 contained separate provisions for price improvement of 100-share orders to establish a minimum threshold of price improvement for small orders.

The CHX believes that separate treatment of 100-share orders is no longer warranted and that the elimination of special treatment for 100-share orders could reduce confusion. In addition, the CHX believes that it is appropriate for CHX specialists to exercise the same discretion with respect to 100-share orders that they currently exercise with respect to larger orders in determining the level of price improvement that they are willing to provide.[12] Although the revised rule would permit CHX specialists to give 100-share orders worse execution prices than would be due under the current rule, the Exchange does not believe that the proposal would result in widespread specialist refusal to price improve 100-share orders.[13] Moreover, the CHX notes that even if a number of CHX specialists declined to price improve 100-share orders, the CHX's rules would continue to obligate CHX specialists to execute such orders at a price no worse than the national best bid or offer.

On May 18, 2004, the CHX filed Amendment No. 2 to the proposal. Amendment No. 2 modifies the proposal by: (1) Revising the text of the proposed rule to indicate that an order will receive the national best bid or offer in effect at the time the order was received, or better; and (2) clarifying that the CHX is deleting CHX Article XX, Rule 37(d)(1)(d) because the Exchange intends for CHX Article XXXI to govern the execution prices due odd-lot orders.[14]

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[15] and, in particular, with the requirements of Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be 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. As described more fully above, the proposal modifies the CHX's SuperMAX rules to eliminate the requirement that 100-share orders receive price improvement of at least $.01 when the national best bid or offer spread at the time the order is received is at least $.02. Under the revised SuperMAX rules, 100-share orders will receive the same treatment provided currently for orders of more than 100 shares. Thus, both 100-share orders and orders of more than 100 shares will receive the national best bid or offer in effect at the time the order was received, or a better price, as determined by the specialist and approved by the CHX. In addition, the proposal will delete the current SuperMAX provisions concerning odd-lot orders and make clear that CHX Rule XXXI will govern the execution prices due odd-lot orders.

The Commission believes that the proposal should provide CHX specialists with greater flexibility in determining the level of price improvement that they will provide for 100-share orders, as well as for orders of more than 100 shares. Although 100-share orders in securities for which SuperMAX has been enabled no longer will receive minimum price improvement of at least $.01 when the national best bid or offer spread at the time the order is received is at least $.02, as provided under the current rule, the CHX's rules will continue to require the CHX's specialists to execute 100-

[6] The CHX estimates that SuperMAX 2000 is enabled for over 90% of the issues traded on the CHX.

[7] *See* CHX Article XX, Rule 37(d)(1).

[8] *See* Amendment No. 2, *supra* note 4.

[9] Under CHX Rule XX, Article 37(d)(1)(d), an odd-lot order in which SuperMAX 2000 is enabled will be executed at the ITS Best Offer or NBO (for a buy order) or the ITS Best Bid or NBB (for a sell order) if the spread in the security at the time the order is received is less than $.05. If the spread is $.05 or greater, the odd-lot order will be executed at a price at least $.01 lower than the ITS Best Offer or NBO (for a buy order) or at least $.01 higher than the ITS Best Bid or NBB (for a sell order).

[10] *See* Amendment No. 2, *supra* note 4.

[11] *See* Securities Exchange Act Release No. 43742 (December 19, 2000), 65 FR 83119 (December 29, 2000) (order approving File No. SR–CHX–00–37).

[12] The CHX specialist's discretion is limited by the CHX Article XX, Rule 37(d)(2), which prohibits changing SuperMAX 2000 price improvement parameters more than once per month.

[13] In this regard, the CHX believes that specialist business considerations, including competitive forces in the securities markets, may dictate that CHX specialists continue to price improve most 100-share orders.

[14] *See* Amendment No. 2, *supra* note 4.

[15] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78f(b)(5).

share orders at a price no worse than the national best bid or offer in effect at the time the order was received. In addition, CHX specialists may continue to offer price improvement for 100-share orders.

Notwithstanding the foregoing, the Commission cautions that the duty of best execution requires a broker-dealer to seek the most favorable terms reasonably available under the circumstances for a customer's transaction.[17] A broker-dealer's duty of best execution is not necessarily satisfied by routing orders to a market center that merely guarantees an execution at the national best bid or offer.[18] Various markets and market makers may provide opportunities for executions at prices superior to the national best bid and offer. The Commission believes that broker-dealers deciding where to route or execute small customer orders must carefully evaluate the extent to which this order flow would be afforded better terms if executed in a market or with a market maker offering price improvement opportunities. In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from the different markets or market makers trading a security.[19]

With respect to odd-lots, because the CHX intends for CHX Article XXXI to govern the execution of odd-lot orders,[20] the Commission believes that deleting CHX Rule Article XX, Rule 37(d)(1)(d), will clarify the CHX's rules and eliminate potential confusion concerning the execution prices due to odd-lot orders.

The Commission finds good cause for approving Amendment No. 2 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 2 clarifies the proposal by indicating that an order must receive the national best bid or offer in effect at the time the order was received, and by stating that the CHX intends for CHX Article XXXI to govern the execution prices due odd-lot orders. Accordingly, the Commission finds that it is consistent with Sections 6(b)(5) and 19(b) of the Act to approve Amendment No. 2 on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2003–21 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CHX–2003–21. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2003–21 and should be submitted on or before June 16, 2004.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–CHX–2003–21), as amended , is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11842 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[17] *See, e.g.*, Securities Exchange Act Release Nos. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (adopting Exchange Act Rule 11Ac1–4 and amending Exchange Act Rule 11Ac1–1) (''Order Handling Rules Release'') at Section III.C.2.

[18] *See, e.g.*, Order Handling Rules Release at III.C.2. and Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10577 (February 28, 2000) (notice of filing of SR–NYSE–99–48 and Commission request for comment on issues relating to market fragmentation) at Section IV.A.3.c.

[19] *See* Order Handling Rule Release, supra note 17 at Section III.C.2.

[20] *See* Amendment No. 2, *supra* note 4.

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49728; File No. SR–CHX–2004–15]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by The Chicago Stock Exchange, Inc. To Set Fees for Member Firms for Computer Hardware Stored on the Exchange Premises and for the Connection of that Hardware to the CHX System

May 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 30, 2004, the Chicago Stock Exchange, Inc. (''CHX'' 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 CHX has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CHX under Section 19(b)(3)(A)(ii) of the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its membership dues and fees schedule (the ''Fee Schedule'') to charge member firms a fee for computer hardware stored on Exchange premises, and for the connection of that hardware to CHX systems, where that hardware is associated with systems that are used solely for any purpose other than transmitting orders to the Exchange for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

execution. The text of the proposed rule change is available at the Commission and the CHX.

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

Many of the Exchange's member firms use automated systems that interact either with their own posts on the floor or with the posts of other trading floor members. These systems might be used to help members manage their positions, to automate the execution of orders that would otherwise be handled manually, to act as a layoff vendor by coordinating the routing of orders to another market or for a variety of other purposes. These systems are linked to the Exchange's own systems through various data connections. In some cases, member firms also store hardware associated with these systems in the Exchange's computer facilities.

The Exchange believes that it is appropriate to share, with member firms, the costs of providing both this equipment storage and the various data connections to the Exchange's systems. This fee proposal would establish a series of fees applicable to the storage of hardware, and the maintenance of connections to CHX systems, for member-owned systems that are solely used for any purpose other than transmitting orders to the Exchange for execution.[4] These fees include a one-time fee associated with the initial installation of the hardware or connection, as well as a monthly cost for the period that the hardware or connection remains in place. These fee changes are designed to take effect May 1, 2004.

2. Statutory Basis

The Exchange believes the proposal is consistent with Section 6(b) of the Act,[5] in general and Section 6(b)(4) of the Act,[6] 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 of 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 Regarding the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[7] and Rule 19b–4(f)(2)[8] thereunder, because it establishes or changes a due, fee or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CHX–2004–15 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CHX–2004–15. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* 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 Section, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of such filing also will be available for inspection and copying at the principal office of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CHX–2004–15 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11880 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[4] The Exchange's members request from time to time, that the Exchange allow other market centers to establish direct linkages to the Exchange's floor so that members can transmit orders to other markets. These linkage systems are available to all CHX specialists and floor brokers that contract with each market center. The Exchange believes that these direct connections provide cost-effective and efficient mechanisms that link the Exchange's members with other markets. However, since only one of these market centers is a member of the CHX, the Exchange believes that it would be inappropriate to impose these fees on one market center, while other market centers are exempt based on their non-member status. Therefore, these fees do not apply to hardware owned and stored in CHX facilities by members that are market centers, or to the data connections associated with that hardware. Telephone conversation between Ellen Neely, Senior Vice President and General Counsel, CHX and Ian Patel, Special Counsel, and Marisol Rubecindo, Law Clerk, Division of Market Regulation, Commission, dated May 17, 2004.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49733; File No. SR–NASD–2004–034]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Allow Members To Report Certain Trades Through SuperMontage

May 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 26, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), submitted to the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(5) thereunder,[4] which renders the proposal effective upon filing with the Commission. Nasdaq filed Amendment No. 1 to the proposed rule change on April 27, 2004.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to allow members to report certain trades through the Nasdaq National Market Execution System (''SuperMontage''). New text is italicized. Deleted text is in brackets.

* * * * *

4630. Reporting Transactions in Nasdaq National Market Securities

This Rule 4630 Series applies to the reporting by members of transactions in Nasdaq National Market securities (''designated securities'') through the Automated Confirmation Transaction Reporting Service (ACT) *or the Nasdaq National Market Execution System (''NNMS''), as permitted by Rule 4720.*

4632. Transaction Reporting

* * * * *

(c) Information To Be Reported

Each last sale report shall contain the following information:

* * * * *

(6) For any transaction in an order for which a member has recording and reporting obligations under Rules 6954 and 6955, the trade report must include:

(A) An order identifier, meeting such parameters as may be prescribed by the Association, assigned to the order that uniquely identifies the order for the date it was received (see Rule 6954(b)(1)).

(B) The time of the execution expressed in hours, minutes, and seconds. This information must be reported regardless of the period of time between execution of the trade and the ACT *or NNMS* trade report. All times reported to the ACT *or NNMS* systems shall be in Eastern Time.

(d) Procedures for Reporting Price and Volume

Members that are required, or have the option, to report transactions using ACT *or NNMS*, pursuant to paragraph (b) above shall transmit last sale reports for all purchases and sales in designated securities in the following manner:

* * * * *

(B) Exception: A ''riskless'' principal transaction in which a member, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell, shall be reported as one transaction in the same manner as an agency transaction, excluding the mark-up or mark-down, commission-equivalent, or other fee. Alternatively, a member may report a riskless principal transaction by submitting the following report(s) to ACT *or NNMS*:

* * * * *

Example:

SELL as a principal 100 shares to another member at 40 to fill an existing order;

BUY as principal 100 shares from a customer at 40 minus a mark-down of $12.50;

REPORT 100 shares at 40 by submitting to ACT *or NNMS* either a single trade report marked with a ''riskless principal'' capacity indicator or by submitting the following reports:

(1) Where required by this Rule, a tape report marked with a ''principal'' capacity indicator; and

(2) Either a non-tape, non-clearing report or a clearing-only report marked with a ''riskless principal'' capacity indicator.

(e) Transactions Not Required To Be Reported

The following types of transactions shall not be reported:

(1) Transactions executed through [the Nasdaq National Market Execution System ('']NNMS['']), the Primex Auction System, or the SelectNet service];

* * * * *

4640. Reporting Transactions in Nasdaq SmallCap℠ Market Securities

This Rule 4640 Series sets forth the requirements for reporting transactions in Nasdaq SmallCap℠ Market securities (''designated securities'') utilizing the Automated Confirmation Transaction Service (ACT) *or the Nasdaq National Market Execution System (''NNMS''), as permitted by Rule 4720.*

4642. Transaction Reporting

* * * * *

(c) Information To Be Reported

Each last sale report shall contain the following information:

* * * * *

(6) For any transaction in an order for which a member has recording and reporting obligations under Rules 6954 and 6955, the trade report must include:

(A) An order identifier, meeting such parameters as may be prescribed by the Association, assigned to the order that uniquely identifies the order for the date it was received (see Rule 6954(b)(1)).

(B) The time of execution expressed in hours, minutes, and seconds. This information must be reported regardless of the period of time between execution of the trade and the ACT *or NNMS* trade report. All times reported to the ACT *or NNMS* systems shall be in Eastern Time.

(d) Procedures for Reporting Price and Volume*

Members that are required, or have the option, to report transactions using ACT *or NNMS,* pursuant to paragraph (b) above shall transmit last sale reports for all purchases and sales in designated securities in the following manner:

* * * * *

(B) Exception: A ''riskless'' principal transaction in which a member, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(5).

[5] *See* letter from Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated April 26, 2004 (''Amendment No. 1''). In amendment No. 1, Nasdaq provided additional description of the proposed rule change but did not amend the proposed rule text.

* For examples of reporting procedures, refer to Rule 4632, Transaction Reporting.

order to sell, sells the security as principal at the same price to satisfy the order to sell, shall be reported as one transaction in the same manner as an agency transaction, excluding the mark-up or mark-down, commission-equivalent, or other fee. Alternatively, a member may report a riskless principal transaction by submitting the following report(s) to ACT *or NNMS*:

* * * * *

Example:

SELL as a principal 100 shares to another member at 40 to fill an existing order;

BUY as principal 100 shares from a customer at 40 minus a mark-down of $12.50;

REPORT 100 shares at 40 by submitting to ACT *or NNMS* either a single trade report marked with a ''riskless principal'' capacity indicator or by submitting the following reports:

(1) Where required by this Rule, a tape report marked with a ''principal'' capacity indicator; and

(2) Either a non-tape, non-clearing report or a clearing-only report marked with a ''riskless principal'' capacity indicator.

(e) Transactions Not Required To Be Reported

The following types of transactions shall not be reported:

(1) Transactions executed through *NNMS* [the SmallCap Small Order Execution System (SOES), the Primex Auction System, or the SelectNet service].

* * * * *

4650. Reporting Transactions in Nasdaq Convertible Debt Securities

This Rule 4650 Series sets forth the applicable reporting requirements for transactions in convertible bonds that are listed on Nasdaq (designated securities) and reported utilizing the Automated Confirmation Transaction Service (ACT) *or the Nasdaq National Market Execution System (''NNMS''), as permitted by Rule 4720.*

4652. Transaction Reporting

* * * * *

(c) Information To Be Reported

Each last sale report shall contain the following information:

* * * * *

(6) For any transaction in an order for which a member has recording and reporting obligations under Rules 6954 and 6955, the trade report must include:

(A) An order identifier, meeting such parameters as may be prescribed by the Association, assigned to the order that uniquely identifies the order for the date it was received (*see* Rule 6954 (b)(1)).

(B) The time of the execution expressed in hours, minutes, and seconds. This information must be reported regardless of the period of time between execution of the trade and the ACT *or NNMS* trade report. All times reported to the ACT *or NNMS* systems shall be in Eastern Time.

(d) Procedures for Reporting Price and Volume*

Members that are required, or have the option, to report transactions using ACT *or NNMS,* pursuant to paragraph (b) above shall transmit last sale reports for all purchases and sales in designated securities in the following manner:

* * * * *

(B) Exception: A ''riskless'' principal transaction in which a member, after having received an order to buy a security, purchases the bond as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the bond as principal at the same price to satisfy the order to sell, shall be reported as one transaction in the same manner as an agency transaction, excluding the mark-up or mark-down, commission-equivalent, or other fee. Alternatively, a member may report a riskless principal transaction by submitting the following report(s) to ACT *or NNMS:*

Example:

SELL as a principal 100 shares to another member at 40 to fill an existing order;

BUY as principal 100 shares from a customer at 40 minus a mark-down of $12.50;

REPORT 100 shares at 40 by submitting to ACT *or NNMS* either a single trade report marked with a ''riskless principal'' capacity indicator or by submitting the following reports:

(1) where required by this Rule, a tape report marked with a ''principal'' capacity indicator; and

(2) either a non-tape, non-clearing report or a clearing-only report marked with a ''riskless principal'' capacity indicator.

* * * * *

4710. Participant Obligations in NNMS

(a) Registration—Upon the effectiveness of registration as a NNMS Market Maker, NNMS ECN, or NNMS Order Entry Firm, the NNMS Participant may commence activity within NNMS for exposure to orders, *[or] entry of orders, or to report trades,* as applicable. The operating hours of NNMS may be established as appropriate by the Association. The extent of participation in Nasdaq by an NNMS Order Entry Firm shall be determined solely by the firm in the exercise of its ability to enter orders into Nasdaq.

* * * * *

4711. Clearance and Settlement

All transactions executed in, *or reported through,* NNMS shall be cleared and settled through a registered clearing agency using a continuous net settlement system.

* * * * *

4720. Reporting Through NNMS

Subject to the conditions set forth below, members may utilize NNMS to report trades in NNMS eligible securities required or eligible to be reported to Nasdaq pursuant to the Rule 4630, 4640, 4650 and 6100 Series.

(1) Members shall include the time of execution on reports submitted to NNMS; and

(2) For transactions between members, the members who are parties to the trade shall agree to all trade details prior to submitting the report to NNMS, and have in effect and on file with Nasdaq, an Automated Confirmation Transaction Service Service Bureau/Executing Broker Supplement to the Nasdaq Workstation II Agreement (''Attachment 2 Agreement''), and a Nasdaq National Market Execution System Give-Up Addendum to the Nasdaq Workstation II Subscriber Agreement (''SuperMontage Give-Up Agreement'').

5400. NASDAQ STOCK MARKET AND ALTERNATIVE DISPLAY FACILITY TRADE REPORTING

5410. Applicability

(a) For a period of time, NASD will operate two facilities for collecting trade reports for executions in Nasdaq National Market, Nasdaq SmallCap Market, and Nasdaq Convertible Debt securities (''designated securities''): The Nasdaq Stock Market and the Alternative Display Facility (''ADF''). Nasdaq will continue to operate the Automated Confirmation Transaction Service (''ACT'') *and the Nasdaq National Market Execution System (''NNMS''),* and NASD, through the ADF, will operate Trade Reporting and Comparison Service (''TRACS''). This Rule 5400 Series establishes the rules for determining which member must report a trade and whether a trade must be reported to ACT *or NNMS (as permitted by Rule 4720),* pursuant to the Rule 4630, 4640, 4650 and 6100 Series

* For examples of reporting procedures, refer to Rule 4632, Transaction Reporting.

or TRACS, pursuant to the Rule 4630A and 6100A Series.

(b) The requirements of this Rule 5400 Series are in addition to the trade reporting requirements contained in Rule Series 4630, 4640, 4650, 6100, 4630A and 6100A Series*, and Rule 4720.*

5430. Transaction Reporting

(a) When and How Transactions Are Reported

* * * * *

(2) Non-Registered Reporting Members shall, within 90 seconds after execution, transmit through ACT*, NNMS* or TRACS, as applicable, or if ACT*, NNMS* or TRACS is unavailable due to system or transmission failure, by telephone to Market Operations Department, last sale reports of transactions in designated securities executed during normal market hours. Transactions not reported within 90 seconds after execution shall be designated as late and such trade reports must include the time of execution.

* * * * *

(5) All members shall report as soon as practicable to the Market Regulation Department on Form T, last sale reports of transactions in designated securities for which electronic submission into ACT*, NNMS* or TRACS is not possible (*e.g.*, the ticker symbol for the security is no longer available or a market participant identifier is no longer active). Transactions that can be reported into ACT*, NNMS* or TRACS, whether on trade date or on a subsequent date on an ''as of'' basis (T + N), shall not be reported on Form T.

* * * * *

(b) Which Party Reports Transaction and to Which Facility

(1) In transactions between two Registered Reporting Nasdaq Market Makers, the member representing the sell side shall report the trade using ACT *or NNMS.*

(2) In transactions between a Registered Reporting Nasdaq Market Maker and a Non-Registered Reporting Member, the Registered Reporting Nasdaq Market Maker shall report the trade using ACT *or NNMS.*

(3) In transactions between two Non-Registered Reporting Members, the member representing the sell side shall report the trade using ACT*, NNMS,* or TRACS.

(4) In transactions between a member and a customer, the member shall report as follows:

(A) A Registered Reporting Nasdaq Market Maker shall report the trade using ACT *or NNMS*;

(B) A Registered Reporting ADF Market Maker shall report the trade using TRACS; and

(C) A Non-Registered Reporting Member shall report the trade using ACT*, NNMS,* or TRACS.

(5) In transactions between two Registered Reporting ADF Market Makers, the member representing the sell side shall report the trade using TRACS.

(6) In transactions between a Registered Reporting ADF Market Maker and a Non-Registered Reporting Member, the Registered Reporting ADF Market Maker shall report the trade using TRACS.

(7) In transactions between a Registered Reporting Nasdaq Market Maker and a Registered Reporting ADF Market Maker, the member representing the sell side shall report as follows:

(A) A Registered Reporting Nasdaq Market Maker shall report the trade using ACT *or NNMS*; and

(B) A Registered Reporting ADF Market Maker shall report the trade using TRACS.

(8) If a member simultaneously is a Registered Reporting Nasdaq Market Maker and a Registered Reporting ADF Market Maker, and has the trade reporting obligation pursuant to paragraphs (1), (2), (4), (5), (6), or (7), the member can report the trade using either ACT *or NNMS,* or TRACS, unless the trade is executed using ACES or [the Nasdaq National Market Execution System ('']NNMS['')]. A trade executed using ACES must be reported using ACT *or NNMS*, and trades executed using NNMS will be reported to ACT automatically.

(9) In transactions conducted through an ACT/*NNMS* ECN (as defined in Rule 6110) that are reported to ACT *or NNMS*, the ACT/*NNMS* ECN shall ensure that transactions are reported in accordance with Rule 6130(c). If an ACT/*NNMS* ECN is also a Registered Reporting ADF ECN (as defined in Rule 4200A), Rule 6130(c) shall apply only to transactions conducted through the ECN for which trade reports are submitted to ACT *or NNMS*.

(10) Nasdaq will append the .T modifier or the .SLD modifier, as appropriate, to those reports submitted to ACT *or NNMS* that contain the time of execution, but that do not contain the appropriate modifier.

6100. AUTOMATED CONFIRMATION TRANSACTION SERVICE (ACT)

6110. Definitions

(q) The term ''ACT/*NNMS* ECN'' shall mean a member of the Association that is an electronic communications network that is a [member] *participant* of a registered clearing agency for clearing or comparison purposes or has a clearing arrangement with such a [member] *participant*, to the extent that transactions executed through it are reported to ACT *or NNMS*.

6130. Trade Report Input

(a) Reportable ACT Transactions

With the exception of those trades reported to Nasdaq through the Nasdaq National Market Execution System '' ''NNMS'' (as permitted by Rule 4720), [M]*m*embers shall utilize ACT to report transactions that are required to be reported to Nasdaq pursuant to the Rule Series 4630, 4640, 4650, 5430, 6400, 6500 and 6600 Series, including executions of less than one round lot if those executions are to be compared and locked-in. Members may utilize ACT to report transactions that are eligible to be reported to Nasdaq pursuant to Rule 5430, including executions of less than one round lot if those executions are to be compared and locked-in.

Members also may utilize NNMS to report transactions that are eligible to be reported to Nasdaq pursuant to Rule 5430, including executions of less than one round lot if those executions are locked-in. All trades that are reportable transactions will be processed through the National Trade Reporting System; however, only those trades that are subject to regular way settlement and are not already locked-in trades will be compared and locked-in through ACT. Trades that are reported as other than regular way settlement (*i.e.*, Cash, Next-Day, Seller's Option) will not be compared in ACT or reported to NSCC. All transactions in Direct Participation Program securities shall be reported to ACT pursuant to the Rule 6900 Series as set forth therein.

* * * * *

(c) Which Party Inputs Trade Reports to ACT

ACT Participants shall, subject to the input requirements below, either input trade reports into the ACT system or utilize the Browse feature to accept or decline a trade within the applicable time-frames as specified in paragraph (b) of this Rule. Trade data input obligations are as follows:

* * * * *

(5) in transactions conducted through an ACT/*NNMS* ECN that are reported to ACT or *NNMS*, the ACT/*NNMS* ECN shall ensure that transactions are reported in accordance with one of the following methods:

(A) The ACT/*NNMS* ECN shall submit the trade reports to ACT *or NNMS* and identify itself as the reporting party;

(B) The ACT/*NNMS* ECN shall submit the trade reports to ACT *or NNMS* on behalf of the reporting party and identify the reporting party in accordance with the rules for determining reporting parties reflected in paragraphs (1), (2), (3), and (4) above; or

(C) The ACT/*NNMS* ECN shall require one of the parties, determined in accordance with the rules for determining reporting parties reflected in paragraphs (1), (2), (3), and (4) above, to submit the trade reports to ACT *or NNMS*.

When an ACT/*NNMS* ECN reports transactions in accordance with subparagraph (A), the ACT/*NNMS* ECN shall be responsible for ensuring that the trade reports are accurate and contain all information required by subsection (d) of this rule for both the ACT/*NNMS* ECN and the identified non-reporting party. When an ACT/*NNMS* ECN reports transactions in accordance with subparagraph (B), both the ACT/*NNMS* ECN and the party identified as the reporting party shall be responsible for ensuring that the trade reports are accurate and contain all information required by subsection (d) of this rule for both the ACT/*NNMS* ECN and the identified reporting party. When an ACT/*NNMS* ECN requires reporting of transactions in accordance with subparagraph (C), the reporting party shall be responsible for ensuring the accuracy and completeness of the trade report.

An ACT/*NNMS* ECN shall provide written notice to the Association of the method of trade reporting used by the ACT/*NNMS* ECN for each of its subscribers, and may change the method of trade reporting used for a subscriber by providing advance written notice of the change to the Association;

(6) In transactions conducted through two ACT/*NNMS* ECNs or an ACT/*NNMS* ECN and an ECN that is not an ACT/*NNMS* ECN, an ACT/*NNMS* ECN shall be responsible for complying with the requirements of paragraph (5) above for reporting a transaction executed through its facilities, and an ECN that routed an order to it for execution shall be deemed to be an Order Entry Firm and a member for purposes of the rules for determining reporting parties reflected in paragraphs (1), (3), and (4) above; and

(7) In transactions conducted through an ACT/*NNMS* ECN in which neither of the parties is a member, the ACT/*NNMS* ECN shall report the transaction in accordance with the requirements of subparagraph (5)(A) above.

* * * * *

6400. REPORTING TRANSACTIONS IN LISTED SECURITIES

* * * * *

6420. Transaction Reporting

* * * * *

(b) Which Party Reports Transaction

(5) In transactions conducted through an ACT/*NNMS* ECN (as defined in Rule 6110), the ACT/*NNMS* ECN shall ensure that the transactions are reported in accordance with Rule 6130(c).

6600. OVER-THE-COUNTER EQUITY SECURITIES

* * * * *

6620. Transaction Reporting

* * * * *

(b) Which Party Reports Transactions

* * * * *

(5) In transactions conducted through an ACT/*NNMS* ECN (as defined in Rule 6110), the ACT/*NNMS* ECN shall ensure that the transactions are reported in accordance with Rule 6130(c), and the term ''Market Maker'' as used in such rule shall be construed to refer to an OTC Market Maker.

6900. REPORTING TRANSACTIONS IN DIRECT PARTICIPATION PROGRAMS

* * * * *

6920. Transaction Reporting

(b) Which Party Reports Transactions

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(3) In transactions conducted through an ACT/*NNMS* ECN (as defined in Rule 6110), the ACT/*NNMS* ECN shall ensure that the transactions are reported in accordance with Rule 6130(c); provided that for purposes of Rule 6130(c)(5) (B) and (C), the party with the reporting obligation shall be as set forth in Rule 6130(c)(3) and the term ''Order Entry Firm'' as used in such rule shall be construed to refer to any member.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to provide members the ability to use SuperMontage to report trades in Nasdaq National Market and SmallCap Market securities (''Nasdaq securities'') that they have matched outside of any system operated by a self-regulatory organization. Today when a member matches orders in its own system it can report the trade to Nasdaq's Automated Confirmation Transaction Service (''ACT''). Under this proposal, members now will be able to report matched trades in Nasdaq securities to SuperMontage. SuperMontage will transmit the information to ACT, where it will be processed as any other information submitted to that system. For example, the trade information will be disseminated on the consolidated tape and included in ACT risk management calculations and Nasdaq's audit trail. In addition, the trades will be submitted to the National Securities Clearing Corporation (''NSCC'') for clearing, if necessary. Trades reported to SuperMontage will not be included in the SuperMontage execution algorithm, and thus will not interact with any quotes or orders in the system.

Members will not be permitted to report through SuperMontage trades for which the details have not already been compared and agreed to by the parties to the trade. This limitation is necessary because SuperMontage will not have the same functionality as ACT that allows one party to submit the trade details and the other party to review the information and affirmatively agree to the trade, or the functionality that allows ACT to compare the information submitted by each party to the trade. Members that desire to report trades using either of these methods must continue to submit reports directly to ACT.

As a result, SuperMontage will accept only: (1) Tape-only reports;[6] (2) locked-

[6] A ''tape-only report'' is a trade that is reported to Nasdaq for dissemination to the public, but the trade does not need to be transmitted to NSCC because one of the parties to the trade is a customer (*i.e.*, not a broker-dealer), or the buyer and seller both are broker-dealers and they have a common clearing arrangement that will enable them to settle the trade without using NSCC's facilities.

in clearing-only reports;[7] (3) tape reports of locked-in trades that are to be submitted to clearing;[8] and (4) non-clearing, non-tape reports.[9] A member that seeks to submit a locked-in report to SuperMontage must have agreements with its contra party that permit one or both of them to submit orders to SuperMontage on behalf of the other, and to report trades on behalf of both of the parties.[10]

Members will be able to report trades through SuperMontage during the hours that ACT is operational, which presently is 8:00 a.m. until 6:30 p.m. eastern time. The full reporting functionality will be implemented in phases and, when fully implemented, with the exception of those trades for which comparison through ACT is necessary, members will be able to report to SuperMontage the same types of trades they can report directly through ACT today.[11] In the first phase, members will be able to report, among other things, the security identity, the number of shares, the price, whether the member is the buyer or seller, and whether its member is acting as agent or principal. In addition, to facilitate the reporting of pre-open, after-hours, and late reports in the first phase, members will be required to include the time of execution on all reports submitted to SuperMontage.[12]

The proposal is designed to provide members several benefits, including the possibility of consolidating the systems used for reporting and executing trades. In addition, members will be able to take advantage of the anonymity feature available in SuperMontage, which is not available for trades submitted directly to ACT, and combine it with the benefits of ''give-up'' relationships, which members utilize today in SuperMontage and ACT.[13] The result is that a member will be able to give up the true contra parties to a trade, but still preserve full anonymity between these parties.

For example, today ECNs match buyers and sellers in their own systems and provide anonymity by becoming the contra party to each party. With the proposed feature, the ECN could submit the same matched order to SuperMontage for anonymous processing and give up the parties that matched in its system. Now, instead of the ECN being the contra party, the parties that matched through the ECN will be direct contra parties. Full anonymity (*i.e.*, anonymity through settlement) will be preserved because the actual buyer and seller will be informed that SIZE is their contra party, just the same as today when they trade fully anonymously, using SIZE in SuperMontage's Non-Directed Order processing.

The processing of fully anonymous trades is the same regardless of whether the trade is executed as a result of a match occurring in the Non-Directed Order processing or matched in a member's own system and submitted to SuperMontage for reporting purposes. For example, the identities of all the parties (buyer, seller, and reporting member) will be known to Nasdaq and NSCC at all times.[14] In addition, the anonymous trades reported through SuperMontage will be included in the risk management reports Nasdaq issues each day, and Nasdaq will reveal contra party identities to members on a trade-by-trade basis if NSCC ceases to act for the buyer or seller, or one of their clearing firms.[15]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[16] in general and with Section 15A(b)(6) of the Act,[17] in particular, in that it is designed to foster coordination and cooperation with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. Nasdaq asserts that the proposal is consistent with this obligation because it will provide members both the opportunity to consolidate the execution and reporting of trades and to combine the benefits give-up relationships and anonymous trading.

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.

[7] A transaction is ''locked-in'' when the buying and selling broker-dealers have agreed to all the trade details prior to submitting the trade to Nasdaq and no further comparison is necessary. A ''locked-in clearing-only report'' is a report that is locked-in and Nasdaq must forward the trade to NSCC for settlement. The trade does not have to be disseminated to the public because an exception to the public reporting requirement is applicable (*e.g.*, the transaction is the offsetting leg of a riskless principal trade).

[8] A ''tape report of a locked-in trade that is submitted for clearing'' is a locked-in report of a trade that must be disseminated to the public and settled through NSCC.

[9] A ''non-clearing, non-tape report'' is a report of trade that is not required to be disseminated to the public and does not need to be transmitted to NSCC for settlement, but the broker-dealer is obligated or chooses to submit this ''regulatory report'' to Nasdaq. *See, e.g.*, NASD Rule 4632 (d)(3)(B) and NASD Notice to Members 00–79.

[10] Today a member can submit locked-in trades to ACT if it has executed an Automated Confirmation Transaction Services Service Bureau/Executing Broker Supplement to the Nasdaq Workstation II Agreement (''Attachment 2 Agreement'') with its contra party and the agreement has been filed with Nasdaq. In addition, a member can submit orders to SuperMontage on behalf of another member if Nasdaq has on file a Nasdaq National Market Execution System Give-Up Addendum to the Nasdaq Workstation II® Subscriber Agreement (commonly referred to as the ''SuperMontage Give-Up Agreement'') that has been executed by both parties. Among other things, these agreements establish which member is responsible for settling trades. A member that wishes to report locked-in trades through SuperMontage must have on file with Nasdaq executed Attachment 2 and SuperMontage Give-Up agreements for each member for which it will report trades though SuperMontage.

[11] Initially, with the exception of .T and .SLD trades, SuperMontage will not accept reports of trades that must include trade report modifiers (*e.g.*, the .W modifier). During this initial phase SuperMontage also will not accept reports of trades that include special settlement conditions (*e.g.*, next-day settlement), special processing conditions (*e.g.*, reversals), or ''as/of'' reports, which are reports of a transaction executed on a previous day. Members will be able to submit these types of reports to SuperMontage once Nasdaq makes that necessary system changes. *See infra* note 12 for a discussion concerning reporting .T and .SLD trades to SuperMontage.

[12] Today, ACT automatically appends the .SLD modifier or .T modifier, as appropriate, to reports it receives that contain the time of execution. ACT compares the time of execution to the time the report was received by ACT, and if more than 90 seconds has elapsed between these times and the report does not contain the .SLD modifier, ACT will append the .SLD modifier. Similarly, ACT will read the time of execution, and if this time is outside normal market hours and the .T modifier is not included on the report, ACT will append the .T modifier. Therefore, requiring members to include the time of execution on reports submitted to SuperMontage will enable them to submit late reports and reports of pre-open and after-hours trades, because ACT will validate the time of execution and automatically append the .SLD modifier or the .T modifier, as appropriate.

[13] When a ''give-up'' occurs, the member that submits the order to SuperMontage (or the trade report to ACT) discloses to the contra party that the order (or report) is being entered on behalf of another member and the trade is to be settled with this other member. The member submitting the order (or trade report) has ''given up'' the identity of the other member who is the true party to the trade.

[14] A detailed description of the processing of anonymous orders in SuperMontage is contained in the Commission's order approving the anonymity feature. *See* Securities Exchange Act Release No. 48527 (September 23, 2003), 68 FR 56361 (September 30, 2003).

[15] NSCC's authority to cease to act for one of its participants is contained in NSCC Rule 46.

[16] 15 U.S.C. 78*o*–3.

[17] 15 U.S.C. 78*o*–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and subparagraph (f)(5) of Rule 19b–4[19] thereunder because it effects a change in an existing order entry or trading system that (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not have the effect of limiting access to or availability of the system. 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.[20]

Nasdaq believes that the proposed rule change, as amended, is consistent with these requirements because it proposes to add a reporting feature to SuperMontage, an existing order-entry system that will not have any affect on the protection of investors. Members are being provided an alternative means to report the types of trading they already conduct today, and the anonymity feature is the same as currently exists in SuperMontage. In addition, the functionality added by the proposed rule change is optional, and thus does not limit access to SuperMontage. Nasdaq states that it will make the proposed rule change operative as the necessary system changes are completed. Nasdaq expects to implement the first phase of the proposal on or about July 15, 2004. Nasdaq has represented that it will issue a Head Trader Alert informing members of the implementation schedule once the exact dates are determined.

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. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–034 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–034. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–034 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11843 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(5).

[20] For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on April 27, 2004, the date Nasdaq filed Amendment No. 1.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49738; File No. SR–NASD–2004–072]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Establish Fees for the Use of the Nasdaq Workstation II Service by NASD Members via Digital Subscriber Lines

May 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 26, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The proposed rule change has been filed by Nasdaq as establishing or changing a due, fee or other charge under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing. On May 4, 2004, Nasdaq filed Amendment No. 1 to the proposed rule change.[5] 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

Nasdaq proposes to establish fees for NASD members using the Nasdaq Workstation II (''NWII'') service via Digital Subscriber Line (''DSL'') connections. Nasdaq will implement the proposed rule change on June 1, 2004, when it will begin the process of connecting firms through DSL. Below is the text of the proposed rule change. Proposed new language is in *italics.*

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated May 3, 2004 (''Amendment No. 1''). Amendment No. 1 changes the implementation dates of the proposal (*see* discussion, *infra*, at I, II(A)).

7000. Charges for Services and Equipment

7010. System Services

(a)–(e) No change.

(f) Nasdaq Workstation™ Service.

(1)(*A*) The following charges shall apply to the receipt of Level 2 or Level 3 Nasdaq Service via equipment and communications linkages prescribed for the Nasdaq Workstation II Service:

Service Charge	$2,035/month per service delivery platform (''SDP'') *connected via T1 circuits.*
	$1,000/month per SDP connected via Digital Subscriber Line (''DSL''), plus $1,000 per DSL early termination fee if service is terminated within 60 days of installation.
Display Charge	$525/month per logon for the first 150 logons.
	$200/month for each additional logon.
Additional Circuit/SDP Charge	$3,235/month.
PD and SDP Maintenance:	
Monthly maintenance agreement	$55/presentation device (''PD'') logon or SDP/month.
Hourly fee for maintenance provided without monthly maintenance agreement.	$195 per hour (two hour minimum), plus cost of parts.

(*B*) A subscriber that accesses Nasdaq Workstation II Service via an application programming interface (''API'') shall be assessed the Service Charge for each of the subscriber's SDPs and shall be assessed the Display Charge for each of the subscriber's logons, including logons of an NWII substitute or quote-update facility. API subscribers also shall be subject to the Additional Circuit /SDP Charge.

(*C*) A subscriber shall be subject to the Additional Circuit/SDP Charge when the subscriber has not maximized capacity on its SDP(s) by placing eight logons on an SDP and obtains an additional SDP(s); in such case, the subscriber shall be charged the Additional Circuit/SDP Charge (in lieu of the service charge) for each ''underutilized'' SDP(s) (*i.e.,* the difference between the number of SDPs a subscriber has and the number of SDPs the subscriber would need to support its logons, assuming an eight-to-one ratio). A subscriber also shall be subject to the Additional Circuit/SDP Charge when the subscriber has not maximized capacity on its T1 circuits by placing eighteen SDPs on a T1 circuit; in such case, the subscriber shall be charged the Additional Circuit/SDP Charge (in lieu of the service charge) for each ''underutilized'' SDP slot on the existing T1 circuit(s). Regardless of the SDP allocation across T1 circuits, a subscriber will not be subject to the Additional Circuit/SDP Charge if the subscriber does not exceed the minimum number of T1 circuits needed to support its SDP, assuming an eighteen-to-one ratio.

(*D*) DSL service (i) shall be provided solely to NASD members without API logons, (ii) shall be provided to only one SDP per location, and (iii) may not be used in connection with SDP T1 circuit connections at the same location. A subscriber with an SDP connected to Nasdaq via T1 circuits that orders DSL on or before June 1, 2004 shall not be required to pay charges under Rule 7040 for initial disconnection of T1 circuits and installation of DSL. In addition, if such a subscriber cancels DSL service within 10 business days of its first date of DSL service, the subscriber shall not be required to pay the early termination fee or charges under Rule 7040 for disconnection of DSL and reinstallation of T1 circuits.

(2) No change.

(g)–(u) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq states that the NWII service allows market participants to access The Nasdaq Stock Market and other Nasdaq facilities, using either an ''NWII presentation device'' (a workstation and associated software provided by Nasdaq) or the subscriber's own workstation and software (often referred to as an ''application programming interface'' or ''API'' device). Each subscriber location has at least one service delivery platform (''SDP'') to which it connects the workstations used by its employees.

Nasdaq represents that, in the past, the only option available for connecting a subscriber's SDP to Nasdaq has been the use of a dedicated T1 circuit pair, provided by Nasdaq's telecommunications service provider pursuant to a contract with Nasdaq. Nasdaq has concluded that this ''one-size-fits-all'' approach is unduly expensive for small firms that never use most of the bandwidth [6] associated with T1 circuits. Accordingly, Nasdaq plans to offer subscribers the option of connecting through lower-bandwidth, lower-cost DSL service. Other market centers, including the New York Stock Exchange and the Archipelago Exchange facility of the Pacific Exchange, allow firms to connect to their trading systems through DSL.[7]

Nasdaq states that it will use a certificate-based ''Virtual Private Network'' (''VPN'') architecture to provide the highest level of security currently available for internet traffic. Data transmitted through the VPN will be encrypted using Triple Data Encryption Internet Protocol Security (''3DES IPSec'') encryption, which is more robust than the encryption used by on-line banking and brokerage services.

Nasdaq represents that it will also take steps designed to ensure that DSL connections generally support the same level of performance as small firm NWII

[6] The term ''bandwidth'' refers to the amount of data that can be transmitted in one second. Specifically, 1.2 megabits per second of data can be transmitted over each of the T1 circuits used to support an SDP. A subscriber that regularly transmitted a much smaller quantity of data would not be utilizing the bandwidth inherent in its T1 circuits. Conversely, a subscriber that utilized most of its bandwidth would eventually be required to obtain an additional SDP to ensure that sufficient bandwidth was always available to it.

[7] *See www.nyse.com/pdfs/anondotintroguide.pdf* (describing internet access to NYSE's Anonymous SuperDOT system); *www.tradearca.com/exchange/realtick.asp* (describing DSL access to Archipelago via RealTick® product of Townsend Analytics, Ltd.).

customers currently receive through their T1 circuits. Specifically, because API devices are frequently used to support high volume computer-generated transactions whereas NWII presentation devices must be operated by an individual and therefore transmit lower volumes of data, DSL connections will only be available to subscribers without API logons. In addition, Nasdaq will provide only one DSL connection per site and will not allow simultaneous use of DSL and T1 connections at the same site, because a firm with sufficient bandwidth needs to require more than one connection at a particular site would be better served by having one or more T1 connections. Finally, firms whose needs for simultaneous access to data about a significant number of securities is such that they would be in danger of exhausting the bandwidth available through a DSL connection will be advised to use a T1 connection.

Nasdaq states that, prior to submitting this rule filing, it contacted 10 of the approximately 150 firms that Nasdaq believes may be interested in using DSL. Nasdaq represents that all of the firms that were contacted stated that they would be interested in trying DSL, and most expressed an interest in doing so as soon as possible. Accordingly, Nasdaq will begin taking orders for the new service during May 2004, and will begin the process of connecting firms that order the service in June 2004.

Nasdaq states that the monthly charge for an SDP attached to a DSL line will be $1,000 per month, less than half the charge of $2,035 per month for a T1 connection, reflecting the lower cost of the lower bandwidth service. Firms wishing to switch from T1 to DSL would be required to pay the cost of disconnecting one line and connecting the other.[8] A subscriber that cancels its service within 60 days of installation would be charged an early termination fee of $1,000 per terminated DSL. Nasdaq represents that, in order to encourage firms that may benefit from DSL usage to switch rapidly, however, it will waive the disconnection and connection charges for firms that order the new service by June 1, 2004. Moreover, firms ordering DSL by that date will be permitted to use it on a 10-day trial basis, and may return to T1 connections at the end of the 10-day period at no additional cost (*i.e.,* Nasdaq will waive the associated disconnection, reconnection, and early termination fees).

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[9] in general, and section 15A(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members. Nasdaq believes the proposed rule change will allow Nasdaq to charge small firms that use the NWII service fees that are more commensurate with the lower levels of bandwidth that they use.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[11] and subparagraph (f)(2) of Rule 19b–4 thereunder,[12] because it establishes or changes a due, fee, or other charge imposed by Nasdaq. 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.[13]

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. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–072 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–072. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–072 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11884 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[8] *See* NASD Rule 7040 (authorizing charges for installation, removal, or relocation of NWII-related equipment).

[9] 15 U.S.C. 78o–3.

[10] 15 U.S.C. 78o–3(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 240.19b–4(f)(2).

[13] For purposes of calculating the sixty-day abrogation period, the Commission considers the period to have begun on May 4, 2004, the date Nasdaq submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49745; File No. SR–NYSE–2003–37]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Amend Exchange Rule 124 To Change the Way Odd-Lot Orders Are Priced and Executed Systemically

May 20, 2004.

I. Introduction

On November 18, 2003, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] to amend Exchange Rule 124 to change the way odd-lot orders are priced and executed systemically. On March 31, 2004, the Exchange amended the proposed rule change.[3] The proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on April 14, 2004.[4] The Commission received no comments on the proposed rule change, as amended. This order approves the proposed rule change, as amended.

II. Description

The Exchange is proposing to change the way odd-lot orders are priced and executed systemically. Currently, odd-lot orders do not enter the Exchange's auction market, but are executed systemically, with the specialist being assigned as the contra-party in all cases. Currently, odd-lot market orders to buy (sell) are generally executed at the price of the adjusted ITS round-lot offer (bid)[5] at the time the Exchange's system receives the order, and odd-lot limit orders are generally executed at the price of the first round-lot transaction, subsequent to the receipt of the order by the system, that is at or better than the limit price on the order.

Under the proposal, odd-lot orders would be priced and executed at the price of subsequent round-lot transactions, and in proportion to round-lot volume, as follows:

a. *Market Orders.* Odd-lot market orders would be executed in time priority at the price of the next round-lot transaction. Buy and sell orders would, in essence, be netted against one another and executed (the specialist is technically the contra party to the buy orders and to the sell orders, but since the specialist is buying the same amount that he or she is selling, there is no economic consequence to the specialist in this type of pairing-off of orders). Any imbalance of buy or sell orders would be executed against the specialist, but only up to the size of the round-lot transaction. Any market orders that do not receive an execution because of the volume limitation would be executed, in time priority order, at the price of the next round-lot transaction, subject to the volume limitation. There would be a ''timer'' provision in the rule to provide that an order not executed within 30 seconds would be executed at the price of the adjusted ITS best round-lot bid (in the case of a sell order) or offer (in the case of a buy order).

b. *Limit Orders.* Odd-lot limit orders would be executed at the price of the first round-lot transaction that is at or better than the limit price of the order, subject to the volume limitation of the round-lot transaction. Odd-lot limit orders also would be aggregated with odd-lot market orders for purposes of the volume limitation. Limit orders eligible for execution would be intermingled with market orders for purposes of determining time priority, and buy and sell orders would be netted against each other in the same fashion as market orders. As with odd-lot market orders, odd-lot limit orders which would otherwise receive a partial execution would be executed in full. There would be no ''timer'' for odd-lot limit orders.

c. *Short Sale Orders.* A short sale market odd-lot order would be eligible for execution at the price of the next sale in the round-lot market on the Exchange which is higher than the last different round-lot transaction. Short sale limit odd-lot orders would be eligible for execution at the price of the first round-lot transaction on the Exchange which is at or above the specified limit of the order, and which is also higher than the last different round-lot transaction.

d. *Stop Orders.* Stop orders in odd-lots would be handled as they are today.

III. Discussion

After careful review, 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.[6] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[7] in that it is designed to promote just and equitable principles of trade, to remove impediments 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.

In the Notice, the NYSE noted that certain legitimate trading strategies may result in specialists having to assume large positions of aggregated odd-lot orders at prices that are not necessarily reflective of the prices such orders would have received had they been executed pursuant to the supply and demand dynamics of the round-lot auction market.[8] The Commission believes that the proposal is a reasonable response to this unintended use and consequence of NYSE's current odd-lot process. Under the proposed rule change, as amended, the NYSE should continue to accommodate traditional odd-lot orders in a manner that is based on the prevailing market, while limiting a specialist's financial exposure. The Commission believes that the proposed rule change, as amended, represents a reasonable method of pricing odd-lot orders because the pricing of odd-lot orders at the execution would reflect actual round-lot market price and activity at the time of execution.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NYSE–2003–37) and Amendment No. 1 are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11881 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter, from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated March 30, 2004 and accompanying Form 19b–4 (''Amendment No. 1'').

[4] *See* Securities Exchange Act Release No. 49536 (April 7, 2004), 69 FR 19890 (''Notice'').

[5] ''Adjusted ITS bid'' and ''adjusted ITS offer'' are defined in NYSE Rule 124.60.

[6] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* note 4, *supra.*

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49737; File No. SR–PCX–2004–36]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

May 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 19, 2004, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which the Exchange has prepared. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Trade-Related Charges portion of its Schedule of Fees and Charges in order to modify applicability of the broker-dealer transaction fee. Below is the text of the proposed rule change, as amended. Proposed new language is in *italics.*

* * * * *

SCHEDULE OF FEES AND CHARGES FOR EXCHANGE SERVICES

PCX OPTIONS: TRADE-RELATED CHARGES

TRANSACTIONS

Customer: $0.00 per contract side
Firm: $0.10 per contract side for customer facilitation
Broker/Dealer: $0.21 per contract side *

** This fee will not apply to the transactions where a broker dealer: (i) Is obligated to log onto the Auto-Ex wheel and satisfy Auto-Ex transactions at a price set by another broker dealer, and (ii) immediately offsets that Auto-Ex position to the member of the trading crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex.*

* * * * *

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 had 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 Exchange charges a standard rate of $0.21 per contract side for transactions executed by broker-dealers on the Exchange. The Exchange also offers performance incentives tied to market share and may adjust the transaction fee to a sum between $0.05–$0.21 per contract side depending upon the quality of a broker-dealer's performance. The Exchange applies a transaction fee to all transactions, regardless of whether they occur automatically or manually.

The Exchange proposes to amend its Schedule of Fees and Charges in order to exclude certain transactions from the applicability of the transaction fee. Specifically, the Exchange proposes not to apply the fee to a transaction where the broker-dealer: (i) Is obligated to log onto the Auto-Ex wheel and satisfy Auto-Ex transactions at a price set by another broker-dealer and (ii) immediately offsets[5] that Auto-Ex position to the member of the trading crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex. The Exchange believes that the proposed exclusion is equitable given that the executing broker-dealer effects the transaction because of its obligation to log onto the Auto-Ex wheel and is entitled to hold the crowd market maker to his or her quote and offset the Auto-Ex position by trading with the crowd market maker (who set the price).[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and Section 6(b)(4) of the Act,[8] 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

The Exchange neither solicited nor received written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder[10] because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The PCX confirmed that, if the broker-dealer who is obligated to log onto the Auto-Ex wheel and satisfy the Auto-Ex transaction at a price set by another broker-dealer does not offset that Auto-Ex position immediately, then such broker-dealer will not be entitled to receive the fee exclusion for the offset transaction. *See* telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Susie Cho, Special Counsel, Division of Market Regulation (''Division''), Commission; and David Hsu, Attorney, Division, Commission, on May 17, 2004.

[6] The PCX has represented that (i) it will surveil for the situation in which the member of the trading crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex also is the counterparty to the Auto-Ex trade and (ii) it will inform the Division of the number of such trades that occur in the six months following the effective date of the proposed rule change. *See* telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Kim St. Hilaire, Vice President Strategic Marketing, PCX; Susie Cho, Special Counsel, Division, Commission; and David Hsu, Attorney, Division, Commission, on May 17, 2004.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

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. Comments may be submitted by any of the following methods:

Electronic comments:

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an E-mail to *rule-comments@sec.gov.* Please include File Number SR–PCX–2004–36 on the subject line.

Paper comments:

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PCX–2004–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–PCX–2004–36 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11883 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49748; File No. SR–Phlx–2004–34]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule by the Philadelphia Stock Exchange, Inc. Relating to the Rescission of Commentary .01(f) to Exchange Rule 708

May 20, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 11, 2004, 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, II, and III below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to rescind Commentary .01(f) to Exchange Rule 708 (Acts Detrimental to the Interest or Welfare of the Exchange). The text of the proposed rule change is set forth below. Proposed new language is in *italics,* and proposed deletions are in [brackets].

* * * * *

Rule 708. Acts Detrimental to the Interest or Welfare of the Exchange

A member, member organization, or person associated with or employed by a member or member organization shall not engage in acts detrimental to the interest or welfare of the Exchange.

Commentary:

.01 Acts which could be deemed detrimental to the interest or welfare of the Exchange include, but are not limited to, the following:

(a) Conviction or guilty plea to any felony charge or any securities or fraud-related criminal misconduct;

(b) Use or attempted use of unauthorized assistance while taking any securities industry or Exchange-related qualification examination;

(c) Failure to make a good faith effort to pay any fees, dues, fines or other monies due and owing to the Exchange;

(d) Destruction or misappropriation of Exchange or member property; or

(e) Misconduct on the trading floor, in violation of the Exchange's Order and Decorum Regulations, that is repetitive, egregious or of a publicly embarrassing nature to the Exchange.

[(f) Any action by a member of the Board of Governors or any Exchange Committee, or by any member organization associated with such member, which contravenes the Seat Transaction Policy contained in Article V of the Code of Conduct for Governors and Committee Members.]

* * * * *

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 IV 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 purpose of the proposed rule change is to rescind Commentary .01(f) to Exchange Rule 708 because this comment has been made obsolete as a result of the demutualization of the Exchange.[3]

Currently, Commentary .01(f) to Phlx Rule 708 provides that acts detrimental to the interest or welfare of the Exchange include, but are not limited to, any action by a member of the Board of Governors or any Exchange Committee, or by any member organization associated with such member, which contravenes the Seat Transaction Policy contained in Article V of the Code of Conduct for Governors and Committee Members. Ownership in the Exchange is no longer represented through seats but rather shares of stock in the Exchange. Therefore, due to the elimination of the concept of seat ownership, the Seat Transaction Policy in Commentary .01(f) to Rule 708 is obsolete.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[4] in general, and furthers the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73).

[4] 15 U.S.C. 78f(b).

objectives of Section 6(b)(5) of the Act[5] in particular, in that it removes an obsolete commentary from Phlx Rule 708.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Exchange Act[6] and Rule 19b–4(f)(6) thereunder[7] because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time that the Commission may designate if consistent with the protection of investors and the public interest.[8] 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 the furtherance of the purposes of the Act.[9]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–34 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–34. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* 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 also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–34 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–11882 Filed 5–25–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] As required under Rule 19b–4(f)(6)(iii), the Phlx provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing date.

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice Before Waiver With Respect to Land at Shenandoah Valley Regional Airport, Staunton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The FAA is publishing notice of proposed release of 7.7± acres of land (Parcels 41A and 42A) at the Shenandoah Valley Regional Airport, Staunton, Virginia to the Virginia Department of Transportation in exchange for 5.6± acres of land (Parcel 38). All associated pavement and right-of-way maintenance for the new relocated access road will become the responsibility of the Virginia Department of Transportation. There are no adverse impacts to the Airport and the land is not needed for airport development. The relocated access road Route 771 is shown on the Airport Layout Plan.

DATES: Comments must be received on or before June 25, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Terry J. Page, Manager, FAA Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Greg W. Campbell, Executive Director, Shenandoah Valley Regional Airport, at the following address: Greg W. Campbell, Executive Director, Shenandoah Valley Regional Airport Commission, P.O. Box 125, Weyers Cave, VA 24486.

FOR FURTHER INFORMATION CONTACT: Mr. Terry Page, Manager, Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166; telephone (703) 661–1354, fax (703) 661–1370, e-mail *Terry.Page@faa.gov.*

SUPPLEMENTARY INFORMATION: On April 5, 2000, new authorizing legislation became effective. That bill, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 10–181 (Apr. 5, 2000; 114 Stat. 61) (AIR 21) requires that a 30 day public notice must be provided before the Secretary may waive any condition imposed on an interest in surplus property.

Issued in Chantilly, Virginia, on May 19, 2004.

Terry J. Page,

Manager, Washington Airports District Office, Eastern Region.

[FR Doc. 04–11897 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice Before Waiver with Respect to Land at Shenandoah Valley Regional Airport, Staunton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The FAA is publishing notice of proposed release of 7.6± acres of land (Parcels 24 and 25) at the Shenandoah Valley Regional Airport, Staunton, Virginia to the Virginia Department of Transportation in exchange for 4.48± acres of land (Parcel 30). This release is to provide the Virginia Department of Transportation right-of-way along Routes 847 and 900. These roads were constructed under ADAP 6–51–0049–08 to extend runway 23. All associated pavement and right-of-way maintenance for the existing roads will be the responsibility of the Virginia Department of Transportation. There are no adverse impacts to the Airport and the land is not needed for airport development. The road sin their current position are shown on the Airport Layout Plan.

DATES: Comments must be received on or before June 25, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Terry J. Page, Manager, FAA Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20116.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Greg W. Campbell, Executive Director, Shenandoah Valley Regional Airport, at the following address: Greg W. Campbell, Executive Director, Shenandoah Valley Regional Airport commission, P.O. Box 125, Weyers Cave, VA 24486.

FOR FURTHER INFORMATION CONTACT: Terry Page, Manager, Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166; telephone (703) 661–1354, fax (703) 661–1370, email *Terry.Page@faa.gov.*

SUPPLEMENTARY INFORMATION: On April 5, 2000, new authorizing legislation became effective. That bill, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 10–181 (Apr. 5, 2000; 114 Stat. 61) (AIR 21) requires that a 30 day public notice must be provided before the Secretary may waive any condition imposed on an interest in surplus property.

Issued in Chantilly, Virginia on May 19, 2004.

Terry J. Page,

Manager, Washington District Office, Eastern Region.

[FR Doc. 04–11898 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement, Atchison County, Kansas and Buchanan County, Missouri

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice of intent to advise the public that an environmental impact statement will be prepared for a proposed highway project on U.S. Highway 59 from the four-lane section within the City of Atchison in Atchison County, Kansas over the Missouri River to the Intersection with State Route 45 in Buchanan County, Missouri.

FOR FURTHER INFORMATION CONTACT: Kurt C. Dunn, P.E., Vital Few Team Leader, Federal Highway Administration, 3300 Southwest Topeka Boulevard, Suite 1, Topeka, Kansas 66611, Telephone: (785) 267–7281; Warren L. Sick, Assistant Secretary and State Transportation Engineer, Kansas Department of Transportation, 915 Harrison Street, Topeka, Kansas 66612, Telephone: (785) 296–3285.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Kansas Department of Transportation (KDOT) and the Missouri Department of Transportation (MoDOT), will prepare an environmental impact statement (EIS) on a proposal to improve U.S. Highway 59 in Atchison County, Kansas and Buchanan County, Missouri. The proposed project would involve improvement of the existing U.S. Highway 59 corridor from the city of Atchison, Kansas over the Missouri River to the U.S. 59/State Route 45 Intersection in Buchanan County, Missouri for a distance of about 6.3 kilometers (3.9 miles) in length. The KDOT and MoDOT have coordinated with local officials and other interested parties on the scope of the proposed project.

Improvements to the corridor are considered needed to provide for the existing and projected traffic demands, improve safety, improve access to Atchison, Kansas, promote local and regional economic stability, and to address the deficiencies of the Amelia Earhart Memorial Bridge over the Missouri River. Alternatives under consideration include taking no action and possible roadway alignments that will improve the existing 2-lane highway facility to 4-lanes. Also, the Amelia Earhart Memorial Bridge alternatives being studied include both the removal and rehabilitation of the bridge.

A scoping process has been initiated that involves all appropriate federal, state, and local agencies, consulting parties, private organizations and citizens who have previously expressed or are known to have interest in this proposal. There had been extensive public involvement conducted to date on the project including a public meeting that has resulted in identification of major issues. A public hearing will be held to present the findings of the draft EIS. Public notice will be given of the time and place of the hearing. 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 addressed and all major issues are identified in the process, comments and suggestions are invited from all interested and/or potentially affected parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or the KDOT at the addresses 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 program.)

Issued on: May 19, 2004.

J. Michael Bowen,

Division Administrator, Kansas Division, Federal Highway Administration, Topeka, Kansas.

[FR Doc. 04–11822 Filed 5–25–04; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 18, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the

Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before June 25, 2004 to be assured of consideration.

Financial Management Service (FMS)

OMB Number: 1510–0012.
Form Number: FMS Form 6314.
Type of Review: Extension.
Title: Annual Financial Statements of Surety Companies—Schedule F.
Description: Surety and Insurance Companies report information used to compute the amount of authorized reinsurance to determine Treasury Certified Companies' underwriting limitations, which are published in Treasury Circular 570 for use by Federal bond approving officers.
Respondents: Business or other for-profit.
Estimated Number of Respondents: 341.
Estimated Burden Hours Per Respondent: 48 hours, 45 minutes.
Frequency of Response: Annually.
Estimated Total Reporting: 14,458 hours.
Clearance Officer: Jiovannah L. Diggs, (202) 874–7662, Financial Management Service, Administrative Programs Division, Records and Information Management Program, 3700 East West Highway, Room 144, Hyattsville, MD 20782.
OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Treasury PRA Clearance Officer.
[FR Doc. 04–11899 Filed 5–25–04; 8:45 am]
BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 18, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before June 25, 2004 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0915.
Form Number: IRS Form 8332.
Type of Review: Extension.
Title: Release of Claim to Exemption for Child of Divorced or Separated Parents.
Description: This form is used by the custodial parent to release claim to the dependency exemption for a child of divorced or separated parents. The data is used to verify that the noncustodial parent is entitled to claim the exemption.
Respondents: Individuals or households.
Estimated Number of Respondents/Recordkeeping: 150,000.
Estimated Burden Hours Respondent/Recordkeepers:
Recordkeeping—7 min.
Learning about the law or the form—5 min.
Preparing the form—7 min.
Copying, assembling, and sending the form to the IRS—14 min.
Frequency of response: Annually.
Estimated Total Reporting/Recordkeeping Burden: 82,500 hours.
Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Treasury PRA Clearance Officer.
[FR Doc. 04–11900 Filed 5–25–04; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 19, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before June 25, 2004 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1081.

Form Number: IRS Form 8809.

Type of Review: Revision.

Title: Request for Extension of Time to File Information Returns.

Description: Form 8809 is used to request an extension of time to file certain information returns. It is used by IRS to process requests expeditiously and to track from year to year those who repeatedly ask for an extension.

Respondents: Business or other for-profit, individuals or households, not-for-profit institutions, farms, Federal government, State, local or tribal government.

Estimated Number of Respondents/Recordkeeping: 50,000.

Estimated Burden Hours Respondent/Recordkeepers:

Recordkeeping—2 hr., 10 min.

Learning about the law or the form—36 min.

Preparing and sending the form to the IRS—28 min.

Frequency of response: On occasion.

Estimated Total Reporting/Recordkeeping Burden: 162,500 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Treasury PRA Clearance Officer.
[FR Doc. 04–11901 Filed 5–25–04; 8:45 am]
BILLING CODE 4830–01–P

Federal Register

Wednesday,
May 26, 2004

Part II

Environmental Protection Agency

40 CFR Part 52

Approval and Promulgation of Implementation Plans for California – San Joaquin Valley PM–10 Nonattainment Area; Serious Area Plan for Attainment of the 24-Hour and Annual PM–10 Standards; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 294–0450, FRL–7663–8]

Approval and Promulgation of Implementation Plans for California—San Joaquin Valley PM–10 Nonattainment Area; Serious Area Plan for Attainment of the 24-Hour and Annual PM–10 Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of the ''2003 PM10 Plan, San Joaquin Valley Plan to Attain Federal Standards for Particulate Matter 10 Microns and Smaller,'' submitted on August 19, 2003, and Amendments to that plan, submitted on December 30, 2003, as meeting the Clean Air Act (CAA or the Act) requirements applicable to the San Joaquin Valley, California nonattainment area for particulate matter of ten microns or less (PM–10)(SJV). The SJV violates the national ambient air quality standards (NAAQS) for PM–10 and is classified as a serious PM–10 nonattainment area.

As a serious PM–10 nonattainment area, the State must submit to EPA a plan that provides for, among other things, the implementation of best available control measures (BACM). In addition, because the serious attainment deadline, December 31, 2001, has passed, the plan must provide for expeditious attainment of the PM–10 NAAQS and for an annual reduction in PM–10 or PM–10 precursor emissions of not less than five percent until attainment.

DATES: *Effective Date:* This rule is effective on June 25, 2004.

ADDRESSES: You can inspect copies of the docket for this action at EPA's Region IX office during normal business hours by appointment at the following locations: Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Doris Lo, EPA Region IX, (415)972–3959, *lo.doris@epa.gov.*

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

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I. Summary of Proposed Actions

On February 4, 2004, (69 FR 5412), we proposed to approve the ''2003 PM10 Plan, San Joaquin Valley Plan to Attain Federal Standards for Particulate Matter 10 Microns and Smaller,'' submitted on August 19, 2003, and Amendments to that plan, submitted on December 30, 2003,[1] as meeting the CAA requirements applicable to the SJV for PM–10. Specifically, we proposed to approve the following elements of the Plan:

- Motor vehicle budgets for transportation conformity;
- Emissions inventories for PM–10 and PM–10 precursors;
- A demonstration that reasonably available and best available control measures (RACM and BACM) will be expeditiously implemented for all significant sources of PM–10 and PM–10 precursors;
- A demonstration that attainment will be achieved as expeditiously as practicable;
- A demonstration that the CAA section 189(d) five percent requirement is met; and
- A demonstration that reasonable further progress (RFP) and quantitative milestones will be achieved.

A detailed discussion of air quality planning in the SJV, the CAA requirements for serious nonattainment areas, and how the 2003 PM–10 Plan complies with these requirements is provided in our proposed rule and the technical support document (TSD).

II. Public Comments and EPA Responses

EPA received 19 comment letters and emails from the following environmental groups, industry groups, agencies and public citizens (some commenters provided more than one letter or email):

- Dr. David Pepper
- Gordon Jones, Tehachapi, California
- Michael E. LaSalle, Hanford, California
- Brent Newell, Stacey Wittorf, Center on Race, Poverty, & the Environment (CRPE) on behalf of the Association of Irritated Residents (collectively, CRPE)
- Art Caputi, Chairman, Wine Institute Air Quality Working Group
- D. Barton Doyle, on behalf of the California Building Industry Association and its Affiliate Associations located in the SJV
- Suzanne Noble, Western States Petroleum Association
- Jan Marie Ennenga, Executive Director, Manufacturers Council of the Central Valley
- David L. Crow, Executive Director/Air Pollution Control Officer, San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or the District)
- Patricia Taylor-Maley, Chair San Joaquin Valley TPA Director's Association
- Charles Swanson, San Francisco, California
- David Moralez, Davis, California
- Susan Britton, Anne Harper and Vanessa E-H Stewart, Earthjustice, on behalf of Medical Advocates for Healthy Air, Latino Issues Forum, Sierra Club and Natural Resources Defense Council (collectively, Earthjustice)

[1] The Amendments to the 2003 PM–10 supersede some portions of the 2003 PM–10 Plan and also add to it. References hereafter to the ''SJV 2003 PM–10 Plan'' or ''the Plan'' mean the 2003 Plan submitted on August 19, 2003, as amended by the December 30, 2003 submittal.

- Barbara Joy, Earth Matters
- San Joaquin Valley agricultural groups: California Cotton Ginners and Growers Association, California Grape and Tree Fruit League, California Citrus Mutual, Fresno County Farm Bureau, Kings County Farm Bureau, Madera County Farm Bureau, Nisei Farmers League and Tulare Lake Resource Conservation District.

EPA appreciates the time and effort made by the commenters in reviewing the proposed rule and providing comments. We have summarized the major comments and provided our responses below.

A. NO_X/PM Strategy

The Plan relies on an oxides of nitrogen (NO_X)/PM strategy as the most effective and expeditious strategy for attaining the PM–10 standards in the SJV, based on the best available information at this time. The California Air Resources Board (CARB) and the SJVUAPCD have examined the effects of controlling ammonia, volatile organic compounds (VOC) and oxides of sulfur (SOx), and have determined that the effect of controls for ammonia is uncertain, the effect of additional VOC controls will not lead to PM–10 reductions throughout the SJV, and that the effect of SOx controls would be very limited because the contribution of ammonium sulfate to the particulate problem in the SJV is small. EPA concurs that these findings are supported by the current analysis of the best available data. However, the more extensive California Regional PM–10/PM–2.5 Air Quality Study (CRPAQS) field study and modeling will provide an improved basis to assess the relationship of precursors in forming secondary particulates.[2] EPA expects that the results of the CRPAQS study will provide additional technical information and is approving the SJVUAPCD's commitment to re-evaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006. (69 FR 5412, 5414).

The attainment demonstration for the Plan is based on receptor modeling based on chemical analysis of filter samples collected during the CRPAQS field study. These samples include filters from days representing typically high PM–10 concentrations in the SJV. However, the photochemical grid modeling, UAM-Aero, presented in the Plan was based on the previous, smaller field study in the SJV, IMS 95, because the modeling from the CRPAQS field study was not complete at the time of the Plan approval. The proposed modeling analysis based on CRPAQS will better characterize the interaction of precursors to form secondary particulates, because of the more robust CRPAQS database and the more extensive CRPAQS modeling approach.

Responses to comments regarding individual precursors are addressed below.

1. Ammonia

Comment 1: Earthjustice comments that all available evidence supports that ammonium nitrate is a significant contributor to fall and winter PM exceedances. CRPE comments that ammonium nitrate represents a significant amount of the total PM–10 concentration, and represents the largest amount of PM–10 during the winter. CRPE comments that the Plan itself concedes that ammonia reacts with other precursor emission to form ammonium nitrate during the winter.

Response: EPA concurs that ammonium nitrate is a significant contributor to violations of both the 24-hour and annual PM–10 standards in the SJV. Ammonium nitrate, a secondary particulate, is not directly emitted, but formed as a product of a series of chemical reactions which involve ammonia (NH3), NO_X, and many other components. EPA believes that the Plan will effectively reduce ammonium nitrate by controlling NO_X, and that controlling ammonia in addition to NO_X will not accelerate the attainment date for PM–10 in the SJV. EPA also believes that the effect of controlling ammonia on ammonium nitrate is less clear than the effect of controlling NO_X at this time, for several reasons. The current emission inventory and control strategies for ammonia have a greater uncertainty than the NO_X emission inventory and control strategies. For NO_X, the control technology and management practices are better understood and well established. In addition, analysis of ambient air quality data in the SJV indicates that ammonia is relatively abundant throughout the SJV and, therefore, controlling ammonia in addition to NO_X controls, will not effectively reduce ammonium nitrate, because it is not the limiting pollutant. As discussed below, the current data suggest that controlling ammonia may be neither an efficient nor an effective approach to reducing ammonium nitrate concentrations in the SJV.

As discussed elsewhere in response to comments on the emissions inventory, EPA believes that the Plan's emissions inventory for ammonia reflects the current state of scientific knowledge. EPA also believes, however, that both ammonia emission factors and ammonia source surveys, and thus the ammonia inventory itself, have a high degree of uncertainty. This is because the ammonia inventory is dominated by emission sources—such as dairy, beef, poultry, fertilizer, and soil—that have not been extensively sampled in the past, and that are inherently difficult to measure even with the most sophisticated and expensive techniques.[3] This sharply contrasts with the confidence level associated with quantifying emissions of NO_X, a gas which is emitted primarily by stationary and mobile source combustion and which can therefore be accurately measured through stack or tailpipe tests.

For example, a calculation of net ammonia emissions from soil would need to measure on a seasonal basis both ammonia emissions and ammonia uptake considering such factors as soil

[2] The CRPAQS study was an extensive 14-month field study conducted on 2000–2001, which measured PM–10, precursors and meteorological parameters during episodes representative of high PM–10 and PM–2.5 in the SJV. The domain for the study encompasses the entire SJV, compared to the smaller IMS 95 domain of an earlier field study, and the CRPAQS study captured more extensive ambient air and meteorological measurements than the IMS 95 field study. The CRPAQS modeling, discussed below, will be more extensive than the Urban Airshed Model-Aerosol (UAM–Aero) modeling based on IMS 95. Additional information regarding the CRPAQS study is available at *http://www.arb.ca.gov/airways/ccaqs.htm.*

The goal of the CRPAQS modeling is to better understand the fundamental physical and chemical processes that contribute to elevated particulate matter concentrations. The CRPAQS modeling package includes evaluation of two complementary modeling approaches. Each model provides particular strengths that will support state implementation plan (SIP) modeling needs. In addition, use of two modeling approaches allows improved diagnosis of potential model errors and biases. The two modeling approaches have fundamentally different modeling formulations. The first type of modeling approach explicitly tracks particle types from individual source types. This method has strong advantages in understanding source-receptor relationships and in tracking specific source contributions to secondary particulate matter. However, this approach can be very resource and time intensive to apply. The second modeling approach lumps similar pollutant emissions together, thus reducing source tracking capabilities. The advantage of this approach is that it requires fewer resources to run, enabling many more sensitivity and control strategy evaluations to be conducted.

[3] Surface isolation flux chambers are generally used to collect field samples of ammonia sources. These samples are then evacuated for laboratory analysis. For livestock waste, the flux chambers need to be stationed at representative locations to sample liquid and solid waste at various ages and under various exposure conditions. See ''Results of the Measurement of PM10 Precursor Compounds from Dairy Industry Livestock Waste,'' Air Toxics Limited, C.E. Schmidt and E. Winegar, June 1996. This report was prepared for the South Coast Air Quality Management District (SCAQMD), and is currently available at: *http://www.aqmd.gov/rules/proposed/r1127/index.html.*

type, climatic variables, soil moisture, vegetative coverage, etc. The accurate quantification of livestock emissions depends on survey data and emissions measurement on a seasonal basis of various animal types, ages, and residency times; animal and waste handling practices (such as types of commercial feed or range feeding, stable housing, manure spreading, and waste storage); climatic and soil variables, etc.[4]

These difficulties and complexities in quantifying baseline ammonia emissions, particularly over an area as large and diverse as the SJV, make it difficult to quantify the benefits of possible ammonia control strategies. In addition, although there are many groups now assessing various ammonia emission reduction approaches, there are few completed scientific studies of the potential effectiveness of ammonia control technologies and control techniques at this time, and no extended record documenting the actual costs and benefits of regulatory control programs in effect for ammonia. Moreover, the costs and benefits of most ammonia control approaches must be assessed on a region-specific basis, since the assessment would need to take into account fundamental differences from one area to another in terms of the affected industries, the availability of control options, and variations in critical conditions, such as soils and soil coverage, temperature, windspeed, and humidity.[5]

Data analysis for the SJV indicates that the Valley is relatively rich in ammonia and, therefore, reductions of ammonia are not likely to be effective. Data analysis is based on measured concentrations of precursors in the ambient air. Therefore, despite the uncertainties in the emission inventory, data analysis can provide an understanding of the relationship of the concentrations of the precursors in an area, and the effect of control strategies of precursors will have on the concentration levels of ammonium nitrate. Ammonium nitrate is a secondary pollutant formed through the neutralization of nitric acid by ammonia. Based on a molar comparison of the observed ion data, the amount of ammonium needed if all the sulfate and nitrate were ammonium sulfate and ammonium nitrate can be calculated. In an area where ammonia concentrations are high relative to the concentrations of nitric acid (which is produced from NO_X and VOC), reducing ammonia will not effectively reduce ammonium nitrate. In areas where the ammonia concentrations are relatively low, reducing ammonia concentrations will effectively reduce ammonium nitrate.

Data analysis results from several investigators support the conclusion that SJV is ammonia rich. Based on the thermodynamic equilibrium of ammonium nitrate and sulfate formation, CARB concluded that there was no ambient ammonia deficiency during the IMS 95 episode.[6] Hence, ammonia is in excess and initial reductions in ammonia concentrations will not reduce ammonium nitrate. Independent data analysis performed by Dr. Chu at EPA concluded that ''the high ammonium nitrate particle concentrations observed in the winter in San Joaquin Valley are not limited by the available ammonia emissions.''[7] Preliminary data analysis from the CRPAQS study also indicates that ''nitrate formation in the San Joaquin Valley Air Basin (SJVAB) is not likely to be limited by ammonia availability.''[8] The NARSTO assessment likewise concludes that for the San Joaquin Valley ''[t]here is typically an abundance of NH3 present.''[9]

Although the UAM-Aero modeling presented in the plan indicates that ammonia reductions may result in lower concentrations of ammonium nitrate (secondary PM) in some areas of the SJV, because of the uncertainty in the ammonia inventory and the atmospheric chemistry, State and local air agency experts question these results. This is discussed in greater detail in the response to comment 9 below.

Finally, EPA is also concerned that there is uncertainty about the effects of ammonia controls in areas such as SJV that have conditions conducive to the formation of acid fog. In such places, reductions of ammonia might serve to increase the exposure to a category of PM–2.5 known as acid aerosols. Historical and present-day evidence suggests that acid aerosols may have both acute and chronic effects on human health.[10]

These fundamental scientific and technical uncertainties regarding ammonia leave reasonable doubts regarding the extent to which ammonia reductions would contribute to PM–10 attainment in the SJV. The CRPAQS should resolve the question of whether ammonia and other possible precursors, including VOC and SO_X, contribute significantly to PM–10 levels which exceed the standard in the SJV. In the

[4] For a discussion of these and other challenges associated with quantifying livestock emissions in California and the progress to date in addressing the issues, see: ''Air Emissions Action Plan for California Dairies'', a report of the Ad hoc Dairy Subcommittee of the San Joaquin Valley Unified Air Pollution Control District. (May 2003, available at: *http://www.arb.ca.gov/planning/agriculture/cafowg/dairy062503.pfd.*, Memo from Patrick Gaffney, ARB, entitled ''Updating Livestock Emissions for California'' (October 1, 2003); and ARB's ''Interim Draft Livestock Husbandry'' emissions factors (October 2003), both available at: *http://www.arb.ca.gov/emisinv/areasrc/drftmeth.htm*. The last of these documents summarizes the current state of knowledge relating to livestock emissions: ''Currently, there are not TOG [total organic gases] or ROG [reactive organic gases] emission factors for livestock that are based on recent or California specific test data. However, even in the absence of good quality emission factors, it is necessary to estimate livestock TOG and ROG emissions. In order to meet the regulatory requirements for livestock emission estimates, interim emission factors were used. These factors are quite old, have many shortcomings, and have very little field or laboratory data to support them. The current emission estimates are intended as placeholders to help begin identifying the gross magnitudes of livestock air emissions.'' (Page x.xx–2). See also a report commissioned by the SCAQMD: ''Literature Survey & National Programs—Livestock Waste Management Practices Survey & Control Option Assessment,'' Tetra Tech, Inc., March 2003. This SCAQMD report is currently available at the Web address in the previous footnote. Additional information on ammonia emissions from animal husbandry operations can be found in EPA's recently released draft report entitled, ''National Emissions Inventory—Ammonia Emissions from Animal Husbandry Operations.'' The draft report includes emission estimates from animal production facilities in the U.S. for the years 2002, 2010, 2015, 2020, and 2030. While the data updates past emission estimates, there are important limitations on the use of the data, including the limited number of emission measurements. The draft report can be found at—*http://www.epa.gov/ttn/chief/net/2002inventory.html#animal*

While the data updates past emission estimates, there are important limitations on the use of the data, including the limited number of emission measurements. The draft report can be found at—*http://www.epa.gov/ttn/chief/net/2002inventory.html#animal*.

[5] As part of a lengthy rule development process, the SCAQMD has collected information on the costs and benefits of reducing ammonia emissions from composting and from livestock waste within the South Coast (metropolitan Los Angeles area), evaluating in particular those control approaches reflected in the SCAQMD's Rules 1133, 1133.1, and 1133.2 (a series of composting rules adopted on January 10, 2003) and in SCAQMD's proposed rule 1127 (livestock waste). See, for example, ''Survey Current Livestock Waste Management Practices in the South Coast Air Basin,'' Tetra Tech, Inc., January 2002; and SCAQMD ''Preliminary Draft Staff Report: Proposed Rule 1127—Emission Reductions from Livestock Waste,'' November 20, 2002. These reports are currently available at the web address in the footnote above. Although some of this information may be applicable to the SJV, much of the data is specific to the South Coast and would need to be replaced with SJV data during a rulemaking process.

[6] Plan at M–11.

[7] Shao-Hang Chu, Wintertime PM formation in San Joaquin Valley. Memorandum to Doris Lo, December 2003.

[8] Lurmann *et al.*, in ''Phase Distributions and Secondary Formation During Winter in the San Joaquin Valley''.

[9] NARSTO at 10–12.

[10] EPA has discussed its concerns with respect to exposure to acid aerosols in more detail in the criteria document for the new PM–2.5 NAAQS. See, U.S. EPA, Air Quality Criteria for Particulate Matter, vol. III at 12–253, April 1996 (EPA/600/P–95/0001cF).

absence of the CRPAQS results, EPA believes that there is insufficient evidence to support a determination that ammonia is a significant PM–10 precursor in the SJV. Thus, EPA is making the Agency's determination under CAA section 189(e) that sources of ammonia do not contribute significantly to PM–10 levels which exceed the standard in the SJV. If the CRPAQS shows that ammonia is a significant precursor, however, EPA will reevaluate this determination. At that point, ammonia could become subject to the various PM–10 and PM–10 precursor control provisions of the Clean Air Act, including BACM under section 189(b)(1)(B) and the 5 percent requirement under section 189(d).

In the proposed rule, EPA concurred with the 2003 PM–10 Plan's NO_X/PM strategy based on the currently available information which includes a high degree of uncertainty regarding the ammonia inventory and the effects of ammonia controls. EPA agrees with the State and local agencies that this approach will not retard air quality progress in the SJV. The SJVUAPCD has made an enforceable commitment to submit a SIP revision by 2006 based on the CRPAQS results, including appropriate controls based on those results. 69 FR 5412, 5414. In the meantime, the area should achieve important reductions in ammonium nitrate PM–10 concentrations through a NO_X-based strategy. Finally, EPA continues to believe that use of the CRPAQS has the potential to avoid wasteful imposition of controls that may be found to be not only expensive and dislocative but also unnecessary and ineffective in advancing PM–10 attainment in the specific circumstances applicable in the SJV.

Comment 2: Earthjustice comments that if ammonia comprises 22.4% of the total mass of ammonium nitrate, this means that ammonia is contributing anywhere from 13 μg/m3 to 22.4 μg/m3 to total mass at each monitoring site.

Response: Ammonium nitrate is a secondary particulate, a product of chemical reaction. Although ammonia participates in the series of reactions to form ammonium nitrate, it is not appropriate to determine the significance of the ammonia contribution to ammonium nitrate in isolation. The effect of ammonia emissions on the formation of ammonium nitrate is specific to each air basin. As presented in the response to comment 1 above, EPA believes that the Plan will effectively reduce the concentration of ammonium nitrate in the SJV by controlling NO_X, and that controlling ammonia will not effectively reduce ammonium nitrate. Therefore, EPA believes that the Earthjustice calculation determining the ammonia contribution to ammonium nitrate for the purpose of determining significance is not appropriate.

Comment 3: Earthjustice comments that more than 151,000 tons of ammonia are emitted from Valley sources and that ammonia must be regulated because EPA's guidance, CAA section 189(e) and the District's own data show that it is a significant contributor.

Response: As stated above, EPA believes that the most effective way to reduce ammonium nitrate is by controlling NO_X. As discussed in the above response, EPA is determining, based upon the best currently available information, that ammonia does not contribute significantly to PM–10 levels which exceed the standard in the SJV. If the results of CRPAQS indicate otherwise, EPA will revisit this determination.

Comment 4: Earthjustice comments that the District's decision not to regulate PM–10 precursors other than NO_X is based on results of sensitivity tests using the UAM-Aero to model the formation of secondary particles in the atmosphere. The Plan admits the data set was not ideal.

Response: EPA concurs that the data set used for the UAM-Aero modeling was not ideal; however, it was the best available data set at the time of the Plan submittal and was sufficient to make the necessary determination. In addition, the determination of the efficacy of ammonia control was based on data analysis (Plan at Appendix M, M–11). This includes the preliminary data analysis based on the CRPAQS study, which captured high values of PM–10 and ammonium nitrate, and supports the conclusion that the SJV ammonium nitrate concentrations are not sensitive to reductions in ammonia. Modeling based on the more extensive CRPAQS field program will not be available until late 2005. As stated above, EPA believes that controlling NO_X will effectively reduce ammonium nitrate. The District has made an enforceable commitment to reevaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006.

Comment 5: Earthjustice comments that the Plan states that ''In rural sites where the ammonia concentrations are low, the Plan further admits that reductions of PM–10 almost entirely depend on ammonia controls.''

Response: EPA believes that the commenter is misinterpreting the explanation of the graphic representation of the reduction strategies presented in the Plan. The Plan supports the conclusion that NO_X reductions are the most effective strategy in rural areas at current levels of ammonia. The full context of the remark that the commenter points to is: ''The rural sites show sensitivity to only NO_X reductions until the ammonia concentrations are very low. After that point the response becomes insensitive to NO_X controls and almost entirely responsive to ammonia controls at higher NO_X emissions.'' [11] According to the information presented in Figure 6 of Appendix M–11 of the Plan, only after ammonia concentrations are reduced to a very low level do the ammonia controls become effective. Therefore, large reductions of ammonia would be required before ammonia reductions would become more effective than NO_X controls in reducing ammonium nitrate. This is not the same thing as saying that ammonia reductions are the most effective or efficient means to attain the PM–10 NAAQS expeditiously, which is the goal of the Plan.

Comment 6: Earthjustice comments that one of the District's rationales for not regulating ammonia is that ''there is too much uncertainty regarding the effects of ammonia controls.'' Plan at ES–16. This is unsupported by facts and EPA itself has commissioned studies documenting control efficiencies for various types of equipment designed to control emissions of ammonia.

Response: EPA cannot find the same quote cited by Earthjustice at ES–16. On page ES–16, the Plan states that there is ''* * * uncertainty regarding ammonia emission controls to achieve attainment * * *,'' but EPA does not agree that the District is questioning the control efficiencies of the controls themselves on this page. As discussed above, however, EPA believes that there are some uncertainties concerning ammonia that support the District's position that it may be better to focus on NO_X reductions at this time.

Comment 7: Earthjustice comments that livestock waste is responsible for approximately 85% of ammonia emissions in the Valley. Sources of livestock waste must be presumed to contribute significantly to violations of the NAAQS because the contribution to the PM–10 impact in these areas is more than double EPA's standard of 5 μg/m3 for the 24-hour average at every site. In addition, Earthjustice states that SCAQMD Rules 1186 and 1127 reduce emissions from livestock waste and should be included in a BACM analysis for this source category.

Response: As discussed in above responses, EPA has determined that

[11] Plan at Appendix M–11.

ammonia does not contribute significantly to PM–10 levels which exceed the NAAQS in the SJV. In addition, although the South Coast and SJV air basins each have relatively high levels of ammonium nitrate, the difference in the relative emission levels of precursors and the atmospheric conditions unique to each basin may lead to different optimal control strategies for each basin. EPA also notes that the SCAQMD does not claim ammonia reductions from Rule 1186, which is designed to reduce fugitive dust, and SCAQMD has not yet adopted Rule 1127, which is currently scheduled for Board consideration in July 2004.

Comment 8: CRPE comments that the standard for requiring PM–10 precursor controls is not whether precursor reductions effectively reduce PM–10, but rather whether the precursor itself contributes significantly to violations of the PM–10 NAAQS. Earthjustice comments that in its Addendum, EPA states that a source category ''will be presumed to contribute significantly to a violation of the 24-hour NAAQS if its PM–10 impact at the location of the expected violation would exceed 5 μg/m^3.'' Addendum at 42011. Earthjustice also comments that the Clean Air Act requires the regulation of major stationary sources of PM–10 precursors (CAA 189(e)) and that, like the South Coast, the SJV should take the prudent approach of regulating ammonia given the uncertainty.

Response: As discussed in above responses, EPA is determining that ammonia does not contribute significantly to PM–10 levels which exceed the standard in the SJV. Although ammonium nitrate concentrations in the Valley are substantial, as discussed above, EPA has determined that NO_X control is the most effective way to achieve the PM–10 NAAQS. In addition, the commenter refers to the Addendum test for whether a source is presumed to be significant. That is not necessarily the test for whether a particular precursor is significant. Although the SJV and the South Coast air basins each have relatively high concentrations of ammonium nitrate, the meteorology and the emissions of each basin are different, leading to potentially different strategies in reducing ammonium nitrate. See responses in this section above and the District's ''Responses to Comments on the Draft 2003 Pm10 Plan,'' #34.

Comment 9: CRPE comments that the Plan states that for Bakersfield on January 6, 1996, reductions of NO_X and ammonia are nearly equally effective in reducing nitrate concentrations. Earthjustice comments that the Plan admits that the UAM-Aero model shows that the ''southern Valley shows a non-negligible sensitivity to ammonia reduction.'' CRPE comments that ammonia controls are equally effective as NO_X controls in reducing ammonium nitrate in Fresno and Bakersfield.

Response: The Plan at the section entitled ''Further Investigations to Assess Apparent Ammonia Limitation at Bakersfield on January 6, 1996'' [12] discusses the apparent disparity between the results of the data analysis and the modeling. Based on the thermodynamic equilibrium of ammonium nitrate and sulfate formation, the data analysis results indicate that there was no ambient ammonia deficiency at Bakersfield during the IMS 95 episode. The Plan indicates that ''[b]ased on sensitivity simulations we performed, we believe that this apparent ammonia limitation is due to the artificially low ammonia emissions in the Southern San Joaquin Valley.'' Because of the uncertainties in the ammonia emission inventory at this time, EPA believes that reliance on the ambient data analysis is more appropriate at this time. EPA expects that the results of the CRPAQS study will provide additional technical information and is approving the SJVUAPCD's commitment to re-evaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006. (69 FR 5412, 5414).

Comment 10: The SJVUAPCD comments that according to the Plan, the preponderance of evidence indicates excess ammonia in nearly all of the cases, and therefore NO_X-only control was determined to be the appropriate means to reduce ammonium nitrate. Peer-reviewed scientific journal articles and papers submitted to EPA as part of the SIP package for the PM–10 Plan support this position. The paper by Kumar, *et al.* (Analysis of Atmospheric Chemistry During 1995 Integrated Monitoring Study) found that of the 150 samples, 93% were ammonia rich.

Response: For the reasons stated above in the response to comment 1, EPA concurs with the SJVUAPCD that current evidence supports that NO_X controls are the most effective approach to reducing ammonium nitrate in the SJV. EPA expects that the results of the CRPAQS study will provide additional technical information regarding the formation of ammonium nitrate in the SJV. EPA is approving the SJVUAPCD's commitment to re-evaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006.

Comment 11: The SJVUAPCD comments that Lurmann *et al.*, in ''Phase Distributions and Secondary Formation During Winter in the San Joaquin Valley'' noted that nitrate formation in the San Joaquin Valley Air Basin is not likely to be limited by ammonia availability. Although these results are preliminary, they are included here because they strongly support the peer-reviewed journal articles referenced above. CRPAQS data analysis is now underway, with results due in 2005.

Response: EPA agrees that this paper represents the most current data analysis for the CRPAQS study, and supports the conclusion of the previous data analysis results that the NO_X strategy is the most effective approach to reduce ammonium nitrate in the SJV.

2. VOC

Comment 1: Earthjustice comments that the proposal to determine that VOCs ''do not significantly contribute'' to PM–10 NAAQS exceedances is inappropriate because it is based on the UAM–Aero modeling which relies on three days of data from 1996, during a period of unusually low PM levels.

Response: EPA agrees that the IMS 95 database is not ideal; however, it was the best available data set at the time of the Plan submittal. The modeling presented in the Plan is based on the time period most representative of high PM–10 during the IMS 95 Study. Modeling based on the more extensive CRPAQS field program will not be available until late 2005. The District has made an enforceable commitment to reevaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006.

The District's UAM–Aero modeling was used to determine the sensitivity of ammonium nitrate to VOC controls (whether VOC controls would increase or decrease the ammonium nitrate in the SJV). The chemical nature of the atmosphere is not likely to significantly change from one winter period to another and, therefore, the response of the atmosphere to reductions in VOC during the IMS 95 time period is likely to be similar to the response in different winter time periods. Therefore, despite the fact that the PM–10 levels were relatively low, the IMS 95 modeling is useful to determine the relative impact of VOC controls on the formation of ammonium nitrate.

As part of the technical support for the Plan, CARB determined the expected response to emission reductions through modeling. The

[12] Plan at Appendix M–11.

sensitivity of ammonium nitrate concentrations to VOC controls is presented in the Plan (Appendix M, M–6). A 50% reduction of VOCs results in only a small reduction of ammonium nitrate concentrations throughout the modeling domain. Plan at Appendix M, M–10. This suggests that even with large reductions of VOC concentrations, the reduction of the concentrations of ammonium nitrate will be small.

Comment 2: Earthjustice comments that there is evidence that VOCs have much to do with facilitating the rate of PM formulation in the Valley. To support this argument, Earthjustice refers to an analysis by Pun and Seigneur, (Pun and Seigneur C, Conceptual Model of Particulate Matter Pollution in the San Joaquin Valley. September 8, 1998 at 3–12).

Response: EPA agrees that VOC plays a role in the formation of ammonium nitrate in the Valley. However, EPA believes that the control of VOC is not an effective method to reduce ammonium nitrate in the SJV. EPA has examined the analysis by Pun and Seigneur, as well as other material, in considering the efficacy of a VOC control strategy in the SJV. The Pun and Seigneur conceptual model is also based on the IMS 95 database, and is therefore subject to the same limitations as the photochemical modeling used in the Plan. In addition, Pun and Seigneur is based on a less sophisticated box model, and is subject to the limitations of a box model, compared to the more refined grid model, UAM–Aero, presented in the 2003 PM–10 Plan. The commenter overstates the conclusion of Pun and Seigneur with respect to the efficacy of VOC control. Although the paper states that the basin may be either NO_X or oxidant sensitive, it does not conclude which of the precursors is most influential in the SJV:

> The ambient formation of HNO3 may be either NO_X or oxidant sensitive. Although information regarding the dominant reaction was not available, indirect evidence from the diurnal profile of total nitrate (peak concentrations in the afternoon) seemed to indicate that the NO2 + OH reaction was an important nitric acid production route. Thus to understand which primary pollutants govern the formation of ammonium nitrate, we need to address the oxidation potential of the atmosphere and determine which pollutants (*i.e.*, NO_X or VOCS) are the most influential for the formation of oxidants in the system.

Although Pun and Seigneur raises the need to address the oxidation potential of the atmosphere and determine which pollutants are the most influential, it does not conclude that VOC controls are absolutely required in the SJV. The Plan's more refined modeling, based on the IMS 95 study, discussed above, indicates that ammonium nitrate concentrations are not very sensitive to VOC control (Plan at Appendix M, M–6) in the SJV. In other words, VOC controls will not have as great an effect on PM formation. The CRPAQS study should provide an improved database for more definitive results regarding the effect of VOC controls in reducing PM–10 in the SJV.

Comment 3: Earthjustice comments that the NARSTO report indicates ''In the case of secondary winter PM nitrate in the SJV * * * nitrate formation is thought to be sensitive to VOC concentrations in many urban areas.'' The report opines:

> Reductions in NO_X may not be the best course of action for reducing particulate nitrate in the possible VOC-sensitive wintertime condition. Box model simulations indicate that NO_X reductions may have the counterintuitive effect of increasing particulate nitrate formation during winter (Pun and Seigneur, 2001). Therefore, coordinated efforts will be required to formulate control strategies beneficial to both ozone and PM air quality.

Response: We believe that the NARSTO report's conclusions are subject to several limitations. They are based on ''Sensitivity of Particulate Matter Nitrate Formation to Precursor Emissions in the California San Joaquin Valley,'' Pun and Seigneur, 2001.[13] As mentioned above, this study is based on the IMS 95 field study and therefore is subject to the same database limitations as the UAM–Aero modeling included in the Plan. In addition, Pun and Seigneur, 2001 is based on a less sophisticated box model, and is subject to the limitations of a box model compared to the more refined grid model, UAM–Aero, presented in the 2003 PM–10 plan. Pun and Seigneur conclude:

> It should be noted that the box model represents some domain-average chemistry but cannot characterize the locally specific chemical regimes. Other assumptions include stagnant conditions and aloft carry-overs of gaseous and PM pollutants. Further work should extend this box model analysis to a three-dimensional modeling study so that transport processes can be simulated and the spatial variability of the response of PM to precursors can be addressed. However, an extensive reliable database is needed for the application of a 3–D model. The forthcoming California Regional PM Air Quality Study (CRPAQS) database may provide such an opportunity.

While Pun and Seigneur indicates that the San Joaquin Valley air basin should not be sensitive to ammonia concentrations and may be sensitive to VOC, each of these conclusions is subject to the limitations of the investigation. EPA concurs that it is important to extend this analysis to a three dimensional modeling study using a more extensive database. In the Plan, CARB has presented a more refined modeling analysis based on a three-dimensional model. The results of that modeling exercise indicate that nitrate concentrations are not very sensitive to VOC concentrations (Plan at Appendix M, M–6). Therefore, control of VOC will not be as effective as NO_X control. The forthcoming CRPAQS database will provide a more extensive, reliable database to support additional modeling. EPA expects that the modeling results of the CRPAQS study will provide additional technical information and is approving the SJVUAPCD's commitment to re-evaluate the 2003 PM–10 Plan with the results of CRPAQS and to submit a new plan to EPA by March 2006. 69 FR 5412, 5414.

Comment 4: Earthjustice comments that the VOC emissions are probably underestimated for the SJV and that it is irresponsible of the Plan to not include controls for livestock waste, a significant VOC source, when the negative effects of VOC pollution are well-known. Furthermore, Earthjustice points out that the South Coast Air Quality Management Plan relies on VOC reductions to attain the PM–10 standard and that the SJV should, as the South Coast has, take the prudent course of action by including VOC reductions.

Response: As discussed above, EPA has determined that for the purposes of section 189(b)(1)(B) and (e), VOC does not contribute significantly to PM–10 levels which exceed the standards in the SJV. While the South Coast and the SJV each have a high level of ammonium nitrate, the air basins are quite different in terrain, meteorology, and emissions. In addition, the South Coast is primarily an urban area, while the SJV is a mix of rural and urban areas. Differences in relative emissions of precursors and the atmospheric conditions unique to each basin lead to different optimal control strategies for each basin.

Comment 5: Earthjustice comments that EPA's proposal to find that VOCs ''do not significantly contribute to PM–10 levels which exceed the standard'' may make it extremely difficult to regulate CAFOs at all under SB 700, which contains provisions requiring the District to show that either source categories of agricultural practices ''cause or contribute to violations of an ambient air quality standard'' before

[13] Pun, B. and Seigneur, C. ''Sensitivity of Particulate Matter Nitrate Formation to Precursor Emissions in the California San Joaquin Valley,'' Environ. Sci. Technol., 2001, 35, 2979–2987.

issuing a permit or BACM/BACT analysis.

Response: As discussed above, EPA has determined that VOCs do not significantly contribute to PM–10 levels which exceed the standard; however, the CRPAQS results may change this determination. In addition, VOC reductions may be necessary for ozone attainment, and the determination with respect to PM–10 does not alter that fact.

Comment 6: One commenter (D. Moralez) inquires about whether the determination that VOC controls will not lead to PM–10 reductions was made based on stationary controls under the District's jurisdiction or whether other sources such as pesticides, fertilizers and insecticides were included. The commenter recommends including these sources in the evaluation.

Response: EPA believes that all of the source categories mentioned by the commenter were included in the District's evaluation.

3. SO_X

Comment 1: Earthjustice comments that secondary ammonium sulfate can be a significant contributor to PM–10 concentrations in certain locations and at certain times of year, yet the Plan contains no controls on SO_X. Pun and Seigneur at 3–14 (ammonium sulfate third largest component of PM–2.5 at Kern).

Response: EPA believes that the contribution of ammonium sulfate to the PM–10 24-hour and annual standards is small, approximately 3–4% of the total mass. The Pun and Seigneur paper indicates that ammonium sulfate was the third largest component of PM–2.5 at the Kern Wildlife Range:

> Although ammonium sulfate only accounted for 6% (<3.4 μg/m³ at Kern Wildlife Refuge, <3.7 μg/m³ at Bakersfield) of the PM–2.5 measured during IMS 95 in the San Joaquin Valley, it was the third largest component at the rural site of Kern Wildlife Refuge.

The relative contribution of ammonium sulfate to PM–2.5 differs from the contribution to PM–10. The percentage contribution of ammonium sulfate to PM–10 levels in the San Joaquin Valley is low, especially at the locations exceeding the PM–10 24-hour and annual standards. The Plan at Appendix N, N39–43 lists the sulfate mass determined by Chemical Mass Balance model, based on a chemical analysis of the filters on days when the PM–10 standards were exceeded. The contribution of the sulfate mass to the 24-hour standard ranges from 2.7 to 7.2 μg/m³, approximately 3.5 to 4% of the total PM–10 mass. The contribution of the sulfate mass to PM–10 concentrations violating the annual standard is 2.6 to 3.1 μg/m³. Plan at Appendix N, N–11.

Comment 2: Earthjustice comments that the SCAQMD regulates all PM–10 precursors, including SO_X.

Response: The relative importance of ammonium sulfate in particulate matter in the South Coast Air Basin is not identical to the San Joaquin Valley Air Basin. The South Coast Air Basin has measured a maximum 24-hour sulfate concentration of 20.6 μg/m³,[14] substantially greater than the values of 2.7 to 7.2 μg/m³ recorded for the SJV (see above). Because the technical analysis done for the SJV does not indicate that SO^2 was a significant contributor to violations of the NAAQS in the SJV, it is not necessary to control SO_X in the SJV to expeditiously attain the NAAQS.

B. Emission Inventory

Comment 1: Earthjustice comments that the emissions inventories are incomprehensible, that specific activity levels, emissions factors and models are only summarized in the Plan, and that the emissions factors are spread through numerous studies, memorandums and documents on a compact disk available only by request. Earthjustice cites EPA's TSD comment that the inventory ''is a massive collection of data and requires a great deal of time to review* * *'' but disagrees with EPA that the incomprehensibility is a ''minor comment.'' Earthjustice states that the inventories do not meet minimum data reporting documentation standards in EPA guidance, and thus should be returned to the State for modification.

Response: The amount of data used to develop, maintain and update the emissions inventories for the SJV, a large and diverse area, is massive. The District and State have provided a detailed discussion of how the inventories are developed and summaries of the inventories in the 2003 PM–10 Plan.[15] The reference documents, R1 and R2, are provided on a compact disk (CD–ROM) and include numerous spreadsheets with volumes of information. Providing these documents in hard copy would require vast amounts of paper.

EPA believes that the information submitted to support the inventories is sufficient. The 2003 PM–10 Plan includes many summaries of the different types of inventories needed for the Plan, the compact disk provides the necessary documentation supporting how the inventories were derived, and supporting studies and memoranda regarding inventories are also included in the docket for this rulemaking. The State and District are also available to help interested parties find any supporting data for the inventories. While EPA notes the difficulty of evaluating these inventories due to the immense amount of information involved (see TSD, page 9) and the complexity of the airshed, EPA does not believe that the inventories are incomprehensible and need to be returned to the State. The summaries provided in the 2003 PM–10 Plan are very comprehensible and the supporting documentation on compact disk is available to any interested parties.

Comment 2: Earthjustice comments that the Plan omits a number of critical pollution sources from the emissions inventory (*i.e.*, cultivation emissions, agricultural and industrial bulk materials, poultry emissions, and windblown dust from orchard and vineyards). Earthjustice comments that the ammonia inventory is possibly underestimated due to using estimates (from Census of Agriculture) that may underestimate the number of poultry and cows. Earthjustice then comments that the emissions inventory lacks emissions from leaf blowers and general landscape and maintenance activities and that these emissions should be included in the Plan and not put off as ''further study measures.''

Earthjustice also comments that there were numerous significant changes made to the inventories which are unjustified. Earthjustice states that drastic reductions in emissions for agricultural sources were made during 2002–2003 based on ''stakeholder suggestions'' rather than scientific evidence. Changes noted by Earthjustice include: agricultural land preparation emissions decreased by approximately 20,000 tons per year of PM–10; almond shaking emissions factor (EF) decreased by ten times from 3.7 to 0.37; CARB's almond sweeping EF of 13.1 pound PM–10/acre was rejected and replaced with a 3.7 EF; calf and heifer populations were excluded from dairy operation emissions; and changes were made to the internal combustion engine emissions, dropping it 275% from 47 tpd of NO_X to 17 tpd of NO_X.

[14] 2003 South Coast Air Quality Management Plan, page 2–21. *http://www.aqmd.gov/aqmp/AQMD03AQMP.htm.*

[15] See Chapter 3, 2003 PM–10 Plan, Appendix B: Basin-Wide Summary of District's On-road Motor Vehicle Emissions Inventory; Appendix C: Updated Emissions Inventory Category Changes; Appendix D: Seasonal Emissions Inventories; Appendix J: Attainment Inventories; R1: Detailed Annual Emissions Inventories (CD–ROM); R2: Detailed Seasonal Emissions Inventories (CD–ROM).

Earthjustice also notes that EPA was ''surprised'' by the ''relatively low emissions estimates'' for sand and gravel and the Plan does not make any commitment to further address this.

Response: As stated in the 2003 PM–10 Plan:

> Emission inventories are never considered to be entirely complete at one given time. * * * [I]nventories can always be improved with the use of better emission factors and activity data. The District, in cooperation with ARB, is committed to continually updating the emission inventory as research studies, emission factor updates, and other information become available. When emissions data change dramatically, the District is committed to revising the inventory and to ensuring that any impact is reflected in the control strategy and the attainment demonstration.

Plan at 3–4.

EPA concurs with the above statement by the District. CAA section 172(c)(3) requires a ''comprehensive, accurate, and current'' inventory of actual emissions from all sources; however EPA recognizes that inventories are not static, but are constantly being updated and renewed as new information, techniques and studies are made available.[16] The State and District used the best available inventories at the time of plan development. If a State excludes any of the emission sources from its emission inventory, it must provide documentation on why the source(s) were excluded (PM–10 Emission Inventory Requirements, Final Report, September 1994, Prepared for: Emission Inventory Branch (MD–14), Sulfur Dioxide/Particulate Matter Programs Branch (MD–15), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, page 20). CARB has provided additional information addressing why sources were emitted (April 21, 2004 memorandum from Sylvia Morrow and Patrick Gaffney to Kurt Karperos, Follow-up information on San Joaquin Valley PM10 Plan emission inventory issues raised in public comment (Morrow and Gaffney memo)) and EPA expects the inventory will be updated as part of the State and District's commitment to submit a new plan by March 2006. EPA generally relies on the State and local agencies to develop, maintain and update their inventories. CARB has a Web site with additional information on how California air districts create, maintain and use emissions inventories. The Web site is: *http://www.arb.ca.gov/emisinv/district/districtresources.htm.*

For categories where Earthjustice is claiming that there are missing source category estimates, the Morrow and Gaffney memo provides additional discussion of how these emissions will not impact the attainment demonstration and how additional data may be obtained on these categories in the future. For categories where the emissions estimates have changed, generally going down, the Morrow and Gaffney memo provides additional discussion on what the lower estimates were based on and why they were used. The Morrow and Gaffney memo also addresses comments raised by D. Howekamp in a declaration supporting Earthjustice's comments. EPA has reviewed the 2003 PM–10 Plan's inventory and the Morrow and Gaffney memo and continues to believe that the Plan's inventory was the best available inventory at the time of Plan development and thus satisfies the CAA's requirement for a comprehensive, accurate, and current inventory. EPA expects that the District and State will include additional inventory revisions in their mid-course review due in March 2006.

Comment 3: Earthjustice comments that the base year relied upon to determine de minimis levels is inconsistent and that different inventories are used in order to exempt sources. The Plastic and Plastic Products Manufacturing source category is provided as an example of a category whose de minimis determination is based on a different base year inventory (2003 PM–10 Plan, Table 4–8). In addition, they believe that federally approved control measures are necessary to ensure that de minimis source categories remain below the de minimis levels.

Response: See section II.C.4. below.

Comment 4: One commenter (LaSalle) states that emission estimates by CARB have been proven inaccurate. The commenter indicates that CARB estimates of dairy ROG emissions have historically been too high and CARB has failed to correct the problem.

Response: As discussed above, the emission inventories are continually being improved and updated with new data. EPA believes that CARB and the District used the best available information at the time of plan development and understand that further refinements will be included in future plan submittals.

C. BACM Demonstration

1. Commitments for BACM/BACT

Comment 1: Earthjustice comments that a large number of significant source categories, in addition to Ag-CMP-regulated sources, are not subject to adopted—or even proposed or identified—control measures. Until the relevant requirements are adopted—and no longer subject to change in the rule development process—for each of these source categories, EPA cannot conclusively determine that the Plan provides for the implementation of BACM/BACT for all significant sources of PM–10 and PM–10 precursors. As a result, Earthjustice claims that full approval of the Plan is improper. Earthjustice cross-references its additional comments on commitments which are addressed in section II.H below.

Response: Section 189(b)(1)(B) requires that serious area PM–10 plans include ''[p]rovisions to assure that the best available control measures for the control of PM–10 shall be implemented no later than 4 years after the date the area is classified (or reclassified) as a Serious Area.'' Nothing in this language either requires a state to have adopted controls in place before a SIP revision can be approved into its PM–10 plan or forbids the adoption of an enforceable commitment to meet the statute's BACM[17] requirement.

Consistent with this statutory language, EPA has historically determined that an enforceable commitment to adopt and implement BACM in a SIP meets this statutory requirement since it constitutes a ''provision to assure that BACM is implemented'' by a fixed deadline. As a result, the commenters' complaint that ''[b]y definition the plan fails to implement BACM/BACT for all source categories for which no developed control measures exist'' has no merit since the statute itself does not impose such a requirement. Because the statute does not define what is a ''provision to assure BACM is implemented,'' EPA may adopt an interpretation reasonably accommodated to the purpose of the statutory provision. *Chevron U.S.A., Inc.*

[16] Once a plan has been adopted, EPA does not generally require plan elements such as emissions inventories to be revisited and updated in response to new information. The U.S. Court of Appeals for the District of Columbia Circuit recently addressed a similar issue and affirmed EPA's position. *Sierra Club* v. *EPA,* 356 F.3d 296 (D.C. Cir. 2004).

[17] EPA has interpreted the BACM requirement in CAA section 189(b)(1)(B) to include BACT. ''State Implementation Plans for Serious Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998, 42009 (August 16, 1994)(Addendum).

v. *Natural Resources Defense Council,* 467 U.S. at 842–44.[18]

In accepting enforceable commitments to meet the requirements of section 189(b)(1)(B), however, EPA has required states to undertake an analysis to ensure that the regulation ultimately adopted pursuant to the commitment will represent a BACM level of control. As we describe in our proposed rule, a state must determine the technical and economic feasibility of potential control measures for each of the significant source categories. 69 FR 5412, 5418. Thus the measure that is the subject of a commitment must describe generally the type and level of control to be adopted.

Moreover, once the ultimate control measure is adopted and submitted to EPA, the Agency undertakes an additional evaluation to ensure that that measure meets the statute's BACM requirements. *See, e.g.*, the Arizona rulemakings in which EPA initially approved as RACM [19] a requirement in a state statute to adopt and implement best management practices for agricultural operations and subsequently determined that the rules adopted pursuant to the statute represented RACM/BACM. 64 FR 34726 (June 29, 1999); 66 FR 51869 (October 11, 2001); 67 FR 48718 (July 25, 2002).

2. Agricultural Conservation Management Practices (Ag CMP) Program

Comment 1: Earthjustice comments that the Ag CMP program exists only in conceptual form, accounts for a large portion of fugitive dust emissions in the SJV and fails to provide for BACM-level controls for several reasons.

First, Earthjustice comments that the Ag CMP program requires growers to select only one CMP per category (*e.g.,* categories include unpaved roads, land preparation, harvest, etc.) which violates the RACM and BACM standards. Earthjustice argues that the RACM process requires adoption of all RACM and a reasoned justification must be provided for any rejected measures. Allowing growers to select only one CMP per category would allow growers to avoid adopting all RACM.

Response: As discussed in our proposed rule, the District has chosen to reduce emissions from agricultural sources with a program, *i.e.,* the Ag CMP program, that provides more flexibility than a typical command and control regulation. 69 FR 5412, 5420. The District's 2003 PM–10 Plan commits to adopt and implement a program that will achieve BACM level controls by a specific schedule and 33.8 tons of emissions reductions. The 2003 PM–10 Plan also states that:

> [p]articipation in the Ag CMP program will be mandatory, but the growers will, by their own choosing, select measures most appropriate for their operation. The source categories include (1) unpaved roads, (2) unpaved vehicle/equipment traffic areas, (3) land preparation, (4) harvest, and (5) other—including windblown PM10 from open areas, and agricultural burning * * *. Growers must select at least one management practice from each of the five categories. * * *

2003 PM–10 Plan, page 4–25.

More than one management practice may be selected by a grower if it is technically and economically feasible, but a BACM level of control will vary from grower to grower. The plan points out that:

> [e]missions from agricultural sources vary by many factors that are beyond the control of the grower. For example, drought conditions and related cuts in water deliveries can lead to increased fallow lands and more wind blown dust emissions. Market conditions can change quickly and can turn a profitable crop into a losing proposition. This limits the ability of growers to absorb the costs of controls in many cases.

Id.

The regulatory approach selected by the District is similar to those adopted by the SCAQMD for the South Coast Air Basin and by the Arizona Department of Environmental Quality for the Phoenix (Maricopa County) PM–10 nonattainment area. *See, e.g.*, discussion of the South Coast and Phoenix approaches at 66 FR 50252, 50268–50271 (October 2, 2001) and 67 FR 48730 (July 25, 2002). As we have pointed out in the context of the Phoenix program, farming operations are inherently complex and highly variable and therefore PM–10 controls need to be tailored to individual circumstances. Moreover, there is a limited amount of scientific information concerning the emission reduction potential and cost effectiveness of the available and known control measures for agricultural operations. Therefore, EPA has previously concluded that, given this rudimentary state of knowledge, requiring more than one control measure cannot be technically justified and could cause an unnecessary burden on farmers. 66 FR 50268, 50269.

We have also previously found that allowing sources the discretion to choose from a range of specified options is particularly important for the agricultural sector because of the variable nature of farming. As a technical matter, neither we nor the State is in a position to dictate what precise control method is appropriate for a given farm activity at a given time in a given locale. The decision as to which control method from an array of methods is appropriate is best left to the individual farmer. Moreover, the economic circumstances of farmers vary considerably. As a result, it is imperative that flexibility be built into any PM–10 control program for the agricultural source category whether that program is required to meet the RACM or BACM requirements of the Act. *Id.*

Furthermore, a requirement that an individual source select one control method from a list, but allowing the source to select which is most appropriate for its situation, is a common and accepted practice for the control of dust. For example, in our PM–10 federal implementation plan (FIP) for Phoenix, we promulgated a RACM rule applicable to, among other things, unpaved parking lots, unpaved roads and vacant lots. The rule allows owners and operators to choose one of several listed control methods (pave, apply chemical stabilizers or apply gravel). 40 CFR 52.128(d).[20] In programs allowing a choice of compliance methods, it is clearly not feasible to require a regulated source to provide a reasoned justification for choosing one option over another.

As with the South Coast and Phoenix programs, EPA believes that the 2003 PM–10 Plan's commitment described above, in our proposed rule and in the 2003 PM–10 Plan provides the flexibility necessary to allow for the variability in farming while still achieving a BACM level of control. Indeed, flexibility is more important in the SJV because of the far greater diversity and number of crops, acreage and soils. For example, in 1997, there were over 9 million acres farmed in the SJV as compared to approximately 700,000 acres in Maricopa County.[21]

[18] EPA's approach here does not represent any departure from prior Agency actions approving SIPs. See section II.H.

[19] CAA section 189(a)(1)(C) contains the same language as section 189(b)(1)(B) with respect to the implementation of RACM.

[20] See also SCAQMD Rule 403 (providing for alternative compliance mechanisms for the control of fugitive dust from earthmoving, disturbed surface areas, unpaved roads etc.). We approved this rule on December 9, 1998 (63 FR 67784). See also our approval of Maricopa County Environmental Services Department (MCESD) Rule 310 and Rule 310.01 as meeting the RACM/BACM requirements of the CAA (67 FR 48718, July 25, 2002) and EPA's proposed approval of Sections 90 through 94 of the fugitive dust regulations for Clark County as meeting those requirements (68 FR 2954, January 22, 2003).

[21] 1997 Census of Agriculture, California Agricultural Statistics Service and Arizona Agricultural Statistics Service, U.S. Department of Agriculture (USDA).

Moreover, in 2002, there were 350 crops grown in California, 77 of which were found in large-scale commercial operations, and there were significant livestock and poultry operations. Six of the 10 agricultural counties in California are in the SJV.[22] In contrast, in Maricopa County in 2002, five crops (cotton, wheat, corn, alfalfa and hay) comprised 83.6% of the acres farmed.[23]

EPA also believes that the SJV Ag CMP approach is consistent with CAA section 172(c)(1) requiring the implementation of all RACM. EPA has long provided for certain limitations on that requirement. For example, EPA has not required the implementation of measures that would not advance attainment or measures for source categories that are *de minimis*. See 57 FR 13498, 13540, 13560 (April 16, 1992). These limitations have been upheld by the courts. See, *e.g., Ober* v. *Whitman,* 243 F.3d 1190 (9th Cir. 2001) and *Sierra Club* v. *EPA,* 294 F.3d 155 (D.C. Cir. 2002). Similarly, and for the reasons discussed above, EPA has concluded that requiring more than one measure for the agricultural sector is not currently reasonably available.

Comment 2: Earthjustice claims that the Ag CMP program does not meet BACM requirements since BACM is more stringent than RACM.

Response: When a moderate area is reclassified to serious, the requirement to implement RACM in section 189(a)(1)(C) remains. Thus, a serious area PM–10 plan must also provide for the implementation of RACM as expeditiously as practicable to the extent that the RACM requirement has not been satisfied in the area's moderate area plan.

However, we do not normally conduct a separate evaluation to determine if a serious area plan's measures also meet the RACM requirements as interpreted by us in the General Preamble at 13540. This is because in our serious area guidance (Addendum at 42010), we interpret the BACM requirement as generally subsuming the RACM requirement (*i.e.* if we determine that the measures are indeed the ''best available,'' we have necessarily concluded that they are ''reasonably available''). Therefore, when, as here, a control measure is being developed to meet both the RACM and BACM requirements, a separate analysis to determine if the measures represent a RACM level of control is not necessary. In such a case, the usual progression from RACM to the generally more stringent BACM does not occur. The SJV is not unique in this respect. In the Phoenix area we approved State legislation and, subsequently, a general permit rule, for the agricultural sector as meeting both RACM and BACM requirements. See discussion at 66 FR 50252, 50254–50255.

Comment 3: Earthjustice comments that since there is no emission reduction target there is nothing to prevent operators from selecting only the least effective measure in a category when other more effective and feasible measures may be available. At a minimum, operators should be required to implement the most effective measure from each category to meet BACM standards.

Response: As stated previously, the 2003 PM–10 Plan commits to achieve a BACM level of control by reducing PM–10 emissions for the overall agricultural category by 33.8 tons per year by 2010. 2003 PM–10 Plan, 4–29. For the reasons discussed in our response to the previous comment, flexibility is needed in any program controlling agricultural sources. The Ag CMP program will require at least one measure from each of the five categories under the program, thus, where it's economically and technically feasible, more than one measure may be implemented.

Comment 4: Earthjustice comments that exemptions found in Draft District Rule 4550 (*i.e.*, agricultural operations of less than 100 acres from the CMP program and animal feeding operations of various sizes) are not justified. Exemptions should be based on whether there is a *de minimis* contribution to the PM–10 problem and no demonstration is made as to whether or not these smaller sources can not be included. Comments also point out that smaller exemptions are found in other areas.

Response: EPA has been working closely with the District during the development of Rule 4550 to ensure that the Ag CMP program will achieve a BACM level of control. That rule, however, is not the subject of this rulemaking. We will thoroughly evaluate the rule once it has been adopted by the District and submitted to us. Earthjustice will of course be able to comment on any rulemaking action EPA may take on Rule 4550.

EPA notes, however, that small quantity exemptions can be justified on an economic basis. Thus, even if sources smaller than 1 acre result in significant emissions, if control costs are too high, the BACM requirement may be deemed met with no control. Addendum at 42010. Most federally-enforceable prohibitory rules have some sort of analogous small quantity exemption. See, for example, 40 CFR 60.32b(a), 40 CFR 63.100(b)(4); District Rule 4305.2.1.

Comment 5: Earthjustice comments that the Ag CMP program does not require BACM for agricultural windblown dust. Windblown dust is one of the most significant contributors to PM–10 in the SJV. Under the CMP program, windblown dust requirements are combined with other categories such as agricultural burning which is already subject to existing District rules and Senate Bill 705. Nothing prevents an operator from satisfying the CMP program by only complying with the agricultural burning requirements. Further, there is no evaluation of the Coachella Valley windblown dust measures.

Response: The District's meteorological analysis of wind speeds associated with PM–10 exceedances found that the exceedances largely occurred during periods of low winds and stagnant conditions in the fall and winter. 2003 PM–10 Plan, ES–10, 5–6; see also section II.L. below. Thus, windblown dust is not generally considered to be a significant contributor to PM–10 exceedances in the SJV and EPA believes that windblown dust measures are therefore not necessary for attaining the PM–10 standards.

The District recognizes, however, that there may be specific localized situations that warrant windblown dust measures and has included them in the Ag CMP program so that growers will have the flexibility to use them as needed (as well as in District Regulation VIII).

Comment 6: Earthjustice comments that Draft Rule 4550 fails to set forth criteria by which the air pollution control officer (APCO) will implement the Ag CMP Program. Draft Rule 4550 currently allows the APCO to weaken the Handbook, grant exemptions from the program, or to increase the number of control categories, all without public input or a SIP revision. Commenters believe that the CMP plans should be available for public review (to same degree as CAA Title V or operating permits are), should contain a mechanism to ensure citizens are able to verify that growers are participating and the CMP plans are being implemented, and that adjustments to rule applicability thresholds are subject to public review.

Response: See our response to the previous comment. EPA is working with the District as it develops Rule 4550 to ensure that the Ag CMP program will achieve a BACM level of control. While Rule 4550 is not the subject of today's

[22] 2002 California Department of Food and Agriculture Resource Directory.

[23] 2002 Arizona Agricultural Statistics Service, USDA.

action, we note that the most recent draft limits the discretion of the APCO.

Comment 7: Earthjustice comments that the Ag CMP Program must contain actual control measures. The ''Ag CMP List'' must be included as part of Rule 4550 in order to allow citizens to challenge the substantive components of the list. Because EPA concedes that the lists were not available for EPA review for the proposal and without the lists, Earthjustice believes there is no basis for EPA's conclusion that the Ag CMP program will achieve a BACM level of control (or even a RACM level). EPA justifies that the Ag CMP program's program description and similarity to other EPA approved programs is enough to satisfy BACM, but Earthjustice believes this comparison must rely on a comparison of actual requirements. Since there are no adopted measures for the Ag CMP program, Earthjustice believes EPA cannot approve the program as BACM. Further, Earthjustice notes that EPA's approval of Maricopa's best management practices (BMP) general permit rule as BACM was based on a rule that was adopted and already approved as RACM.

Response: EPA believes that the Agency can approve, as meeting the CAA's BACM requirement, the commitment to adopt and implement the Ag CMP Program based on the description provided in the 2003 Plan. As discussed previously in section II.C.1. above, we believe that section 189(b)(1)(B) does not require that BACM be in the form of an adopted rule. Moreover, the Plan, pages 4–23 to 4–29, contains a detailed description of the scope of the program. EPA believes that the Plan's commitment to implement a BACM level of control for agricultural sources is sufficient to satisfy the BACM requirement. EPA will continue to work with the District as it develops Rule 4550 to ensure that the Ag CMP program will achieve a BACM level of control.

In fact, the history of the control of agricultural operations in Maricopa County, alluded to by the commenter, is instructive. In August 1988, EPA promulgated a FIP for the Phoenix PM–10 moderate nonattainment area.[24] Among other things, the FIP provided for the implementation of RACM for agricultural fields and aprons via an enforceable commitment to propose and finalize adoption of RACM for those sources in September 1999 and April 2000, respectively. In the preamble to the rule EPA explained that the Agency intended to convene a stakeholder process to develop the specific RACM that would ultimately be proposed for adoption and that EPA intended the RACM to take the form of BMPs. 63 FR 41326 (August 3, 1988). Thus, rather than an adopted regulation, EPA promulgated a commitment accompanied by a conceptual description of the program to meet the CAA's RACM requirements.

In 1997, Arizona passed legislation establishing an Agricultural BMP Committee and directing the Committee to adopt by rule by June 10, 2000, an agricultural general permit specifying BMPs for reducing PM–10 from agricultural activities. The legislation also required that implementation of the agricultural controls begin by June 10, 2000 with an education program and full compliance with the rule be achieved by December 31, 2001. See Arizona Revised Statutes (A.R.S.) 49–457. On June 29, 1999, we approved the legislation as meeting the RACM requirements of the CAA and withdrew the FIP commitment to adopt and implement RACM for agricultural fields and aprons in the Maricopa area. 64 FR 34726. While more extensive than the FIP commitment, the legislation approved by EPA as meeting BACM is less detailed than the Ag CMP Program provisions in the SJV 2003 Plan.

While we approved the Arizona legislation as RACM, it was the State's intent that it also serve as BACM for agricultural sources in the serious area PM–10 plan. After a series of meetings during 1999 and 2000, the Agricultural BMP Committee adopted the agricultural general permit rule and associated definitions, effective May 12, 2000, at Arizona Administrative Code (AAC) R18–2–610, ''Definitions for R18–2–611,'' and 611, ''Agricultural PM–10 General Permit; Maricopa PM10 Nonattainment Area'' (collectively, general permit rule). The general permit rule contains the BMPs that regulated sources are required to regulate. We approved the general permit rule as meeting the CAA requirement for RACM on September 10, 2001 (66 FR 34598) and for BACM on July 25, 2002 (67 FR 48718).

Thus, in the Phoenix area, the development of RACM/BACM controls took a number of years and evolved from a simple commitment to adopt and implement RACM to a fully developed general permit rule with specific BMPs that provides for a BACM level of control. The evolution from a commitment through an expanded conceptual approach to the final rule was necessary for a number of reasons, chief among them that the agricultural sector had traditionally been unregulated. As such, extensive stakeholder input, among other things, was absolutely essential. In the SJV, the development of a mature regulatory program is necessarily following a similar path from concept to specific controls.

Comment 8: One commenter (D. Moralez) inquires about the mechanism for including VOC controls in the Ag CMP program. Commenter also recommends a recordkeeping requirement for pesticides and other VOC-containing materials applied to agricultural crops in the Ag CMP program.

Response: The 2003 PM–10 Plan does not include VOC reductions from the Ag CMP program. The District will be developing their ozone plan in coming months which may address VOC emissions from pesticides.

3. Ag Crop Processing Losses and Ag Products Processing Losses

Comment 1: Earthjustice comments that the Plan fails to implement BACM for agricultural crop processing losses and agricultural products processing losses. The Plan has identified these as significant source categories. As a result, it is not sufficient that the Plan merely states the District's unenforceable intention to update these inventory items.

Response: After the close of the comment period, we discussed this and other comments with District staff and received copy of a March 30, 2004 memorandum from George Heinen (SJVUAPCD) to Scott Nester (SJVUAPCD) regarding, ''EPA questions on 2003 PM10 Attainment Demonstration Plan'' (SJVUAPCD's 3/30/04 memo). As discussed in this memo, these categories were vestiges of past emission inventory practices and encompassed field activities (crop processing) and post-harvest activities (product processing). Implementation of BACM for the field activities is addressed by other components of the Plan, including the Conservation Management Practice program and state and federal mobile source controls. Implementation of BACM for the post-harvest activities, which are primarily stationary heat sources, is also addressed by other components of the Plan, including SJV Rule 4306 (boilers, steam generators and process heaters), commitment C (dryers), and commitment I (small boilers, steam generators and process heaters). 2003 PM–10 Plan, 4–23. The statement in the Plan regarding inventory improvements was not intended as a demonstration of BACM implementation.

[24] The area was subsequently reclassified as a serious PM–10 nonattainment area. 61 FR 21372 (May 10, 1996).

4. Plastics and Plastic Products Manufacturing Sources

Comment 1: Earthjustice comments that the Plan fails to implement BACM for plastics and plastic products manufacturing sources. The Plan does not demonstrate that the regulations adopted in 2000 fulfill BACM nor does the Plan justify that it is appropriate to use an inventory for a different year in evaluating emissions from this category as *de minimis*. Furthermore, the Plan does not demonstrate that emissions from this source category will be *de minimis* in future years, when emissions are projected to increase.

Response: SJVUAPCD's 3/30/04 memo explains that after the Plan was developed, the District determined that emissions had been overestimated for this source category. It appears that the 1.5 tons per day (tpd) emission estimate was based on obsolete inventory methods preceding consolidation of the eight county air pollution control districts into the SJVUAPCD. SJVUAPCD's current emissions estimate, based on information for each of the specific sources within the category, is 0.07 tpd of PM–10. We believe that this information is derived from a more accurate methodology than the 1.5 tpd estimate and is well below the *de minimis* level of .9 tpd for PM–10. 2003 PM–10 Plan, pages 4–14 to 4–15.

5. Cotton Gins

Comment 1: Earthjustice comments that the Plan fails to implement BACM for cotton gins. The Plan merely describes various measures that could be adopted to implement BACM, and does not even clearly commit to specific requirements.

Response: We agree that the description of this control measure on page 4–30 of the Plan does not explicitly commit to specific requirements for cotton gins. However, language on pages 4–22, 4–23 and 4–30 clearly and explicitly commits to 1.5 tpd of NO_X emission reductions from this category. SJVUACPD's 3/30/04 memo explains that the 1.5 tpd commitment was based on an assumption that high efficiency 1D–3D and 2D–2D cyclones would be required of existing sources. EPA's TSD noted that 1D–3D cyclones are considered BACT when issuing permits for new and modified sources in the SJV. BACT determinations associated with permits for new and modified sources are generally at least as stringent as BACM for existing sources because it is generally more cost effective to control new sources than existing sources. The Plan committed to adopt BACM requirements for cotton gins by the 4th quarter of 2004. SJVUAPCD has drafted Rule 4204 to regulate cotton gins, held workshops on the draft rule, and appears on schedule for 4th quarter 2004 adoption. The April 6, 2004 draft staff report for Rule 4204 includes analysis of several alternative control strategies (*e.g.*, rotary drum filters, mechanical conveyors and plenum chambers) which further supports the conclusion that 1D–3D cyclones generally fulfill BACM for this source category.

6. Manufacturing and Industrial Fuel Combustion Sources

Comment 1: Earthjustice comments that the Plan fails to implement BACM for manufacturing and industrial fuel combustion sources. The Plan merely describes generalized control concepts that could be developed, and does not even clearly commit to specific requirements. No basis is provided for EPA's conclusion that controls to be developed for industrial water heaters will generally establish 30 ppm NO_X limits similar to SCAQMD Rules 1146.1 and 1146.2.

Response: We agree that the descriptions of these control measures on pages 4–31, 4–43 and 4–44 of the Plan do not explicitly commit to specific requirements for manufacturing and industrial fuel combustion sources. However, the language on pages 4–22, 4–23, 4–30, 4–31 and 4–42 to 4–44 clearly and explicitly commits to 2.2 tpd of NO_X emission reductions from this category. SJVUAPCD's 3/30/04 memo explains that the 2.2 tpd commitment was based on an assumption that a 30 ppmv standard would be applied to these sources. This memo notes that, ''as part of the Plan development effort, the District examined similar, existing standards and found the 30 ppmv limits in SCAQMD Rules 1146.1 and 1146.2 to be the most stringent rules, at that time.'' SCAQMD staff reports for these actions include analysis of several control measures and estimates cost effectiveness of Rule 1146.2 requirements as high as $8,400/ton for retrofitting some units.

7. Oil Drilling and Workover

Comment 1: Earthjustice comments that the Plan fails to implement BACM for oil drilling and workover sources. The Plan fails to evaluate lower emission limits such as those promulgated in Ventura County Rule 74.16 and SJVUAPCD 4701 and the State has not submitted a revised version of SJVUAPCD Rule 2280.

Response: The TSD associated with our proposed approval of the Plan explains that SJVUAPCD Rule 2280 and CARB's portable equipment registration program (PERP, see 13 California Code of Regulations 2450–2466) provide BACM for this category. These rules establish numerous operational requirements and emission limitations for applicable engines. Sources may choose to register engines, including those used for oil drilling and workover, under either PERP or SJVUAPCD's analogous Rule 2280 program. Most sources register under PERP because it is less expensive and allows use of portable engines throughout the state.

We believe that PERP does on balance provide more stringent requirements than Ventura County Rule 74.16 for engines used in oil drilling and workover. While Ventura County Rule 74.16.B.1 requires electrification of drilling operations, most sources have been exempted from this requirement under section C of the rule and few, if any, new wells have electrified as a result of this requirement (per telephone conversation between Karl Krause, Ventura County APCD, and Andrew Steckel). As a result, most sources subject to Ventura County Rule 74.16 must comply with the State (adopted January 27, 2000 *http://www.arb.ca.gov/regact/ciengine/ciengine.htm*) and national (40 CFR 89.112) Tier 1 NO_X standard for off-road compression ignition engines. By comparison, the PERP program has required most engines to comply with Tier 1 or more stringent Tier 2 standards. In addition, Ventura County Rule 74.16 applies only to new well drilling, while PERP applies to both new wells and well workover. We note that comparison to SJVUAPCD Rule 4701 limits is not necessary because Rule 4701 was not designed to control engines used for oil drilling and workover.

8. Residential Water Heaters

Comment 1: Earthjustice comments that the Plan fails to implement BACM for residential water heaters. The Plan does not demonstrate that Rule 4902's 40 nanogram/joule limit fulfills BACM in light of the 10 nanogram/joule limit in SCAQMD Rule 1121.

Response: SJVUAPCD's 3/30/04 memo explains that there is significant concern that Rule 1121's technology-forcing limit of 10 nanogram/joule may not be adequately available by the compliance deadlines. The memo notes that SCAQMD has received approximately $1 million in mitigation fees from manufacturers to date for failing to meet Rule 1121's currently applicable 20 nanogram/joule limit, suggesting that this limit is also not yet adequately available. In addition, all

manufacturers have requested a delay in implementing Rule 1121's future effective 10 nanogram/joule limit. As discussed in the TSD for EPA's proposed approval of the Plan, when Rule 1121's more stringent limits are demonstrated to be adequately available, they may become a basis for future BACM determinations.

9. Charbroiling

Comment 1: Earthjustice comments that the Plan fails to implement BACM for charbroiling sources. Neither the Plan nor EPA has provided a demonstration that SJVUAPCD Rule 4692 or SCAQMD Rule 1138 fulfills BACM.

Response: In developing Rule 4692, *Commercial Charbroiling*, SJVUAPCD investigated the scope of the source category, currently available control technologies, emission reduction potential and cost-effectiveness of various options.[25] SJVUAPCD determined that flameless catalytic oxidizers can reduce PM–10 emissions by 83% and VOC emissions by 86%, with an overall cost-effectiveness of approximately $3,000 per ton of reduced emissions. Fiber-bed filters, thermal incinerators, and activated carbon adsorbers were among the other control technologies considered. SJVUAPCD acknowledged that some technologies (*e.g.*, thermal incineration) may result in higher control efficiencies, but SJVUAPCD believes these technologies are not practical to require for every source because of the overall expense and cost effectiveness. SJVUAPCD estimates that implementation of Rule 4692 will reduce PM–10 emissions by 0.11 ton/day. Based on the requirements contained in Rule 4692 and the detailed analyses provided in the associated staff report, we believe SJVUAPCD has adequately demonstrated implementation of BACM for commercial charbroilers.

The TSD associated with our proposed approval of the Plan further notes that SJVUAPCD used SCAQMD Rule 1138 as guidance in developing SJVUAPCD Rule 4692 for this category. The TSD associated with our proposed approval of the Plan further notes that SJVUAPCD used SCAQMD Rule 1138 as guidance in developing SJVUAPCD Rule 4692 for this category. SCAQMD Rule 1138 is considered the most effective district regulatory standard in effect for this source category and SJVUAPCD Rule 4692 is nearly identical. See SJVUAPCD's 3/21/02 staff report for Rule 4692.

10. Regulation VIII Fugitive Dust Sources

Comment 1: Earthjustice states that the ''Fugitive PM–10 Management Plan'' (FPMP) compliance alternative in Rules 8061, 8071 and 8081 does not appear to have a basis for its inclusion and no other district has such a provision. The commenter compares Rule 8081's 20% opacity limits, stabilized unpaved road requirements, and concrete compliance options (*e.g.*, watering) to the FPMP compliance alternative's minimum control efficiency requirement of 50% and its lack of a clear mandate to comply with 20% opacity. On this basis, the commenter states that the FPMP compliance alternative does not add any clear benefit to the rule and, in fact, could weaken it.

Response: The FPMP's requirement that 50% control efficiency be achieved is equivalent to the minimum control efficiency expected from compliance with Rule 8081's surface stabilization requirement[26] which otherwise applies. We agree that the FPMP alternative does not contain an explicit requirement for sources to comply with 20% opacity. However, it is unclear whether compliance with 20% opacity would necessarily increase control efficiency for unpaved roads or parking areas above the minimum 50% control mandated. Also, while the FPMP alternative does not specify control measure options from which applicants can choose, all FPMPs must include the control measure to be applied (see Rules 8011 and 8081, section 7.5.4.) along with specific information as to the method, frequency and intensity of the application. Therefore, the FPMP alternative offers the same minimum control efficiency (50%) and a defined method of control as would otherwise be achieved by compliance absent a FPMP.

Potential benefits of FPMPs include: owners/operators expressly planning in advance where and when vehicle trip thresholds in the rule will be exceeded and the details of dust suppressant application or other treatment; an emphasis on preventative control as opposed to remedial control in response to a 20% opacity exceedance, and; a potential mechanism for targeted inspections by the District.

Comment 2: Earthjustice states that the Rule 8081 FPMP administrative requirement allowing growers to submit plans to the Natural Resources Conservation Service (NRCS) instead of to the SJVUAPCD is not justified. The NRCS' role should be limited to providing technical information rather than evaluating compliance alternatives.

Response: Although FPMPs do not need to be submitted to the District for approval, the District is responsible for developing guidance and criteria by which NRCS (specifically, local resource conservation districts or the Fresno Regional Office) would use to evaluate the FPMPs in order to verify their consistency with the District's guidance. Therefore, the NRCS' role is limited to reviewing the FPMPs for consistency with the District's guidance, rather than evaluating compliance alternatives absent criteria. Furthermore, all verified FPMPs are to be made available to the District and the public. For these reasons, in addition to the requirement for FPMPs to demonstrate 50% control efficiency, we believe the FPMP administrative requirements are sufficient to ensure enforceable controls.

Comment 3: Earthjustice states that Maricopa's Dust Control Plan requirements (as contained in Maricopa County Rules 310 and 303) provide a more appropriate model for an acceptable FPMP.

Response: Maricopa's Dust Control Plan requirements are specific to construction sites, which have multiple sources of fugitive dust. The FPMP provisions of Rules 8061, 8071 and 8081 only apply to unpaved roads and unpaved vehicle/equipment traffic areas. Therefore, we do not believe it is necessary for the FPMPs to be modeled after the extensive dust control plan requirements adopted in Maricopa County for construction sites.

Comment 4: Earthjustice states that the Plan retains a threshold of 500–3,000 average daily trips to trigger the requirement to pave shoulders in Rule 8061. It is unclear what a threshold with a range means in practice. In order to meet BACM, the Plan should either establish the threshold as 500 average daily trips or justify any higher threshold.

Response: The format of the 500–3,000 average annual daily trip (AADT) threshold for existing paved roads in Rule 8061 does not adversely impact the rule's clarity. In practice, cities and counties responsible for modifying existing paved roads determine the AADT of the road. If the AADT is between 500 and 3,000, Rule 8061 requires a 4-foot shoulder to be established, and if the AADT is above 3,000, Rule 8061 requires a 8-foot

[25] Final Staff Report for SJVUAPCD Rule 4692, March 21, 2002.

[26] ''Technical Support Document for Maricopa County Nonattainment Area PM–10 FIP: Revision to the Phoenix FIP final rule for Unpaved Parking Lots, Unpaved Roads and Vacant Lots,'' January 19, 1999, page 3.

shoulder to be established. For purposes of meeting BACM, the rule clearly establishes 500 AADT as the baseline threshold above which paved road shoulder requirements apply. Thus, we do not agree with the commenter that the requirement is unclear or insufficient to meet BACM.

Comment 5: Earthjustice states that although the Plan commits to remove the exemption for ''implements of husbandry'' from vehicle daily trip counts in Rule 8081, the 75 vehicle daily trip threshold should be lowered to account for higher emissions resulting from multiple wheelsets of implements of husbandry. The rule credits trips made by implements of husbandry the same as trips made by passenger vehicles and this may underestimate emissions from implements of husbandry.

Response: The District's BACM analysis for Rule 8081 evaluates emissions from both passenger vehicles and implements of husbandry with multiple wheelsets, *e.g.*, tractors and implements with 8 wheels, using EPA's AP–42 emissions factor equation for unpaved roads. The District concludes that a tractor operating between 4 and 9 miles per hour produces 85–88 percent of the emissions produced by a pickup truck traveling 15 miles per hour.[27] This analysis supports including implements of husbandry in the rule's vehicle trip threshold, but not the commenter's assertion that implements of husbandry generate higher emissions than passenger vehicles and that the 75 vehicle trip threshold should be lowered.

Comment 6: Earthjustice states that the District eliminated a proposed commitment to require that visible emissions not travel beyond the property line on the basis that such disturbances would be ''subject to the District's nuisance rule.'' The commenter indicates that many counties in the Valley specifically exempt agriculture from nuisance rules and lack a mechanism to control dust traveling beyond property lines. The commenter concludes that no basis exists for SJVUAPCD's elimination of its initial commitment to control visible emissions that travel beyond property lines.

Response: EPA's proposed approval of Regulation VIII as BACM (69 FR 5420–5421) absent a property line limitation for visible emissions was not based on the District's statement that sources are subject to the District's nuisance rule. Rather, we believe that a property line limit provides little to no benefit when a fugitive dust source is located well within the property line. Alternatively, if a source is located immediately adjacent to the property line (*e.g.*, an unpaved road), it may be technically infeasible to comply with a property line limit which would essentially require that no dust be emitted. The applicable standard in Regulation VIII for visible fugitive dust is 20% opacity. Comparing the relative stringency of a property line limit to an opacity standard is technically difficult due to the variety of meteorological and other factors associated with any scenario. However, because the 20% opacity standard is determined at the source's origin, we generally consider it to be the more stringent standard given the speed with which visible fugitive dust particles disperse into the atmosphere. Therefore, we are relying on the applicability of the 20% opacity standard in lieu of a property line limit for purposes of meeting the BACM requirement.

Comment 7: Earthjustice states that the Plan unjustifiably lacks a commitment to include a 100-foot dust plume limit. SCAQMD Rule 403 includes a 100-foot limit. The commenter notes that SJVUAPCD defended the importance of a plume distance threshold as a measure ''of value for construction site managers to judge the need for additional control application'' [28] and that ''a combination of opacity with plume distance limits (*e.g.*, 100 yards) is the best standard to use.'' [29] Notwithstanding, SJVUAPCD eliminated the proposed commitment to establish a 100-foot dust limit.

Response: The District raises concerns as to the technical feasibility of compliance with a 100-foot limit, given the speed with which a moving vehicle or mobile construction equipment can cover a 100-foot area.[30] The inclusion of a 100-foot limit in SCAQMD Rule 403 does not mean it is necessary for Regulation VIII to meet BACM, as long as other applicable limits combined provide adequate stringency. We believe the combined effect of the 20% opacity limit and control measure requirements in Regulation VIII are sufficient to meet BACM.

11. Significant Sources of VOC, Ammonia and SO_X

Comment 1: Earthjustice disagrees that a BACM demonstration is not needed for VOC, ammonia and SO_X based on the NO_X/PM strategy. They question the defensibility of the NO_X/PM strategy and even if it is the most expeditious strategy for attaining the PM–10 standards, Earthjustice believes the District still retains the obligation to evaluate and include BACM/BACT for significant sources of VOC, ammonia and SO_X as BACM are to be established generally independent of the attainment needs of an area.

In addition, Earthjustice points out that livestock waste is the most significant VOC source under the District's control, that the South Coast Air Quality Management District is controlling VOCs and ammonia from this source and that the SJV's Ag CMP program only covers the PM–10 emissions from this source. Pesticides and fertilizers is also a very significant source of VOCs in the SJV, not currently covered by BACM requirements.

Finally, Earthjustice points out that EPA has previously provided comments to the District about the lack of BACM for non-*de minimis* sources of VOCs. In particular, Earthjustice points out that EPA wrote ''Categories that must be analyzed for BACM include coatings and related process solvents; other cleaning and surface coatings; waste burning and disposal; food and agriculture (industrial processes); nonmetallic minerals (this BACM analysis should consider any processing activity not addressed by Regulation VIII) and landfill gases.'' Earthjustice also points out that EPA commented that the steam enhanced oil well vents category had not been adequately evaluated for BACM as it did not contain provisions found in similar Ventura and South Coast rules. Since EPA previously treated these source categories as needing BACM, Earthjustice believes EPA has no basis on which to conclude that BACM demonstration are not needed at this time.

Response: As discussed in section II.A. above, EPA is concurring with the SJV PM–10 Plan's NO_X/PM strategy until the CRPAQS results become available. Since, consistent with the NO_X/PM strategy, VOC, SO_X and ammonia reductions are not necessary for attainment, EPA believes a BACM demonstration is not necessary at this time for these precursors. 69 FR 5412, 5423. If the CRPAQS results indicate that reduction of precursors other than NO_X play a significant role in reducing PM–10, the District will be required to revise the 2003 PM–10 Plan to include BACM for those precursors and any additional reductions needed for expeditious attainment.

[27] PM–10 Plan at Appendix G, Exhibit C ''Supplemental BACM Analysis'', page 27.

[28] SJVUAPCD response to April 21, 2003 EPA comments at No. 118.

[29] PM–10 Plan at Appendix G, page G–28.

[30] PM–10 Plan at Appendix G, Exhibit C ''Supplemental BACM Analysis,'' page 17.

In an April 23, 2003 letter to the District, EPA commented that certain VOC source categories needed to be evaluated for BACM; however, these preliminary comments were based on an initial review of the District's Draft PM–10 Plan dated March 25, 2003.[31] In response to EPA's comments, the District included an enforceable commitment to revise the 2003 PM–10 Plan by March 2006 using the CRPAQS results which will provide the necessary technical information to clearly understand the role VOC, SO_X and ammonia play in attaining the PM–10 standards in the SJV. Given this enforceable commitment and the NO_X/PM strategy, EPA believes that requiring BACM/BACT demonstrations for VOC, SO_X and ammonia is not warranted at this time.

12. Mobile Sources—Transportation Control Measures (TCMs)

Comment 1: Earthjustice states that the Plan fails to include a BACM analysis addressing any section 108(f) TCMs. The Plan's only reference to TCMs is its assertion that certain unspecified measures were analyzed by the Regional Transportation Authorities for the Valley's ozone ROP plan, and are incorporated by reference in the plan. However, because the TCMs in the ROP plan were analyzed only for RACM, Earthjustice believes that the TCMs are insufficient to meet BACM requirements. The District errs in responding to a public comment that a BACM analysis needs to be performed when the District states that EPA's Addendum does not require BACM for TCMs.

Response: The 2003 PM–10 Plan incorporates the 2002 Ozone ROP Plan analyses and commitments by the 6 metropolitan planning organizations and 2 transportation planning agencies, representing collectively the 8 counties, numerous transit agencies, and all of the cities in the San Joaquin Valley ozone nonattainment area.[32] The commitments and feasibility analyses are included in Appendix E of the 2002 Ozone ROP Plan, which consists of approximately one thousand pages of TCM analyses and resolutions adopted by the local and regional governments, committing the governments to specific TCMs.

Although the Agency's PM10 BACM guidance does not provide an extensive discussion of TCMs, EPA agrees with the commenter that the PM10 BACM requirement applies to TCMs.[33] CAA section 108(f) lists 16 transportation control measures. In order to ensure that each entity reviewed comprehensively and consistently these measures, as well as subcategories of the measures, the San Joaquin Valley agencies broke the 16 TCMs into a matrix of 126 measures. The agencies then expanded the matrix by adding 14 other possible measures (labeled 17), 9 ''existing local government control measures'' (18), and 22 measures recommended for consideration by the public (19), for a grand total of 171 measures. Appendix E to the 2002 Ozone ROP Plan (incorporated by reference in the 2003 PM–10 plan) includes for these measures the commitments adopted by the multitude of jurisdictions, as well as the entities' reasoned justifications for not adopting particular measures. For example, see the ''Fresno COG Summary of Commitments—2002 Severe Area Ozone Plan,'' displaying the commitments for the Fresno COG itself, Fresno County, the 15 cities in the County, and the 3 transit agencies relating to the matrix of candidate control measures.

Appendix E includes resolutions adopted by each entity. For each of the hundreds of measures where implementation has already occurred or is programmed to occur, the resolutions describe the measure fully, identify the responsible agency and implementation authority, set out the implementation schedule, present the levels of personnel and funding for implementation, specify the enforcement program (if any is required), and describe the monitoring program.

EPA believes that the explanations for not including specific measures are equally applicable for BACM as for RACM, because the justifications reflect each entities' careful considerations and conclusions that particular measures simply are infeasible for the area because of technical, practical, or economic reasons. See, for example, City of Ridgecrest table ''Control Measures Which are Not Feasible for Implementation''; City of Coalinga Resolution No. 2892; City of Orange Cove, Resolution No. 2002–12, Exhibit A—Local Government Control Measures That will not be Implemented; County of Fresno Resolution #02–128; Kern Council of Governments table ''Example Local Government Measures.'' The reasoned justifications are based on factors that make a measure either inapplicable or impractical to the area, such as density levels, urbanized area configuration, centers of employment, traffic volume and flow, congestion levels, measure redundancy, economic issues relating to implementing agencies or public participation levels, potential for measures to be counter-productive from an emissions perspective (*e.g.*, creation of new one-way streets), absence of traffic signals, no means of reasonable enforcement, etc. The commenter has not shown that any of the analyses and commitments would be different for BACM, and EPA believes that they would not in fact differ.

EPA therefore believes that both the analyses performed by the San Joaquin Valley transportation and governmental entities and the commitments by the

[31] Letter from Jack P. Broadbent to David L. Crow, RE: Preliminary Review of the Draft 2003 PM–10 Plan, April 21, 2003.

[32] ''The resolutions adopted by the respective entities to commit to implement local government control measures are included in the Regional Transportation Planning Agency Commitments for Implementation Document, April 2002. The document is available for public review at the central San Joaquin Valley Unified APCD office located in Fresno. In accordance with the Air District planning process for the PM–10 Plan, these commitments are incorporated by reference into the PM–10 Plan. The ozone measures will provide emission reductions for precursor gases and help to address the secondary particulate problem.'' PM–10 Plan, Appendix I, page 4.

[33] EPA's General Preamble includes a discussion of RACM provisions for TCMs: ''Local circumstances relevant to the reasonableness of any potential control measure involve practical considerations that cannot be made through a national presumption. Various TCM's must be locally coordinated to minimize contradictory results and maximize mutually supportive outcomes. Feasibility of TCM implementation can thus be particularly complicated, and EPA recognizes the importance of assessing candidate TCM's in the context of each particular area's situation. Finally, with respect to TCM's or any other control measures, EPA does not believe that Congress intended the RACM requirement to compel the adoption of measures that are absurd, unenforceable, or impracticable (see 55 FR 38326, September 18, 1990). The EPA, therefore, concludes that it is inappropriate to create a presumption that all of the measures listed in section 108(f) are *per se* reasonably available for all nonattainment areas. All States must, at a minimum, address the section 108(f) measures. The EPA believes that at least some of the measures will be reasonably available for implementation in many nonattainment areas. Where a section 108(f) measure is reasonably available, section 172(c)(1) requires its implementation.'' 57 FR 13560 (April 16, 1992). The TCM RACM discussion concludes with comments on the legislative history of the 1990 CAA Amendments and EPA's 1979 guidance on RACM as construed by the Court of Appeals for the Ninth Circuit in *Delaney* v. *EPA*, 898 F. 2d 687 (1990).

In the 8/16/94 supplement to the General Preamble relating to SIPs for Serious PM–10 areas, EPA provided the following brief guidance on BACM for mobile sources: ''It does not currently appear that mobile sources, as distinct from the surfaces on which they travel, contribute significantly to the PM–10 air quality problem in a sufficient number of areas to warrant issuing national guidance on best available transportation control measures for PM–10 under section 190 of the Act. However, in those areas where mobile sources do contribute significantly to PM–10 violations, the State must, at a minimum, address the transportation control measures listed in section 108(f) to determine whether such measures are achievable in the area considering energy, environmental and economic impacts and other costs.'' Addendum at 42013.

entities reflect a conscientious effort to assess the viability of achieving reductions from implementation of each of the section 108(f) measures and other possible candidate measures, and to adopt and expeditiously implement all measures that were determined to be available at this time.

EPA believes that these assessments were conducted in a thorough process with full public involvement. The documents were subject to public review and comment in 5 public workshops before adoption by the local governments.[34] Before adoption, the measures and assessments underwent an extensive process, which is summarized in Appendix I of the 2003 PM–10 Plan in a document labeled ''Overview of Regional Transportation Planning Agency Process to Identify and Implement Best Available Control Measures in Support of the PM–10 Attainment Plan for the San Joaquin Valley'' (April 2003 RTPA BACM Submittal). This document sets out an 8-step process for biweekly/monthly meetings to review candidate measures, obtain input and feedback, share information, and document in a consistent fashion conclusions on economic and technological feasibility and program selection and implementation. This 8-step process was followed as the plans were being prepared, and the agencies are continuing the process to reassess the viability of additional controls as circumstances change in the future. Again, the public is invited to participate in the process and the results of the process are readily available to the public on a continuing basis.

Finally, it should also be noted that the San Joaquin Valley regional transportation planning agencies reviewed the adopted measures and the candidate measure analyses in the 2002 Ozone ROP Plan and concluded that they constitute BACM for TCMs and for other types of measures under their jurisdiction with respect to control of secondary particulate matter, such as NO_X. The agencies further agreed that they needed also to address additional BACM controls for direct particulate matter to supplement PM BACM. ''A key requirement for the PM–10 Attainment Plan is the implementation of Best Available Control Measures (BACM). Since the ozone measures described in the previous section will be used to address the secondary particulate problem, the control measures being pursued for the PM–10 Attainment Plan focus on direct particulate.'' See ''Overview of Regional Transportation Planning Agency Process to Identify and Implement Best Available Control Measures in Support of the PM–10 Attainment Plan for the San Joaquin Valley'' (April 2003 RTPA BACM Submittal), page 5.

These analyses and the resulting measures are included as elements of the reentrained dust and street cleaning provisions of the plan (Regulation VIII), rather than as TCMs. EPA agrees that this is appropriate, since the only significant source of primary particulate matter associated with motor vehicles is reentrained dust from paved and unpaved roads, and the specific control measures to reduce those emissions (paving unpaved roads, stabilizing access points onto paved roads, curbing, sweeping, erosion clean-up, etc.) are not categorized as TCMs. See the definition of TCMs at 40 CFR 93.101: *''Transportation control measure (TCM)* is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.'' Measures to reduce primary particulate matter emissions through reductions in ''vehicle use or changing traffic flow or congestion conditions'' are already addressed in Appendix E to the 2003 Ozone ROP Plan, since these categories of measures relate to the ozone precursors NO_X and VOC.

Comment 2: Earthjustice states that the transportation agencies may have proposed a measure to limit vehicle idling for the ozone ROP plan, but the plan appears to be voluntary and clearly fails to meet BACM. The Plan must evaluate implementation of enforceable idling control measures covering all vehicles and equipment throughout the Valley.

Response: Many of the SJV jurisdictions, as part of their TCM assessment, considered and rejected mandatory idling controls at the local level as infeasible, because of enforceability, safety, and public health issues. Moreover, idling controls were also being developed on a Statewide basis in ways that would surmount the feasibility concerns associated with a local program. Before the PM10 Plan was prepared, CARB had already adopted the State's Diesel Risk Reduction Program (October 2000), and as part of that plan had scheduled expeditious adoption and implementation of Statewide idling control programs for diesel vehicles. Also before the PM10 Plan was prepared, the State had already enacted the most stringent Statewide idling control measure in the country, a restriction on idling in the vicinity of schools. CARB has now scheduled a public hearing on July 22–23, 2004, to consider adoption of Statewide idling control regulations for heavy-duty diesel vehicles.[35]

One of the San Joaquin Valley agencies' primary justifications for rejecting adoption and implementation of local idling restrictions was their determination that local police enforcement programs needed for non-technology based restrictions on idling were simply infeasible. For the same reason, the proposed State program emphasizes required installation of tamper resistant, automatic idling control equipment, as opposed to an idling prohibition enforceable against vehicle operators. Like the commenter, CARB concluded that voluntary programs would be ineffective, based on evaluations of the State's limited success using educational programs. Unlike the commenter, CARB determined that idling restrictions on gasoline-fueled vehicles and engines should not be pursued because the hot and cold start emissions associated with gasoline engines could cancel out or even exceed the benefits from reduced idling. San Joaquin Valley entities reached the same conclusion.[36] Finally,

[34] The San Joaquin Valley regional transportation planning agencies developed a Web site to provide the public with information on the BACM process.

[35] The CARB public notice of the proposed regulatory program provides the following summary of the intended regulation: ''The ARB staff is proposing a regulation to reduce idling emissions from new 2007 and later model year on-road heavy-duty diesel vehicles (HDDV) with gross vehicle weight rating greater than 14,000 lbs. The proposal requires HDDVs to be equipped with an idle shutdown system that will shut down the engine after 5 minutes of continuous operation at idle. The proposal allows the use of alternative idle reduction devices/strategies in order to provide heating and air conditioning for cab comfort, engine oil heating for easy engine start-up in cold ambient conditions, and electric power to charge batteries and for on-board accessories. Such devices include, but are not limited to, an automatic stop-start system, on-board auxiliary devices such as fuel-fired heaters and auxiliary power units, and power inverter/chargers for use with batteries and grid supplied electricity. The use of these devices, in lieu of operating the heavy-duty engine at idle, will result in significant NO_X reductions. Reductions in ROG, carbon monoxide and carbon dioxide are also expected, but to a lesser extent depending on the type of alternative idle reduction device/strategy used.'' More details on the proposed regulation, including the rule language, appear at: *http://www.arb.ca.gov/regact/hdvidle/hdvidle.htm.*

[36] See, for example, the reasoned justification adopted by the City of Clovis in Appendix E of the 2003 Ozone ROP Plan for not adopting an idling restriction: ''This measure is infeasible for the City of Clovis Police Department to implement at this

Continued

CARB decided to exclude from idling restrictions all commercial and school buses to avoid jeopardizing public health, in view of the need for continuous passenger cooling and heating.

EPA agrees with the State's reasoning and conclusions regarding the best approach and appropriate targets for idling restrictions. Thus, EPA supports both the San Joaquin Valley agencies' reasoned justifications for not pursuing local idling controls and CARB's rationale for expeditiously developing, adopting, and implementing the proposed Statewide heavy-duty diesel vehicle idling control program.

13. Mobile Sources—South Coast Fleet and Low Sulfur Diesel Rules

Comment 1: Earthjustice claims that while the Plan includes a generalized commitment to control emissions from publicly-owned fleets, Regulation IX is merely in the ''initial stages of development.'' The Plan fails to incorporate or even evaluate the SCAQMD's fleet rules.

Response: Following adoption of the SCAQMD's fleet rules, the Engine Manufacturers Association (EMA), joined by other parties, filed suit against the SCAQMD arguing, among other things, that such rules were preempted under section 209(a) of the Clean Air Act. Although the SCAQMD prevailed before the U.S. District Court and U.S. Court of Appeals for the Ninth Circuit, EMA appealed to the U.S. Supreme Court. *EMA* v. *SCAQMD,* Supreme Court Case Number 02–1343. On April 28, 2004, the U.S. Supreme Court ruled that at least certain aspects of the SCAQMD fleet rules appear to be preempted by CAA section 209, and remanded the case. Based on this decision and pending final resolution of other issues of authority not addressed by the decision, EPA does not consider local air district adoption of rules similar to the SCAQMD's fleet rules to be authorized or required.

Comment 2: Earthjustice comments that the Plan should incorporate a rule akin to SCAQMD's rule 431.2 (low sulfur diesel). Although EPA will require all on-road vehicles to use low sulfur fuel by mid-2006 and California has proposed to adopt rules applying to off-road vehicles in 2006, the District could achieve significant reductions immediately with the introduction of low sulfur diesel, which would enable new control technologies.

Response: SCAQMD's rule prohibits producing or supplying greater than 15 ppm sulfur fuel on and after January 1, 2005, but that date would be extended to match a later compliance date adopted by CARB, if no later than June 1, 2006. Rule 431.2(c)(4). CARB has workshopped amendments to the State's diesel fuel regulations and issued the 15-day notice for the rule amendments, based on the CARB Board's authorization to proceed with the rule adoption, which is currently scheduled for July 24, 2004. On that date, CARB expects to amend the State's diesel regulations not only to prohibit sale/supply of greater than 15 ppm sulfur fuel on and after June 1, 2006, for mobile sources and stationary sources, but also to regulate fuel lubricity levels. Moreover, EPA's national 15 ppm sulfur rule goes into effect June 1, 2006 for motor vehicles, and EPA has indicated its intention to finalize in the near future national low sulfur fuel restrictions for nonroad vehicles and engines as part of the Tier 4 nonroad standards, which were proposed on May 23, 2003 (68 FR 28328). Finally, it is not clear that local agencies (as opposed to the State) have authority to adopt and enforce provisions relating to motor vehicle fuel specifications. For these reasons, EPA does not agree that adoption by SJVUAPCD of a rule comparable to SCAQMD's rule 431.2 is appropriate or required as BACM at this time.

D. Attainment Demonstration

1. Attainment Deadline

Comment 1: Earthjustice states that, under section 188(c)(2) and (e), serious PM–10 nonattainment areas such as the SJV may be granted at most one extension of their December 31, 2001 attainment deadlines of no more than 5 years, *i.e.*, to no later than December 31, 2006. Instead, in the proposed rule, EPA states that ''because the SJV missed the 2001 attainment date otherwise applicable, we believe that the attainment date is governed by other provisions of the CAA.'' 69 FR at 5424. This is not a reasonable basis for failing to apply section 188(e) given the fact that EPA approved deadline extensions for other serious nonattainment areas, such as Clark County, Coachella Valley, Maricopa County, the South Coast and Phoenix, after they missed the 2001 date and still applied section 188(e).

Earthjustice further states that EPA cites CAA section 179(d)(3) to support an extension of a PM–10 nonattainment deadline for the first time beyond 2006 [sic]. Because the subpart 1 provision EPA cites applies to nonattainment areas in general as opposed to the PM–10-specific subpart 4, EPA is not permitted to extend the attainment deadline for up to 10 years. If EPA's interpretation were correct, EPA would be permitted to endlessly extend attainment deadlines for up to 10 year periods after each finding of nonattainment. Clearly Congress intended for all serious PM–10 nonattainment areas to attain by December 31, 2006 at the very latest. If Congress ''has directly spoken to the precise question at issue'' and ''the intent of Congress is clear, that is the end of the matter.'' *Chevron* at 842–843. It is a general principle of statutory construction that where a statute addresses an issue specifically in one section and more generally in another, the more specific provision applies.

Response: EPA's conclusion regarding the attainment deadline applicable to the SJV appropriately reconciles the provisions of sections 188(c)(2) and (e) and 189(d). EPA agrees that, in the first instance, *i.e.*, upon classification or reclassification to serious, the attainment deadline for such an area can be no later than December 31, 2001 unless extended in accordance with the conditions in section 188(e) to no later than December 31, 2006. When section 188(c)(2) and (e) is read in conjunction with section 189(d), however, it is clear that, after EPA has made a finding of failure to attain for a serious area, the provisions of section 189(d) apply to the subsequently required serious area plan.[37] This is apparent from the plain language of section 189(d): ''In the case of a Serious PM–10 nonattainment area *in which the PM–10 standard is not attained by the applicable attainment date*, the State * * * shall * * *submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM–10 air quality standard * * *.'' Emphasis added. Section 189(d) clearly governs a situation in which a serious area has failed to meet its original attainment date of 2001 under section 188(c)(2) (or up to 2006 under section 188(e)) and therefore must submit a new plan that demonstrates attainment some date that is beyond the earlier established deadline. Thus, the attainment plan to be submitted within 12 months of the

time because traffic stall or congestion is almost exclusively limited to short term signal light cycling. It would be impracticable and unadvisable to turn off engines during this time. Furthermore, based on the type of short-term traffic delays noted above, the City does not feel this measure would * * * reduce emissions. Rather this measure would increase emissions due to the stop and start of engines, as well as be an issue to public health and safety.''

[37] In the case of the serious nonattainment areas other than the SJV cited by the commenters, EPA had not made findings of failure to attain the serious area deadline. In such cases, section 188(c)(2) and (e) continues to govern the applicable attainment deadline.

applicable attainment date which has been missed cannot be subject to the same attainment deadline as the previous plan.

Because, however, section 189(d) merely requires the new plan to ''provide for attainment,'' EPA looked elsewhere in the statute to determine the outer bounds of that deadline. The only other provision of the statute that addresses planning requirements applicable to a PM–10 nonattainment area for which EPA has made a finding of nonattainment is section 179(d). Thus, the Agency did not ignore subpart 4 in favor of subpart 1, but rather applied subpart 4 to its maximum extent before turning to subpart 1 to determine the applicable attainment deadline for the SJV under the prevailing circumstances.

Under section 179(d)(3), the attainment deadline applicable to an area that misses the serious area attainment date is as soon as practicable, but no later than 5 years from the publication date of the nonattainment finding. EPA may, however, extend the attainment deadline to the extent it deems appropriate for a period no greater than 10 years from the publication date, ''considering the severity of nonattainment and the availability and feasibility of pollution control measures.'' Because section 189(d), standing alone, does not establish a specific outer attainment deadline for areas that fail to meet their original or (one time) extended deadline, EPA adopted an interpretation reasonably accommodated to the purpose of the statutory provisions. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. at 842–44. In contrast, the commenters' interpretation would write out of the statute entirely the language in section 189(d) that addresses attainment.

Finally commenters claim that ''if EPA's interpretation were correct, EPA would be permitted to endlessly extend attainment deadlines for up to 10 year periods after each finding of nonattainment.'' EPA has the responsibility under CAA sections 179(d) and 188(b)(2) of determining within 6 months of the applicable attainment date whether an area has attained the standards. Once EPA approves a specific deadline for the SJV under section 179(d)(3), it becomes the applicable deadline for the purpose of such a determination. If the SJV fails to meet its 179(d)(3) deadline, the provisions of section 189(d) will once again apply. We believe that result is what Congress intended in these circumstances.

2. Attainment Demonstration Overestimates Emission Reductions

Comment 1: Earthjustice believes that the emissions reductions from certain control measures are drastically overstated. In particular, they point out that many of the proposed practices listed in the Ag CMP are commonly acknowledged to be in widespread practice already, but whose reductions have not been included in the emission inventory. Earthjustice argues that if this is the case, then the plan's inventory is overstated and future reductions from the Ag CMP program to meet attainment and the 5% requirement will not be achieved because they are already in the baseline. In addition, Earthjustice points out that many of the emission factors have been lowered and the inventory may not reflect existing practices, thus, overstating future reduction estimates. Either way, Earthjustice believes that since many growers are already implementing the CMP, the current inventory and reductions for the attainment demonstration are not accurately portrayed.

Response: The inventory and emissions reductions estimates found in the 2003 PM–10 Plan are based on the best available data at the time of Plan development. The District is currently developing the Ag CMP program's rule and a draft list of CMP is available for review. As stated previously, that rule is not the subject of this rulemaking and we will thoroughly evaluate the rule once it has been adopted by the District and submitted to us. We note, however, that while some of the CMP on the draft list may already be implemented by some farmers, this may only mean that these farmers are already implementing BACM. We also note that the latest draft of Rule 4550 contains a backstop provision to ensure that sufficient emission reductions are achieved by the agricultural sector.

3. Attainment as Expeditiously as Practicable

Comment 1: CRPE comments that because the five percent requirement has not been adequately addressed and because the Ag CMP program does not require BACM, the Plan does not demonstrate attainment will be achieved as expeditiously as practicable.

Response: Since we believe that the section 189(d) five percent requirement has been met and that the BACM requirement for agricultural sources has also been met, we continue to believe attainment is based on all reasonably achievable emissions reductions and is as expeditious as practicable. See, respectively, section II. E. and C.2.

E. Five Percent Demonstration

Comment 1: Earthjustice and CRPE comment that the Plan fails to demonstrate ''* * * *an annual reduction* of PM–10 or PM–10 precursors of not less than five percent * * *'' (emphasis added) as required by CAA section 189(d). The commenters assert that the statute is clear in requiring PM–10 or PM–10 precursor emissions to be reduced by at least 5% in each year. The commenters also point to legislative history which they assert precludes any interpretation of the statute that would allow less than 5% reduction of PM–10 or PM–10 precursors in each and every year until attainment. Finally, the commenters note that the SJV is the first area subject to the requirements of section 189(d), making this an important question of first impression.

Response: EPA agrees that this is a question of first impression and that the application of section 189(d) to the SJV is an important aspect of this action. Because EPA has not previously applied the provision, this action represents the Agency's first experience with interpreting the provision in order to determine how best to implement the statute in light of the facts of an actual plan. As explained in the proposed approval of the Plan (69 FR 5412, 5430), EPA believes that the express statutory language allows the District to develop a plan that targets reductions of either direct PM–10 or PM–10 precursors in each year, and to alternate or vary the approach from year to year. This is a plain reading of the statute that gives effect to the word ''or.'' Even if the statutory provision were ambiguous on this point, EPA believes that its interpretation is reasonable, given that this reading of the statute provides some flexibility to the state to determine whether it is more effective or more practicable to obtain reductions of direct PM–10 or PM–10 precursors from year to year, as the facts and circumstances dictate, so long as the state is making progress towards attainment of the NAAQS as expeditiously as practicable.

As further explained in the proposed rule, EPA believes that the express statutory language of section 189(d) authorizes the Agency to approve a plan that achieves 5% reductions of either direct PM–10 emissions, or 5% of the emissions of one or more precursors that EPA determines to be the precursor emissions appropriate for the District to target in order to attain the NAAQS as expeditiously as practicable. EPA believes that this is a literal reading of

the provision because the term ''precursor'' must be read in light of what the District establishes and EPA agrees are the chemicals that are the PM–10 precursors for regulatory purposes in the SJV. Even if the statute were ambiguous on this point, EPA believes that it is appropriate to interpret section 189(d) to allow for the calculation of the 5% reduction of precursors based upon the overall strategy of the plan. This approach is confirmed by the terms of section 189(e) in which the statute permits EPA to determine whether or not certain precursors from stationary sources significantly contribute to violations of the NAAQS, in essence distinguishing between chemicals that may be precursors from an academic perspective and chemicals that should be precursors from the regulatory perspective. Were EPA to require the District to obtain 5% emission reductions of chemicals that are not the appropriate precursor or precursors to control, that could result in reductions that would not expedite attainment.

In this case, the District has designed a plan that targets reductions of PM–10 and NO_X, because they believe that this strategy will be the most effective and efficient way to reach attainment. In order to comply with section 189(d), the District has therefor structured its plan to ensure that it will achieve reductions of either PM–10 or NO_X sufficient to meet the 5% requirement. As explained elsewhere in more detail, EPA has evaluated the 2003 Plan as a whole and concurs that, based upon currently available information, the PM–10 and NO_X reduction strategy will be the most effective approach to attain the PM–10 NAAQS as expeditiously as practicable. Accordingly, EPA believes that the reference in section 189(d) to 5% emission reductions of ''PM–10 precursors'' should be interpreted to mean 5% of the precursors that have been determined to be effective for achieving the NAAQS, *i.e.*, 5% of the type of emissions that are PM–10 precursors for regulatory purposes.

For the 2003 Plan, for example, the District has argued and EPA agrees that it would not be an effective strategy for the District to obtain 5% reductions of ammonia because this degree of ammonia reduction would not appreciably move the SJV towards attainment given that most portions of the area appear to be NO_X-limited so that reductions of ammonia would not be as effective. Similarly, the District has argued and EPA agrees that reductions of VOC would not be as useful as reductions of NO_X to reduce PM formation, so that achieving reductions of 5% of VOC emissions would not be as effective. With respect to SO_X, the relatively small amount of SO_X emissions in the District compels the conclusion that achieving annual reductions of 5% of SO_X emissions would not significantly affect the ambient PM–10 levels in the SJV.

In short, given the PM–10 and NO_X strategy adopted by the District and the supporting technical analysis and modeling they have provided, NO_X is the regulatory ''PM–10 precursor'' in the SJV for purposes of section 189(d). Should this determination change as a result of further analysis in the CRAPQS study, the content of the section 189(d) requirement would also change.

In light of these facts, EPA has concluded that it is appropriate to read the provisions of section 189(d) to permit the District to calculate the 5% reduction of PM–10 precursors based upon the overall strategy of the Plan, *i.e.*, to require a 5% reduction of NO_X in those years that the District is not obtaining a 5% reduction of PM–10. EPA emphasizes that this approach is appropriate because the strategy and the technical support for the strategy indicate that NO_X reductions are the most effective control strategy in the SJV, and that this conclusion might not be appropriate in other locations with different mixtures of emissions, sources, atmospheric conditions, and other plan-specific considerations.

These commenters also take issue with the way in which EPA has read the statute to allow the District to take credit for early reductions of PM–10 or PM–10 precursors. The commenters assert that because the statutory language requires ''annual reductions in PM–10 or PM–10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area,'' the District must obtain ''at least'' 5% reduction in each year of the Plan.

As explained in the proposed rule, EPA does not believe that the explicit statutory language compels this approach and that such an interpretation of section 189(d) might not be the best way to encourage early reductions to achieve the NAAQS. Although the statute does use the term ''annual reductions,'' the statutory language does not in fact use the phraseology advocated by the commenters. The provision does not explicitly require reductions of 5% ''in each year,'' ''in each individual year,'' ''in each and every year,'' or in any such terms. The provision instead merely requires that the District's plan must provide for ''annual reductions'' of not less than 5% and does not indicate that the plan could not allow such reductions to occur earlier than would otherwise be required, yet on average or when looked at as a whole, to have met the requirement of an annual 5% reduction. EPA notes that Congress did explicitly provide for required emissions reductions in each year in section 187(g), which is the analogous provision applicable to carbon monoxide (CO) nonattainment areas that fail to attain by the applicable attainment date. In that provision, the statute explicitly requires reductions of ''5 percent per year in each year.'' Because this was not stipulated in section 189(d), we conclude that we are permitted to take a different approach.

EPA believes that a plain reading of section 189(d) does not preclude an approach that permits earlier reductions to count towards the 5% calculation for subsequent years. To the extent that the provision is ambiguous on this point, however, EPA believes that its interpretation is preferable because encouraging reductions earlier is more consistent with obtaining emissions reductions and achieving the NAAQS more quickly. EPA acknowledges that the obligation to achieve the NAAQS as expeditiously as practicable is a separate and simultaneous obligation, yet also recognizes that legitimate concerns such as the cost and technical feasibility of control measures might result in decisions to delay or limit the implementation even of BACM level controls. By encouraging the District's efforts to obtain reductions sooner through, *e.g.*, the earliest possible implementation date notwithstanding resulting higher costs, EPA believes that an interpretation of section 189(d) to allow early reductions to count towards the 5% calculation for later years is consistent with the larger goals of the CAA.

EPA would not, however, agree that section 189(d) would allow ''backloading'' of emissions reductions to meet the 5% calculation requirement, *i.e.*, if reductions that occur in later years were counted towards the 5% requirement for earlier years. While the statutory language of section 189(d) might also be susceptible to an interpretation allowing backloading of reductions, EPA believes that such an interpretation would be inconsistent with the goal of the section, which is to move an area to attainment as expeditiously as practicable. In addition, other provisions indicate how Congress addressed situations in which reduction requirement backloading might be appropriate. In section 182(c)(2)(B), Congress laid out a specific

approach for backloading of otherwise required VOC reductions. By contrast, were EPA to interpret section 189(d) rigidly to require at least 5% reductions in each year as the commenters assert is absolutely required, a state might feel compelled to schedule the implementation of controls in order to ensure that it could meet the technical requirement of at least 5% reductions in each and every year in order to avoid the legal consequences of failure to meet that requirement. This might result in decisions that were not optimal in terms of obtaining emissions reductions from as many sources as possible, as early as possible, thereby exalting the 5% requirement over the larger goals of the CAA.

In support of their position that section 189(d) does strictly require 5% reductions in each and every year, the commenters quote a particular selection from the legislative history for the CAA in which the House Committee on Energy and Commerce summarized the provisions of H.R. 3030, and described section 189(d) as requiring a state ''to reduce the total tonnage of emissions of PM–10 in the area by at least 5 percent per year in each year after submission of the plan revisions until attainment of the standard.'' See 1990 CAA Leg. Hist. 3021, 3292. Setting aside a debate about the relative weight appropriate to a particular piece of legislative history, EPA also believes that the quoted language itself does not necessarily contradict the Agency's interpretation of the provision with respect to giving credit for earlier reductions. The House Report summary merely states that the provision requires a new plan that will reduce emissions by at least 5% ''per year in each year,'' but does not explicitly state that the plan could not provide for earlier reductions that could count toward the calculation for subsequent years. For the reasons stated above, EPA has concluded that encouragement of earlier reductions is important and strict adherence to an interpretation that might dissuade states from attaining reductions sooner is not a reasonable approach to interpreting the 5% requirement.

Comment 2: Earthjustice and CRPE comment that neither of the District's two options for demonstrating a 5% annual reduction satisfies CAA section 189(d).

Response: EPA agrees that one of the methods proposed by the District in the 2003 Plan is unacceptable because it would allow improper calculation of the 5% reduction by adding reductions of PM–10 and reductions of NO_X to reach the target percentage. Unless the District determined the necessary amount of annual reductions by adding the total tonnage of PM–10 and NO_X into one sum and then calculating 5% of that total sum, this method would be mathematically incorrect. To say that 2% of 100 units of PM–10 and 3% of 200 units of NO_X equals 5% of one or the other or both is simply improper; 8 units would not be 5% of 100 units, 200 units, or 300 units. EPA contends that Congress cannot have intended application of the statute in a way that is inconsistent with basic mathematical principles, so this approach is not acceptable.[38]

In EPA's proposed rule (69 FR 5412, 5430), the Agency recognized that the ''Alternative Method'' (see 2003 PM–10 Plan, Table 7–2) for calculating the five percent requirement ''* * * [a]chieves the 5% annual reduction of either PM–10 or PM–10 precursors * * * [and] [c]arries forward any reductions beyond 5% towards calculating the 5% requirement for a future year.'' As explained in the response above, EPA believes that the explicit language of the statute permits the District to target reductions of either PM–10 or PM–10 precursors in each year, and to vary the approach from year to year, depending upon whether it is more effective or more practicable to obtain reductions of direct PM–10 or PM–10 precursors from year to year, as the facts and circumstances dictate. In this approach, the District will obtain 5% reductions of either the total amount of NO_X or the total amount of PM–10 in each year, or earlier. As described in more detail above, EPA believes that allowing the District to carry forward excess reductions in emissions to succeeding years is helpful because it will encourage earlier reductions and will provide practical flexibility that a strict numerical approach would not.

Comment 3: CRPE comments that the alternative interpretation (''Alternative Method'') allows ''extra'' emissions achieved through BACM rules in 2003, 2004 and 2005 to be applied to later years in order to meet CAA section 189(d). CRPE believes that section 189(d) requires the 5% reductions to be in addition to reductions achieved from BACM requirements since BACM requirements were required to be implemented by 1997. CAA section 189(b)(1)(B); 64 FR 51489 (September 23, 1999). In addition, CRPE comments that EPA's rationale that allowing reductions ''* * * to be carried forward in order to encourage emissions reductions as quickly as possible'' should not apply to BACM requirements since they were due seven years ago.

Response: The commenter is correct that the 2003 Plan uses reductions achieved through implementation of BACM level controls in order to meet the 5% requirement of section 189(d). The commenter asserts that this is inappropriate, given that the reductions required for BACM level of controls should already have occurred and that the 5% reduction requirement of section 189(d) should be in addition to those previously required reductions.

EPA disagrees that this is the proper way to interpret section 189(d) in this situation. Congress did not explicitly word section 189(d) to provide that the 5% reduction may not include reductions that would otherwise occur as a result of the implementation of BACM level controls. Instead, Congress simply required that a state that misses the serious area attainment date must submit a plan that provides for progress towards attainment on a regular basis, and did not qualify whether these reductions should occur through the imposition of RACM, BACM, or indeed any specific level of control. EPA notes that in another provision, section 182(b)(1)(B), Congress did explicitly direct EPA to exclude certain emissions reductions for purposes of subsequent calculations. Similarly, in section 182(c)(2)(B), Congress explicitly directed EPA to include certain emissions reductions in subsequent calculations. No such explicit directive appears in section 189(d).

EPA believes that because the provision does not explicitly require the 5% reductions to be over and above the reductions that could occur through implementation of BACM level controls, it is more appropriate to interpret section 189(d) literally as a requirement to implement controls that meet the percentage reduction requirement. Nevertheless, the District is still under an obligation to require BACM level controls to be implemented on the appropriate sources as soon as possible. In addition to the 5% requirement, the CAA imposes a continuing obligation to attain the NAAQS as expeditiously as practicable. Even if the statute is ambiguous with respect to whether the

[38] If the District had wanted to achieve 5% from a combination of PM–10 and NO_X, they would have had to achieve 5% of each (*i.e.,* 5 tons of PM–10 and 10 tons of NO_X) or it might also have been appropriate to achieve 5% of the total emissions of PM–10 and NO_X (*i.e.*, 15 tons total from PM–10 and NO_X). This approach of calculating 5% from a single summed total of PM–10 and NO_X may be an appropriate interpretation given the insertion of the word ''or'' into the statute, because the approach would at least comport with basic mathematical principles. It is unnecessary to resolve this latter point for purposes of today's action, however, because the 2003 Plan did include another option for demonstrating the 5% calculation that EPA believes is acceptable and consistent with the statute.

5% reduction requirement is in addition to other emission reductions, EPA believes that its approach is the most reasonable. EPA notes that the analogous provision for CO nonattainment areas, section 187(g), explicitly provides that a state's plan must use certain measures that ''in combination with other elements of the revised plan, shall be adequate to reduce the total tonnage by at least 5% per year.'' EPA believes that this language demonstrates that Congress contemplated that a state would use a mixture of measures, including previously required or available measures, to obtain the reductions that would meet the 5% reduction requirement. Although section 189(d) does not include this identical ''in combination with'' language, EPA believes that the existence of this language in the analogous provision suggests that its reading of the statute to allow this approach for PM–10 is a reasonable one.

As a practical matter, EPA recognizes that imposition of BACM level controls takes time and resources and that a state must often sequence its efforts in order to achieve the necessary level of controls.[39] For example, with respect to BACM level controls on direct PM–10 emissions from agricultural sources, EPA agrees that the District will need a reasonable period of time in order to implement the Ag CMP program. Were EPA to adopt the commenter's approach, EPA would have to require the District to meet a 5% reduction requirement above and beyond the reductions from BACM controls on its sources, and to obtain those reductions well before the District's rules could reasonably achieve those reductions. While EPA shares the commenter's serious concerns that the SJV should attain the NAAQS as expeditiously as practicable, EPA believes that it would be unreasonable to require the District to obtain reductions in advance of the time that it can practicably do so through BACM level controls. EPA believes that the proper focus is on the requirements that the District implement BACM and that it do so in the manner and on the schedule that will provide for the most expeditious attainment of the NAAQS. In this context, the 5% requirement of section 189(d) does provide an impetus for regular progress towards attainment, as it should. The commenter's suggestion that the 5% be above and beyond and before what is achievable through BACM level controls is not a feasible approach, and therefore EPA believes that it is not an appropriate way to interpret section 189(d) in the circumstances at hand.

Comment 4: Earthjustice comments that the 2003 Plan includes incentive measures towards the calculation of the 5% reductions required by section 189(d). Because the measures are not regulatory and enforceable, and because the Plan indicates that funding for the measures has not been provided past 2005, the commenter asserts that the reductions in the years 2005 to 2010 are not creditable toward the 5% demonstration.

Response: The comment appears to refer to two measures in the SJV plan: Incentive Programs (IP) and Indirect Source Mitigation Program (ISMP). The District's commitment to specific emissions reductions from these measures is shown below.

SAN JOAQUIN PM–10 SIP INCENTIVE PROGRAMS AND INDIRECT SOURCE MITIGATION PROGRAM

[Emission Reductions of NO_X in Tons per Day (Annual/Seasonal)]

Control measure	2005	2008	2010
Incentive Programs	6.3/4.8	6.8/5.2	6.5/5.0
Indirect Source Mitigation Program	0.7/0.5	2.7/2.0	4.1/3.1

Source: PM–10 Plan, Tables 4–17 and 4–18.

The IP, which has been in actual operation since 1992, consists of various elements, including the Heavy-Duty Engine Emission Reduction Incentive Program, the Reduce Motor Vehicle Emissions (REMOVE) program for heavy-duty engines, a recently concluded program for light- and medium-duty vehicles, and a Green Yard Machine Program (electric lawnmowers). The IP is a long-established program which is continuing, using various State-Federal funding sources, and the District has indicated that it will pursue new funding sources to achieve additional reductions claimed in years after 2005.[40]

The commenter quotes the 2003 Plan's discussion of the relationship between current funding and the emissions reductions associated with the measure:

> Emission reductions projected to be achieved by completed projects and with currently committed funding amount to 6.1 tons per day of NO_X by 2005. The Air District expects additional funding will be obtained to allow continued emission reductions in later years.

As shown above, the District has committed to achieve an additional 0.2 tpd of NO_X reductions by 2010 beyond the level achieved in 2005 from already completed projects and presently committed funding.

In the SJV, there is a long track record of District and State funding support for these incentive programs. Moreover, the quantification and documentation of obtaining of emissions reductions from these incentive programs are well established and fully adequate to validate the reductions. See, for example, the Carl Moyer Memorial Air Quality Standards Attainment Program Guidelines, electronically available at *http://www.arb.ca.gov/msprog/moyer/moyer.htm.*

The Moyer program procedures have served as models for the design of national, state, and local credit validation systems for mobile source subsidy programs, and California continuously refines these guidelines to reflect accurately the reductions associated with the program subsidies. The procedures address emission reduction quantification issues associated with both baseline emissions and the amount of reductions

[39] Within the statutory scheme, Congress implicitly recognized that states could not immediately implement BACM level controls. In section 189(b)(1)(B), the statute provides that a state plan must implement BACM within four years after classification or reclassification to serious PM–10 nonattainment. In this instance, of course, BACM level controls should have been implemented by 1997. The more general point, however, is that in developing a plan, EPA recognizes that it may not be possible for all controls to be implemented instantaneously.

[40] The Plan indicates that current funding sources include California's Carl Moyer Program, State transportation funds, State peaker power plan offset funds, Federal Congestion Mitigation and Air Quality Improvement Program (CMAQ), and District Department of Motor Vehicle (DMV) Surcharge Fees. 2003 PM–10 Plan, page 4–62. It should be noted that revenue from the $4 DMV registration surcharge fee is a permanent source of IP funding under State law.

achievable from the various repower, retrofit, and replacement technologies and alternative fuel options, as well as issues associated with project life, enforceable requirements to ensure that reductions must continue within the nonattainment area, etc.

EPA believes that, by approving the Plan, EPA is approving the District's enforceable commitments to continue to implement the long-established programs in the IP to achieve the specified reductions. EPA and the public may enforce this emission reduction obligation if the District fails to demonstrate that the reductions have been achieved by the milestones. EPA therefore disagrees with the commenter that credit towards the section 189(d) calculation for the IP is unwarranted.

While the IP is indeed an incentive program and relies on guidelines rather than rules, the ISMP is clearly intended to be enforced through new Rules 3180 and 9510. In the plan, the District commits to final implementation of the ISMP regulations in the 4th quarter of 2004 sufficient to achieve the projected reductions shown for the milestone years, similar to other regulatory measures. By approving the plan, EPA is approving the District's enforceable commitments to implement new ISMP regulations to achieve the specified reductions. When Rules 3180 and 9510 are submitted as SIP revisions, EPA will review those regulations, like the future regulations associated with other committal measures, to ensure that the rules meet applicable requirements, including federal enforceability. Thus, EPA disagrees with the commenter's contention that the ISMP is an unenforceable and non-regulatory measure, and believes that it is appropriate to include it in the section 189(d) calculations.

Comment 5: Earthjustice comments that section 189(d) does not allow for ''running averages'' using ''banked'' credits from year to year to meet the annual 5% reduction requirement. Earthjustice also comments that the Addendum states that annual reduction requirements require ''linear progress for quantitative milestones'' for areas which meet certain requirements, as the SJV does. Finally, Earthjustice states that CAA section 182(c)(2)(B) regarding ozone plans specifically allows for averaging and had Congress intended similar treatment for PM–10 plans, it would have included such language in section 189(d).

Response: As discussed more fully in response to the commenter above, EPA believes that the explicit provisions of section 189(d) do not preclude an approach that would encourage earlier emissions reductions to count towards the 5% calculation for subsequent years. Even if the statute were ambiguous on this point, EPA believes that an interpretation that encourages states to obtain the reductions earlier than might otherwise be required consistent with prompt adoption and implementation of BACM level controls and attainment of the NAAQS as expeditiously as practicable, is an appropriate interpretation. The commenter disparages the approach by referring to it as ''banking'' or ''running averages,'' but EPA contends that such an approach is more consistent with the overall goals of the CAA and is more practical given what would otherwise be a potential disincentive to get reductions sooner out of concern that there might otherwise be a failure to get 5% reductions in a later year.

With respect to the commenter's reference to the ''linear progress'' requirement of the Addendum, as discussed in section II.F. below, that guidance addresses linear progress with respect to the reasonable further progress (RFP) provisions of the CAA applicable to the 2003 Plan. The discussion in the guidance, however, neither requires linear progress for RFP nor mentions at all the 5% requirement of section 189(d). Furthermore, EPA believes that strict adherence to the concept of a perfectly straight line on a graph representing emissions reductions is less important than obtaining the reductions earlier, if possible. Given the option, EPA would prefer that a section 189(d) plan with a ten year strategy obtain 50% PM–10 reductions in year one rather than a more rigid plan that provided only for a ''linear'' reduction of 5% per year for 10 years. Unfortunately, the difficulties of devising rules, implementing rules, and obtaining emissions reductions are not usually conducive to such approaches and require a balancing of what is technologically, economically, and practicably achievable. This may not easily result in a straight line on a graph.

EPA agrees with the commenter that the statutory language of section 182(c)(2)(B) explicitly directs EPA to allow a state to use early reductions to meet ''reasonable further progress'' requirements for VOC emission reductions. These provisions do not, however, apply to PM–10 and do not necessarily indicate or control how EPA should interpret the different language of section 189(d). The commenter takes the position that had Congress intended to allow any early PM–10 or PM–10 precursor reductions to count towards the 5% requirement for later years, Congress would have inserted provisions similar to section 182(c)(2)(B) into section 189(d). EPA disagrees with the basic assertion that EPA should not credit early reductions towards the 5% calculation for a number of reasons, as discussed more fully in other responses. In this specific context, however, EPA notes that the bulk of the provision relevant to VOCs is necessary to specify the conditions under which EPA can allow a state to reduce the percentage of reductions otherwise required, not how to credit early emission reductions to meet the percentage reduction requirement for later years. This fundamental difference at least suggests that EPA need not follow section 182(c)(2)(B) even by analogy in interpreting section 189(d). To reiterate, EPA believes that its approach in effect ensures that the plan will achieve reductions of at least 5% of PM–10 or 5% of PM–10 precursors each year, but encourages earlier reductions rather than discouraging them.

Comment 6: Earthjustice comments that because the 2003 Plan relies on a 1.5 to 1 ratio of NO_X to PM–10 (secondary nitrate) reductions for some modeling purposes, EPA should require the District to use this ratio to determine how many tons of NO_X or PM–10 reductions are necessary to meet the section 189(d) 5% requirement. The commenter suggests that requiring the District to use this ratio might cause the District to attain the NAAQS as early as 2006, instead of its target date.

Response: EPA agrees that having approved the NO_X-PM–10 ratio for some purposes, it might theoretically be appropriate to consider requiring the District to use the ratio throughout the Plan, including in the section 189(d) 5% reduction calculation. However, in this respect, EPA believes that the literal language of section 189(d) refers to a plan that will obtain reductions of ''5 percent of the amount of such emissions, as reported in the most recent inventory prepared for such area.'' The use of both the term ''amount'' and the reference to ''the most recent inventory'' clearly seem to refer to emissions in units of weight, most appropriately tons, given that this is the common unit of emissions inventories. The explicit language of section 189(d) does not refer to calculation of the required reductions of tons of PM–10 or PM–10 precursors by any method that would weight them differently or require a specific ratio between the tons of reduction. Unlike other provisions of the CAA which impose an explicit obligation to make reductions of a given pollutant in accordance with a set ratio; *e.g.*, sections

182(a)(4), 182(b)(5), 182(c)(10), 182(d)(2), and 182(e)(1), section 189(d) does not include such a requirement.

The lack of explicit language directing EPA to require a state to make the PM–10 or PM–10 precursor reductions on a weighted or ratio basis is perhaps not surprising, given that Congress may well have recognized the inherent difficulties of specifying the proper ratio in all circumstances in advance in the statute. Nevertheless, had Congress desired EPA to make the calculations on an area by area basis, one would assume that the statute would expressly direct EPA to ascertain the proper ratio. Given that section 189(d) provides only that there must be a 5% reduction in the ''amount'' of the respective pollutants, EPA believes that the language is plain on its face that tons of PM–10 or tons of PM–10 precursor reductions are to be weighted equally.

Even if the language were ambiguous, EPA believes that its interpretation, that the statute directs the calculation of the percentage based upon the weight of the respective pollutants and a 1:1 ratio, would seem to be the easiest and most straightforward reading of the statute and method to perform the 5% calculation. Moreover, EPA notes that the legislative history cited by the commenters in support of other arguments discussed above, explicitly refers to section 189(d) as requiring a plan ''to reduce the tonnage'' of emissions and makes no explicit mention of any ratio between PM–10 and precursors. EPA continues to believe that the legislative history cited by the commenters is not necessarily controlling as to Congressional intent concerning the provision, but if the legislative history is clear on any point, it would seem to be that the 5% calculation is to be based on tonnage of emissions and there is no reference to setting a ratio between direct PM–10 emissions and PM–10 precursors.

Comment 7: The SJVUAPCD comments that EPA should approve both methods for demonstrating the 5 percent requirement. In particular, the District argued that adding the percentages of NO_X and PM–10 to meet the 5% requirement would be similar to the ozone rate of progress guidance which allows aggregation of VOC and NO_X reductions to achieve the 3% requirement. Given that there is no EPA guidance on meeting section 189(d), the commenter believes the ozone guidance for rate of progress should apply.

Response: As stated in the proposed rule, EPA does not believe that the method summarized in Table 7–1 satisfies the CAA section 189(d) 5% requirement because adding percentages does not achieve the necessary 5% reductions. 69 FR 5412, 5430. To illustrate this as simply as possible, assuming 100 tons of PM–10 and 100 tons of NO_X, the District believes that a 2% reduction in PM–10 and a 3% reduction in PM–10 precursor should be allowed. However, this approach would only yield 5 tons of PM–10 and NO_X reductions. Since there are 200 tons of PM–10 and NO_X, EPA does not believe that one could argue that 5 tons is 5% of 200. Because this approach would not make sense from a simple mathematical perspective, EPA has concluded that this cannot be a proper interpretation of the provision.

The existing guidance cited by the commenters concerning the use of either VOC reductions or NO_X reductions to meet the rate of progress percentage requirements of other sections of the CAA is simply not controlling in light of the explicit statutory language of section 189(d). The commenters also misread the guidance. It requires the calculation of reduction of NO_X and VOCs to be either 3% of total NO_X and VOCs or 3% of NO_X and 3% of VOCs. Finally, EPA believes that it is not necessary to used the strained mathematical logic of the commenter's approach. As described above in response to other commenters, EPA does believe that the District's alternative method for calculation of the 5% reduction does comport with the statute, so EPA can properly approve the plan as meeting the requirements of section 189(d) requirements.

F. RFP Demonstration

Comment 1: Earthjustice comments that an analysis of the incremental reductions towards attainment is not provided in the 2003 PM–10 Plan. Earthjustice believes that the 5% demonstration does not satisfy the CAA section 172(c)(2) RFP and 189(c)(1) quantitative milestone requirements as it does not show linear progress toward the attainment date, which should be December 31, 2006.

Response: The 2003 PM–10 Plan implies that the section 172(c)(2) RFP requirement is satisfied by meeting the 5% requirement. However, as discussed in EPA's proposed rule, ''* * * RFP is a separate statutory requirement and is to be determined relative to attainment. Thus, in order to satisfy the RFP requirement, there must be an analysis which shows that incremental reductions towards attainment are being made for both the 24-hour and annual standards. * * * [EPA's] evaluation of the attainment demonstration coupled with the expected yearly emissions reductions shows that RFP is being met.'' We also determined that the 2003 Plan contains quantitative milestones which are to be achieved every three years until the area is redesignated to attainment. The reader is referred to the proposed rule for the details of our evaluation. 69 FR 5412, 5430–1531.

There is nothing in the language of either section 172(c)(2) or 189(c)(1) that requires linear progress. In fact, section 171(1) defines RFP as ''such annual incremental reductions in emissions * * * as are required by this part [D] *or may reasonably be required by the Administrator* for the purpose of ensuring attainment * * * by the applicable date.'' Emphasis added. Thus the statute provides EPA with discretion to determine what constitutes RFP in individual cases.

In the Addendum, we explain that historically RFP has been met by showing annual incremental emission reductions sufficient generally to maintain at least linear progress towards attainment by the specified deadline. Addendum at 42015. We then provide several examples of when ''[requiring linear progress reductions may be appropriate.'' Emphasis added. Id. The use of the word ''may'' clearly indicates that we did not intend to mandate linear progress in the cited circumstances. We further buttress this conclusion by explaining that ''EPA will determine whether the annual emission reductions to be achieved are reasonable in light of the statutory objective to ensure timely attainment of the PM–10 NAAQS.'' *Id.* at 42016.

In the case of the SJV, we have concluded that the annual incremental reductions in PM–10 and NO_X emissions are sufficient without linear progress to meet the RFP requirements of sections 172(c)(2) and 189(c)(1).

G. Contingency Measures

Comment 1: Earthjustice states that EPA's proposed approval of the 2003 PM–10 Plan omits any discussion of contingency measures required by section 172(c)(9) and is in violation of the CAA and the Agency's own policy (Addendum at 40215). The likelihood that contingency measures will be necessary is a virtual certainty and in fact should have gone into effect within 60 days of EPA's July 23, 2002 finding of failure to attain. EPA has never proposed full approval of a SIP for a serious PM–10 nonattainment area without a discussion of the adequacy of contingency measures contained in the plan. The District of Columbia Circuit Court of Appeals in *Sierra Club* v. *EPA,* 294 F.3d 155 (D.C. Cir. 2002) recently vacated an EPA decision to approve a SIP without the required contingency

measures. The commenters request that EPA address the adequacy of the contingency measures in the Plan in its final action and then specifies the ways in which they consider that the measures fail to meet the requirements of the Act.

Response: EPA is not required by the CAA or Agency policy to act on contingency measures in a SIP at the same time that it acts on other elements of the plan. A SIP is not a single document that is prepared once and then reviewed and approved as a single action. Rather it is a collection of regulations, demonstrations, and other items that develops over time. When the State revises the plan, either to change an existing element or to add additional elements required by the statute, the revisions themselves, not the entire plan, are submitted to EPA. Thus, in reviewing the 2003 Plan, EPA did not have to consider whether the independent requirement to have contingency measures in the plan had been met.

This conclusion is well supported by the language and structure of the Act. The basic requirements of a SIP for a nonattainment area, including the contingency plan requirement, are listed in section 172(c). The introductory language, by referring to ''plan provisions'' and ''plan items,'' makes clear that the contingency plan provision and the other subsections of this provision each set forth independent components of the overall plan. The specific plan revisions under review here are independent plan requirements that are required by separate sections of the statute, *e.g.*, section 189(b) and (d).

It is true that section 172(c)(9) refers to the inclusion of contingency measures in ''the plan revision.'' It is ambiguous, however, as to what plan revision this section refers. For example, section 189(b) and (d) requires various revisions to be submitted to EPA on different schedules: for areas such as the SJV that were reclassified from moderate to serious under section 188(b)(1), the attainment demonstration is due within 4 years of reclassification and the BACM demonstration no later than 18 months from the reclassification. EPA determined that states must submit contingency measures for serious PM–10 areas (or otherwise demonstrate that adequate measures are in place) within 3 years of reclassification. Addendum at 42015. Thus, the contingency measures contemplated by section 172(c)(9) are intended to be part of a different plan revision from the attainment and BACM demonstrations required by section 189(b). The fact that these submissions were to be made at different times clearly demonstrates that EPA is not required to consider contingency measures in its approval of the 2003 Plan.

The severability of these provisions is made even more clear by section 110(k)(3), which was added as part of the 1990 Amendments to clarify that EPA is not required to approve or disapprove a submission as a whole, but may separately approve and disapprove different portions. It makes no sense to say that Congress gave EPA this authority, but at the same time prohibited EPA from approving the 2003 Plan without acting on the contingency measures in it. Because the statute clearly allows EPA to approve these elements of the plan without considering other elements such as contingency measures, that is the end of the question. *Chevron,* 467 U.S. at 842–43.

Consistent with the above interpretation of the Act, on April 13, 2000, EPA proposed to approve certain provisions of the serious area PM–10 plan for the Phoenix, Arizona nonattainment area. In the proposal, EPA stated that the ''plan contains contingency measures as required by CAA section 172(c)(9). We are not proposing action on these contingency measures at this time. Contingency measures are a distinct provision of the Clean Air Act that we may act on separately from the attainment requirements.'' 65 FR 19964, 19965. See also 62 FR 1150 (January 8, 1997) and 65 FR 18903 (April, 10, 2000) (approval of provisions of California ozone plan revisions without acting on contingency measures in those revisions).

EPA agrees with the D.C. Circuit's holding in *Sierra Club,* 294 F.3d at 164, that contingency measures are required to be included in a SIP for a nonattainment area. EPA does not believe, however, that the Agency is prohibited from approving certain elements of the 2003 Plan without acting on the contingency measures in the plan. As demonstrated above, these are independent elements of the SIP that EPA can separately approve or disapprove. EPA also notes that the plan at issue in the D.C. Circuit's decision in *Sierra Club* was an ozone plan subject to the provisions of section 182(c)(9) regarding the inclusion of contingency measures, while this plan is a PM–10 plan not subject to those provisions. Because EPA is not acting on the contingency measures in the 2003 Plan in this action, the Agency is not responding to the comments raised regarding the adequacy of those measures in the Plan. EPA intends to act separately on the pending contingency measures and will respond to all comments on those measures at that time.

H. Full Approval With Commitments Violates the CAA

Comment 1: Earthjustice comments that the Plan must contain actual, adopted control measures to attain the PM–10 standard. The only enforceable commitments allowed by the Act are those pursuant to CAA section 110(k)(4), conditional approvals, which require a commitment by the state to adopt specific enforceable measures within one year of the approval.

Response: Our proposed rule provides in detail EPA's rationale for accepting the enforceable commitments found in the 2003 PM–10 Plan (69 FR 5412, 5427–5429). In short, EPA believes, consistent with past practice, that the CAA allows for the approval of enforceable commitments under CAA section 110(k)(3) that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures. See 69 FR 5412, footnotes 28 and 29. The U.S. Court of Appeals for the Fifth Circuit recently upheld EPA's interpretation and specifically found that nothing in the CAA or in the legislative history supports the theory that section 110(k)(4) (added in the 1990 Amendments to the statute) was intended to supplant the Agency's use of enforceable commitments under sections 110(a)(2)(A) and 172(c)(6). The court further found that, in the 1990 Amendments to the CAA, Congress in fact expanded EPA's authority under section 110(a)(2)(A). In this respect, the court concluded that because that section ''is silent on the issue of whether an enforceable commitment is an 'appropriate' 'means' or 'technique' to reach attainment, EPA's interpretation must be upheld if the court finds it a permissible construction of the statute.'' The court proceeded to do so. *BCCA Appeal Group et al.* v. *U.S.E.P.A. et al.*, 348 F.3d 93, 115 (5th Cir. 2003). In addition, see section II.C.1. above.

Comment 2: Earthjustice comments that EPA does not use consistent methods for calculating the percentage of commitments for NO_X and PM–10. Furthermore, EPA needs to evaluate the percentage of commitments used to specifically satisfy the 5% requirement.

Response: EPA estimates that the NO_X enforceable commitments make up approximately 15–16% of the overall reductions since 1999 needed for attainment of the annual and 24-hour

PM–10 standards (69 FR 5412, 5428). For PM–10, EPA estimates that the enforceable commitments make up approximately 72% and 92% of the reductions needed to attain the annual and 24-hour standards, respectively, in the attainment year, 2010 (69 FR 5412, 5428–5429).

EPA believes that the calculation of the reductions in the Plan attributable to enforceable commitments should include the historical and ongoing reductions from already adopted programs. This approach (which Earthjustice calls the ''net emissions reductions'' method) is used in estimating the NO_X reductions where the enforceable commitment reductions in 2010 are compared to the change in overall NO_X emissions since 1999 which include reductions from already adopted programs (*i.e.*, state and federal mobile source and district stationary source rules).[41]

For the PM–10 enforceable commitments evaluation, however, EPA uses a different approach. This is because ''[t]he PM–10 inventories do not have the same steady decline exhibited by the NO_X inventories due to the need to further refine the backcasted inventories for PM–10.'' 69 FR 5412, 5428; see also 2003 PM–10 Plan, p. 4–8 to 4–9.[42] Since using the NO_X approach does not provide a comparison of the 2010 PM–10 enforceable commitment reductions to the reductions from already adopted programs since 1999, EPA believes that a better approach in evaluating the PM–10 enforceable commitments reductions is to compare them to the total reductions needed in the attainment year (which Earthjustice calls the ''*annual* emissions reductions'' method).

The purpose of the percentage calculations for the NO_X and PM–10 enforceable commitments is to estimate the portion of the 2003 PM–10 Plan attributable to enforceable commitments. EPA believes the two approaches above do just that and does not believe that a consistent approach must be used. For this reason, EPA does not believe that the percentage of enforceable commitments must be evaluated for separate CAA requirements such as the 5% requirement and reasonable further progress demonstrations.

Comment 3: Earthjustice comments that the ''three-factor test'' used to determine the acceptability of the commitments is not consistent with the Act. The fact that district court decisions have made State commitments enforceable does not mean that EPA can approve commitment-based plans, especially since there is nothing in the Act that allows it. Furthermore, even if the three-factor test is allowed, the factors are not met.

Response: EPA does not rely on district court decisions holding commitments enforceable as the basis for the Agency's approval of plans containing commitments. As discussed above and in our proposed rule, the Fifth Circuit Court of Appeals in BCCA Appeal Group recently upheld EPA's interpretation of CAA sections 110(a)(2)(A) and 172(c)(6) and the Agency's use and application of the three factor test in approving enforceable commitments in the Houston-Galveston ozone SIP. 69 FR 5412, 5427, footnote 30. In addition, as discussed below, EPA believes the three factors have been met.

Comment 4: Earthjustice comments that the first factor, that the commitments address a ''limited portion'' of the Plan, is not satisfied by the Plan and that the percentage of commitments calculated by EPA is extremely high. The 15–16% of commitments for NO_X reductions and 72–92% of commitments for PM–10 reductions are clearly not a limited portion of the Plan. Earthjustice points out that the Maricopa County, Arizona PM–10 plan had a limited portion of commitments which involved improvements to already adopted rules and improving testing and enforcement, and all of the BACM measures had been previously approved by EPA. The Clark County, Nevada plan's commitments were for incremental reductions above an already adopted baseline with substantial immediate reductions. These commitment percentages far exceed the 6% found to be reasonable by the Fifth Circuit Court [in BCCA Appeal Group] for the Houston SIP.

Response: The enforceable commitment component in the SJV plan is higher than for other areas such as Maricopa and Clark Counties; however, we believe that the percentages must be evaluated on a case-by-case basis since each area's circumstances are different. For example, as noted in the proposed rule:

> * * * a significant portion * * * of the needed reductions come from the Ag CMP Program which controls agricultural fugitive dust sources, a previously unregulated category. * * * measures for agricultural sources must be determined on a case-by-case basis. The Ag CMP Program is an effort that is well under way as the District has worked diligently with stakeholders * * * to develop the best available measures for the SJV. An enforceable commitment is necessary at this time in order to allow the additional time required to further assess the dust measures that the District will establish for agricultural sources. * * *

69 FR 5412, 5428–5429.

In contrast, Clark County did not need to include any significant agricultural controls in its plan, and neither Clark County nor Maricopa County needed to evaluate and prepare control strategies for secondary PM, while at the same time developing primary PM controls. Indeed, with the possible exception of the South Coast area, no area in the country has had to undertake the complexity of the control measure development task facing the SJV, with its remarkably diverse primary and secondary PM problem, the dominant place of agricultural controls in its attainment strategy, and the magnitude of its emissions reductions target. See also, section II.C.3., response to comment 7. Given the prevailing conditions in the SJV, EPA believes that the percentage of commitments in the Plan is acceptable.

Moreover, the majority of the SJV's PM–10 commitments have adoption and implementation dates in 2004. EPA noted in the proposal that ''[g]iven the difficulties in controlling direct PM–10 in the SJV and the near term adoption and implementation dates, EPA believes the PM–10 reductions coming from enforceable commitments is acceptable.'' EPA continues to believe that the percentage of enforceable commitments for PM–10 is acceptable given these circumstances.

Comment 5: Earthjustice comments that the second factor, that the State and District are capable of fulfilling their commitment, is also not satisfied by the plan. Earthjustice does not understand how ongoing development, past records of accomplishment and a promise to fulfill the reduction commitments show that they are capable of fulfilling their commitments. Instead, Earthjustice notes the District's history of failures and believes there is no basis for EPA to conclude that the District will fulfill the Plan's commitments.

Response: EPA disagrees and believes that ongoing development, past record

[41] The overall change in NO_X emissions since 1999 also includes emissions from growth. Thus, EPA believes this approach may provide a higher percentage estimate of enforceable commitments since the additional reductions necessary to offset any growth are not included in the percentage calculation.

[42] According to the 2003 PM–10 Plan, ''[o]ne reason for the apparent increase in growth in PM10 in the mid-1990s is that a significant new emissions inventory category, prescribed burning, totaling approximately 23 tons per day, was added to the emissions inventory in the late 1990s and was not back cast into prior year inventories. With that correction, the PM10 inventory will show a small decline during that period. * * *'' *Id.*

of accomplishments and a promise (*i.e.*, enforceable commitment) to fulfill the reduction commitments do indicate that the District and State are capable of fulfilling their commitments. As discussed in our proposed rule (69 FR 5412, 5429), examples of ongoing development include the Ag CMP Program, Regulation VIII revisions and the State's mobile source measures. All of these programs are well on their way towards adoption and implementation. In addition, the State's long history of success in adopting new and challenging mobile source controls is a good indication that they will be capable of meeting their enforceable commitments. Finally, in the event that the Plan's category-specific enforceable commitments cannot be met, the District has also committed to ''* * * adopt, submit and implement substitute rules and measures that will achieve equivalent reductions in the same adoption and implementation timeframes.'' SJVUAPCD Governing Board, Resolution No. 03–06–07, #10, June 19, 2003. The commitments in the 2003 Plan are for requirements and reductions that the District and State are capable of meeting and are enforceable by EPA and the public.

Comment 6: Finally, Earthjustice comments that the third factor, that the commitments are for a reasonable and appropriate period of time, is not satisfied by the Plan. For many categories the implementation dates extend beyond 2004 and even as far as 2020 for residential space heating. Furthermore, implementation dates beyond 2004 are unreasonable in light of the past delay (*e.g.*, BACM should have been implemented by 1997) and severity of the Valley's nonattainment problem. Finally, Earthjustice notes that Maricopa County's SIP commitments all had deadlines of less than one year after their approval and that the District has already slipped on the Ag CMP program deadlines.

Response: EPA continues to believe that overall the commitments are for a reasonable and appropriate period of time, especially given the circumstances in the SJV (see response to comment 4 in this subsection). Tables 4–15 and 4–16 (2003 PM–10 Plan, 4–52) [43] summarize the reductions and final implementation dates coming from the PM–10 commitments. Table 4–15 shows that the majority of the emissions reductions coming from commitments, approximately 56.5 tpd, have final implementation dates by 2004. Approximately 9.9 tpd of the committed emissions reductions will occur after 2004 from Cotton Gins, Regulation VIII unpaved road measure, the Indirect Source Mitigation Program and the State and Federal Measures. Table 4–16 shows that approximately 63.5 tpd have final implementation dates by 2004 and approximately 10.2 tpd of the reductions will occur after 2004. Tables 4–17 and 4–18 summarize the reductions and final implementation dates coming from the NO_X commitments. For NO_X, the portion of reductions coming from commitments with implementation dates beyond 2004 is much higher (*i.e.*, approximately 34.3 tpd for the annual inventory and 34.0 tpd for the seasonal inventory); however, many of the NO_X reductions relied upon by the 2003 PM–10 Plan are from already adopted measures which will yield substantial reductions.

As noted by Earthjustice, the residential space heating commitment has a final implementation date of 2020, modeled after the Bay Area Air Quality Management District's program (2003 PM–10 Plan at 4–46); however, the Plan only relies on 0.1 tpd of reductions from this category which will be achieved in 2010.

Finally, as discussed above in response to comment 4 in this subsection, the nonattainment situation in the SJV is much more complex than for most other areas, such as Maricopa County, and EPA believes that a case-by-case evaluation of the needs for each area is warranted in determining whether commitments should be accepted. In this regard, we note that the Ag CMP program is extensive and complicated and believe that the District is working diligently to ensure that the program meets the 2004 implementation deadline in their commitment.

Comment 7: CRPE comments that EPA's decision to stop the Regulation VIII sanctions and FIP clocks based on a PM–10 Plan with commitments violates the CAA sections 110(c) and 179(a).

Response: As discussed above, EPA believes the enforceable commitments in the 2003 PM–10 Plan are approvable for overall plan purposes as well as for other nonattainment area requirements, such as RACM and BACM. On February 26, 2003, EPA finalized a conditional approval of Regulation VIII for RACM purposes and simultaneously finalized a limited approval and limited disapproval of Regulation VIII for BACM purposes (68 FR 8830). The conditional approval required SJVUAPCD to provide to EPA a RACM demonstration within a year of the final action. The BACM limited disapproval identified as deficiencies SJVUAPCD's failure to submit a BACM demonstration for Regulation VIII or to make appropriate upgrades to Regulation VIII to ensure that it meets BACM requirements. Failure to meet the condition of the conditional approval or address the deficiencies identified in the limited disapproval would have FIP and sanctions consequences under CAA sections 110(c) and 179(a). However, as previously discussed, SJVUAPCD met the condition of the conditional approval and addressed the BACM deficiencies by including in the 2003 PM–10 Plan adequate RACM/BACM demonstrations and commitments to upgrade Regulation VIII. See EPA's TSD for the 2003 PM–10 Plan, January 27, 2004, pages 14–45). Therefore, this final action appropriately stops all FIP and sanctions clock implications of EPA's February 26, 2003 and earlier actions regarding Regulation VIII.[44]

I. Adoption of All Feasible Measures (Section 179(d)(2)) for Ag CMP Program

Comment 1: CRPE comments that the proposed approval does not address CAA section 179(d)(2) which states that a SIP revision ''* * *shall include such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.'' CRPE comments that the CMP concept allows agricultural sources to select at least one practice from each category and that this conflicts with the requirement for all feasible measures as stated by section 179(d)(2).

Response: CRPE misinterprets CAA section 179(d)(2) which provides, among other things, that SIP revisions triggered by a failure to attain under section 179(d)(1) ''* * *shall include additional measures as the Administrator *may reasonably prescribe,* * * *'' Emphasis added. It is clear from the plain language of this provision, *i.e.*, the use of the word ''may'' rather than ''shall,'' that Congress intended the Administrator's action here to be permissive rather than mandatory. Under this provision,

[43] Tables 4–15 and 4–16 represent the estimated emissions reductions from commitments for the annual and seasonal inventories, respectively. The annual inventory is representative of the annual PM–10 standard and the seasonal inventory is representative of the 24-hour PM–10 standard.

[44] In a separate action raising different issues, certain organizations have filed an appeal with the Ninth Circuit Court of Appeals challenging EPA's February 23, 2003 action on Regulation VIII, *See Latino Issues Forum et al.* v. *U.S. EPA,* appeal docketed, No. 03–70987; *Associations of Irritated Residents* v. *U.S. EPA,* appeal docketed, No. 03–71696 (9th Cir. March 4, 2003).

therefore, EPA has the option to mandate specific additional feasible measures beyond those measures otherwise required in nonattainment areas. EPA is not, however, required to prescribe such measures.

The 2003 Plan does, however, need to address the requirements of section 189(b)(1)(B) that BACM be applied to all significant sources such as agricultural sources covered by the CMP program. We have determined that the CMP program will expeditiously achieve a BACM level of control. We have also concluded that the Plan provides for attainment of the PM–10 standards as expeditiously as practicable. Therefore we did not believe it necessary to require additional measures pursuant to section 179(d)(2). Thus, since the provision of section 179(d)(2) cited by the commenters is discretionary and since EPA has not chosen to prescribe any additional SIP measures under it, neither the 2003 PM–10 Plan nor EPA's proposed rule was required to address it.

J. Approval of Commitments for VOC Sources—Wineries

Comment 1: The Wine Institute and the Manufacturers Council of the Central Valley comment that a great deal of work has been done in evaluating VOC emissions from wine fermentation. Commenters state that past work has indicated that winery controls were technically feasible, but not cost effective. Commenters provided data that indicate winery emissions are overestimated and state that the District has failed to include this information. Commenters ask EPA to remove this source category from the PM–10 Plan prior to EPA approval.

Response: Under the Act, states have primary responsibility for regulating air quality within their borders. Under CAA section 110(k)(3), EPA has an obligation to act on State submittals. While we do not believe a rule for wineries is required for purposes of satisfying the section 182(b)(1)(B) BACM requirement,[45] we do believe that such a rule will strengthen the SJV's SIP, especially since VOC reductions are needed for ozone attainment. Thus, EPA is approving the commitment under sections 301(a) and 110(k)(3) as strengthening the SIP.

K. Approvability of Indirect Source Mitigation Measure

Comment 1: The California Building Industry Association (CBIA) and its Affiliate Associations located in the SJV comment that the Indirect Source Mitigation Program does not meet CAA criteria requiring control measures to provide quantifiable, surplus, enforceable, permanent, and adequately supported reductions in air emissions. Thus, CBIA recommends that the measure should not be approved.

Response: See section II.E., response to comment 4.

L. Windblown Dust Issues

Comment 1: A commenter (C. Swanson) cites an excerpt from the PM–10 Plan, Appendix G, Table G–15 ''BACM Comparative Analysis for ''On-Field Activities'' concerning the BACM justification discussion associated with the ''Other'' category of the District's proposed Ag CMP:

> The SJV does not have a windblown dust problem to anywhere near the extent of the other nonattainment areas. The SJV has some of the lowest average wind speeds in the country. No wind related exceedances have been recorded in the basin during the last three years. Wind speeds are highest during the spring when PM–10 levels are at their lowest. The majority of the fugitive dust emissions are generated from earth disturbing activities. Certain soil types and crops are more prone to windblown dust problems. The ''Other'' category will give the farmers with the potential to experience wind blown dust emissions the flexibility to address this issue with a CMP.

The commenter states that this excerpt provides a synopsis of the PM–10 Plan's characterizations of airflow in the valley and how it relates to the regulation of agricultural land use. The commenter believes the Plan's characterizations do not adequately portray the conditions in the entire valley and may not lead to proper regulatory actions. The commenter states that his study of the conditions of one dust storm on June 20, 2002 in Northwest Kern County contradicts the statements in the excerpt and that wind events on this side of the valley appear to have an episodic component related to a regular summer cycle of heating and cooling in the SJV.

Response: Below we respond to the commenter's specific comments on the statements cited from the Plan. In general, however, the information in Appendix G, Table G–15 reflects monitored PM–10 exceedances and the District's analysis of meteorological data on exceedance days. In contrast, the data provided by the commenter is not sufficient to support the conclusions made with regard to regulatory actions, given that wind speed data alone does not provide evidence of PM–10 concentrations.

Comment 2: C. Swanson disagrees with the Plan's assessment that the San Joaquin Valley Air Basin does not have a windblown dust problem to anywhere near the extent of the other [PM–10] nonattainment areas. Examination of Caltrans data for the southern San Joaquin Valley reveals that in the year 2002, Caltrans posted signs warning of low visibility due to windblown dust during all months of the year. Some locations had warnings posted four different times during the year.

Response: Caltrans windblown dust postings are based on field observations by Caltrans employees, as opposed to measured PM–10 concentrations. They do not reveal whether exceedances of the PM–10 standards occurred at the locations of the postings. Therefore, neither the District nor EPA can rely on them for purposes of identifying PM–10 exceedances. The Caltrans-reported events generally do not correlate with days on which PM–10 monitors exceeded the PM–10 standards.[46] This means that the Caltrans-reported events are not being recorded by the monitors and are therefore spatially limited. The District's monitors have detected some high hourly rates downwind for a few of the events, but not for substantial enough periods that the 24-hour PM–10 standard is exceeded.[47]

Comment 3: C. Swanson disputes the following statement in the PM–10 plan: ''The SJVAB has some of the lowest average wind speeds in the country. No wind related exceedances have been recorded in the basin during the last three years.'' Commenter states that while large areas in the center of the valley have very low average wind speeds, large areas around the periphery of the basin can be subject to periods of high wind velocity and windblown dust. The current siting of monitoring stations does not capture the air flow patterns on the western side of the valley in Kern County and therefore cannot be used to represent conditions in Western Kern County.

Response: The ambient monitoring network for the SJV operated by the District and CARB was designed to meet the requirements of EPA regulations at 40 CFR part 58. Monitoring for representative air flow patterns is not one of the criteria used to design a criteria pollutant monitoring network. The SJV 2003 PM–10 Plan did utilize meteorological data from the District's ambient monitoring network as well as other non-district monitoring networks, such as the Automated Surface Observing System (ASOS) sponsored by the Federal Aviation Administration,

[45] See above comments and responses in section II.A.2. and C.11.

[46] Letter from James Sweet, SJVUAPCO, to Doris Lo, EPA Region 9, April 15, 2004, page 2 (4/15/04 letter).

[47] 4/15/04 letter, page 2.

National Weather Service, the U.S. Department of Defense, and the California Irrigation Management Information System (CIMIS), in evaluating episodes for exceedance days at PM–10 monitors in the SJV. These networks included many meteorological sites in the western and southwestern portions of the SJV. During the episodes studied, high wind speeds were not observed at these western and southwestern meteorological sites. ''Meteorological Analysis Applied to the San Joaquin Valley Air Pollution Control District's 2003 PM–10 State Implementation Plan,'' SVUAPCD, DRAFT (May 29, 2003). The District acknowledges that no definitive statement can be made about peak PM–10 concentrations at Blackwells Corner absent a PM–10 monitoring site near the location; however, there are insufficient resources to saturate the valley with monitoring sites at a density that would be required to establish a definitive case for the entire Valley. Id., page 2. In accordance with EPA regulations, the District's monitoring sites are selected to evaluate exposure of populated areas to adverse air quality caused by anthropogenic activity. Low population on the west side of the SJV has resulted in a lack of monitors in that area. Id., pages 1 and 7. EPA has evaluated the adequacy of the PM–10 monitoring network for the SJV and concluded that ''* * * the network meets all applicable statutory and regulatory requirements and is adequate to support the technical evaluation of the PM–10 nonattainment problem in the [District's] plan.'' Evaluation of the Adequacy of the Monitoring Network for the San Joaquin Valley, California for the Annual and 24-Hour PM–10 Standards; Bob Pallarino, EPA Region 9, Air Division; September 22, 2003.

Comment 4: C. Swanson states that 2002 wind speed data collected at a CIMIS station in Blackwells Corner documents periods of high wind velocity during all times of the year, contrary to the PM–10 Plan's statement that wind speeds are highest during the spring when PM–10 levels are at their lowest. The Blackwells Corner data shows that more wind events occur during the summer period than the winter/spring period.

Response: The statements in the PM–10 Plan cited by the commenter concerning wind velocity provide an accurate, general characterization of the SJV. The District acknowledges that exceptions to the characterization of low wind speeds occur in passes, along ridges, on mountainous terrain and other areas of terrain influence that create slope flows.[48] The District's meteorological analysis of wind speeds associated with measured PM–10 exceedances found that they largely occurred during periods of low winds and stagnant conditions in the fall and winter.[49]

Comment 5: C. Swanson states that CIMIS data for Blackwells Corner indicates several days throughout the year with sustained periods of high wind velocity that exceed the 13 mph wind velocity threshold described in the PM–10 Plan as a point of possible entrainment of geological material.[50] The commenter provides a table of the aforementioned CIMIS wind data for Blackwells Corner. The commenter states that data from the nearby Lost Hills National Oceanic and Atmospheric Administration (NOAA) vertical profile corroborates the CIMIS data and some of the longest periods of sustained high winds are during the summer months when local soils may be dryer and have disturbed surfaces from agricultural activities.

Response: We agree that CIMIS data indicates several days throughout the year in the Blackwells Corner area with sustained periods of wind velocity capable of elevating fugitive dust from disturbed surfaces.[51] However, based on this information alone, we cannot conclude that the Blackwells Corner area or other areas in its immediate downwind vicinity are experiencing PM–10 exceedances. The Blackwells Corner wind velocities are not representative of typical wind velocities in other parts of the SJV, as evidenced by the District's compilation of wind speed data associated with PM–10 exceedance days. The District conducted a specific analysis of the days on which CIMIS sites at Blackwells Corner and other west-side CIMIS sites historically recorded elevated winds.[52] While one-in-six-day monitoring captured a representative sample of days where CIMIS sites recorded elevated winds (18% coincidence), the District did not find a correlation of those days with observed PM–10 exceedances.[53] Only five PM–10 exceedance days spanning a 13-year period were identified as associated with strong winds.[54] The PM–10 Plan does recognize that windblown dust can occur from agricultural disturbed surfaces by including windblown measures in the ''Other'' category in the proposed Ag CMP Program.

M. Transportation Conformity and the Trading Mechanism

Comment 1: The commenter (TPAs) references the trading mechanism discussion in the proposed rule (69 FR 5412, 5416–5417). This section of the proposal discusses the transportation conformity trading mechanism. The commenter requests a clarification on the requirement for a new analysis of the emission trading, for subsequent conformity findings, once the U.S. Department of Transportation (DOT) has approved a conformity finding which relied upon the trading mechanism. Specifically, the commenter requests that a new analysis of emissions trading be completed only when a new regional emissions analysis is required for the new conformity finding.

Response: EPA agrees with the commenter that a new analysis of trading is only required when a new regional emissions analysis is also required. Once the U.S. DOT has approved a conformity finding which relied upon the trading mechanism, the transportation planning agency cannot necessarily rely on that trading scenario for future conformity findings that require a new regional emissions analysis.

Comment 2: The commenter (TPAs) also requests that the proposed rule, which states that the trading mechanism can only be used once approved by EPA, be modified to state that the trading mechanism could be used upon an EPA finding that a budget is adequate. The commenter feels that existing language permits use of trading once budgets in the SIP are adequate.

Response: The commenter is correct that if an area has a trading mechanism in an approved SIP for a criteria pollutant, and that trading mechanism permits the trading of precursors and/or the pollutant, then the language of 40 CFR 93.124(c), the conformity rule, does permit trading to occur among pollutants or precursors for budgets once EPA finds the budgets adequate. However, the trading mechanism must be approved as part of the SIP before it can be used, even if adequate or approved budgets already exist. Section

[48] *Id.*, page 1.

[49] One recent exception is a May 20, 2002 Bakersfield-Golden exceedance that the District attributes to a large-scale wind episode involving thunderstorms and hail. 4/15/04 letter, page 2.

[50] Commenter also cites a 2003 report by V. Etyemezian of Desert Research Institute in support of relying on 13 mph as the appropriate wind velocity threshold needed to generate fugitive dust.

[51] The District acknowledges that CIMIS data reports 118 days in the Blackwells Corner area with winds over 13 mph.

[52] The District's analysis reviews CIMIS wind speed data between 1990 and the present for the top one-hundred values of maximum hours observed with winds over 13 mph, as well as with other related data sets.

[53] 4/15/04 letter, pages 3–4.

[54] *Id.*, page 4.

93.124(c) only allows trading among budgets for the purposes of conformity if there is an approved mechanism in the SIP to allow trading to take place. The provision in § 93.124(c) specifically states that:

> [a] conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the *implementation plan* establishes appropriate mechanisms for such trades.

Emphasis added. The references to the ''applicable implementation plan'' and the ''implementation plan'' in the second and last line of this paragraph are consistent with the definition for 'applicable implementation plan' in § 93.101 of the conformity rule. The definition states that: ''Applicable implementation plan is defined in section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirement of the CAA.'' Furthermore, the reference to the implementation plan submission is in regard to any SIP which establishes budgets, not one which establishes a trading mechanism.

EPA does not make adequacy findings on trading mechanisms in submitted SIPs. EPA's adequacy review is limited to determining whether the budgets in a SIP meet the criteria in § 93.118(e)(4). For more information regarding adequacy, please refer to the preamble of EPA's June 30, 2003, proposed rule, which includes our current adequacy policy to date (68 FR 38979–38984).

Comment 3: The commenter (Earth Matters) references the proposed rule at page 5415 (Section IV.B.2., second to last paragraph, fourth sentence and Footnote 7). This section of the proposal discusses the interconnections between conformity findings for subarea budgets by the multiple Metropolitan Planning Organizations (MPOs) in the SJV. The proposal clarified that if an individual MPO could not show conformity to their individual county budget, then the remaining MPOs in the SJV cannot make any new conformity determinations. The commenter requests that this requirement apply to Federal actions only.

Response: EPA cannot clarify that the action applies to Federal actions only since this requirement does apply to both actions by U.S. DOT and by MPOs in adopting conformity documents. This requirement is not a new requirement. Section 176(c) of the Clean Air Act clearly states that conformity applies in nonattainment and maintenance areas. Section 176(c) also states that the Federal government and MPOs cannot approve transportation activities unless they conform to a SIP, and SIPs are established for a nonattainment or maintenance area. In a nonattainment or maintenance area with more than one MPO, all MPOs must conform even if the SIP has established subarea budgets. If an individual MPO lapses, it has not demonstrated that it can conform to its subarea budgets. Therefore, there is no way for the other MPOs to show that their planned transportation activities still conform to the SIP until the lapse is resolved.

Comment 4: The commenter (Earth Matters) also requests that EPA add clarification that this requirement and associated clarifying language apply solely during a conformity lapse that results from a Transportation Improvement Plan (TIP) or Regional Transportation Plan (RTP) expiration only.

Response: EPA disagrees with the commenter. In an area with subarea budgets and more than one MPO, if conformity for one MPO lapses for any reason, the other MPOs in the area cannot determine conformity until the first MPO resolves its lapse. This prohibition on other MPOs applies whether the conformity lapse is caused by the expiration of a transportation plan or TIP, or any another reason, such as failure to determine conformity within 18 months of approval of a SIP that establishes new budgets.

In an area with more than one MPO, if one MPO lapses, the other MPOs in the area would not lapse immediately. Instead, the other MPOs can still proceed with projects in their current TIPs. However, these other MPOs could not make new conformity determinations until the lapsing MPO resolves the lapse by re-establishing conformity for its plan and TIP.

N. Other Comments

Comment 1: Several commenters noted the health issues caused by PM–10 and other pollutants. Commenters wanted clean air as soon as possible and no more delays.

Response: EPA believes that the 2003 PM–10 Plan provides a road-map towards meeting the PM–10 standards as soon as possible for the SJV.

Comment 2: One commenter (LaSalle) stated that the PM–10 standards and plan are built upon insubstantial evidence. Commenter stated that the PM–10 standard was last revised in 1987 and more recent studies needed to be addressed.

Response: The purpose of the 2003 PM–10 Plan is to achieve the PM–10 standards in the SJV. Evaluation of the PM–10 standards is outside the scope of the 2003 PM–10 Plan and this rulemaking. In addition to the PM–10 standards, EPA has promulgated standards for PM–2.5 (40 CFR 50.7) and is currently developing guidance for their implementation.

Comment 3: CRPE comments that the 2003 PM–10 Plan fails to comply with the requirements of the CAA and that EPA's approval of the Plan is nothing more than an attempt to avoid promulgating a Federal Implementation Plan (FIP).

Response: EPA's proposed approval provides detailed discussions of how each of the CAA requirements are adequately addressed by the 2003 PM–10 Plan. When possible, EPA prefers approving a State's plan requirements in lieu of promulgating a FIP. We have expedited our rulemaking to avoid a FIP for the SJV, but we do not believe that we proposed to approve an unapprovable plan.

Comment 4: EPA received comments (LaSalle) that the public comment period does not meet the requirements of due process. Given the complexity and technicality of the 2003 PM–10 Plan, comment suggests 180 days as a more appropriate timeframe for public review and comment.

Response: EPA provided a 30-day comment period which was extended for an additional 2 weeks, until March 19, 2004. The 2003 PM–10 Plan is a complicated document; however, prior to the publication of EPA's proposed rule, the District and State held public processes to discuss the Plan with the public. Numerous workshops were held prior to the SJV's Board's adoption of the 2003 PM–10 Plan in June 2003. Following that adoption, the State also provided a comment and response period before its adoption of the Plan and submittal to EPA.

Comment 5: EPA received comments (Jones) complaining about pollution from a cement plan in Tehachapi, California. Commenter wanted controls found in SJV's Regulation VIII applied to the source.

Response: Tehachapi, California is located in Eastern Kern County, outside of the SJV PM–10 nonattainment area. EPA Region 9 Enforcement Office and the Kern County Air Pollution Control Office has been notified of the complaint.

III. EPA Action

EPA is finalizing its approval pursuant to CAA section 110(k)(3) the following elements of the 2003 PM–10 Plan as meeting the CAA requirements applicable to serious PM–10 nonattainment areas that have failed to meet their attainment date:

(1) EPA is approving the emissions inventories as meeting the requirements of section 172(c)(3).

(2) EPA is approving the RACM/BACM demonstration for all significant PM–10 and NO_X sources in the SJV as meeting the requirements of sections 189(a)(1)(C) and 189(b)(1)(B). Approval of this demonstration with respect to fugitive dust sources regulated by SJVUAPCD Regulation VIII terminates all sanction, FIP, and rule disapproval implications of our February 26, 2003 action. 68 FR 8830.

(3) EPA is approving, as meeting the requirements of sections 179(d)(3) and 189(d), (a) the attainment demonstration, associated motor vehicle budgets and trading mechanism; (b) commitments to adopt and implement new, identified stationary, area and mobile source BACM to reduce PM–10 and NO_X emissions; (c) a commitment for the Indirect Source Mitigation Program; (d) a commitment for 10 tpd of NO_X and 0.5 tpd of PM–10 reductions from State mobile source measures; (e) and the commitment to submit a SIP revision by March 31, 2006 based on a mid-course review that will include an evaluation of the modeling from the CRPAQS and the latest technical information (inventory data, monitoring, etc.) to determine whether the level of emission reductions in the 2003 PM–10 Plan is sufficient to attain the PM–10 standards.

(4) EPA is approving under section 110(k)(3) and 301(a) as strengthening the SIP the commitments to adopt and implement VOC and SOx measures.

(5) EPA is approving the NO_X and PM–10 emissions levels necessary to meet the 5% annual reduction requirement in section 189(d).

(6) EPA is approving the reasonable further progress demonstration as meeting the requirements of section 172(c)(2) and 189(c)(1).

(7) EPA is approving the Plan as meeting the quantitative milestones requirement in section 189(c)(1).

(8) EPA is approving the PM–10 and NO_X motor vehicle emission budgets for purposes of transportation conformity for 2005, 2008, and 2010 and the associated trading mechanism for demonstrating conformity for years after 2010, under CAA section 176(c)(2)(A). These budgets are reproduced in EPA's proposed rule on the 2003 PM–10 Plan in a table printed at 69 FR 5416. As proposed, we are limiting this approval to last only until the effective date of our adequacy findings for new replacement budgets.[55] The trading mechanism is discussed in EPA's proposed rule at 69 FR 5416.

IV. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 26, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

[55] For further discussion of the rationale for, and effect of, this limitation, please see the proposed rule at 69 FR 5415, and EPA's promulgation of a limitation on motor vehicle emission budgets associated with various California SIPs, at 67 FR 69139 (November 15, 2002).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 28, 2004.

Deborah Jordan,

Acting Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by revising paragraph (c)(317) and adding paragraph (c)(327) to read as follows:

§ 52.220 Identification of plan.

(c) * * *

(317) The plan and amended regulation for the following APCD were submitted on August 19, 2003, by the Governor's designee.

(i) Incorporation by reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Rule 4901, adopted on July 15, 1993 and amended on July 17, 2003.

(*2*) 2003 PM10 Plan, San Joaquin Valley Plan to Attain Federal Standards for Particulate Matter 10 Microns and Smaller (all except ''Contingency Control Measures'' section, pages 4–53 to 4–55), adopted on June 19, 2003, and ''Regional Transportation Planning Agency Commitments for Implementation,'' dated April 2003 (Volume 3).

* * * * *

(327) The following plan was submitted on December 30, 2003 by the Governor's designee.

(i) Incorporation by reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Amendments to the 2003 San Joaquin Valley Plan to Attain Federal Standards for Particulate Matter 10 Microns and Smaller, adopted December 18, 2003.

* * * * *

[FR Doc. 04–11667 Filed 5–25–04; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Wednesday,
May 26, 2004

Part III

Environmental Protection Agency

40 CFR Part 52

Final Determination To Extend Deadline for Promulgation of Action on Section 126 Petition From North Carolina; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OAR–2004–0076; FRL–7667–3]

Final Determination to Extend Deadline for Promulgation of Action on Section 126 Petition From North Carolina

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is extending by six additional months the deadline for taking final action on a petition submitted by the State of North Carolina under section 126 of the Clean Air Act (CAA). The petition requests that EPA make findings that certain sources located in 13 States are significantly contributing to fine particulate matter and/or 8-hour ozone nonattainment or maintenance problems in North Carolina. Under the CAA, EPA is authorized to grant this time extension if EPA determines that the extension is necessary, among other things, to meet the purposes of the CAA's rulemaking requirements. By this document, EPA is making that determination.

DATES: *Effective Date:* This action is effective on May 18, 2004.

ADDRESSES: The EPA has established a docket for the action on North Carolina's section 126 petition under Docket ID No. OAR–2004–0076. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Air Docket is (202) 566–1742.

You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

FOR FURTHER INFORMATION CONTACT: For general information and policy questions, contact Carla Oldham, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539–02, Research Triangle Park, NC 27711, telephone (919) 541–3347, e-mail at *oldham.carla@epa.gov.* For legal questions contact Howard J. Hoffman, U.S. EPA, Office of General Counsel, Mail Code 2344A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone (202) 564–5582, e-mail at *hoffman.howard@epa.gov.*

SUPPLEMENTARY INFORMATION: Today's action is procedural and is set in the context of a separate action that EPA is taking to address the problem of interstate transport of fine particulate matter and 8-hour ozone and their precursors in the eastern half of the United States.

On January 30, 2004 (69 FR 4566), EPA proposed the ''Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule),'' now known as the Clean Air Interstate Rule. This action proposes to require 29 States and the District of Columbia to revise their State implementation plans (SIPs) to include control measures to reduce specified amounts of emissions of sulfur dioxide (SO2) and/or nitrogen oxides (NO_X). The proposal is designed to assure that the SIPs meet the requirements of CAA section 110(a)(2)(D), which mandates that SIPs contain adequate provisions prohibiting emissions that contribute significantly to nonattainment problems in downwind States. Controlling the pollution transport will assist the downwind States in achieving the fine particulate matter and 8-hour ozone national ambient air quality standards.

On March 19, 2004, EPA received a petition from the State of North Carolina filed under CAA section 126. Section 126 is related to section 110(a)(2)(D) and is also designed to remedy interstate pollution transport. Section 126(b) authorizes States or political subdivisions to petition EPA for a finding that major stationary sources or groups of sources in upwind States emit in violation of the prohibition of section 110(a)(2)(D), by contributing significantly to nonattainment problems in downwind States. If EPA makes such a finding, EPA is authorized to establish Federal emissions limits for the affected sources.

Under section 126(b), EPA must make the finding requested in the North Carolina petition, or deny the petition, within 60 days of the March 19, 2004, receipt of the petition. Under section 126(c), any existing sources for which EPA makes the requested finding must cease operations within 3 months of the finding, except that those sources may continue to operate if they comply with emission limitations and compliance schedules that EPA may provide to bring about compliance with the applicable requirements.

Section 126(b) further provides that EPA must allow a public hearing for the petition. In addition, EPA's action under section 126 is subject to the procedural requirements of CAA section 307(d). *See* section 307(d)(1)(N). One of these requirements is notice-and-comment rulemaking, under section 307(d)(3).

In addition, section 307(d)(10) provides for a time extension, under certain circumstances, for rulemaking subject to section 307(d). Specifically, section 307(d)(10) provides:

> Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of the subsection.

Section 307(d)(10) applies to section 126 rulemakings because the 60-day time limit under section 126(b) necessarily limits the period after proposal to less than 6 months.

In accordance with section 307(d)(10), EPA is today determining that the 60-day period afforded by section 126(b) is not adequate to allow the public and the Agency adequate opportunity to carry out the purposes of section 307(b). Specifically, the 60-day period is not sufficient for EPA to develop an adequate proposal on whether the sources identified in the section 126 petition contribute significantly to nonattainment problems downwind, and, further, to allow public input into the promulgation of any controls to mitigate or eliminate those contributions.

The determination whether upwind emissions contribute significantly to downwind nonattainment areas is highly complex. The proposed Clean Air Interstate Rule, which proposes a somewhat comparable determination, relies on extensive computer modeling of air quality emissions and ambient impacts therefrom in the large geographic region of the eastern half of the United States.

In action on the section 126 petition, EPA must make determinations that, generally, are at least as complex as those required for the Clean Air Interstate Rule. Moreover, if EPA determines that the petitions should be granted, EPA would promulgate

appropriate controls for the affected sources.

The EPA is in the process of determining what would be an appropriate schedule for action on the section 126 petition, in light of the complexity of the required determinations and the usefulness of coordinating generally with the procedural path for the Clean Air Interstate Rule. It is imperative that this schedule afford EPA adequate time to prepare a proposal that clearly elucidates the issues so as to facilitate public comments, as well as to afford the public adequate time to comment. The EPA is currently discussing an appropriate schedule with North Carolina.

Extending the date for action on the section 126 petition for 6 months is necessary to determine the appropriate overall schedule for action, as well as to continue to develop the technical analysis needed to develop a proposal.

II. Final Action

A. Rule

Today, EPA is determining, under CAA section 307(d)(10), that a 6-month period is needed to assure the development of an appropriate schedule for rulemaking on the North Carolina section 126 petition, which schedule would allow EPA adequate time to prepare a notice of proposed rulemaking that will best facilitate public comment, as well as allow the public sufficient time to comment. Accordingly, EPA is granting a 6-month extension to the time for rulemaking on the North Carolina section 126 petition. Under this extension, the date for action on the petition is November 18, 2004.

B. Notice-and-Comment Under the Administrative Procedures Act (APA)

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). The EPA believes that because of the limited time provided to make a determination that the deadline for action on the section 126 petition should be extended, Congress may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination is subject to notice-and-comment rulemaking, EPA evokes the good cause exception pursuant to the EPA, 5 U.S.C. 553(b)(3)(B). Providing for notice-and-comment would be impracticable because of the limited time provided for making this determination, and would be contrary to the public interest because it would divert Agency resources from the critical substantive review of the section 126 petition.

C. Effective Date Under the APA

Today's action is effective on May 18, 2004. Under the APA, 5 U.S.C.(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if the agency has good cause to mandate an earlier effective date. Today's action—a deadline extension—must take effect immediately because its purpose is to extend by 6 months the deadline for action on the petition. Moreover, EPA intends to use immediately the 6-month extension period to continue to develop an appropriate schedule for the ultimate action on the section 126 petition and to continue to develop the technical analysis needed for the notice of proposed rulemaking. These reasons support an effective date prior to 30 days after publication.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The OMB has exempted this regulatory action from Executive Order 12866 review. Accordingly, Executive Order 12866 does not apply to today's action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Today's rule does not create new requirements and is not subject to the Paperwork Reduction Act.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the ''good cause'' exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice-and-comment requirement.

Although this final rule is not subject to the RFA, EPA nonetheless has assessed the potential impact on small entities subject to the rule. Today's rule does not create new requirements for small entities or other sources.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rules with ''Federal mandates'' that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year.

The EPA has determined that these requirements do not apply to today's action because today's rulemaking is not a Federal mandate—rather, it simply extends the date for EPA to take action on a petition—and it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' 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.''

Today's action does not have federalism implications. It imposes no regulatory burdens. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

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 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. Today's action does not significantly or uniquely affect the communities of Indian tribal governments. As discussed above, today's action imposes no new requirements that would impose compliance burdens. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health 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.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it simply extends the deadline for EPA to take action on a petition and does not impose any regulatory requirements.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions 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. Today's action does not establish any new regulatory requirements.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (''NTTAA,'' Public Law 104–113 section 12(d) 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities that establish technical standards, unless to do so would be inconsistent with applicable law or otherwise impractical.

The NTTAA does not apply because today's action does not establish any new technical standards.

J. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

K. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

Under CAA section 307(b)(1), a petition to review today's action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days of May 18, 2004.

List of Subjects in 40 CFR Part 52

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

Dated: May 18, 2004.

Michael O. Leavitt,

Administrator.

[FR Doc. 04–11768 Filed 5–25–04; 8:45 am]

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Federal Register

Wednesday,
May 26, 2004

Part IV

Environmental Protection Agency

40 CFR Part 180

Imidacloprid; Order Denying Objections to Issuance of Tolerance, and Final Order Imidacloprid; Pesticide Tolerance; Final Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0152; FRL–7355–7]

Imidacloprid; Order Denying Objections to Issuance of Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final order.

SUMMARY: On four occasions in the first half of 2002, the Natural Resource Defense Council (NRDC) and various other parties filed objections with EPA to final rules under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) establishing pesticide tolerances for various pesticides. The objections apply to 14 pesticides and over 70 separate pesticide tolerances. Although the objections raise numerous pesticide-specific issues, they all focus on the potential risks that the pesticides pose to farm children. This order responds to NRDC's objections as to the imidacloprid tolerance on blueberries. The objections are denied as moot because this imidacloprid tolerance has expired. Because EPA is elsewhere in today's **Federal Register** reestablishing the imidacloprid tolerance on blueberries, EPA has treated NRDC's objections as comments on the petition to reestablish the blueberry tolerance and has explained in full in this document why NRDC's objections are not well taken.

ADDRESSES: EPA has established a docket for this action under Docket ID number OPP–2004–0152 All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whosedisclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: William Jordan, Office of Pesticide Programs, 7506C, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–4099; fax number: (703) 308–4776; e-mail address: *jordan.william@epa.gov*.

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I. General Information

A. Does this Action Apply to Me?

In this document EPA denies as moot objections to a tolerance action filed by NRDC. In addition to NRDC, this action will be of interest to the pesticide manufacturers and pesticide registrants whose product was the subject of the objections. Further, this action may be of interest to the following parties who have filed similar objections with EPA on other pesticide tolerances: Boston Women's Health Book Collective, Breast Cancer Action, Californians for Pesticide Reform, Commonweal, Lymphoma Foundation of America, NRDC, Northwest Coalition for Alternatives to Pesticides, Pesticide Action Network, North America, Pineros y Campesinos Unidos del Noroeste, SF-Bay Area Chapter of Physicians for Social Responsibility, and Women's Cancer Resource Center. Finally, this action may be of interest to agricultural producers, food manufacturers, or other pesticide manufacturers. Potentially affected categories and entities may include, but are not limited to:

- Industry, e.g., NAICS 111, 112, 311, 32532, Crop production, Animal

production, Food manufacturing, Pesticide manufacturing.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities who may be interested in this action.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at *http://www.epa.gov/*. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' and then look up the entry for this document under the **Federal Register**—Environmental Documents. You can also go directly to the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

2. *In person*. The Agency has opened a docket for this action under docket ID number OPP–2002–0057. Included in the docket are EPA documents specifically referenced in this action, any public comments received during an applicable comment period, and other information submitted by NRDC. The docket does not include any information claimed as CBI. The docket is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Introduction

A. What Action is the Agency Taking?

On four occasions in the first half of 2002, NRDC and various other parties filed objections with EPA to final rules under section 408 of FFDCA, 21 U.S.C. 346a, establishing pesticide tolerances for various pesticides. The objections apply to 14 pesticides and over 70 separate pesticide tolerances. Although the objections raise numerous pesticide-specific issues, they all focus on the potential risks that the pesticides pose to farm children. Further each of the objections makes two main assertions with regard to the pesticide tolerances in question:

1. That EPA has not properly applied the additional 10X safety factor for the protection of infants and children in section 408(b)(2)(C) of FFDCA.

2. That EPA has not accurately assessed the aggregate exposure of farm children to pesticide residues.

NRDC did not exercise the option provided in section 408(h) of FFDCA to request a hearing on its objections, but instead asked that the Agency rule on its objections on the basis of its written objections and attached submissions. Because the objections raised questions of broad interest, EPA published a representative copy of the objections in the **Federal Register** for comment, (67 FR 41628) (June 19, 2002) (FRL–7167–7), and made all of the objections available for public review on its website. This order responds to NRDC's objections as to the imidacloprid tolerance on blueberries.

EPA had planned to respond to the four sets of objections in a single order. That plan has been superceded by the December 31, 2003, expiration of the objected-to imidacloprid tolerance on blueberries, the demonstrable agricultural need for continuation of use of imidacloprid on blueberries, and NRDC's submission in June, 2003 of significant supplemental information on its objections. Technically, NRDC's objections to the imidacloprid tolerance on blueberries have become moot due to the expiration of the tolerance and this order denies them on that ground. Nonetheless, due to the fact that elsewhere in today's **Federal Register** EPA is re-establishing an imidacloprid tolerance on blueberries, EPA has treated the objections as a comment on the petition to re-establish the imidacloprid tolerance and is issuing in this denial order its planned response to the objections as a response to comments on the proposed establishment of the imidacloprid tolerance. If NRDC files the same objections to the re-established imidacloprid tolerance, EPA will re-issue this comment response as a response to NRDC's objection forthwith. EPA cannot issue its response to all four sets of NRDC's objections at this time because EPA has not completed reviewing supplemental information on the objections submitted by NRDC in June, 2003. As to imidacloprid, however, specific facts relating to that pesticide allow EPA to address all of the issues raised by the objections to that tolerance.

The body of this document contains the following sections. First, there is a background section which explains the applicable statutory and regulatory provisions, the relevant EPA science policy documents, and prior NRDC actions with regard to farm children. Second, there is a section setting forth in greater detail the substance of the objections. Third, a summary of the public comment is presented. Fourth, there is a section which denies theobjections to the imidacloprid tolerance as moot. Finally, EPA's detailed response to the issues raised by the objections on the imidacloprid tolerance is included as a part of its action in granting a permanent tolerance for imidacloprid on blueberries.

B. What is the Agency's Authority for Taking this Action?

The procedure for filing objections to tolerance actions and EPA's authority for acting on such objections is contained in section 408(g) of FFDCA and regulations at 40 CFR part 178. 21 U.S.C. 346a(g).

III. Statutory and Regulatory Background

A. Statutory Background

EPA establishes maximum residue limits, or ''tolerances,'' for pesticide residues in food under section 408 of FFDCA. 21 U.S.C. 346a. Without such a tolerance or an exemption from the requirement of a tolerance, a food containing a pesticide residue is ''adulterated'' under section 402 of FFDCA and may not be legally moved in interstate commerce. 21 U.S.C. 331, 342. Monitoring and enforcement of pesticide tolerances are carried out by the U.S. Food and Drug Administration (FDA) and the U. S. Department of Agriculture (USDA).

A pesticide tolerance may only be promulgated by EPA if the tolerance is ''safe.'' 21 U.S.C. 346a(b)(2)(A)(i). ''Safe'' is defined by the statute to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' 21 U.S.C. 346a(b)(2)(A)(ii). Section 408 of FFDCA directs EPA, in making a safety determination, to ''consider, among other relevant factors . . .available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources.'' 21 U.S.C. 346a(b)(2)(D)(vi). Other provisions address in greater detail exposure considerations involving ''anticipated and actual residue levels'' and ''percent of crop actually treated.'' See 21 U.S.C. 346a(b)(2)(E) and (F). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to risks posed

to infants and children. This provision directs that ''an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children.'' 21 U.S.C. 346a(b)(2)(C). EPA is permitted to ''use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children.'' Id. [The additional safety margin for infants and children is referred to throughout this notice as the ''children's safety factor.''] These provisions establishing the detailed safety standard for pesticides were added to section 408 of FFDCA by the Food Quality Protection Act of 1996 (FQPA), an Act that substantially rewrote this section of the statute.

Tolerances are established by rulemaking under the unique procedural framework set forth in FFDCA. Generally, the rulemaking is initiated by the party seeking the tolerance by means of filing a petition with EPA. See 21 U.S.C. 346a(d)(1). EPA publishes in the **Federal Register** a notice of the petition filing along with a summary of the petition, prepared by the petitioner. 21 U.S.C. 346a(d)(3). After reviewing the petition, and any comments received on it, EPA may issue a final rule establishing the tolerance, issue a proposed rule, or deny the petition. 21 U.S.C. 346a(d)(4). Once EPA takes final action on the petition by either establishing the tolerance or denying the petition, any affected party has 60 days to file objections with EPA and seek an evidentiary hearing on those objections. 21 U.S.C. 346a(g)(2). EPA's final order on the objections is subject to judicial review. 21 U.S.C. 346a(h)(1).

EPA also regulates pesticides under FIFRA, 7 U.S.C. 136 *et seq*. While the FFDCA authorizes the establishment of legal limits for pesticide residues in food, FIFRA requires the approval of pesticides prior to their sale and distribution, 7 U.S.C. 136a(a), and establishes a registration regime for regulating the use of pesticides. FIFRA regulates pesticide use in conjunction with its registration scheme by requiring EPA review and approval of pesticide labels and specifying that use of a pesticide inconsistent with its label is a violation of federal law. 7 U.S.C. 136j(a)(2)(G). In the FQPA, Congress integrated action under the two statutes by requiring that the safety standard under the FFDCA be used as a criterion in FIFRA registration actions as to pesticide uses which result in dietary risk from residues in or on food, 7 U.S.C. 136(bb), and directing that EPA coordinate, to the extent practicable, revocations of tolerances with pesticide cancellations under FIFRA. 21 U.S.C. 346a(l)(1).

B. Assessing Risk Under the FFDCA

In assessing and quantifying non-cancer risks posed by pesticides under the FFDCA as amended by the FQPA, EPA first determines the toxicological level of concern and then compares estimated human exposure to this level of concern. This comparison is done through either calculating a safe dose in humans (incorporating all appropriate safety factors) and expressing exposure as a percentage of this safe dose (the reference dose (RfD) approach) or dividing estimated human exposure into the lowest dose at which no adverse effects from the pesticide are seen in relevant studies (the margin of exposure (MOE) approach). How EPA determines the level of concern, chooses safety factors, and estimates risk under these two approaches is explained in more detail below.

For dietary risk assessment (other than cancer), the dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern. However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. A safety or uncertainty factor is then applied to this toxicological level of concern to calculate a safe dose for humans, usually referred to by EPA as an acute or chronic reference dose (acute RfD or chronic RfD). The RfD is equal to the NOAEL divided by all applicable safety or uncertainty factors. Typically, a safety or uncertainty factor of 100 is used, 10X to account for uncertainties inherent in the extrapolation from laboratory animal data to humans and 10X for variations in sensitivity among members of the human population as well as other unknowns. Further, under the FQPA, an additional safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different factor. To quantitatively describe risk using the RfD approach, estimated exposure is expressed as a percentage of the RfD. Dietary exposures lower than 100% of the RfD are generally not of concern.

For non-dietary, and combined dietary and non-dietary, risk assessments (other than cancer), the same safety factors are used to determine the toxicological level of concern. For example, when 1,000 is the appropriate safety factor (10X to account for interspecies differences, 10X for intraspecies differences, and 10X for FQPA), the level of concern is that there be a 1,000-fold margin between the NOAEL from the toxicology study identified as appropriate for use in risk assessment and human exposure. To estimate risk, a ratio of the NOAEL to aggregate exposures (MOE = NOAEL/exposure) is calculated and compared to the level of concern. In contrast, to the RfD approach, the higher the MOE, the safer the pesticide. Accordingly, if the level of concern for a pesticide is 1,000, MOE's exceeding 1,000 would generally not be of concern.

For cancer risk assessments, EPA generally assumes that any amount of exposure will lead to some degree of cancer risk. Using a model based on the slope of the cancer dose-response curve in relevant studies, EPA estimates risk in terms of the probability of occurrence of additional cancer cases as a result of exposure to the pesticide. An example of how such a probability risk is expressed would be to describe the risk as one in one hundred thousand (1×10^{-5}), one in a million (1×10^{-6}), or one in ten million (1×10^{-7}). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. No further discussion of cancer risk assessment is included because imidacloprid has not been identified as posing a cancer risk.

C. Science Policies

As part of implementation of the major changes to section 408 of FFDCA included in FQPA, EPA has issued a number of policy guidance documents addressing critical science issues. Of particular interest to the NRDC objections are the science policies covering the children's safety factor, aggregate pesticide exposure, and the population percentile of exposureused in estimating aggregate exposure.

1. *Children's Safety Factor Policy*. On January 31, 2002, EPA released its science policy guidance on the children's safety factor. (Ref. 48), [hereinafter referred to in the text as the ''Children's Safety Factor Policy'']. That policy had undergone an intensive and extended process of public comment as well as internal and external science peer review. An EPA-wide task force was established to consider the children's safety factor in March 1998. Taking into account reports issued by

the task force on both toxicity and exposure issues, EPA's OPP released a draft children's safety policy document in May 1999. That document was subject to an extended public comment period as well as review by the FIFRA Scientific Advisory Panel. Id. at 5.

The Children's Safety Factor Policy emphasizes throughout that EPA interprets the children's safety factor provision as establishing a presumption in favor of application of an additional 10X safety factor for the protection of infants and children. Id. at 4, 11, 47, A-6. Further, EPA notes that the children's safety factor provision permits a different safety factor to be substituted for this default 10X factor only if reliable data are available to show that the different factor will protect the safety of infants and children. Id. Given the wealth of data available on pesticides, however, EPA indicated a preference for making an individualized determination of a protective safety factor if possible. Id. at 11. EPA stated that use of the default factor could under- or over-protect infants and children due to the wide variety of issues addressed by the children's safety factor. Id. EPA noted that ''[i]ndividual assessments may result in the use of additional factors greater or less than, or equal to 10X, or no additional factor at all.'' Id. Because EPA thought that individualized assessments would be able to be made in most cases, EPA indicated that ''this guidance document focuses primarily on the considerations relevant to determining a safety factor 'different' from the default 10X that protects infants and children. Discussions in this document of the appropriateness, adequacy, need for, or size of an additional safety factor are premised on the fact that reliable data exist for choosing a 'different' factor than the 10X default value.'' Id. at 12.

In making such individual assessments regarding the magnitude of the safety factor, EPA stressed the importance of focusing on the statutory language that ties the children's safety factor to concerns regarding potential pre- and post-natal toxicity and the completeness of the toxicity and exposure databases. Id. at 11-12. As to the completeness of the toxicity database, EPA recommended use of a weight of the evidence approach which considered not only the presence or absence of data generally required under EPA regulations and guidelines but also the availability of ''any other data needed to evaluate potential risks to children.'' Id. at 20. EPA indicated that the principal inquiry concerning missing data would center on whether the missing data would significantly affect calculation of a safe exposure level (commonly referred to as the Reference Dose (RfD)). Id. at 22; see 67 FR 60950, 60955 (Sept. 27, 2002) (finding no additional safety factor necessary for triticonazole despite lack of developmental neurotoxicity (DNT) study because the ''DNT is unlikely to affect the manner in which triticonazole is regulated.''). When the missing data are data above and beyond general regulatory requirements, EPA indicated that the weight of evidence would generally only support the need for an additional safety factor where the data ''is being required for 'cause,' that is, if a significant concern is raised based upon a review of existing information, not simply because a data requirement has been levied to expand OPP's general knowledge.'' (Ref 48 at 23). Finally, with regard to the developmental neurotoxicity study (DNT), EPA listed several important factors addressing the weight of evidence bearing on the degree of concern when such a study has been required but has not yet been completed. Id. at 24. Moreover, EPA reiterated that, like any other missing study, the absence of the DNT does not trigger a mandatory requirement to retain the default 10X value, but rather depends on an individualized assessment centering on the question of whether ''a DNT study is likely to identify a new hazard or effects at lower dose levels of the pesticide that could significantly change the outcome of its risk assessment . . . '' Id.

As to potential pre- and post-natal toxicity, the Children's Safety Factor Policy lists a variety of factors that should be considered in evaluating the degree of concern regarding any identified pre- or post-natal toxicity. Id. at 27-31. As with the completeness of the toxicity database, EPA emphasized that the analysis should focus on whether any identified pre- or post-natal toxicity raises uncertainty as to whether the RfD is protective of infants and children. Id. at 31. Once again, the presence of pre- or post-natal toxicity, by itself, was not regarded as determinative as to the children's safety factor. Rather, EPA stressed the importance of evaluating all of the data under a weight of evidence approach focusing on the safety of infants and children. Id.

In evaluating the completeness of the exposure database, EPA explained that a weight of the evidence approach should be used to determine the confidence level EPA has as to whether the exposure assessment ''is either highly accurate or based upon sufficiently conservative input that it does not underestimate those exposures that are critical for assessing the risks to infants and children.'' Id. at 32. EPA described why its methods for calculating exposure through various routes and aggregating exposure over those routes generally produce conservative exposure estimates—i.e. health-protective estimates due to overestimation of exposure. Id. at 40-43. Nonetheless, EPA emphasized the importance of verifying that the tendency for its methods to overestimate exposure in fact were adequately protective in each individual assessment. Id. at 44.

2. *Aggregate exposure policies*. As mentioned above, the FQPA-added safety standard directs that the safety of pesticide residues in food be based on ''aggregate exposure'' to the pesticide. 21 U.S.C. 346a(b)(2)(A)(ii). Aggregate exposure to a pesticide includes all ''anticipated dietary exposure and all other exposures for which there is reliable information.'' Id. The statute makes clear that in assessing aggregate exposure pertaining to a pesticide EPA must consider not only exposure to the pesticide in the food covered by the tolerance in question but exposure to the pesticide as a result of other tolerances and from ''other non-occupational sources.'' Id. Section 346a(b)(2)(D)(vi). Further, the statute directs EPA to consider aggregate exposure to other substances related to the pesticide so long as that exposure results from a non-occupational source. Id. Section 346a(b)(2)(D)(vi). In November 2001, EPA released a science guidance document entitled *General Principles for Performing Aggregate Exposure and Risk Assessments*. This document deals primarily with the complex subject of integrating distributional and probabilistic techniques into aggregate exposure analyses. (Ref. 49).

More relevant to the current objections, is the science guidance document issued in March 2000 addressing the population percentile of exposure used in making acute exposure estimates for applying the safety standard under section 408 of FFDCA. (Ref. 52). Traditionally, EPA had used the 95th percentile of exposure in acute dietary exposure assessments as representing a reasonable worst case scenario. Id. at 15. Due to the very conservative (health-protective) assumptions used for acute exposure assessments, the 95th percentile was viewed as a reasonable approximation of an exposure level not likely to be exceeded by any individuals. Id. at 15-17. Generally, such an approach assumes that all crops for which there is a tolerance are treated with the

pesticide and all treated crops have residues at the highest level legally permitted.

More recently, because of the availability of better data on residue values and new risk assessment techniques, EPA has restructured its approach to the use of population exposure percentiles in making safety determinations for acute risks under section 408 of FFDCA. (Ref. 52). EPA has retained the 95th percentile as the starting point of analysis for worst case (tolerance level) assessments. EPA, however, generally uses higher percentiles of exposure when less conservative assumptions are made concerning residue values. Id. For example, beginning in the late 1990's, EPA has increasingly relied upon probabilistic assessment techniques for assessing acute dietary exposure and risk. Because EPA generally uses much more realistic exposure values (e.g., monitoring data on pesticide levels in food) in conducting probabilistic assessments, a higher population exposure percentile was generally found to be necessary to ensure that exposure for the overall population was not understated. The Percentile Policy explains and defends EPA's choice of the 99.9th percentile as a starting point for evaluating exposure and acute risk with probabilistic assessments.

EPA confirmed in the Percentile Policy document that it would generally continue to use the 95th percentile of exposure for deterministic acute risk assessments that used worst case exposure assumptions. Id. at 17, 29. The conservative (health-protective) nature of this approach was confirmed by data EPA cited showing that deterministic assessments of exposure at the 95th percentile assuming residues at tolerance levels regularly result in exposure predictions significantly higher than probabilistic exposure estimates of the 99.9th percentile using monitoring data. Id. at 16-17.

Importantly, EPA's Percentile Policy makes clear that in choosing a population percentile to estimate exposure, EPA is not intending to define the portion of the population that is to be protected. The policy explicitly states that: ''OPP's goal is to regulate pesticides in such a manner that everyone is reasonably certain to experience no harm as a result of dietary and other non-occupational exposures to pesticides.'' Id. at 28.

D. NRDC Farmworker Children Petition

On October 22, 1998, NRDC and 58 other public interest organizations and individuals submitted a petition to EPA asking that EPA ''find that farm children are a major identifiable subgroup and must be protected under FQPA when setting allowable levels of pesticide residue in food.'' (Ref. 36 at 2). The Petition claims that ''[a]n increasing body of scientific evidence, including biomonitoring data and residential exposure studies, indicates that farm children face particularly significant exposures and health risks from pesticides.'' Id. at 3. In addition to requesting the ''major identifiable subgroup'' designation, the Petition also asked that EPA use the children's safety factor to protect farm children, require additional exposure data on farm children exposure and not issue any new tolerances until such data are available, deny registration for any pesticide without a validated method for detecting residues in food, increase research into issues concerning farm children exposure to pesticides, and honor the President's Executive order on Environmental Justice.

Although EPA prior to this action has not issued a formal response to the petition, it has undertaken numerous steps to ensure that it is adequately protecting farm children including both initiating data gathering on exposure of children in agricultural areas to pesticides and programs to enhance compliance with label directions designed to minimize any bystander exposures to pesticides that could occur. Data gathering activities include EPA participation in the following studies:

National Agricultural Workers Survey (NAWS). EPA and the National Institute for Occupational Safety and Health (NIOSH) are currently providing funding for the NAWS, an ongoing effort by the Department of Labor. The NAWS is the only national information source on the working and living conditions of U.S. farmworkers and their families. EPA is working with the Department of Labor in analyzing over 20,000 interviews since the survey's onset to look at farm worker experiences over time. The interviews include questions concerning the following: Demographics, farmworkers' job mobility, day care arrangements, access to medical care, participation in pesticide training, exposures to pesticides, and reports of pesticide illness. Results from this survey, along with other studies, will assist EPA in addressing issues of pesticide exposures to farmworkers and any secondary exposures to their families. Additional information on the NAWS survey can be found at *http:// www.dol.gov/asp/programs/agworker/naws.htm.*

Agricultural health study. The National Cancer Institute (NCI), EPA, NIOSH, and the National Institute of Environmental Health and Safety are conducting a long-term epidemiology study of 90,000 certified pesticide applicators and their families in North Carolina and Iowa. The study is looking at both cancer and non-cancer endpoints using periodic surveys of the population. Pesticide use practices and health outcomes are being examined in detail. Additionally, scientists are conducting other studies on this cohort to learn further about exposures and potential effects, including birth defects, Parkinson's disease, asthma, and other disease endpoints. As part of the Agricultural Health Study, field work in Iowa is being conducted, and over the next three years detailed exposure analyses on a sub-sample of families using various agricultural pesticides will be completed. Some initial results have already been published for high exposure events and effects to the eye. A detailed listing of these studies and a number of publications already reporting the results of the Agricultural Health Study can be found at *http:// www.aghealth.org/.*

The Agency is also pursuing several other research efforts likely to provide additional information about any pesticide exposure to farmworkers and their children:

National Human Exposure Assessment Survey (NHEXAS). EPA developed this survey in the early 1990s to provide critical information about multi-pathway, multi-media population exposure distribution to chemicals. The data have been collected and the database is now being compiled. EPA expects to have the information accessible on the Internet later this year.

Children's total exposure to persistent pollutants. This study, conducted by EPA, will add to our understanding of any pesticide exposures to farmworker families. The data collection for this study, initiated this year, should be completed and available in 2004.

In terms of actions taken to enhance protections to children so as to avoid bystander-type exposures, EPA has numerous programs and materials focusing upon pesticide safety issues for farm workers and their families both at the national and regional level. A brief overview of EPA's approaches will be discussed here. However, more information about EPA's farm worker efforts across its regional offices can be found in the docket for this action.

An overview of what EPA is doing on the national level includes an assessment of the EPA's 1992 Worker Protection Standard (WPS). See 40 CFR part 170. The Worker Protection Standard is a regulation intended to

help reduce the risk of pesticide poisonings and injuries among agricultural workers and handlers of agricultural pesticides. The WPS offers protections to over three and a half million people who work with pesticides at over 560,000 workplaces. The WPS contains requirements for pesticide safety training, notification of pesticide applications, use of personal protective equipment, restricted entry intervals following pesticide application, decontamination supplies, and emergency medical assistance. The national overview of implementation and enforcement of WPS programs has been completed and recommendations are being compiled. The national assessment of WPS was a collaborative effort of EPA, the USDA, the Department of Labor, the Department of Health and Human Services (HHS), States, farm workers, and farmers. The reassessment effort included a great amount of stakeholder input, and has led to the development of a variety of pilot programs intended to improve the Agency's outreach to farm workers.

Other examples of activities conducted at the national level include the Agency's cooperative agreement with the Association of Farm Worker Opportunity Programs (AFOP) through which EPA funds the National Pesticide Safety Education Program for agricultural workers and farm worker children. Working with Americorps members, AFOP trains 25,000 farm workers and farm worker children every year about pesticide safety using Americorps members in over 50 sites in 16 states. AFOP conducts pesticide safety training for children at childcare centers, schools, churches, and community centers, and has developed a handbook in Spanish. Also, through EPA funding, AFOP has developed radio programs targeted at preventing pesticide poisonings of children.

Also on the national level, EPA has initiated a program with the Migrant Head Start Program (MHS) to develop materials and training for MHS on pesticide safety for migrant families with specific attention to protecting children from pesticides. MHS is designed to provide comprehensive Head Start services and programming to migrant families and their children. A total of 25 grantees and 41 delegate agencies provide services in 33 States and serve over 30,000 migrant children, and 25,000 children of seasonal workers, ranging in age from birth to 5 years. The MHS program has a unique emphasis on serving infants and toddlers as well as pre-school age children, so they will not have to be cared for in the fields, or left in the care of very young siblings while parents are working. MHS also teams with Americorps to provide refresher training on pesticide safety.

EPA on a national level, has also been involved in the development of two videos on pesticide safety for farmworkers and their families. The video, ''Chasing the Sun/Siguiendo El Sol,'' is a bilingual farmworker pesticide safety training video designed to comply with the agricultural worker training requirements mandated under the Worker Protection Standard. It was developed by the National Center for Farmworker Health and funded through an interagency agreement between EPA and HHS Migrant Health Program. This video is available through NCEPI and the National Center for Farmworker Health.

Another video, entitled *The Playing Field* is a bilingual pesticide safety training video for farmworker families. Through a story about a girl poisoned by playing in a treated field, the video teaches farmworkers and farmworker children about the dangers of pesticides and how to protect themselves from pesticides. The video was developed by the National Center for Farmworker Health and funded through an interagency agreement between EPA and the HHS Migrant Health Program. The video is available through the National Center for Farmworker Health.

Finally, EPA's regional offices have performed, and are performing, a number of outreach activities. These activities can be divided into three general categories: Direct outreach; partnerships, where the Agency provides funding and/or technical assistance, and research. Examples of EPA's activities on pesticide safety for farm workers and their families can befound in EPA's docket.

IV. NRDC Objections

A. In General

During the first half of 2002, NRDC submitted four separate sets of objections on various pesticide tolerances. The dates of the objections and the pesticides involved are captured in Table 1 of this unit.

TABLE 1.—OBJECTIONS SUBMITTED

Date submitted	Pesticides involved	FR citations (respectively)
February 25, 2002	Halosulfuron-methyl, pymetrozine	66 FR 66,333 (December 26, 2001); 66 FR 66,778 (December 27, 2002); 66 FR 66,786 (December 27, 2001)
March 19, 2002	Imidacloprid, mepiquat, bifenazate, zeta-cypermethrin, diflubenzuron	67 FR 2580 (January 18, 2002); 67 FR 3113 (January, 23, 2002); 67 FR 4913 (February 1, 2002); 67 FR 6422 (February 12, 2002); 67 FR 7085 (February 15, 2002)
May 7, 2002	2,4-D	67 FR 10622 (March 8, 2002)
May 20, 2002	Isoxadifen-ethyl, acetamiprid, propiconazole, furilazole, fenhexamid, fluazinam	67 FR 12,875 (March 20, 2002); 67 FR 14,649 (March 27, 2002); 67 FR 14,866 (March 28, 2002); 67 FR 15,727 (April 3, 2002); 67 FR 19,114 (April 18, 2002); 67 FR 19,120 (April 18, 2002)

See Objections to the Establishment of Tolerances for Pesticide Chemical Residues: Halosulfuron-methyl and Pymetrozine Tolerances (filed February 25, 2002) [hereinafter cited as Halosulfuron-methyl Objections]; Objections to the Establishment of Tolerances for Pesticide Chemical Residues: Imidacloprid, Mepiquat, Bifenazate, Zeta-cypermethrin, and Diflubenzuron Tolerances (filed March 19, 2002) [hereinafter cited as Imidacloprid et al. Objections], Objections to the Establishment of Tolerances for Pesticide Chemical Residues: 2,4-D Tolerances (filed May 7, 2002) [hereinafter cited as 2,4-D Objections]; Objections to the Establishment of Tolerances for Pesticide Chemical Residues: Isoxadifen-ethyl, Acetamiprid, Propiconazole, Furilazole, Fenhexamid, and Fluazinam Tolerances (filed May 20, 2002) [hereinafter cited as Isoxadifen-ethyl et al. Objections]. NRDC was joined in the objections concerning 2,4-D by the following

public interest and/or advocacy organizations: Boston Women's Health Book Collective, Breast Cancer Action, Californians for Pesticide Reform, Commonweal, Lymphoma Foundation of America, Northwest Coalition for Alternatives to Pesticides, Pesticide Action Network North America, Pineros y Campesinos Unidos del Noroeste, SF-Bay Area Chapter of Physicians for Social Responsibility, and Women's Cancer Resource Center.

This order responds to the objections filed on March 19, 2002, but only to the extent those objections apply to the pesticide imidacloprid and the tolerance for imidacloprid on blueberries.

B. Generic Issues

NRDC raises a myriad of claims in its objections to the imidacloprid tolerance. Most of these claims fall fairly neatly into three categories:

- Children's safety factor issues.
- Aggregate exposure issues.
- Issues regarding use of findings from hazard studies in calculating safe exposure levels— the ''no observed effect level'' (NOEL) versus ''no observed adverse effect level'' (NOAEL) and the ''lowest observed adverse effect level'' (LOAEL) questions.

In describing these objections, citation is made generally to the objections filed on the imidacloprid tolerance; however, one of the other sets of objections is referenced if it provides further clarification.

1. *Children's safety factor issues*. For imidacloprid, EPA decided to use an additional safety factor for the protection of infants and children that is different from the default 10X value. NRDC claims that EPA erred in doing so due to the ''significant toxicity and exposure data gaps'' corresponding to the tolerance established. See, e.g., Imidacloprid et al. Objections at 3. Three types of data gaps are cited by NRDC. First, NRDC notes that EPA has required a developmental neurotoxicity study but such study has not yet been submitted. Pointing to various EPA documents recommending that this study be widely required and EPA's specific finding that this study is required as to imidicloprid, NRDC argues that use of a factor different than 10X is precluded. Second, NRDC claims EPA lacks ''pesticide-specific data on water-based exposure'' on imidacloprid. See, e.g., Imidacloprid et al. Objections at 6. NRDC argues that exposure estimates EPA calculated through the use of models cannot qualify as the ''reliable data'' needed to vary from the default 10X value. Id. Third, NRDC claims that ''EPA failed to consider important exposure routes for millions of infants and children, including exposure to children living on farms and who accompany their parents into farm fields [], and exposure from spray drift.'' Isoxadifen-ethyl et al. Objections at 5. Fourth, NRDC asserts that EPA is missing a prospective groundwater study on imidacloprid and a short-term residential risk assessment. Imidacloprid Objections at 5. Finally, NRDC argues that EPA lacks data on regional blueberry consumption and thus has potentially underestimated exposure in blueberry-producing states.

2. *Aggregate exposure issues*. NRDC raises several issues relating to whether EPA properly estimated ''aggregate exposure'' for imidacloprid. First, NRDC argues that farm children are a ''major identifiable subgroup'' and that EPA has failed ''to consider information concerning the sensitivities and exposures of farm children as a major identifiable subgroup'' in conducting its aggregate exposure assessment. According to NRDC, farm children have unique exposures to pesticides ''from their parents' clothing, dust tracked into their homes, contaminated soil in areas where they play, food eaten directly from the fields, drift from aerial spraying, contaminated well water, and breast milk.'' Imidacloprid et al. Objections at 12. Further, NRDC asserts farm children's exposure is increased because they ''often accompany their parents to work in the fields . . . .'' Id. NRDC cites various studies collected in its Farm Children Petition as well as more recent studies in support of these claims. Imidacloprid et al. Objections at 12–13. Second, NRDC argues that EPA's aggregate exposure assessment is flawed for these pesticides because EPA did not consider the added exposure to pesticides that farmworkers receive as a result of their occupation. Id. at 14. NRDC states that EPA's interpretation of the statute as excluding occupational exposure is incorrect. Id. Third, NRDC argues that for imidacloprid, EPA has, in effect, underestimated aggregate exposure by using the 95th population percentile of exposure instead of the 99.9th percentile in determining whether exposure to the pesticide meets the safety standard. Imidacloprid et al. Objections at 19. NRDC claims that this is inconsistent with existing Agency policy. Id.

3. *Reliance on LOAELs and NOAELs*. NRDC asserts that, in the absence of identifying a NOEL in relevant animal studies, EPA cannot make a safety finding under section 408(b)(2)of FFDCA. In support of this argument, NRDC cites to legislative history using the term NOEL. NRDC calls particular attention to the instances where EPA determined safety relying on a LOAEL. In this regard, it asserts that EPA used a LOAEL in making a safety finding for acute and chronic toxicity for imidacloprid. Imidacloprid et al. Objections at 18.

4. *Other issues*. NRDC claims that the EPA failed to comply with the statutory requirements pertaining to the use of percent crop treated for chronic risk assessments with regard to the imidacloprid blueberry tolerance. NRDC asserts that the use of national percent crop treated data cannot provide a valid basis for estimating exposure in Michigan and New Jersey, and, in fact, is likely to understate exposure in those states. Further, NRDC argues that EPA erred by relying on national consumption data instead of regional data from New Jersey and Michigan in estimating the risk posed by imidacloprid. Finally, NRDC, in comments it filed on its objections, claims that the emergency exemption approved under FIFRA authorizing the use of imidacloprid on blueberries in Michigan did not meet the standard in 40 CFR 166.3(d) for the granting of such exemptions.

V. Public Comment

A. General

On June 19, 2002, EPA published a notice in the **Federal Register** calling attention to and requesting comments on the Halosulfuron-methyl et al. Objections, Imidacloprid et al. Objections, and the 2,4-D Objections. 67 FR 41628 (June 19, 2002). As part of that notice, EPA published the full text of the Imidacloprid et al. Objections in the **Federal Register**. A period of 60 days was initially allowed for comment but that period was extended twice and was closed on October 16, 2002. See 67 FR 58536 (September 17, 2003); 67 FR 53505 (August 16, 2002). In addition to a large number of form letters (principally supporting the objections) and the NRDC's comments mentioned in Unit V.B., EPA received roughly 20 sets of substantive comments. These comments were for the most part from pesticide manufacturers and each requested denial of the objections. The most significant of these comments that pertain to imidacloprid are summarized in Unit V.B. EPA has not repeated comments in instances where they were made by more than one commenter.

B. Individual Comments

1. *The FQPA Implementation Working Group*. Extensive comments were filed by the FQPA Implementation Working Group (IWG), an organization comprised of associations representing pesticide

manufacturers, growers, and food processors. (Ref. 21). The IWG comments provided two alternative approaches as to why the NRDC's objections should be denied. First, the IWG asserted that EPA has misinterpreted the concept of ''aggregate exposure'' ever since passage of the FQPA, and once this interpretation is corrected, it becomes clear that the objections, for the most part, are flawed. Second, in the alternative, the IWG, assuming the EPA's aggregate exposure interpretation is retained, explained why the objections still are without merit.

The IWG argues that, under the safety standard in section 408 of FFDCA, 21 U.S.C. 346a, the concept of aggregate exposure to pesticide chemical residues is restricted to aggregate exposure to pesticide residues in food. Id. at 5-6. To support this interpretation, the IWG cites to language in the safety standard tying aggregate exposure to exposure to ''pesticide chemical residues.'' The term ''pesticide chemical residue,'' the IWG notes, is defined as ''a residue in or on raw agricultural commodity or processed food of . . . a pesticide chemical . . . .'' 21 U.S.C. 321(q). Under the IWG interpretation, EPA would not be permitted to consider, in making safety determinations on tolerances, exposures to pesticides in drinking water, exposures to pesticides resulting from application of pesticides in residences or public spaces, or most of the farm children exposures forming the basis of NRDC's objections. Such an interpretation clearly defeats most of the NRDC's claims regarding the children's safety factor and estimation of aggregate exposure.

The IWG also offers a backup legal argument which would, in execution, reach much the same result. It asserts that even if non-food exposure is properly considered under section 408 of FFDCA, any non-food exposure must meet the ''reliable data'' requirement in section 408(b)(2)(ii) of FFDCA. The IWG defines ''reliable data'' to mean ''information to allow OPP to make a reasonable estimate of the actual, real-world exposure distribution to add to information on dietary exposure so that probabilistic estimates of aggregate exposure can be made.'' Id. at 10. According to the IWG, the EPA generally does not have data meeting this standard as to ''exposure from drinking water or from residential or other non-occupational exposure routes.'' Id. at 9. Thus, the IWG's legal interpretation of the ''reliable data'' requirement basically gets the IWG to the same place—EPA should not be considering non-food pesticide exposures in making safety determinations under section 408.

Not resting on these legal arguments, the IWG provided detailed comments on several other of the claims in the NRDC objections, including the following:

a. *Drinking water exposure models*. Noting that NRDC claims that EPA's drinking water models are not conservative, the IWG points out that NRDC ''gives no reasons for this assertion.'' Id. at 12. The IWG takes the contrary view arguing that the models are very health protective (conservative) ''because their input parameters are extremely conservative.'' Id. at 11. In support, the IWG notes that EPA models ''assume maximum [pesticide] application rates, 100% of crop area treated with a maximum fraction of the watershed planted to the modeled crop, maximum number of applications per year, minimum application intervals for multiple applications of the pesticide, and upper-bound aerobic half-life estimates in soil.'' Id. at 12. The IWG also cites to data collected by EPA and the U.S. Geological Survey showing ''concentrations of 178 pesticides and their degradation products in both raw surface water and finished drinking water from twelve water-supply reservoirs were all substantially less than those predicted by EPA's computer models, FIRST and PRZM/EXAMS-Index Reservoir.'' Id.

b. *Farm children subgroup*. The IWG argues that NRDC's farm children subgroup is not an ''identifiable subgroup'' within the meaning of the statute. Rather, the IWG contends the NRDC's subgroup is ''a whole series of different groups, including children who live on farms, children who play near agricultural land, children who attend schools near agricultural land, children who work on farms, children whose family members work on farms, children whose family members handle pesticides as part of their jobs (whether on farms or not), and children who live in ''agricultural communities'' (whatever that means).'' Id. at 13. The IWG asserts that these groups ''have nothing in common other than that they are all children.'' Id. Further, the IWG argues that the FQPA directs EPA to consider ''major identifiable subgroups of consumers'' and that NRDC has not demonstrated that there is anything identifiable about the consumption patterns of its farm children subgroup. Id. at 14.

c. *Farm children's pesticide exposure*. The IWG questions whether NRDC has shown that children who live on farms face higher exposure to pesticides noting that ''NRDC has cited selective results from epidemiological studies that relied on retrospective self-reporting regarding use of pesticides.'' Id. The IWG presented preliminary data from a study funded by pesticide and chemical companies and associations. According to the IWG, the results of this study showed that ''urinary concentration [of pesticides] was associated with direct handling and application of pesticides. However, for children and spouses not involved in pesticide handling and application, exposures were low and did not vary appreciably by day of study.'' Id. at 15 (emphasis in original).

d. *Pesticide exposure from food purchased at farm stands*. The IWG challenges the NRDC's assertion that levels of pesticide residues in foods purchased at farm stands are higher than residue levels in food purchased at other retail outlets. The IWG notes that ''NRDC does not provide information to support its allegations, and we are not aware of any credible data to suggest that this is the case.'' Id. at 16. The IWG cites two demonstrable reasons undermining NRDC's claim: First, label directions and restrictions on pesticide use apply equally to food grown for sale at farmstands and food grown for distribution through broader channels of trade; and second, ''[t]he various circumstances (weather, pest pressure, etc.) that affect residue levels resulting from a given treatment regimen are the same for those who grow crops to market through wholesale channels and for those who grow crops to sell at retail.'' Id. Finally, the IWG notes that assuming residue levels are at the tolerance value would vastly overstate exposure amounts given that FDA data has shown ''no pesticide residues in 41% and 73.5% of fruit and vegetable samples and either no residues or below tolerance residues in 99.5% and 98.9% of fruit and vegetable samples.'' Id. at 17.

e. *Regional consumption of blueberries*. The IWG disputes NRDC's assertions regarding higher consumption of blueberries in regions that produce the crop. The IWG notes that there is both a national and international market for blueberries that makes blueberries widely available throughout the United States for several months of the year as a fresh commodity and available year round in the frozen state, the condition in which over half of the U.S. blueberry crop is marketed. Id. at 18.

2. *Inter-Regional Research Project Number 4 (IR–4)*. The IR-4 is a program sponsored by USDA and land grant universities and directed toward obtaining regulatory approval for pesticide uses on minor and speciality

food crops that are not likely to be supported by private sector companies. In its comments, the IR–4 notes that several of the pesticides covered in the objections—diflubenzuron, imidacloprid, halosulfuron-methyl, and fenhexamid—are both ''critical to minor crop growers'' and safer, reduced risk pesticides. (Ref. 27). The IR–4 asserts that diflubenzuron and imidacloprid provide alternatives to the organophosphate pesticides and that halosulfuron-methyl is a methyl bromide alternative. Id.

3. *Bayer CropScience*. Bayer CropScience notes that the required DNT has been submitted for imidacloprid. (Ref. 3 at 1). Bayer CropScience asserts that the 3X children's safety factor imposed by EPA should now be removed because the ''a clear NOEL was established'' in the DNT. Id. at 2. Bayer CropScience also claims NRDC errs in contending that percent crop treated data was relied upon by EPA for blueberries. Bayer CropScience cites 66 FR 18554, 18556 (April 10, 2001) as showing that 100% crop treated was assumed for blueberries in EPA's risk assessment. Id. at 10.

VI. Response to Objections

NRDC objected to EPA's extension of a temporary tolerance for the residues of imidacloprid on blueberries. See Imidacloprid et al. Objections at 1. That tolerance extension expired on December 31, 2003. See 67 FR 2580 (January 18, 2002). As the objected-to tolerance is no longer in existence, NRDC objections are denied as moot. Nonetheless, NRDC's objections remain relevant to the petition that Interregional Research Project Number 4 filed to establish a permanent tolerance for imidacloprid on blueberries. 68 FR 5880 (February 5, 2003) (petition for imidacloprid tolerance on the crop group bushberries which includes blueberries). EPA has analyzed NRDC's objections, and considering them in light of the currently available information on imidacloprid, has decided to establish the permanent tolerance for imidacloprid on blueberries. EPA's analysis of the NRDC objections and the comments received on the objections is below.

As noted in Unit II.A., if NRDC refiles the same objections to the re-established imidacloprid tolerance relying solely on the information and arguments already presented, EPA will re-issue this comment response as a response to NRDC's objection forthwith. If, however, NRDC adds new issues, cites new information, or makes new arguments in support of its objections, EPA will have to analyze and respond to these new items before issuing a response.

VII. Analysis of the Issues Raised by NRDC's Objections

EPA has considered all of the issues raised by NRDC in its imidacloprid objections in acting on the petition to re-establish the imidacloprid tolerance on blueberries. For the reasons explained below, EPA concludes that the safety concerns with the imidacloprid tolerance asserted by NRDC are without merit.

One consistent theme emphasized by NRDC in its objections is the potential heightened exposure of ''farm children'' to pesticides. Accordingly, EPA begins analysis of the issues raised by the objections, in Unit VII.A., with an examination of the data bearing on children's exposure to pesticides in agricultural areas. Then EPA turns to NRDC's more specific claims. Unit VII.B. addresses issues regarding the children's safety factor. Unit VII.C. covers aggregate exposure questions. Unit VII.D. responds to claims regarding use of LOAELs and NOAELs.

A. Children's Exposure to Pesticides in Agricultural Areas

Children can be exposed to pesticides through multiple sources and pathways. The Agency currently considers children's exposure to pesticides by three broad pathways: Food, drinking water, and residential use. NRDC, however, has asserted that children residing in agricultural communities also are significantly exposed to agricultural pesticides through additional exposure pathways.

Children in agricultural areas may be exposed to agricultural pesticides through pathways such as contact with treated fields, roadsides and other areas; contact with moving spray drift while near application areas; contact with spray drift residues left by any spray drift that may reach their homes, yards or other areas they frequent, such as schools and schoolyards; and contact with pesticide residues that have volatilized after application. In addition, some of these children may also be exposed to agricultural pesticides in their homes via other pathways.

In analyzing the potential exposure of children in agricultural areas, EPA first focused on data from studies relied upon by NRDC or otherwise known to EPA that attempted: To measure levels of pesticides in the homes of children in agricultural areas; to measure levels of pesticide metabolites in body fluids of children in agricultural areas; and/or to compare levels of pesticide exposure of farm children to those experienced by non-farm children, based on similar types of measurements. In addition, EPA examined data NRDC submitted relating to airborne levels of pesticides (stemming from spray drift or volatilization) in farm communities. Finally, EPA reviewed data it has concerning the potential for pesticides to drift offsite during application.

Although EPA discusses its views concerning this data in more detail below, those views can be summarized as follows. First, the data concerning levels of pesticides in homes or children's bodily fluids are limited and inconclusive, and do not demonstrate that children in agricultural areas as a group receive more pesticide exposure than children in non-agricultural areas. (In fact, some data suggest that pesticide residues in houses in urban or non-agricultural areas may be higher than those in houses in agricultural areas.) Second, even if airborne pathways such as volatilization may lead to significant exposures to some pesticides, imidacloprid would not be one of those pesticides. Finally, data already gathered by EPA and processed through EPA's Spray Drift Model show that the highest off-target deposition levels from agricultural applications occur adjacent to the treated area and that deposition levels decrease with increasing distance from the treatment area; moreover, and in any event, any spray drift from agricultural applications of imidacloprid, which has residential uses on turf and pets, is largely irrelevant to the pesticide's aggregate exposure assessment, because any estimated exposure from spray drift would be dwarfed by estimated exposure from the lawn and pet use.

1. *Studies focusing on exposure to children in agricultural areas*. In examining the first set of data, EPA found it useful to concentrate first on what the cited studies showed regarding exposure levels in the children's immediate environment. These types of studies have tended to focus on exposure levels in the children's homes, with an emphasis on the level of pesticide residues in house dust. Second, EPA examined the data bearing on the actual exposure children received in agricultural areas as compared to the actual exposure levels of children in non-agricultural areas.

a. *Potential for exposure due to heightened pesticide levels in the homes of farm children*. NRDC's argument that farm children experience higher pesticide exposures than other children relies primarily on studies purporting to show that there are higher environmental levels of pesticides in and around the homes of farm children.

Leaving to one side, for the moment, the issue of whether such elevated environmental levels of pesticides actually increase farm children's exposures, EPA first has focused on whether such elevated levels actually exist. In evaluating this question, EPA has concentrated on the levels of pesticides in house dust, because nearly all the contemporary literature addressing the potential exposure of farmworker children to agricultural pesticides includes a discussion or measurements of pesticide concentrations in house dust. This matrix is now widely recognized as a potential reservoir for many environmental pollutants, including pesticides. In addition, EPA has reviewed not only studies submitted by NRDC, but also other studies known to EPA. (Ref. 40).

The house dust evidence, contrary to NRDC's view, is fragmentary at best as to whether there exists a potential for higher exposure to ''farm children'' due to higher environmental contamination of the homes of such children. For example, house dust samples collected from diverse locations such as Cape Cod, MA; Long Island, NY; Iowa City, IA; Detroit, MI; Seattle, WA; and Los Angeles County, CA have been compared to house dust samples taken from the homes of farm workers in agriculturally intensive Yuma County, AZ. Contrary to NRDC's general hypothesis, in Yuma County, the 90th percentile dust concentrations (µg)/g) for the pesticides chlorpyrifos, diazinon, carbaryl, propoxur, and the disinfectant ortho phenylphenol all were lower than those in most, if not all, of the aforementioned urban areas.(Ref. 8). This may well be due to the fact that, in addition to being agricultural pesticides, all of these pesticides are widely used residential pesticides, which may be used substantially in urban areas as well.

Studies also have been performed in the agricultural area around Wenatchee, WA, which is situated in the heart of the apple growing region in that state. For example, Simcox et al. (Ref. 63) designed a study of housedust and soil samples in this area in an attempt to determine whether children of agricultural families were exposed to higher levels of pesticides than children whose parents were not involved in agriculture. Forty-eight applicator and fourteen reference families were recruited to participate. Families living within 200 feet of an orchard were classified as agricultural families, while families living in homes more than one-quarter mile from an orchard were classified as reference families. Pooled house dust measurements were taken from two locations in each house:

- Three feet inside the entry way.
- In the children's play area.

This study's authors reported significantly higher indoor dust levels of azinphos-methyl, chlorpyrifos, and parathion in agricultural homes as compared to the reference homes. Analysis of the pesticide residues in the soil and house dust samples showed that the pesticide residues present were of agricultural origin, demonstrating in the authors' view that children of agricultural families have a higher potential for exposure to agricultural pesticides than children of non-farm families. In addition, the authors concluded that proximity to agricultural spray areas appeared to be the predominant but not exclusive explanation of the increased soil concentrations.

The study's authors, however, focused on a specific and perhaps unique geographic area. As other study authors have reported, Wenatchee, WA, can be characterized as being situated in an area of canyons ''conducive to wind patterns responsible for spray drift'' (Ref. 11). The site-specific characteristics of this area may not necessarily apply to other agricultural areas, such as those like Yuma County, which, as mentioned in this unit, is situated on a riparian flood plain, and is distinct from the canyons of the Wenatchee area in terms of cropping systems, application techniques and topography. In fact, when University of Washington investigators began assessing house dust concentrations of farm worker houses in the Lower Yakima Valley of Washington, an area of that state that is more expansive than the Wenatchee area, they did not observe an association between proximity to fields and house dust concentrations. Rather, these investigators observed a stronger correlation between house dust concentrations and dust concentrations in vehicles used by farm workers to commute to and from work. (Ref. 11). In addition, for chlorpyrifos, a pesticide once having both residential and agricultural uses, the range of house dust concentrations reported by Simcox (Ref. 63) (<0.02–3.6 µg/g) was exceeded by the median value house dust concentration from non-agricultural family homes (4.7 µg/g; n=9) reported in Jacksonville, FL. (Ref. 22).

b. *Whether farm children actually experience increased exposure.* Assuming for the purposes of argument, moreover, that contaminated house dust may indicate activity patterns (in addition to tracked-in drift) that can lead to the potential exposure of young children to agricultural pesticides in residential environments (Ref. 9 and Ref. 5), the challenge would remain to find an association between house dust concentrations and indications of dose based on measurements of biomarkers of pesticides in farm worker's children. The evidence likewise is fragmentary, at best, on this point.

Fenske et al., for example, ''were unable to demonstrate a strong relationship between housedust concentrations and biological levels,'' i.e., levels in study participants, in Wenatchee area residents. (Ref. 14). These researchers suggested that this was due to several factors, including the tendency of the vacuum system used to capture ''particles from deep carpet'' areas that ''may not represent chemical available to children during normal residential activity.'' The researchers also pointed to ''the complexity inherent in children's exposures'' through ''intermittent contact with surfaces [and] variable hand-to-mouth behaviors,'' as well as the ''relatively high variability'' associated with the spot urine sampling method used to obtain biological values.

Similarly, although Simcox et al. demonstrated the potential migration of agricultural chemicals from an application site to a residence under the unique circumstances of the Wenatchee study, they also questioned the relevance of house dust concentrations in samples collected by the vacuum system used in the study. Like Fenske et al., Simcox and colleagues were not sure if the house dust measurements taken with the system were representative of the house dust routinely encountered by children living in those homes. It was suggested that biological monitoring of these young children ''may serve as an appropriate and noninvasive means of sampling exposure among small children.''

For other reasons as well, these and other studies have provided little data to support either the hypothesis that pesticide levels in house dust are correlated to exposure levels or the hypothesis that children in agricultural areas generally receive significantly higher exposure to pesticide residues than children in the general population.

i. *Studies allowing comparison of children from agricultural and non-agricultural areas.* In Fenske 2000a, for example, Fenske et al. compared the DMTP (dimethylthio phosphate) concentrations reported in a 1995 study of the Wenatchee population with those measured in Seattle children, and found that concentrations from the Seattle

children (Ref. 32) appeared to be similar to those of the Wenatchee reference population—*i.e.,* children in an agricultural area. This suggested that biological pesticide metabolite levels for agricultural and non-agricultural children were very similar. Therefore, even if agricultural children could be said to have the potential for more routes of exposure, they were not more highly exposed. (Quite possibly, the metabolites found in the urine represent exposure to the breakdown products themselves rather than to the parent compounds. (Ref. 15).

Work performed by Higgins et al. (2001) also allows a comparison of agricultural children to non-agricultural children. This study measured cholinesterase levels as a biomarker of organophosphate pesticide exposure in a group of migrant farm workers and their children. The researchers collected blood samples from two groups of Hispanic children (age 3—6 years) in the summer of 1997 to compare cholinesterase levels in populations with varying degrees of contact with agriculture, and hypothetically varying levels of contact with organophosphate pesticides. Ninety-eight migrant Hispanic farm worker children (50% male, 50% female) were recruited from two counties in Oregon. (Ref. 25). A seasonally and age-matched comparison group of 53 Hispanic, non-agricultural family children (64% male, 36% female) was also recruited in 1998 from two non-agricultural areas in Oregon. Results from these two groups showed that cholinesterase levels were not significantly different between the agricultural and non-agricultural children (analysis of variation (ANOVA), p=0.69). (Ref. 25). A further analysis of the data using a multiple regression model to account for potential age and gender effects also supported the conclusion of no significant difference between the two groups. (Ref. 25).

Finally, in its report entitled *Pesticide Exposure and Potential Health Effects in Young Children Along the U.S.-Mexico Border*, EPA concluded that:

> population distributions of OP [organophosphate] pesticide exposure in children (either living in close proximity to agricultural fields, i.e., Yuma Study, or being admitted to health clinics with flu-like symptoms, i.e., Symptomatic Children Study) as measured by alkyl phosphate metabolites are not significantly different than population distributions of OP pesticide exposure for the general population as measured by NHANES III Studies [National Health and Nutrition Examination Survey conducted by the Department of Health and Human Services].

(Ref. 67)

ii. *Studies focusing solely on children from agricultural areas.* Other studies have focused solely on children in agricultural areas, including studies performed in the Wenatchee area by Fenske and his colleagues at the University of Washington. Loewenherz et al. (1997), for example, used members of the Wenatchee study population (48 applicator families and 14 Wenatchee-area reference families) to evaluate and compare levels of OP pesticide metabolites in urine. Their study aimed specifically to:

- Measure urinary metabolite levels of OP pesticides in children living with occupationally exposed parents.
- Compare these with a reference population.
- Evaluate the relative importance of the para-occupational exposure pathway.

One hundred sixty spot urine samples were collected from 88 children, including repeated measures 3–7 days apart. Because the researchers detected DMTP with far greater frequency than any other alkylphosphate, they chose it as this population's most appropriate biomarker of exposure. Over two sampling rounds, however, Loewenherz and colleagues detected statistically significant differences in the frequency of DMTP detectability among applicator and reference children in only one round, and those differences were only marginally statistically significant. From this one exposure event, there was no way to conclude what the potential for exposure could be for each population participating in this study. Moreover, the sample sizes represented by the populations were small, and thus diminished the value of the study in general.

The Loewenherz team, moreover, did not address the potential sources of exposure to pesticides from gardens, pets, lawns, and diet. Although the researchers recognized that this population's use of residential pesticides was less than the national average, it is still possible that exposures from air, dietary intake, and pesticide use in other settings where the children may have spent time (i.e., day care centers, homes of others) may also have contributed to observed urinary metabolite concentrations. (Ref. 31). In fact, misuse of a non-residential pesticide for residential purposes was reported in the study. This may have had a significant impact on the urinary metabolite levels reported in this paper, as two of the three highest measurements in the study came from these households.

In addition, a comparison of the exposures of the farm worker children to the farm workers themselves suggested that it was unlikely that the exposures experienced by the applicator children in the Loewenherz study were sufficient to produce acute health effects. (Ref. 31). Finally, a strong relationship between pesticide house dust concentrations and biological levels in these children was not found. (Ref. 14).

Using a larger cohort (109 children) from the same region, Lu et al. (2000) collected environmental and biological samples to evaluate the total potential exposure of agricultural and reference children. The researchers took spot urine samples, as well as hand wipe samples, house and vehicle dust samples, and surface wipe samples from various surfaces (including steering wheels and work boots). Environmental measurements indicated that children living with parents who work with agricultural pesticides (applicator children), or who live in close proximity to pesticide-treated farmland, have the potential for higher exposures than do other children living in the same community. (Ref. 33). However, dimethyl OP pesticide metabolite levels in the urine of agricultural and reference children showed only a marginally significant difference. Id. The children of farm workers, moreover, had the same range of urinary DMTP as the reference children, and less urinary DMDTP (dimethyldithio phosphate) than applicator children. Diet is likely to have been an important contributor to metabolite concentrations. Id. Interestingly, 23 agricultural families that participated in this study also participated in the study reported by Simcox et al. (Ref. 63). Of these, the four homes that had the highest house dust concentrations in 1992 had lower concentrations in 1995. Overall, 16 of 23 households reported lower house dust concentrations than in the previous study, suggesting that changes in activity patterns can influence levels of pesticides in house dust.

In addition to the azinphos-methyl and phosmet results reported in Lu et al. (2000), Fenske et al. (2002) measured chlorpyrifos and parathion in environmental samples from the homes of the same 109 children and those chemicals' metabolic by-products in biological samples from the children themselves. In their study, Fenske et al. relied on more specific urinary metabolites of the diethyl, OP parent compounds. For chlorpyrifos, the researchers used the metabolite 3,4,6-trichloro-2-pyridinol (TCPy) as a biological measure, and for parathion they used 4-nitrophenol as the biological measure. Environmental

pesticide loadings, however, could not explain the biological levels measured. (Ref. 13). Fenske et al., stated that the use of OP pesticides in gardens was associated with an increase in the TCPy concentrations in children's urine. However, no explanation was offered for this association. Unfortunately, TCPy is a ubiquitous compound in the environment and exposure could still be associated with exposure to both chlorpyrifos and TCPy. The authors reported that most children studied did not have measureable urinary levels of metabolites of either chlorpyriphos or parathion. The study concluded that children living in homes including household members who worked with agricultural pesticides or that were close to pesticide treated farmland did not appear to have increased pesticide exposures, even though their homes showed elevated levels of pesticide concentrations in house dust.

Using the data gathered in their field studies, Fenske and colleagues (2000b) also compared spray season and single-day dose estimates for agricultural and reference children, but only showed a marginal difference between the two cohorts. (Ref. 15). Moreover, a majority of the children classified as reference children had measurable dialkylphosphates in their urine, and a substantial fraction had doses that exceeded the reference values for azinphos-methyl. Id.

An additional team based at the University of Washington examined 571 farm workers involved in a community intervention project in the Washington State's Lower Yakima Valley. This project is presented in Thompson et al. (2003) and Curl et al. (2002) (Refs. 66 and 11). The cohort consisted of field workers and pesticide handlers (e.g., applicators). Questionnaires regarding self reported pesticide exposure and common sense methods to reduce para-occupational exposure were evaluated. Sub-samples of urine and other environmental media (house and vehicle dust) were taken to establish baseline exposure levels of the intervention and control groups. Intervention was described as individuals performing common sense hygiene practices such as removing footwear prior to entering the house.

Based on this research, both Thompson et al and Curl et al. reported a significant association between levels of dialkyl phosphates (DAP, a class of breakdown products of organophosphate pesticides) in urine of adults and their children. There was also a significant association between house dust and vehicle dust. However, Curl et al did not report an association between house dust and proximity to fields and orchards. The DAP metabolites measured were DMP (dimethyl phosphate), DMTP, DMDTP, DEP (diethyl phosphate), and DETP (diethylthio phosphate), and may represent exposure to numerous pesticides from several pathways including diet and pathways associated with residential use of pesticides. The authors speculate that it is also possible that some workers may have taken agricultural chemicals from work for home use.

It has been suggested that the removal of shoes prior to entering the house, or the use of entry mats, can significantly lower the amount of pesticide tracked-indoors. (Ref. 38). Other investigators have observed mixed or inconclusive results. (Refs 33, 11 and 66). When Curl et al. (Ref. 11) compared concentrations of urinary DAPs and OP concentrations in house dust and vehicle dust between two groups (Intervention and Control, Lower Yakima Valley), no significant differences were seen. The intervention group performed activities such as washing hands after work, removing footwear prior to entering the house, washing work clothing separately, and removing work cloths before holding children. If intervention has no impact, it is not clear then whether para-occupational pathways are indeed significant. In general, Thompson et al. (Ref. 66) saw no differences regarding hygiene practices such as removing shoes prior to entering the house between households having children and those that did not. However, the authors suggested the need for continuing current educational efforts. As compared to field workers, pesticide handlers were more likely to perform protective practices such as washing hands immediately after work and removing work clothing before holding children. Yet, in other studies, concentrations in urine were higher among children of applicators than among children of field workers. (Ref. 33).

Finally, Mills and Zahm (Ref. 34) conducted a feasibility study to obtain urine samples from farm workers and their children in an area of extensive OP use. They tested for six urinary metabolites of OPs, including DMP, DEP, DMTP, DMDTP, DETP, and DEDTP. They also compared the levels between adults and children living in the same households. A total of 27 individuals from 9 families (18 adults and 9 children) were selected to participate. Levels of OP metabolites were generally very low in both adults and children in this survey. The frequencies of detection of DMP, DMTP, and DETP were higher among Fresno-area farm workers and their children than among the general population sampled during the National Health and Nutrition and Examination Survey (NHANES) II survey. However, informational data on pesticide use practices in the U.S. general population supplied by the authors suggested that this comparison was unfair, since NHANES II was survey data collected through 1980, when the prevalence of OP pesticide use was only just beginning to increase. In a second comparison, Mills and Zahm showed that the frequencies of detection and mean levels of DMTP among Fresno children were intermediate between those found by Fenske and his co-workers among Wenatchee, Washington applicator and reference children. Id. No statistical analyses were conducted on these data comparisons. Thus, it was unclear whether the urinary metabolite levels seen in the Fresno children were significantly different from the applicator and reference children studied in Washington State.

iii. *Ongoing research on farm children exposures*. Preliminary information from the Farm Family Exposure Study (FFES) conducted by investigators at the University of Minnesota and Emory University bears on the question of whether farm children have higher levels of pesticide exposure than non-farm children, and whether farm children should be identified as a major, identifiable subgroup of consumers. In this study, researchers identified urinary pesticide concentrations for 95 farm families before, during, and for 3 days after an application of glyphosate, 2,4-D or chlorpyrifos. In their preliminary reporting of results, the researchers stated that they found '' appreciable variation by chemical in the proportion of farm family members with detectable urinary concentrations.'' See *http://www.farmfamilyexposure.org/html/abstracts.html#ser/*. However, it was only in the case of farmers—not spouses and children—that the researchers claimed to have detected significant differences in urinary pesticide concentrations and patterns of uptake and elimination. Id. ''For the vast majority of spouses and children, urinary concentrations did not change appreciably after pesticide application.'' Id. Moreover, the researchers asserted, based on their findings, that ''little pesticide exposure is received through . . . living on a farm, per se,'' and that it is the following, specific behaviors instead that are associated with elevated pesticide exposure for farm children:

- ''[d]irect contact with chemicals in the mixing or application area.''

- ''[w]orking as a co-applicator.''
- ''[t]ouching containers without gloves.''
- ''[p]laying barefoot in the area where pesticides are being mixed and loaded[.]''

See *http://www.farmfamilyexposure.org/html/the_study.html*.

EPA recognizes that these representations of the researchers are only preliminary. Nevertheless, the fact that the FFES researchers' preliminary views point in the same direction as the analysis above should not escape note.

In sum, as discussed in this unit the studies and information, whether concerning children in agricultural areas and non-agricultural areas or children in agricultural areas alone, and whether concerning environmental levels, biological levels, or both, shows that there is little or no evidence to indicate that EPA has ignored a significant source of exposure in calculating the potential aggregate exposure from pesticides.

c. *Conclusion*. In conclusion, the limited number of studies containing data relevant to NRDC's arguments, taken together, fail to demonstrate that children in agricultural areas experience significantly higher levels of exposure than children in non- agricultural areas. In EPA's judgment, the weight of currently available evidence relating to pesticide residues in house dust or on other surfaces fails to establish that children living in agricultural areas or children living nearer to agricultural pesticide use areas experience higher exposures to pesticides than children in the general population. Similarly, biomonitoring data available for comparing the levels of pesticide exposure experienced by agricultural children with other children is fragmentary and does not show that there are significant differences between these groups of children. Thus, regardless of whether such children constitute a ''major identifiable subgroup of consumers,'' it does not appear that such children consistently receive more pesticide exposure than the groups of children (those at the upper percentile of estimated exposure) used by EPA in its current approach to assessing aggregate risk.

This is not to say, however, that issues addressed in these materials do not bear further research. On the contrary, the government is engaged in or supporting, or has recently engaged in or supported, relevant research in a number of ways. These efforts include, for example, the Minnesota and South Carolina study discussed in this unit. These efforts also include:

- A similar study which the federal government itself is conducting with children in North Carolina and Iowa.
- A systematic analysis which EPA is undertaking to review the raw data underlying the Wenatchee, WA area and Yuma County, AZ studies discussed in this unit.
- A study of pesticide exposure pathways for farm workers' children in the Yakima Valley.
- An assessment of sources of pesticide contamination, concentrations in pathways, and exposure-prone behavior in Salinas, CA.
- A study of ingestion of pesticides by children in an agricultural community on the U.S./Mexico border.
- An assessment of exposure of children to pesticides in Yuma County, AZ.

EPA will review the results of this ongoing research and take appropriate steps to address any exposure concerns regarding children that are documented.

2. *Supplemental information regarding spray drift and drift of volatilized residues*. On June 19, 2003, NRDC supplemented its submission to the Agency with several pieces of additional information. Included was a report generally addressing the issue of spray drift from pesticide applications in California (Ref. 7) (hereinafter cited as the CFPR Report). Although EPA defines spray drift as the movement of droplets off-target during or shortly after application, which is independent of the chemical properties of the pesticide being sprayed, the CFPR Report looked more broadly at atmospheric pesticide transport including pesticide volatilization as a potential mechanism by which pesticides travel beyond treated fields.This section of the document discusses drift as a result of volatilization. Drift of the pesticide spray is addressed in the following section of the document. Also included in NRDC's supplemental information was a research article entitled ''Community Exposures to Airborne Agricultural Pesticides in California: Ranking of Inhalation Risks,'' containing an analysis of the degree of inhalation risk posed by certain migrating pesticides in California, based on ambient air monitoring data gathered, in part, by the California Air Resources Board and the California Department of Pesticide Regulation. (see Ref. 29, hereinafter referred to as the Ranking Study). EPA is still examining the information in these studies but presents its preliminary views on these studies in this unit.

The Ranking Study conducted screening level assessments for many of the pesticides ranked as having the highest potential as toxic air contaminants as well as several pesticides categorized as hazardous air pollutants. The screening level assessment only identified four soil fumigants as potentially presenting non-cancer acute or chronic risks of concern. Id. at 1179. The study concluded that ''vapor pressure is a significant predictor of [] ranking of inhalation risks.'' Id. at 1182. The CFPR Report examined the potential health risks from air levels of three pesticides characterized as moderate to highly volatile (chlorpyrifos, diazinon, and molinate) measured at the field boundary and at more distant locations. The Report concluded that in many instances the measured air levels of these pesticides posed risks of concern. The Report also concluded that drift due to volatilization was not a concern for pesticides that are not highly volatile. CFPR Report at 40.

Even assuming that volatilization may lead to significant exposures to some pesticides, imidacloprid would not be one of those pesticides. EPA is in general agreement that vapor pressure is the key factor in predicting whether a pesticide has the potential to volatilize and drift offsite in significant amounts. Because soil fumigants traditionally have very high vapor pressures, and thus are highly volatile, EPA is now accounting for potential exposure due to volatilization of these pesticides in calculating their aggregate exposure. Imidacloprid is a solid at room temperature with a low vapor pressure (1.5×10^{-9} mmHg). In fact, imidacloprid's vapor pressure is not only much lower than pesticides used as soil fumigants, it is also substantially lower than the pesticides presented in NRDC's supplementary submission: chlorpyrifos (1.87×10^{-5} mmHg); diazinon (1.4×10^{-4} mmHg); molinate (5.3×10^{-3} mmHg). Thus, any losses due to volatilization for imidacloprid are expected to be minimal at most.

3. *EPA Data on Spray Drift and the Spray Drift Model*. EPA has gathered substantial data on the potential of pesticides, as applied, to drift offsite through the work of the Spray Drift Task Force (SDTF). The SDTF is a group of pesticide registrants who have worked collaboratively to develop a database to meet the majority of their collective spray drift data requirements under 40 CFR 158.440. The group was chartered on April 17, 1990, and its formation was announced in PR Notice 90–3. Since its formation, the SDTF has generated standardized data on spray drift levels resulting from different application methods under varying meteorological conditions. The data developed by the

SDTF was reviewed by EPA internally, through external peer review workshops, and through FIFRA Scientific Advisory Panel meetings. The reviews generally identified the data set associated with aerial applications to be the most robust, followed by the data sets from ground boom applications, orchard/vineyard airblasting, and chemigation, respectively. After the spray drift data were available, the SDTF worked with EPA's Office of Research and Development, as well as the USDA's Agricultural Research Service and Forest Service to use the data in the development/evaluation of the AgDRIFT model. (See generally Refs. 4, 24, and 65).

The AgDRIFT model and the SDTF data show that the highest off-target deposition levels from agricultural applications occur adjacent to the treated area and that deposition levels decrease with increasing distance from the treatment area. See Table 2 of this unit.

TABLE 2.—HIGH-END DOWNWIND SPRAY DRIFT DEPOSITION LEVELS BY APPLICATION METHOD

Lawn placement relative to application area	Spray drift deposition (percent of application rate)				
	aerial[1]	ground boom[2]	airblast[3]		granular[4]
			dormant orchards	dense or tall canopies	
10 to 60 ft downwind	34.1	9.3	25.0	8.4	0
20 to 80 ft downwind	31.6	6.4	16.1	6.0	0
40 to 90 ft downwind	27.9	4.1	8.0	3.7	0
80 to 130 ft downwind	22.0	2.4	3.0	1.9	0
160 to 210 ft downwind	14.9	1.3	0.8	0.9	0

[1] ASAE very fine to fine spray, 10 mph wind, 10 ft release height and other standard AgDRIFT 2.01 default inputs.
[2] Tier 1 AgDRIFT 2.01 ground boom inputs: 90th percentile, high boom, fine spray.
[3] Tier 1 AgDRIFT 2.01 airblast inputs: model outputs multiplied by 3 to approximate an upper 90th percentile value.
[4] Particle drift from granular applications is generally considered to be insignificant in EFED assessments.

The AgDRIFT model helps EPA assess the relative [upper bound] magnitude of residues from direct residential use of a pesticide versus residues that might occur as a consequence of spray drift. As of yet, EPA has not included data from the AgDRIFT model as a standard component of its residential exposure assessments. In responding to NRDC's objections other than as to imidacloprid, EPA is still examining how this data informs the understanding of aggregate exposure generally and how this data can be considered in a meaningful way in assessing aggregate exposure. Nonetheless, even prior to completing this analysis, some conclusions can be made concerning pesticides such as imidacloprid which have broad residential uses. What the data for imidacloprid show is that predictions of exposure based on the spray drift model are largely irrelevant to the pesticide's aggregate exposure assessment because any estimated exposure from spray drift would be dwarfed by estimated exposure from the lawn and pet use. An explanation of EPA's residential exposure assessment for imidacloprid and the operation of the AgDRIFT model for imidacloprid will clarify this point.

EPA estimates residential exposure by incorporating pesticide-specific information in exposure scenarios that are built based on data on human behavior and human physical statistics (e.g., body surface area). (See Refs. 35, 55, and 61) EPA's scenario for estimating exposure due to turf uses assumes that children play for a substantial period (2 hours) on lawns immediately after treatment with the pesticide. The scenario models both dermal exposure from contact between skin (arms and legs) and the lawn and oral exposure resulting from soil ingestion, mouthing grass, and hand-to-mouth behavior (placing hands repeatedly in mouth after being in contact with treated lawn) (Refs. 35, 55 and 61). With the pet treatment, EPA also uses scenarios for both dermal and oral exposure. For dermal exposure, EPA uses a pet hug scenario which assumes a child hugs the pet immediately after treatment. EPA assumes that 20% of the applied dose is available on the surface of the pet for transfer to the child and that the child essentially wraps its full body around the pet such that one-half of the child comes in contact with the pet. The child is assumed to be wearing a short-sleeved shirt and short pants. EPA assumes 100% transfer where the child's skin touches the pet and 50% transfer to the child's skin where the child's clothing touches the pet (Refs. 35, 55 and 61). For oral exposure, EPA used a combination of imidacloprid specific data and its standard exposure scenario. EPA had imidacloprid data on the transfer of imidacloprid to hands from petting dogs that was gathered by petting a treated dog 10 minutes after imidacloprid application wearing cotton gloves. EPA assumed that a child put its hand in its mouth 20 times/hour for 2 hours and each time the hand contained the exposure level measured on the glove. (See Ref. 44 at 51-57 and Refs. 35, 55 and 61)

Using these scenarios, EPA estimated the exposures and MOE's for imidacloprid residential exposures presented in Table 3 of this unit.

TABLE 3.— RESIDENTIAL EXPOSURES FOR IMIDACLOPRID

Use	Route of exposure	Exposure in milligram/kilogram/day (mg/kg/day)	MOE
Lawn	oral	0.0059	1,700
	dermal	0.001	10,000
Pet	oral	0.0027	3,600
	dermal	0.036	280

(Ref. 44 at 51-52).

In calculating potential drift, it is important to consider the maximum amount that may be applied and the manner of application. Imidacloprid is approved for use on residential turf at 0.4 lb/acre/year. This amount may be applied in a single application. This application rate is comparable to the maximum agricultural yearly rate (0.5 lb/acre/year) and exceeds most single agricultural application rates. Imidacloprid application methods differ for various crops with some uses being restricted to soil incorporation of granules and others permitting aerial spraying. The agricultural use that has the potential for the greatest spray drift is on cranberries. The label permits imidacloprid to be applied at 0.5 lb/acre/year for cranberries and that amount of pesticide may be applied in a single application. Further, the label does not prohibit, and therefore permits aerial application. For cranberries this would generally mean application from a helicopter. In EPA's experience aerial application to cranberries is relatively uncommon. The use having the second highest potential for drift is on artichokes where 0.25 lb/acre may be applied aerially in a single application.

To calculate exposure and risk (in terms of MOEs) from imidacloprid spray drift, EPA multiplied the agricultural application rates by the high-end prediction of spray drift deposition (shown in Table 2 of this unit) and then applied the standard residential exposure estimation methods. The estimated exposure and MOE's from spray drift from these uses are presented in Table 4 of this unit.

TABLE 4.—SPRAY DRIFT EXPOSURES FOR IMIDACLOPRID ON LAWNS

Use	Route of exposure	Exposure in mg/kg/day on lawns 10–60 feet from edge of field	MOE
Cranberries	oral	0.0025	4,000
	dermal	0.00035	29,000
Artichokes	oral	0.00127	7,900
	dermal	0.000175	57,000

(Ref. 39).

Comparing the potential exposure from spray drift onto lawns from cranberries with the highest residential exposure already incorporated into EPA's aggregate assessment, the pet hug scenario, shows that worst case exposure at the edge of the field from drift is an order of magnitude lower. Thus even assuming that a child who received maximum exposure from hugging a treated dog was exposed to imidacloprid at the edge of a treated cranberry bog, the exposure and risk assessment for that child would not be meaningfully different.

B. Failed to Retain Children's 10X Safety Factor

1. *Introduction*. NRDC's objections concerning the children's safety factor focus on the question of whether EPA properly applied a children's safety factor of other than 10X given that EPA is allegedly missing data on each of the pesticides. Particular emphasis is placed by NRDC on the fact that a DNT has been required for imidacloprid but not yet submitted. In addressing the issues raised by these objections, EPA first has summarized its children's safety factor decision that was relied upon in approving the imidacloprid tolerance and a re-analysis of that decision that has been performed in light of the objections and the revision to EPA's children's safety policy released in mid-2002. Second, EPA addresses NRDC's contentions regarding the lack of a DNT study. Third, EPA explains its response to each allegation NRDC makes regarding general and pesticide-specific data that NRDC asserts is missing and necessitates retention of the 10X factor.

2. *EPA's children safety factor decision*—a. *In general*. In making decisions regarding the children's safety factor, EPA's OPP, from 1999 until early 2002, looked primarily to an internal committee to make recommendations on the children's safety factor decision and to articulate a rationale for that decision. This committee, the FQPA Safety Factor Committee, was constituted solely for this purpose. To a lesser extent, during this period, OPP relied upon the another internal committee, the Hazard Identification and Assessment Review Committee (HIARC) to explain EPA's rationale. Within the last year or so, OPP has administratively restructured such that most of the work regarding toxicity issues and the children's safety factor falls within the jurisdiction of the HIARC. Consideration of exposure issues falls in the first instance to the team of scientists of OPPs' HED assigned to the specific pesticide. That judgement is then reviewed by the Risk Assessment Review Committee (RARC). It is the RARC's responsibility to ensure adequate rationale is provided for the decision on the children's safety factor and to ensure consistency with current policy and similar pesticides/circumstances. The RARC's recommendation and complete rationale

is included in the risk assessment document for the pesticide.

Two particular aspects of that new policy are worthy of mention. First, the policy emphasizes that in applying the provision the focus should not be simply on whether the young have a greater sensitivity to a pesticide but rather on what reliable data show with regard to the safety of infants and children in situations where studies have shown that the young are more sensitive to a pesticide. Thus, where increased sensitivity is demonstrated, EPA examines how well-defined that sensitivity is by the existing toxicity data and whether that sensitivity has been adequately taken into account in calculating a safe MOE.

Second, the policy stresses that when data are missing or inadequate the focus should be on whether there are reliable data to show that any additional safety factor different than the 10X default value is protective of the safety of infants and children. This issue has arisen frequently with regard to the developmental neurotoxicity study (DNT), a study that EPA is now requiring to be submitted for more pesticides. In evaluating whether a different factor than 10X would be protective of infants and children where a required DNT is absent, EPA examines related studies in the database to develop a sense for the likely range in which effects may be seen in the DNT (and therefore, the range of doses which will be used in the DNT). When the expected doses in the DNT are substantially higher than the doses that are presently providing the regulatory endpoint, a different and lower additional safety factor may be appropriate depending on the degree of difference between the doses for the DNT study and the current regulatory endpoint. On the other hand, where the range of expected doses in the DNT parallels the levels at which effects have already been identified in the database, it is less likely that there will be a reliable basis for assigning an additional factor lower than 10X.

b. *Imidacloprid*. The FQPA Safety Factor Committee recommended an additional safety factor of 3X for imidacloprid for the protection of infants and children. Although available studies demonstrated no indication of increased sensitivity of rats or rabbits to *in utero* and/or postnatal exposure to imidacloprid, the Committee concluded that an additional factor of 3X was needed due to the fact that there was data indicating a potential for developmental neurotoxicity (and, therefore, a need for a DNT study) and the potential for exposure to young children given the pet and outdoor residential uses of imidacloprid. The data indicating a potential for developmental neurotoxicity included structure activity relationship information and data from a 2-year study in rats showing neurotoxic effects following a single oral dose. (Ref. 56 at 6).

The DNT has now been submitted and reviewed. It showed evidence of an increased qualitative susceptibility in the rat. At the highest dose tested (750 parts per million (ppm)), maternal effects consisted largely of slight decreases in food consumption and body weight gain during early lactation, while pup effects included decreased body weight, decreased motor activity, decreased caudate/putamen width, females only (post-natal days 11 and adult), and slight changes in performance in the water maze, males only, at the same dose. The NOAEL identified in the DNT (20 mg/kg/day) was higher than the NOAELs previously identified (ranging from 5.7 to 10 mg/kg/day) and thus the DNT results had no impact on regulatory endpoint selection and the risk assessment. The HIARC concluded the DNT indicated no residual concerns regarding post-natal toxicity based on:

- The effects in pups are well-characterized with a clear NOAEL.
- The pup effects occur in the presence of maternal toxicity with the same NOAEL for effects in pups and dams.
- The doses and endpoints selected for regulatory purposes are protective of the pup effects noted at higher doses in the developmental neurotoxicity study. (Ref. 46 at 9).

EPA ultimately determined that, other than a 3X factor for acute risk assessments to address the lack of a NOAEL in an acute study, no other additional safety factors were needed to protect the safety of infants and children. This conclusion was based upon:

- There is no quantitative or qualitative evidence of increased susceptibility of rat and rabbit fetuses to *in utero* exposure in developmental studies. There is no quantitative or qualitative evidence of increased susceptibility of rat offspring in the multi-generation reproduction study.
- There is evidence of increased qualitative susceptibility in the rat developmental neurotoxicity study, but the concern is low since:

1. The effects in pups are well-characterized with a clear NOAEL.
2. The pup effects occur in the presence of maternal toxicity with the same NOAEL for effects in pups and dams.
3. The doses and endpoints selected for regulatory purposes are protective of the pup effects noted at higher doses in the developmental neurotoxicity study. Therefore, there are no residual uncertainties for pre-/post-natal toxicity in this study.

- The toxicological database is complete for FQPA assessment.
- The acute dietary food exposure assessment utilizes existing and proposed tolerance level residues and 100% [crop-treated] CT information for all commodities. By using these screening-level assessments, actual exposures/risks will not be underestimated.
- The chronic dietary food exposure assessment utilizes existing and proposed tolerance level residues and % CT data verified by [OPP's Biological and Economic Analysis Division] BEAD for several existing uses. For all proposed uses, 100% CT is assumed. The chronic assessment is somewhat refined and based on reliable data and will not underestimate exposure/risk.
- The dietary drinking water assessment utilizes water concentration values generated by model and associated modeling parameters which are designed to provide conservative, health protective, high-end estimates of water concentrations which will not likely be exceeded.
- The residential handler assessment is based upon the residential [Standard Operating Procedures] SOPs in conjunction with chemical-specific study data in some cases and [Pesticide Handlers Exposure Database] PHED unit exposures in other cases. The majority of the residential post-application assessment is based upon chemical-specific [Turf Transferable Residue] TTR data or other chemical-specific post-application exposure study data. The chemical-specific study data as well as the surrogate study data used are reliable and also are not expected to underestimate risk to adults as well as to children. In a few cases where chemical-specific data were not available, the SOPs were used alone. The residential SOPs are based upon reasonable ''worst-case'' assumptions and are not expected to underestimate risk. These assessments of exposure are not likely to underestimate the resulting estimates of risk from exposure to imidacloprid. (Ref. 44 at 22).

Although the HIARC's conclusions regarding exposure are stated in terms of the imidacloprid exposure estimates not being expected to ''underestimate risk,'' in all likelihood, the imidacloprid exposure assessments substantially

overstate exposure. This overestimate of exposure is a result of the aggregation of worst case or, at the least, very conservative (health protective) estimates of, exposure through each pathway of exposure - food, water, and residential. For food, EPA used a worst case approach of assuming all food which can be legally treated with imidacloprid bears imidacloprid residues at the tolerance level for assessing acute risk. Tolerance values are chosen to be slightly higher than any expected residue values at the time of harvest assuming maximum application practices are followed (See Ref. 51 at 11). Assuming tolerance values in food fails to take into account that pesticides are infrequently used on more than a relatively small fraction of a crop, that pesticides are not uniformly applied at the maximum application rate, that even when pesticides are applied at the maximum application rate much of the treated crop will have residues well below the tolerance level, and that pesticides often degrade substantially between the time of harvest and consumption naturally or as the result of food processing or cooking. Id. at 10-12, 17-30. For assessing chronic risk, EPA took only a slightly less conservative approach by incorporating percent crop treated data for approximately $\frac{1}{3}$ of the commodities having tolerances. All treated commodities were still assumed to bear tolerance level residues.

For water, EPA estimated possible exposure with a surface water exposure model (Pesticide Root Zone Model and the Exposure Analysis Model System) that generally produces very conservative (health protective) estimates of exposure. As the analysis in Unit VII.B.4.b.ii. shows, this model generally substantially over predicts residue levels in water, frequently by orders of magnitude. Finally, for residential exposure, EPA relied on models using conservative (health protective) assumptions that are also likely to overstate actual exposure. These assumptions are described in detail in Unit VII.A.3.

3. *Missing toxicity data - lack of DNT*. NRDC contends that ''the absence of required developmental (DNT) tests for imidacloprid, mepiquat, and zeta-cypermethrin is a crucial data gap that by itself should prohibit EPA from overturning the default 10X safety factor.'' See, e.g., Imidacloprid Objections at 6. Given, however, that the DNT has now been submitted and incorporated into the imidacloprid risk assessment, this objection is no longer relevant to the imidacloprid tolerance on blueberries.

4. *Missing exposure data - general*—

a. *Farm children exposure*. NRDC argues that EPA is lacking data on exposure to farm children and thus may not remove the additional 10X safety factor. EPA disagrees. As discussed above, the data submitted by NRDC have not shown that there are significant exposures to farm children that occur as a result of living in close proximity to agricultural operations. EPA concluded that the evidence presented by NRDC is fragmentary, at best, as to whether pesticide exposure levels in homes of children living in agricultural areas are significantly different than levels in other homes and whether children living in agricultural areas have significantly different exposures than non-agricultural children.

After reviewing all of this data, EPA concludes it has sufficient reliable data to find that an additional 10X factor is not needed to protect the safety of infants and children with regard to any uncertainties due to lack of data on exposure of farm children to pesticides. Specifically with regard to imidacloprid, EPA is confident that its exposure assessment is protective of all children given that it has taken into account, in its aggregate exposure assessment, that imidacloprid is registered for use on pets and turf. EPA's aggregate assessment has assumed that children will come in direct contact with treated pets and turf. Indirect exposure from agricultural uses is unlikely to be significant compared to direct exposure to treated pets and turf. Additionally, EPA has found the chance of pesticide exposure as a result of the volatilization of pesticide residues in the field to be extremely slight given the vapor pressure of imidacloprid.

b. *Lack of comprehensive DW monitoring data*. NRDC contends that because EPA used a model for calculating drinking water exposure to imidacloprid that, as a definitional matter, EPA does not have ''reliable data'' for choosing a factor different than the 10X default value. Similar comments were made during the development of EPA's Children's Safety Policy. For the reasons below, EPA rejects NRDC's claims.

i. *Models and data*. Modeling is a necessary part of both the hazard and exposure components of risk assessment. In the absence of perfect data, EPA must extrapolate through the use of modeling from the individual data available to more general conclusions concerning hazard, exposure, and risk. (See Ref. 48 at A-7). As EPA noted in responding to NRDC's comments on its Children's Safety Factor Policy, ''short of measuring the pesticide residues in every sip of water and every bite of food as it is being consumed, OPP must model or estimate exposure values for residues in drinking water and food. The need for models exists whether the exposure estimate is based on monitoring values in drinking water and food, residue values from field studies, or data on a pesticide's properties and characteristics which are used to predict anticipated residue levels in water and food.'' (See Ref. 47 at 149) Accordingly, NRDC errs to the extent it attempts to cast models as the antithesis of data. The question is not whether EPA is relying on reliable data or a model but whether the model EPA is using is based on reliable data. Id. (''[T]he reliability of any method of estimating exposure will have to be evaluated based on what data the method relies upon'').

For imidacloprid, EPA relied on a combination of modeling information and pesticide-specific data. EPA concluded that use of this information was unlikely to underestimate exposure to the imidacloprid in drinking water. EPA believes that a description of its drinking water models and their underpinnings, an evaluation of how these models have performed generally, and a review of the data pertaining to imidacloprid demonstrates that this conclusion was reasonable. Hence, EPA finds that in using these models and the pesticide-specific imidacloprid data it was acting on the basis of reliable data. (See Ref. 48 at A-7) (''OPP does not interpret the reliable data requirement in the infants and children's provision as mandating that any specific kind of data be available, just that the data and information that form the basis for the selection of a different safety factor must be sufficiently sound such that OPP could routinely rely on such information in taking regulatory action.'')

ii. *EPA's drinking water models*. Although the availability of drinking water monitoring data has increased dramatically in the last several years, EPA still finds it necessary to rely for most pesticides upon various exposure models to estimate exposure levels in drinking water. As explained below these models are based on generic data regarding fate and transport of pesticides in the environment, and they operate by combining this generic data with pesticide-specific data on chemical properties to estimate exposure.

EPA has primarily used its drinking water models to ''screen'' those pesticides that may pose unacceptable risks due to exposures in drinking water from pesticides not likely to result in such exposures. To accomplish this

goal, the models are based on data from studies at sites that are highly vulnerable to runoff of pesticides to surface water or leaching of pesticides to ground water. If a pesticide fails this conservative (health-protective) screen, EPA would investigate whether the model is significantly overstating the residue levels that actually occur.

EPA has developed models for estimating exposure in both surface water and ground water. EPA uses a two-tiered approach to modeling pesticide exposure in surface water. In the initial tier, EPA uses the FQPA Index Reservoir Screening Tool (FIRST) model. FIRST replaces the GENeric Estimated Environmental Concentrations (GENEEC) model that was used as the first tier screen by EPA from 1995-1999. If the first tier model suggests that pesticide levels in water may be unacceptably high, a more refined model is used as a second tier assessment. The second tier model is actually a combination of the models, Pesticide Root Zone Model (PRZM) and the Exposure Analysis Model System (EXAMS). For estimating pesticide residues in ground water, EPA uses the Screening Concentration In Ground Water (SCI-GROW) model. Currently, EPA has no second tier ground water model.

Whether EPA assesses pesticide exposure in drinking water through monitoring data or modeling, EPA uses the higher of the two values from surface and ground water in assessing overall exposure to the pesticide. In most cases, pesticide residues in surface water are significantly higher than in ground water.

Table 5 describes what models were used to estimate drinking water residue levels with regard to imidacloprid both for the 2002 tolerance and the 2004 tolerance. The table also indicates which model estimates were used in assessing overall exposure to the pesticide.

TABLE 5.—DRINKING WATER MODEL PROJECTIONS FOR IMIDICLOPRID

Year	Residue	Surface Water Model	Ground Water Model	Surface Water acute	Surface Water chronic	Ground Water acute and chronic	Model Used for Exposure Assessment
1998	Imidacloprid parent	PRZM/ EXAMS	SCI-GROW	4.1 ppb	0.1 ppb	1.1 ppb	PRZM/EXAMS (acute); SCI-GROW (chronic)
2003	Parent and degradates	FIRST	SCI-GROW	36.04 ppb	17.24 ppb	2.09 ppb	FIRST (acute and chronic)
2003	Parent	FIRST	SCI-GROW	35.89	16.52	1.43	N/A

The increase in estimated levels in surface and ground water in the 2003 assessment is due to the use of different models (for surface water), the addition of new uses, and more updated information on aerobic soil and water half-lives and use of the organic carbon normalized soil/water equilibrium partition coefficient (K_{OC}) instead of the soil/water equilibrium partition coefficient (K_D) (Refs. 45 and 59) For the recent tolerance action, EPA used the surface water estimates for calculating aggregate exposure because they are higher than the levels projected for ground water.

a. Surface water—i. GENEEC. GENEEC uses readily-available pesticide properties to estimate peak and time-averaged pesticide concentrations in a ''farm pond,'' 20 million liters (5.3 million gallons) in capacity, located at the edge of a 10-hectare (approximately 25 acres) treated field. GENEEC is designed to simulate reasonable worst case pesticide levels in this farm pond following a major rainfall event. It assumes that a maximum of 10% of the applied pesticide is removed by rainfall and washed into the adjacent waterbed. The underlying data supporting GENEEC is an extensive study of the level of pesticide residues in runoff studies. (Ref. 69). That paper provided a summary of 122 study values and revealed that the amount of pesticide transport off of the treated field by rainfall ranged from a low of 0.00% to a high of 22% of the applied pesticide, with most of the values clustered toward the lower end. Only 4 of the 122 study values were above 10%. The study author recommended that percentage loss estimates for the pesticides most likely to be carried away by runoff should be from 2 to 5% based on slope of the field. (Id.; see Ref. 30) (''Under natural conditions, pesticide runoff losses in the 10% range would be rare.''). GENEEC assumes that the 10% figure corresponds to pesticides with the greatest solubility and that pesticides which have a greater tendency to bind to soils are transported to the farm pond in lower amounts on a percentage basis. The capacity of a chemical to dissolve in water or, conversely, to bind to soil is generally expressed as the soil/water equilibrium partition coefficient (K_D) or the organic carbon normalized soil/water equilibrium partition coefficient (K_{OC}). The higher the K_D or K_{OC} value for a pesticide, the greater tendency it has to adsorb or bind to soil; there is a partial correlation with the solubility of the pesticide with strong adsorption generally associated with lower solubility. An individual pesticide's K_D or K_{oc} value is used to estimate the percentage of pesticide applied that is likely to enter the farm pond. In estimating the amount of pesticide entering the pond and hence the concentration of the pesticide in the pond, the instructions for the model recommend use of the assumption that the pesticide was applied at the maximum rate permitted on the pesticide label. The concentration of the pesticide in the pond over time is calculated taking into account the aerobic aquatic metabolic half-life, the hydrolysis half-life, and the photolysis half-life, of the pesticide in question.

GENEEC produces a conservative estimate of levels in surface water due to the fact that the model is constructed based on the highest values of pesticide residues found in farm ponds and that it assumes pesticides are applied at maximum application rates. Further conservatism is added by, among other things, the assumption that the entire drainage area surrounding the farm pond is planted to crops for which the pesticide is registered and 100% of those crops are treated. Additionally, GENEEC tends to overstate residue values in a drinking water location because it is designed to represent a water body in the upper reaches of the agricultural watershed. Drinking water reservoirs typically have contributions from multiple sources. (Ref. 54 at 6)

In the SAP's review of GENEEC in 1997, ''nearly all the Panel members agreed that the pesticide concentration estimates provided by GENEEC are most likely overly conservative.'' (Ref. 18 at 18). In late 1999, EPA revised GENEEC by substituting a reservoir for the farm pond in the model. As indicated above, this model is designated the FQPA Index Reservoir Screening Tool (FIRST).

ii. FIRST. FIRST provides a slightly more realistic model for estimating pesticide residues in drinking water than GENEEC because it models a small drinking water reservoir instead of a static farm pond. It maintains, however, many of the conservative features of GENEEC. Like GENEEC, FIRST is based on data concerning residue in actual water bodies and the data chosen to construct the model represent a reasonable worst case scenario.

The drinking water reservoir that EPA chose to use as the Index Reservoir for modeling pesticide levels is Shipman City Lake in Shipman, Illinois (Ref. 60 at 17). Shipman City Lake is representative of a number of reservoirs in the central midwestern United States that are known to be vulnerable to pesticide contamination. Id. at 18. The site at Shipman, Illinois was chosen for the IR because of extremely high pesticide concentrations found there by the Acetochlor Registration Partnership (ARP) monitoring program and because of its hydrologic simplicity for modeling purposes (Refs. 1 and 2). In 1996, Shipman City Lake had one of the highest atrazine concentrations of the lakes monitored. (Ref. 60 at 8). Two or three of the other ARP reservoirs had slightly higher annual peak concentrations but presented substantial modeling difficulties.

The FIRST model was constructed in a very similar manner to GENEEC. FIRST assumes that up to a given percentage of a pesticide may run off into an adjacent drinking water reservoir with the precise percentage being a factor of the pesticide's K_D or K_{oc} value. After considering the concentrations of atrazine found in Shipman City Lake and other ARP reservoir monitoring sites, atrazine's K_D value, atrazine application rates, and various potential percentages of pesticide runoff, EPA determined that, with a reservoir model, assuming that up to 8% of the pesticide applied could reach the reservoir was a conservative (health protective) value. Like GENEEC, FIRST assumes that a pesticide is applied at its maximum application rate.

Although FIRST, also like GENEEC, assumes that all cropped area is 100% treated with the pesticide in question, FIRST attempts to be slightly more realistic and does not assume that 100% of the drainage area for the reservoir is planted to the treated crop. As to four major crops (corn, soybeans, wheat, cotton), FIRST uses a value representing the maximum drainage area for a reservoir that could be expected to be planted to the crop in question. These values are derived from geoprocessing analysis that combines U.S. Department of Agriculture data on crop coverage with U.S. Geological Service data on watershed boundaries. (Ref. 57 at 8). For all other crops, EPA assumes that 87% of the pond's drainage area is cropped and 100% of that cropped area is treated. (See Ref. 53 at 24) (explaining choice of 87% is based on fact that 87% cropped was the largest cropped area in any 8-digit hydrologic unit in the continental United States).

The SAP has endorsed the concept of using a reservoir as reasonable, but questioned the representativeness of the reservoir EPA chose to model. (See Ref. 17 at 3). Based on SAP comments, EPA undertook a comprehensive review of its Index Reservoir model. EPA considered 82 reservoirs as candidates for modeling (Ref. 54 at 15) and selected 20 for further investigation. Factors evaluated included depth and volume of the reservoirs, percentage of the reservoir that is cropped, the ratio of drainage area to normal reservoir capacity, and the availability of sufficient years of monitoring data. Following this evaluation, EPA again selected Shipman City Lake as the most appropriate reservoir to serve as a basis for modeling. The other three best candidate reservoirs which were not selected were Springfield, Illinois (watershed too large for the model), Gillespie, Illinois (two reservoirs used alternatively by the city) and Higginsville (reservoir has a pre-settling basin which cannot be accurately modeled.)

iii. PRZM/EXAMS. The EPA PRZM and EXAMS models used together are a more complex modeling system that provide a more realistic estimate of residue levels in surface water by incorporating more site-specific information than GENEEC or FIRST. The PRZM component of the model is designed to predict the pesticide concentration dissolved in runoff waters and carried on entrained sediments from the field where a pesticide has been applied into an adjoining edge-of-field surface water body. The model can simulate specific site, pesticide, and management properties including soil properties (organic matter, water holding capacity, bulk density), site characteristics (slope, surface roughness, field geometry), pesticide application parameters (application rate, application frequency, spray drift, incorporation depth, application efficiency, application methods), agricultural management practices (tillage practices, irrigation, crop rotation sequences), and pesticide environmental fate and transport properties (aerobic soil metabolism half-life, soil:water partitioning coefficients, foliar degradation and dissipation, and volatilization). EPA selects a combination of these different properties to represent a site-specific scenario for a particular pesticide-crop regime.

The EXAMS component of the model is used to simulate environmental fate and transport processes of pesticides in surface water, including: abiotic and biotic degradation, sediment:water partitioning, and volatilization. Currently, OPP is using an index reservoir and a farm pond as benchmark surface water bodies for human health and aquatic exposure assessments, respectively.

For each component of PRZM/EXAMS, the values used are derived from real world data. For example, the EPA-approved product label is the source of the application rate, frequency, and method of pesticide application. Pesticide environmental fate properties used in PRZM and EXAMS modeling come from registrant-submitted data used for pesticide registration or reregistration. The values used for soil properties and site characteristics are chosen from real world databases appropriate for the sites on which the pesticide may be used. For example, if the pesticide is approved for use on cotton, OPP uses data reflecting the soil types in the Cotton Belt. The index-reservoir being modeled is based on and represents an actual, fairly typical, small flow-through reservoir used for drinking water. Finally, the weather inputs for the model are taken from site-specific weather data, based on the USDA Major Land Resource Areas. PRZM modeling is generally simulated for 30 or 36 years in order to calculate the variability of the pesticide concentration in the surface water body due to variations in weather over time and the value used for risk assessment is the 90th percentile value.

Despite the fact that PRZM/EXAMS uses much greater site-specific information than either GENEEC or FIRST, it still provides high end or upper bound estimates of pesticide values in surface water. The high end/upper bound estimates result from the conservative manner in which PRZM/EXAMS selects and combines values

derived from real world data. EPA intentionally chooses values for the model which are likely not to underestimate the potential levels of pesticide residue in surface water. For example, the application rate and frequency used in the model are the highest allowed by the product label. In addition, PRZM/EXAMS modeling is assumed to be conservative because both the farm pond and index reservoir represent a vulnerable water supply; conservative fate parameters are used in the model; 100% of the cropped area in the watershed is assumed to be treated with pesticide; for all but four major crops (corn, soybeans, wheat, and cotton) 87% of the watershed is assumed to be cropped and treated; site conditions (annual rainfall and soil) are chosen to represent a site especially vulnerable to runoff taking into account all of the sites on which the specific crop is grown across the United States; and the simulation is run for up to 36 years and the results are reported at the 90% highest year. For the crops corn, soybeans, wheat, and cotton, 46%, 41%, 56%, and 20%, respectively of the watershed is assumed to be cropped and treated. Further compounding the tendency of these assumptions to overstate exposure, EPA also assumes that all of the pesticide in the watershed is applied simultaneously using the application method most likely to produce maximum runoff. Assuming simultaneous application tends to exaggerate residue estimates in drinking water because that means all potentially treated area in the watershed will have pesticide residues (from a maximum application applied with the technique most likely to produce runoff) available when the next rainfall event occurs. Assuming staggered application between growers would be more realistic but data is not currently available that would allow that level of sophistication in the model. All these factors lead to an assessment that PRZM/EXAMS is expected to predict high end or upper bound concentrations. (Ref. 53 at 20-21).

EPA sought SAP review of the PRZM/EXAMS modeling system in 1995 as part of the SAP's review of the report entitled ''Aquatic Dialogue Group Report: Pesticide Risk Assessment and Mitigation''. The SAP was complementary of this overall approach to exposure assessment modeling (See Ref. 19 at 7-9). In addition, the PRZM/EXAMS model has been before the SAP in the context of the issue of the introduction of incorporation of a ''percent cropped area'' [PCA] factor in OPP's drinking water models. In 1999, EPA requested SAP review of the appropriateness of using PCA and presented the results of several modeling exercises using PCA in connection with both PRZM/EXAMS and GENEEC. Comparisons of these modeling exercises to monitoring data showed that in most cases, the models overstated residues by an order of magnitude or greater. In other cases, the models overstated residues by factors less than 10. Finally, in two instances, the models understated values found in vulnerable water bodies.

The SAP generally endorsed the use of the concept of PCA for drinking water models. (See Ref. 16 at 67). Further, the SAP concluded that ''[u]se of the maximum PCA appears to result in an appropriately conservative assessment for most chemicals for major-use compounds.'' Id. The SAP, however, was skeptical of the conservativeness of the use of PCA with regard to minor crops. Id. at 68. This appears to have been due to the fact that the two instances in which PRZM/EXAMS under predicted drinking water concentrations involved minor crops. Accordingly, EPA has used a default PCA value of 87% in conducting PRZM/EXAMS modeling for minor crops for drinking water assessments. Further examination of the two cases of under prediction, however, suggest that not too much weight should be attached to these results. As to one of the cases (methomyl), the comparison was between PRZM/EXAMS modeling for minor crop (lettuce and peaches) and monitoring data on a major crop (corn). Further, the relatively higher concentration value found in monitoring was not from a drinking water reservoir but a stream adjacent to a corn field. In the other case (methidathion), the monitored value was from a river (the San Joaquim River in California) that is largely composed of irrigation return flow from agricultural fields. Such a river is generally not a drinking water source (the portion of the San Joaquim River where the samples were drawn is not used for drinking water) and PRZM/EXAMS is not structured so as to predict levels in such an environment.

Both the PRZM and EXAMS models have been the subject of extensive validations. The FIFRA Environmental Model Validation Task Force recently completed a review of PRZM. (Ref. 28). That study was an industry-sponsored calibration effort, but EPA scientists participated in the design and conduct of the study. The study's report concluded that PRZM ''provides a reasonable estimate of chemical runoff at the edge of the field.'' Id. at 6. The study found that ''[s]imulations based on the best choices for input parameters (no conservatism built into parameters) are generally within an order of magnitude of measured data with better agreement observed both for larger events and for cumulative values over the study period.'' Id. When simulations were run using conservative input parameters such as employed by EPA, according to the study, ''substantial over-prediction of runoff losses occur.'' Id. at 6, 8, 49. This conclusion regarding over-prediction only considered estimated values at the edge of the field and did not take into account the substantial conservatism introduced by EPA's assumptions regarding pesticide application amount, the percentage of the watershed receiving pesticide treatment, and the timing of application on adjacent fields.

EXAMS has also been the subject of extensive validation efforts. Satisfactory validation has been achieved in studies conducted in the Monogahela River, USA, an outdoor pond in Germany, a bay on the each coast of Sweden, Japanese rice paddies, and rivers in the United Kingdom and South Dakota, USA. (Ref. 6).

The most important validation of these models is not the abstract study of these models but how well the models have worked in practice when used by EPA in pesticide risk assessment. To do such an evaluation, EPA compared its surface water estimates from GENEEC, FIRST, and PRZM/EXAMS to data on pesticides in surface water compiled through the U.S. Geological Survey's National Water-Quality Assessment (NAWQA) Program. NAWQA is designed to provide ''consistent and comparable information on water resources in 60 important river basins and aquifers across the Nation.'' (Ref. 68)These river basins and aquifers account for approximately 60 to 70% of the country's water use. Id. EPA found 47 instances in which it had estimated pesticide residues in surface water resulting from the pesticide's use on a particular commodity using either GENEEC (14), FIRST (3), or PRZM/EXAMS (30) and there was also NAWQA data on the pesticide in surface water. (Ref. 41)See Table 6 below. In each instance, the peak modeled value exceeded the maximum value in the NAWQA data. In fact, in 42 of the 47 cases, the modeling value was nearly an order of magnitude or more higher. This further confirms that reliable data support EPA's conclusion that use of these surface water models is not likely to underestimate drinking water exposure. To the contrary, these data confirm that these models produce

conservative (health-protective), and often extremely conservative, results.

TABLE 6.—COMPARISON OF SIMULATION MODEL OUTPUTS WITH UPPER LEVEL NAWQA MONITORING VALUES

Pesticide	Model(s)	Crop	Peak Modeled Value*	NAWQA 95th%ile	NAWQA Maximum
2,4-D	FIRST	Sugarcane	132.00	0.35	15(E)
2,4-D	PRZM/EXAMS	Apples	118.00	0.35	15(E)
Acetochlor	PRZM/EXAMS	Corn	284.00	0.17	25.1(E)
Acifluorfen	PRZM/EXAMS	Soybeans	14.00	<0.04	1.10
Alachlor	GENEEC	Corn/Soybeans	199.00	0.10	10.90
Aldicarb	PRZM/EXAMS	Citrus	2.03	<0.550	0.51(E)
Atrazine	PRZM/EXAMS	Sugarcane	205.00	2.86	201(E)
Azinphos methyl	PRZM/EXAMS	Peaches	16.00	<0.05	0.5(E)
Benfluralin	PRZM/EXAMS	Apples	61.00	<0.01	0.01
Bentazon	PRZM/EXAMS	Not given	122.00	0.15	8.60(E)
Bentazon	GENEEC	Not given	100.20	0.15	8.60(E)
Butylate	GENEEC	Corn	33.10	<0.002	1.40
Carbaryl	PRZM/EXAMS	Citrus	494.00	<0.041(E)	5.2(E)
Carbofuran	PRZM/EXAMS	Grapes	39.40	0.043(E)	7.00(E)
Chlorothalonil	PRZM/EXAMS	Tomatoes	43.80	<0.48(E)	0.29(E)
Chlorpyralid	FIRST	Canola	17.10	<0.230	<0.230
Chlorpyrifos	GENEEC	Sweet corn	56.50	0.01	0.26
Chlorpyrifos	PRZM/EXAMS	Sweet corn	40.60	0.01	0.26
DCPA	PRZM/EXAMS	Cabbage	160.00	0.02	100(E)
Diazinon	PRZM/EXAMS	Citrus	540.00	0.02	2.50
Dichlobenil	GENEEC	Turf	951.00	<1.2(E)	0.01(E)
Disulfoton	PRZM/EXAMS	Potatoes	15.51	<0.021	0.43
Diuron	GENEEC	Orchard	152.00	0.26	14(E)
EPTC	PRZM/EXAMS	Citrus	57.35	0.02	7.30
Ethalfluralin	PRZM/EXAMS	Sunflowers	2.27	<0.009	0.07
Ethoprop	PRZM/EXAMS	Sweet Potato	127.00	<0.005	0.45
Linuron	PRZM/EXAMS	Carrots	1.30	<0.035	1.40
Malathion	PRZM/EXAMS	Citrus	324.00	<0.027	0.52
Methomyl	GENEEC	Lettuce	409.00	<0.020	0.67
Methomyl	PRZM/EXAMS	Corn	60.00	<0.020	0.67
Metolachlor	PRZM/EXAMS	Corn	134.60	1.38	77.6(E)
Metribuzin	GENEEC	Sugarcane	390.00	0.05	6.61
Norflurazon	GENEEC	Cane Berry	72.10	<0.040	1.24
Norflurazon	PRZM/EXAMS	Citrus	396.00	<0.040	1.24

TABLE 6.—COMPARISON OF SIMULATION MODEL OUTPUTS WITH UPPER LEVEL NAWQA MONITORING VALUES—Continued

Pesticide	Model(s)	Crop	Peak Modeled Value*	NAWQA 95th%ile	NAWQA Maximum
Oxamyl	GENEEC	Pineapple	321.80	<0.020	0.16
Parathion	GENEEC	Cotton	166.00	<0.008	0.14
Pebulate	PRZM/EXAMS	Not given	2.90	<0.004	0.08
Propargite	PRZM/EXAMS	Cotton	34.30	<0.023	2.62
Propochlor	GENEEC	Sorghum	202.00	<0.010	0.51
Propochlor	PRZM/EXAMS	Sorghum	64.00	<0.010	0.51
Propyzamide (Pronamide)	FIRST	Ornamentals	390.00	<0.004	0.28
Tebuthiuron	PRZM/EXAMS	Pasture/Range	15.10	0.02	0.95
Terbufos	PRZM/EXAMS	Sorghum	21.70	<0.017	0.56
Thiobencarb	GENEEC	Celery	186.00	<0.005	3.66
Triallate	PRZM/EXAMS	Wheat	5.50	<0.001	0.65
Triclopyr	GENEEC	Pasture	364.00	<0.25	16(E)
Trifluralin	PRZM/EXAMS	Sugarcane	3.44	<0.009	0.17

* = 1-in-10 year peak value; (E) = NAWQA Estimate

A review of drinking water assessments by the pesticide industry reached a similar conclusion. In this study, results from FIRST modeling (conducted for the purpose of the study) and PRZM/EXAMS modeling (from EPA exposure assessments) were compared with data from a USGS/EPA monitoring program.(Ref. 23). The monitoring data was gathered from small drinking water reservoirs in areas with high pesticide use in 12 geographically disparate regions in the United States. The study compared acute prediction values with the maximum value from the monitoring data and the chronic prediction values with 95th percentile of a time weighted average of monitored values. The result was that ''[f]or both acute and chronic exposure the models systematically overestimate measured exposure typically by 10 to 10,000 fold for the majority of cases.'' Id. There was no instance in which a model underestimated exposure. Id. The study concluded that the overestimation occurred due to ''[c]ompounding conservative assumptions, without considering associated probabilities of occurrence/co-occurrence.'' Id. The conservative assumptions identified as most likely leading to this result are (1) maximum label rate application on the highest percent cropped area in the United States; (2) reservoir immediately bordered by treated field; and (3) highest mobility, upper percentile half life, no reservoir dilution effects, and no soil photolysis. Id.

b. Ground water. As mentioned above, EPA uses the SCI-GROW model for estimating residues of pesticides in ground water. SCI-GROW is a regression model that uses chemical-specific data on a pesticide's adsorption (i.e. the soil/water partition coefficient of K_D or K_{oc} value) and the pesticide's persisence (i.e. the soil metabolism half-life) in combination with the assumption that the pesticide is being applied at its maximum application rate. The model is based on data obtained from ten prospective monitoring studies measuring the degree to which various pesticides leached to ground water. These studies were conducted in hydrogeologically-vulnerable sites (i.e., shallow aquifers; sandy, permeable soils; and substantial rainfall or irrigation to maximize leaching). SCI-GROW provides a screening value which is applied to both peak and chronic exposure screening.

In its review of the SCI-GROW model in 1997, a majority of the SAP concluded that it was ''highly conservative.'' (See Ref. 18 at 10) The SAP summarized the reasons for this conservatism as follows:

a. SCI-GROW is based mainly on OPP prospective ground water studies designed to maximize the opportunity for pesticides to leach into ground water:

- Soil site highly vulnerable to leaching (very sandy, little clay, low organic matter).
- Rainfall supplemented with irrigation to ensure higher than average monthly rainfall for each consecutive month of study. Supplementation of rain with irrigation errs on the side of greater opportunity for encountering rainfall amounts in excess of normal patterns.
- Sites with shallow water tables.
- Sites that represent an unknown but very low percentage of the ground water used as drinking water.
- Sites with wells totally surrounded by treatment area; no dilution with clean water.
- Sites with wells directly adjacent to treatment area; short path to well.
- Maximum rate of pesticide application; multiple treatments may be applied as one massive application.

b. Development of SCI-GROW ignored PGW [prospective ground water] studies with no ground water detections; only those that produced concentrations were included in the regression data set. Therefore, SCI-GROW reflects a filtered data set that implies greater frequency of observed concentrations than what actually occurred in the PGWs.

Id. at 12.

As with the surface water models, EPA has examined how well the models have worked in practice when used by EPA in pesticide risk assessment. To do such an evaluation, EPA compared its ground water estimates from SCI-GROW to data on pesticides in ground water compiled through the NAWQA program. Comparisons of the SCI-GROW screening model have been made to various upper bound distributions (99.0,

99.5, and 99.8 percentiles) rather than to the absolute maximum values in the NAWQA data (as was done with the surface water model). No higher percentiles were calculated because such calculation would not be reasonable given the sample size. The reason for not using maximum values, as was done with surface water evaluation above, is the difference in the nature of ground water and most surface water sources sampled in the study. Surface water bodies sampled were generally streams, reservoirs, or lakes which represent a significant amount of mixing of runoff water from a watershed that may be tens or hundreds of square miles in area. Well water often is most representative of pesticides leaching from a much smaller geographic area. Furthermore, there is a significant risk that at least some individual wells in any large sample will be severely impacted by pesticides because of either poor well construction (allowing direct influx of pesticide residues from the surface) or spillage from pesticide mixing/loading activities or leakage from pesticide storage facilities. Contamination levels in individual wells can be much, much higher from these sources than would occur in ground water solely from maximum agricultural applications of pesticides to the surface. The consequence of this is that the highest values of pesticides observed in a large scale survey of ground water cannot be assumed to represent contamination from normal outdoor uses of pesticides.

EPA identified 39 instances in which it had estimated pesticide residues in ground water resulting from the pesticide's use on a particular commodity using SCI-GROW and there was also NAWQA data on the pesticide in ground water. (Ref. 42). In all but three instances, the peak modeled value exceeded the 99.8th percentile value from the NAWQA data. No exceedances occurred for any of the 39 compounds at the 99.5 percentile level or below. Most estimates, even at the 99.8th percentile, were substantially above the NAWQA value. For example, in 24 cases, the modeling value was an order of magnitude or more higher than the 99.8th percentile NAWQA value. Of the three cases in which the monitoring value exceeded the projected value, in each instance the difference was less than a factor of 2x. In two of the three cases both the projected and monitored values were extremely low both absolutely and relative to other exposure values for the pesticide. For example, malathion had SCI-GROW and NAWQA ground water values (99.8th percentile) of 0.006 ppm and 0.007 ppm, respectively, compared to PRZM-EXAMS and maximum NAWQA surface water values of 324 ppm and 0.39 ppm, respectively. Additionally, tolerance values for malathion range from 0.1 ppm to 135 ppm with most values for agricultural crops either 4 ppm or 8 ppm. The other instance where a monitored value exceeded the modeled value involved alachlor. There, SCI-GROW predicted a value of 0.82 ppm and the monitored value was 1.2 ppm or a factor of 1.5x higher. Preliminary results of comparisons with alachlor concentration frequency distributions from other large scale surveys, including those targeted for alachlor or at least for corn use areas (the major crop use for alachlor) are inconclusive with regard to the conservativeness of the SCI-GROW prediction. Id. EPA plans to look more closely at the data on alachlor to determine if any adjustment of SCI-GROW is warranted. Primarily needed for this are the completion of analysis of new monitoring data recently submitted to support the registration of acetochlor (which includes some very useful concentration distribution information for alachlor as well as two other corn herbicides) and the analysis of a large amount of additional ground-water monitoring for multiple pesticides conducted by USGS in more recent phases of the long-term NAWQA project. EPA expects that any adjustment to SCI-GROW would be slight.

iii. *Imidacloprid-specific data*. EPA has received and reviewed two prospective ground water studies for imidacloprid (Refs. 43 and 45). Such studies are designed to measure maximum concentrations of pesticides likely to occur in ground water under geological conditions vulnerable to ground water contamination. The studies were conducted in Montcalm County, Michigan and Monterrey County, California.

At the Michigan study site, imidacloprid parent was consistently detected in one of six monitoring well clusters in the treated field beginning about 500 days after application and continuing through the close of the study some 5 years after application. No degradation products were detected in ground water during this period (there were a very few detections before application that may have been due to previous uses nearby or sample contamination). The maximum concentration of imidacloprid parent detected in ground water in any one sample at the Michigan study site was 0.24 ppb. EPA concluded that the 0.24 ppb level might increase slightly over time as imidacloprid continues to leach into ground water; however, the level was not expected to increase dramatically given that the levels seen at the 3 and 12 foot soil depths was 1.63 ppb and 1.31 ppb, respectively. (Ref. 43)

Data from the California site is less useful due to the fact that there appears to have been very little ground-water recharge occurring during the course of the study as evidenced by the almost complete lack of detection of the bromide tracer (applied concurrently with imidacloprid) in ground water. The maximum combined residue of imidacloprid parent and degradates found in the suction lysimeters was 0.62 ppb at 633 days post application. The maximum combined imidacloprid residue in the ground water at the California site was 0.14 ppb found 149 days post application. EPA concluded that low (sub-ppb) level contamination of potable ground water might occur in this region following application to irrigated vegetable or fruit crops. Id.

Additionally, extensive ground water monitoring data that has recently been submitted from the New York State Department of Environmental Conservation, Division of Solid and Hazardous Materials for Nassau and Suffolk Counties of New York includes data on imidacloprid. Nassau and Suffolk counties have ground water that is exceptionally vulnerable to pesticide contamination and have a long history of a number of pesticides being banned from use in these counties over the years. This exceptional vulnerability to contamination is due to the very rapid infiltration of pesticides that occurs in the sandy soils present in the agricultural areas of Long Island and the tendency for pesticides to persist in the ground water. These conditions have been documented from many years of monitoring ground water in this area (many of early detections for pesticides that were subject to scrutiny for ground-water contamination in the 1960s and 1970s were from Long Island. (Ref. 26).

For imidacloprid, there have been about 27 detections of imidacloprid above a detection limit of 0.2 ppb in about 5,000 ground water samples taken by the Suffolk County Department of Health Services, to date, with much of the monitoring targeted to areas with known histories of imidacloprid use and previously documented ground-water contamination issues. Overall, imidacloprid detections are rare in drinking water wells. Three wells had detections above the model-predicted maximum of 1.4 ppb. After closer investigation, however, EPA has concluded that those three wells are not reliable indicators of imidacloprid

values that can be expected in ground water from agricultural use of imidacloprid. The first of these wells is a private well in Mattituck, Long Island in which imidacloprid was found at a level of 6.69 ppb. An investigation by the New York authorities, however, concluded that these high levels were due to misuse of the pesticide in a greenhouse adjacent to the well where imidacloprid contaminated water was drained onto the ground in the immediate vicinity of the well. The second well was one of five shallow monitoring wells installed directly down gradient from imidacloprid use sites for the purpose of monitoring pesticide levels. One of those wells, ''Jamesport B-2'', showed levels of imidacloprid as high as 2.06 ppb. It was discovered, however, that this well was in all likelihood contaminated as a result of a manmade sump nearby that was constructed to alleviate ponding in the field and directly connected surface water to ground water. Imidacloprid was detected in only one of the other five wells, and the level of imidacloprid detected in the other well did not exceed 0.24 ppb. Finally, imidacloprid has been detected in shallow ground water wells directly downgradient from a site investigating use of tree injection treatments of imidacloprid. The highest level of imidacloprid found in these wells was 3.9 ppb. These wells, however, are not representative of wells used to supply ground water for drinking water. The wells were screened at extremely shallow depths (screens beginning only 4 to 10 feet from surface) due to the fact that the depth to ground water averaged about five feet. It was concluded that these wells are ''no more representative of what would likely occur in drinking water supplies than pesticide concentrations in samples taken from a weir draining an agricultural field are representative of what would occur in a community water supply drawing from a river or reservoir downstream.'' (Ref. 43)

iv. *Conclusion*. Based on the above analysis of EPA's drinking water models, EPA concludes that they are based on reliable data and have produced estimates that EPA can reliably conclude will not underestimate exposure to pesticides in drinking water. The model estimates EPA used for assessing the aggregate exposure to imidacloprid (37.6 ppb for acute and 17.52 ppb for chronic from the FIRST surface water model) are substantially higher than any actual data on imidacloprid residues in drinking water including the imidacloprid prospective ground water study and even the extraordinary and unrepresentative values seen in ground water on Long Island as a result of pesticide misuse, a direct connection between ground water and surface water, or extremely shallow ground water.

5. *Missing exposure data - specific*—

a. *Information on regional consumption*. NRDC contends that, for imidacloprid, EPA relied on estimates of national consumption of blueberries and not regional or state-specific data for its granting tolerances in connection with the approval of emergency exemptions under FIFRA for use of the pesticide on blueberries in the States of New Jersey and Michigan. NRDC argues that the fresh nature of the food and the potential for heavy local consumption with a strong seasonal component strongly suggests that national consumption data may underestimate consumption in localized areas in New Jersey and Michigan.

EPA is confident that the methodologies used in its estimation of exposure and the percentile of regulation selected do not systematically underestimate exposures to major identifiable subpopulations. This is based, in part, on the extensive food consumption survey data from USDA (its Continuing Survey of Food Intake by Individuals or CSFII) which surveyed more than 20,000 individuals from all States and results in more than 40,000 unique person-days of consumption. EPA notes that, contrary to the assertion by NRDC, consumption is not averaged throughout the year, but instead the CSFII includes each reported consumption amount in the form of a frequency distribution of actual reported single-day consumptions. Each individual consumption event thus can be considered separately when such consideration is appropriate to risk assessment as for risk assessments estimating acute risks.

Accordingly, the CSFII survey is adequate to capture the high-end consumers about which NRDC raises concerns. The survey is statistically designed to be representative of the U.S. population and reflects variability in consumption over all seasons and geographic regions. Due in part to this design and the fact that fresh blueberries are widely available in season in states where they are not grown, EPA does not believe that the high-end consumption estimates present in the USDA CSFII survey materially or systematically underestimate the consumption patterns of consumers in blueberry-producing states (either overall or during harvest and other ''high-availability'' seasons). (Ref. 52).

It should be emphasized that in objecting to EPA's reliance on this scientifically designed consumption survey, NRDC has offered nothing other than speculation to support its claim that EPA is underestimating blueberry consumption. For this reason alone, NRDC's argument lacks merit.

For the reasons detailed above, NRDC's allegations concerning blueberry consumption do not indicate that EPA has underestimated exposure of consumers in Michigan and New Jersey to imidacloprid. NRDC's objection to the children's safety factor decision on this ground, therefore, is without merit.

b. *Residential exposure information*. NRDC claims that EPA failed to include several residential exposure scenarios in its aggregate exposure estimate for imidacloprid based on low toxicity. Imidacloprid Objections at 16. Previously, EPA had concluded that certain residential exposure scenarios did not present any significant risk either because the toxicity data did not reveal any relevant adverse effects for the duration of exposure in question (intermediate-term exposure for all population groups) or because imidacloprid exposure was not expected for a particular population group (short-term adult exposure). See 66 FR at 56229, 56231. On October 8, 2002, however, the Health Effects Division (HED) Hazard Identification Assessment Review Committee (HIARC) re-reviewed the hazard and exposure database for imidacloprid and established additional endpoints. Endpoints were chosen for each of the following exposure scenarios: acute dietary, chronic dietary, short-term oral, intermediate-term oral, short-term dermal, intermediate-term dermal, long-term dermal, short-term inhalation, intermediate-term inhalation, and long-term inhalation. Additionally, it was concluded that short-term exposure was likely for adults by the dermal and inhalation route. Oral exposure for adults is not expected from the residential uses for imidacloprid (e.g., turf, ornamental, pets) because adults do not generally engage in the type of hand-to-mouth behavior that can produce such pesticide exposure in young children. Accordingly, an aggregate risk assessment for short-term dermal and inhalation exposure for adults was conducted. 68 FR 61624, 61632 (October 29, 2003). Intermediate-term risk assessments (i.e. risk assessments that aggregate exposure from food, water, and residential exposures for comparison to intermediate risk endpoints) were not conducted because, based on residential application

practices and the half-lives observed in the turf transferable residue study, residential exposures to imidacloprid are not expected to be continuous for periods of 30 to 90 days. 68 FR at 61632; (see Ref. 44 at 51).

c. *Prospective ground water monitoring studies*. As discussed above, these studies have been received and reviewed. The levels of imidacloprid found in ground water were below the levels from modeling used to calculate aggregate exposure.

6. *Missing risk assessment*. NRDC claims that a short-term residential risk assessment is missing as to imidacloprid. Imidacloprid Objections at 5. EPA would note, however, that such a risk assessment was conducted and is summarized on pages 39,046 and 39,047 of the **Federal Register** notice. 67 FR 39041, 39046-39047 (July 21, 1999). See also 68 FR 61624, 61632 (October 29, 2003).

7. *Conclusion on children's safety factor issues*. In the challenged tolerance action, EPA applied an additional safety factor of 3X to address the missing DNT study. As discussed above, that study has now been received and reviewed. Taking into account the results of that study as well as all of the arguments raised by NRDC, EPA has concluded that there are reliable data supporting removal of the additional safety factor for infants and children for all risk assessments other than the acute risk assessment relying on the acute neurotoxicity study in rats to project a safe dose in humans. As to the acute risk assessment using the acute neurotoxicity study in rats, there are reliable data supporting use of an additional 3X factor instead of 10X. See Unit VII.C.2. The 3X safety factor has been incorporated into the acute risk assessment by dividing the LOAEL from the acute neurotoxicity study by 3 in deriving the acute reference dose.

C. LOAEL/NOAEL

NRDC argues that EPA cannot legally make the reasonable certainty of no harm finding for imidacloprid because EPA has relied on a LOAEL in assessing the safe level of exposure to the pesticide. NRDC claims EPA ''cannot lawfully establish tolerances in the absence of a no-observed-effect-level (NOEL).'' Imidacloprid Objections at 18. Implicit in this argument is that EPA cannot use a no-observed-adverse-effect-level (NOAEL) in making a safety finding. In later objections, NRDC confirmed that in fact it was contending that section 408's safety standard does not permit EPA to rely on a NOAEL in concluding a tolerance is safe. Rather, according to NRDC, EPA may only make a safety finding for a pesticide where EPA has determined the dose in animals at which no effects, adverse or otherwise, are elicited from exposure to the pesticide. Isoxadifen-ethyl Objections at 17-18. Below EPA identifies the flaws in NRDC's generic argument concerning LOAELs and NOAELs and addresses the pesticide-specific concerns NRDC raises with regard to use of a LOAEL as to imidacloprid.

1. *Generic legal argument*. EPA believes that it can make a reasonable certainty of no harm finding based on a LOAEL from an animal study (where no NOAEL was found) in appropriate circumstances. Whether or not a reasonable certainty of no harm finding can be made when only a LOAEL is identified in a study depends on whether EPA has sufficient toxicological evidence to estimate with confidence a projected NOAEL that is unlikely to be higher than the actual NOAEL. Typically, when a LOAEL but not a NOAEL has been identified by a study, EPA will, when the data support it, project a NOAEL for that study by dividing the LOAEL by a factor, usually 3X.

There is nothing in the statutory safety standard explicitly addressing the use of NOAELs or LOAELs. Moreover, nothing in the phrase ''reasonable certainty of no harm'' legally precludes use of LOAELs to make a finding regarding the likelihood that harm will occur at a given dose. Whether a LOAEL provides a sufficient basis for a reasonable certainty of no harm finding is a question of scientific fact.

NRDC correctly notes that the House Commerce Committee indicated that its ''expect[ation]'' was that EPA would be able to make a reasonable certainty of no harm finding where there was an ample margin of safety between exposure levels and -

> the level at which the pesticide chemical residue will not cause or contribute to any known or anticipated harm to human health. The Committee further expects, based on discussions with the Environmental Protection Agency, that the Administrator will interpret an ample margin of safety to be a 100-fold safety factor applied to the scientifically determined ''no observable effect'' level when data are extrapolated from animal studies.

H. Rep.104-669, pt. 2 , 41 (1996). Congress' expectation, however, that a reasonable certainty of no harm finding could be made under one set of circumstances (100-fold safety factor applied to the ''no observable effect'' level), certainly does not preclude the finding being made in a different set (e.g., 300-fold safety factor applied to the lowest observable effect level). Moreover, Congress made clear that it was adopting the reasonable certainty of no harm standard based on EPA's ''current application of the standard.'' Since the passage of FFDCA section 409 in 1958, both FDA and EPA have a long history of applying that standard. In no instance, has either agency indicated that reliance on LOAELs, although it has been an accepted practice generally, (See Ref. 12) was barred by the reasonable certainty of no harm standard. To the contrary, EPA has relied on LOAELs to make reasonable certainty of no harm findings under section 409. (See 61 FR 33041 , 33042 (June 26, 1996) (establishing food additive regulation for flutolanil); 55 FR 23736 (June 12, 1990) (establishing food additive regulation for pirimphos methyl). In fact, FDA and EPA interpreted the reasonable certainty of no harm standard to permit a safety finding to be made in circumstances where a NOAEL cannot be identified - that is, when a substance is believed not to have a threshold below which no adverse affect will result - and the House Commerce Committee in its Report on the FQPA specifically recognized and approved that approach. Id. Thus, the legislative history, if anything, supports the proposition that a LOAEL may provide a sufficient basis for a reasonable certainty of no harm finding.

EPA also rejects NRDC's argument that a safety finding for a threshold effect can only be made based on a ''no observed effect level'' (NOEL) as opposed to a ''no observed adverse effect level'' (NOAEL). EPA's Office of Pesticide Programs (''OPP'') in a response to comment document has explained the Agency's reasoning. Although noting the House Commerce Committee Report uses the term ''NOEL'', OPP concluded that:

> the legislative history does not indicate that Congress intentionally used the term NOEL because it did not think it appropriate for OPP to consider the NOAEL. H. Rept. 104-669, 104th Cong., 2d Sess. 41 (1996). In fact, Congress appears to have assumed NOELs are NOAELs. For example, in defining ''threshold effect'' Congress stated that this ''is an effect for which the Administrator is able to identify a level at which the pesticide chemical residue will not cause or contribute to any known or anticipated harm to human health.'' Id. (emphasis added). If Congress had intended that threshold effects be based on NOELs rather than NOAELs, it would not have used the word ''harm'' in defining the effect.
>
> Congress seems to have used the term NOEL because it was common usage for OPP at the time FQPA was passed. However, prior to 1998, in OPP's discussion of the hazard identification process of evaluating pesticide toxicity, the term NOEL was used to describe

the dose level at which no significant adverse effects were noted. OPP's terminology was not consistent with the rest of the Agency, as illustrated in EPA's Integrated Risk Information System (IRIS). This system included more hazard terms than OPP generally employed, including NOAEL, LOAEL, and FEL (Frank Effect Level). On September 2, 1998, this apparent semantic inconsistency was eliminated by HED Standard Operating Procedure (SOP) 98.3 which indicated that OPP would commence using the terms NOAEL and LOAEL in their scientific reviews and documents. It also stated, ''In a practical sense, the terms NOEL and NOAEL have been used interchangeably in OPP. As a general rule, OPP would consider as appropriate for hazard identification and risk assessment only those effects which are adverse or potentially adverse. This inclusion of the term NOAEL should not change any of our hazard endpoints for regulation but add to the quality of the risk assessment.''
(Ref.47 at 165-166)

NRDC claims that only by relying on a NOEL can the Agency legally make the required reasonable certainty of no harm finding. Isoxadifen-ethyl Objections at 17-18. Yet, NRDC's legal argument here both ignores the language of the statute and relies on unsupported factual generalities. NRDC asserts use of a NOEL is required because only by use of a NOEL is ''the risk assessor [] assured that regulatory decisions are based on a dose at which no effect is elicited.'' Isoxadifen-ethyl Objections at 17 (emphasis added). The statute, however, defines the safety standard in terms of protecting against ''harm,'' not ''effects.'' NRDC also argues that the ''adverse'' effects used to define NOAELs are ''crude toxicological endpoints,'' and that ''a NOAEL may represent a dose high enough to elicit significant unpleasant and harmful effects . . . .'' Id. NRDC, however, provides no data or explanation to support such assertions. EPA believes it applies the NOAEL standard in a way that takes into account sensitive indicators of adverse effects. EPA's use of cholinesterase inhibition as an adverse effect is only one example of this. (Ref. 50). In any event, general claims about the non-protectiveness of NOAELs are insufficient to contest a specific finding of safety by EPA. An objector must explain why the specific safety finding, taking into account its component parts (e.g., the NOAEL or LOAEL identified, the safety factors used), does not provide a reasonable certainty of no harm. NRDC has not even attempted to make this case with regard to the NOAELs used in making the safety finding for imidacloprid.

2. *Use of LOAELs to assess imidacloprid risk*. NRDC asserts that EPA relied upon a LOAEL in assessing both acute and chronic toxicity to imidacloprid. Imidacloprid Objections at 18. NRDC is mistaken as to chronic toxicity. In assessing chronic risk, EPA set the RfD using the NOAEL of 5.7 mg/kg/day based upon thyroid effects at the next highest dose of 16.9 mg/kg/day in the imidacloprid combined chronic/carcinogenicity study in rats. 64 FR 39041, 39044 (July 21, 1999); see Imidacloprid Risk Assessment at 26, Table 4. The acute toxicity endpoint was based upon a LOAEL of 42 mg/kg/day from an acute neurotoxicity study in rats. This value was adjusted with a safety factor of 3X to approximate the value of a NOAEL. EPA has high confidence that this value of 3X is sufficient for several reasons. First, the LOAEL (42 mg/kg) from the acute neurotoxicity study is comparable to the LOAELs seen in adults in the developmental rat study (30 mg/kg/d) and the two-generation reproduction study (47/52 mg/kg/d (male/female)) and in the offspring in the DNT study (55 mg/kg/d). Second, the extrapolated NOAEL of 14 mg/kg (42/3 = 14) is comparable to the NOAEL of 20 mg/kg/d established in the offspring in the DNT. Importantly, the LOAEL in DNT study like the acute neurotoxicity study was based on decreased motor activity, and the DNT established a clear NOAEL for that effect. Finally, the neurotoxic effects on motor activity in the acute neurotoxicity study showed a good dose response which resulted in minimal effects on motor activity and locomotor activity at the LOAEL.

D. Aggregate Exposure

1. *Worker exposure*. EPA has interpreted ''aggregate exposure'' to pesticide residues not to extend to pesticide exposure occurring at the workplace based on the language in section 408(b)(2)(D) explaining what exposures are included in the term ''aggregate exposure:''

[T]he Administrator shall consider, among other relevant factors . . . available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including the dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources . . . .

This language quite plainly directs EPA to limit consideration of aggregate exposure of pesticide residues and other related substances to those exposures arising from non-occupational sources. NRDC's claim that EPA erred by not considering worker risks in making tolerance decisions under section 408 runs afoul of Congress' explicit mandate that such exposures not be included. Although there is some ambiguity as to precisely how the factors listed in section 408(b)(2)(D) relate to the safety finding described in section 408(b)(2)(A)(ii), for the reasons set forth below, NRDC's interpretation of the statutory language is unreasonable.

NRDC argues occupational exposures must be considered because the general safety standard as set forth in section 408(b)(2)(A)(ii) describes ''aggregate exposure'' broadly without any exclusion for occupational exposures. This reading, however, renders section 408(b)(2)(D)'s limitation of aggregate exposure to ''non-occupational'' exposures without effect. Three important principles of statutory construction suggest that such an approach is insupportable. First, the language in the statute should be construed in a manner that accords meaning to all provisions. *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (''It is our duty to give effect, if possible, to every word, clause and sentence of a statute.'') It is not lightly presumed that Congress enacted a meaningless or superfluous provision. *Asiana Airlines* v. *FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (''A cardinal principle of interpretation requires us to construe a statute 'so that no provision is rendered inoperative or superfluous, void or insignificant.'''). EPA's interpretation gives meaning to the occupational exposure exclusion in section 408(b)(2)(D). Second, and similarly, statutory language should be construed in a harmonious fashion to the greatest extent possible. *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979) (''[T]he maximum possible effect should be afforded to all statutory provisions, and, whenever possible, none of those provisions rendered null or void.'') ''The cardinal principle of statutory construction is to save and not to destroy.'' *Menasche*, 348 U.S. at 538. Although EPA's interpretation does not relieve all potential tension between section 408(b)(2)(A)(ii) and section 408(b)(2)(D), NRDC's approach treats the two sections as directly contradictory, negating the specific language in subsection (b)(2)(D)(vi) pertaining to occupational exposure. Third, specific language should control over general. *Ohio Power Co.* v. *FERC*, 954 F.2d 779, 784 (D.C. Cir. 1992) (''Of course, it is black letter law that when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences.'') Hence, the more detailed

explanation in section 408(b)(2)(D) concerning the scope of aggregate exposure should be relied upon to help to provide a harmonious construction of the two sections.

NRDC, pointing to the ''among other relevant factors'' language in section 408(b)(2)(D), objects that this section should not be viewed as controlling because this section is intended to be ''illustrative'' and not ''exhaustive.'' EPA fully agrees that section 408(b)(2)(D) was not intended to list exhaustively all of the considerations appropriate to making safety determinations under section 408, but cannot accept the proposition that the ''other relevant factors'' language somehow undoes the express limitation in subsection (b)(2)(D)(vi) concerning occupational exposure. Not only does NRDC's approach once again fail to give meaning to the occupational exposure exclusion in subsection (b)(2)(D)(vi) but it fails to take into account Congress' directive that EPA could consider ''other relevant factors.'' When used in this fashion, the word ''relevant'' restricts EPA to considering factors that are relevant to the safety determination under section 408(b) - that is, relevant to whether a pesticide's aggregate exposure meets the reasonable certainty of no harm test. Presumably, Congress provided an important reference point for determining relevance by the long list of factors it required that EPA consider. Relevance, moreover, is indicated not only by the factors that Congress included but by the aspects of those factors that Congress expressly directed were not to be considered. Thus, EPA believes that Congress, by excluding occupational exposures from the term ''aggregate exposure'' in subsection (b)(2)(D)(vi) was, in effect, determining the relevance of occupational exposure to aggregate exposure and the safety determination under section 408.

Finally, NRDC has argued, in a Petition which it has appended to its objections, that even if worker exposure generally is excluded from aggregate exposure, ''*in utero*'' exposures resulting from the presence of pregnant women in the workplace should not be excluded from consideration. NRDC, Petition for a Directive that the Agency Designate Farm Children as a Major Identifiable Subgroup and Population (1998). NRDC points to the statutory language directing EPA to consider ''*in utero*'' exposures and cases under state worker compensation statutes that have held that children who are injured ''in utero'' as a result of their mother's employment are not barred by worker compensation schemes from bringing an action against the employer. These cases have held that the bar to seeking a tort remedy against the employer applies only to ''employees'' and an *in utero* fetus is not an employee. See, e.g., *Snyder* v. *Michael's Stores, Inc.,* 945 P.2d 781 (Calif S.Ct. 1997).

Although the statutory language on this issue may permit multiple readings here, EPA believes it is reasonable to exclude workplace exposures to the in utero fetus from aggregate exposure. EPA is not suggesting that the fetus is an employee - the issue involved in the worker compensation cases cited by NRDC. The language of section 408 is significantly different than worker compensation statutes. Section 408 does not bar consideration of exposure to ''employees'' but rather exposure from ''occupational sources.'' Given this statutory language EPA believes it is reasonable to focus upon whether the exposure is principally due to exposure in an occupational setting or not. An exposure to a fetus that results from the fetus' mother's presence in an occupational setting would fall well within this approach. This interpretation also makes sense in terms of the overall statutory scheme. Presumably, Congress excluded occupational exposures from section 408 because it determined that acceptable levels in food for the general public should not be set using the discrete, and highly regulated (including regulation by EPA under FIFRA), exposures occurring in the workplace as an assumed underlying exposure. If occupational exposure to pregnant women is included in aggregate exposure under section 408, however, occupational exposure will invariably be an aspect of the section 408 safety finding for pesticides involved in agriculture or other commercial enterprises because EPA would generally have to assume that pregnant women may be in the workforce.

2. *Classification of farm children as a major identifiable population subgroup.* NRDC points out that FFDCA section 408 directs EPA to consider not just the general population in assessing aggregate exposure but also ''major identifiable subgroups of consumers.'' 21 U.S.C. 346a(b)(2)(D)(vi). In this regard, NRDC argues that children living in agricultural communities should be treated as such a major identifiable subgroup. These children are an identifiable subgroup, according to NRDC, because of the allegedly heightened exposure to pesticides that they receive due to their proximity to farm operations and farm land and, for some, due to their contact with parents involved in agriculture. Isoxadifen-ethyl Objections at 11-12. NRDC claims these children comprise a ''major'' subgroup citing statistics showing that ''320,000 children under the age of six live on farms in the United States[], . . . many hundreds of thousands of children play or attend schools on or near agricultural land, . . . [and] [t]he nation's 2.5 million farm workers have approximately one million children living in the United States.'' Id.

Whether or not EPA attaches the label ''major identifiable subgroup'' to farm children, EPA's risk assessment approach to children, including the major identifiable subgroups of children used in its risk assessments, adequately takes into account any pesticide exposures to children - whether as a result of living close to agricultural areas or otherwise. For some time, EPA has treated infants and children grouped by ages (e.g., infants younger than 1 year, children 1 - 2 years) as major identifiable subgroups. These age groupings have been chosen to reflect different eating patterns of the age groups. In evaluating exposure to these or any other subgroup, however, EPA considers the range of exposures across the subgroup not just as a result of pesticide residues in food but from all non-occupational exposures. If a significant number of any of the population subgroups of children have higher exposures due to a non-food source (e.g., residential uses of a pesticide, proximity to agricultural areas), EPA believes that that exposure is appropriate to consider in evaluating the range of exposures for the subgroup. The fact that the children in the subgroup receiving the higher exposures are not themselves labeled a major identifiable subgroup in no way lessens EPA's consideration of their exposures. This approach is nicely illustrated by the imidacloprid risk assessment.

In the imidacloprid risk assessment, EPA not only considered imidacloprid exposure from food but also exposures resulting from use of imidacloprid on lawns and pets. The residential use scenario that produced the highest estimate of exposure was a toddler hugging the pet right after imidacloprid treatment. In evaluating aggregate exposure to toddlers (children 1-2 years-old), EPA aggregated imidacloprid exposure from the pet hug scenario with imidacloprid exposure from food and water. This was done even though (1) children living with pets capable of receiving a full body hug are not designated a major identifiable subgroup; (2) it is likely that only a minority of the children in the age subgroup of 1-2 years-old live with pets

of this size; and (3) the number of 1-2 year-old children that may actually experience the exposures estimated by the pet hug scenario is likely to be exceeding small. Similar to the manner in which residential exposure was incorporated in the aggregate exposure assessment, if EPA had information showing meaningful exposure to children as a result of living close to agricultural areas, those exposures would receive full consideration in assessing aggregate exposure to the existing children's subgroups. Thus, the fact that EPA has not labeled farm children as a major identifiable subgroup has not in any way affected EPA's consideration of exposures that are unique to farm children. For the reasons discussed in the Units VII.A. and VII.D.4, however, EPA concludes that its exposure assessment has adequately considered any potentially greater exposures to children in agricultural areas.

That being said, EPA does not believe that NRDC has made an adequate case that the group of children NRDC designates as ''farm children'' are an identifiable group. Many of the commenters protested NRDC's designation of ''farm children'' as a major identifiable subgroup, noting the heterogeneous nature of the group and NRDC's lack of precision in defining the group. To be sure, NRDC's suggested subgroup is constructed differently than EPA's historical practice with regard to population subgroups. That practice has focused on categorizing individuals by age, ethnicity, and region of the country. Similarly, NRDC is, in fact, far from precise in defining the limits of the suggested subgroup. For example, NRDC does not clarify whether urban or suburban children on the borders of areas that exist side-by-side with agricultural areas should be included in the alleged subgroup, or whether it would include in the subgroup children in agricultural areas who might live no closer to application sites than some urban or suburban children.

Moreover, several of the reports submitted by NRDC undermined its contention that farm children are an identifiable subgroup based on exposure. The CFPR Report, for example, in a number of places highlights the degree to which, not only farm-area residents, but also urban and suburban residents are exposed to pesticides. The asserted exposures suffered by urban dwellers, moreover, include spray drift not only from urban area applications (e.g., from home and garden applications, as well as other structural applications), but long-range spray drift from agricultural area applications. These aspects of the report run counter to NRDC's suggestions that: (1) farm children are a major subgroup that receives greater exposure than non-farm children; and (2) farm children are a major identifiable subgroup, in that the lines in the report between farm area children and non-farm-area children exposed to agricultural spray drift are blurred.

In addition, although in places the CFPR Report cites to studies purportedly showing that farm children suffer more exposure to pesticides than other children, on account of spray drift, it largely relies on the Washington State studies discussed above. For reasons already mentioned, the Agency does not believe that those studies support the designation of farm children as a major identifiable subgroup.

The Ranking Study, for its part, also emphasized that ''an increasing number of children live along the nation's agricultural-urban edge.'' As discussed above, this phenomenon clouds the potential for a distinction between farm and non-farm children. Moreover, the authors of the study identified ''[n]otable uncertainties'' in their risk assessment, and would go only so far as to suggest that ''farmworker/farm children'' constitute a subgroup ''potentially at higher risk.'' Thus, it, too, fails to support the identification of farm children as a major identifiable subgroup, as distinguished from children generally.

NRDC also alleges that farm children have ''unique . . .sensitivities to exposure'' that must be considered by EPA. Imidacloprid Objections at 11-12. NRDC, however, cites no unique toxicological sensitivities of farm children but rather focuses on the allegedly unique exposure patterns of farm children. At most, NRDC points to the fact that children generally may be more toxicologically sensitive than adults because their internal organs and bodily processes are still developing. Id. at 13. But the fact that children may have different toxicological sensitivities than adults does not support any claim regarding differences in sensitivities between children generally and farm children.

In sum, the above studies and information, whether concerning children in agricultural areas and non-agricultural areas or children in agricultural areas alone, and whether concerning environmental levels, biological levels, or both, provide no sufficient basis for designating ''farm children'' as a major identifiable subgroup. It thus was reasonable for EPA to assess aggregate exposure to the challenged pesticide tolerances without identifying farm children as an additional major identifiable subgroup of consumers. EPA's approach, described above, of examining the range of exposures in each of the age-based subgroups of children is adequately protective of children to the extent they experience higher exposures from proximity to agricultural areas.

3. *NRDC's 1998 petition on farm children*. As previously mentioned, NRDC petitioned EPA in 1998 to designate farm children as a major identifiable subgroup under section 408 and take several other various steps regarding farm children's exposure to pesticides. For the reasons stated above, EPA does not believe it is appropriate to designate farm children as a major identifiable subgroup although, as indicated, EPA will consider reliable data on the range of pesticide exposures received by children, including data pertaining to such issues as spray drift, volatilization, and farmworker take-home exposures that were raised by the 1998 petition.

The 1998 petition also requested that EPA: (1) retain the additional 10X safety factor for the protection of children where EPA lacks data on farm children exposure; (2) make specific determinations as to the exposure of farm children from all pathways; (3) require data from registrants where data is lacking on farm children's exposure and not issue a tolerance until such data is submitted; (4) refuse to register a new pesticide unless a validated scientific method is available to detect residues of the pesticide in food; (5) increase research into exposures and health status of farm children; and (6) honor the Executive Order on environmental justice.

As explained above, EPA has initiated a myriad of different research and outreach programs concerned with pesticide exposure to farmworkers and their families. The most important of these include, on the research front, EPA work with the National Agricultural Workers Survey (NAWS), and the Agricultural Health Survey (AHS). In terms of outreach, EPA has many ongoing programs, but would like to highlight two projects in particular. The Agency's work with the Association of Farmworker Opportunity Programs (AFOP), and its work on the National Strategies for Health Care Providers: Pesticide Initiative.

Through the Agency's cooperative agreement with the Association of Farmworker Opportunity Programs (AFOP), EPA funds the National Pesticide Safety Education Program for agricultural workers and farm worker children. Working with Americorps

members, AFOP trains 25,000 farm workers and farm worker children every year about pesticide safety using Americorps members in over 50 sites in 16 states. AFOP conducts pesticide safety training for children at childcare centers, schools, churches, and community centers, and has developed a handbook in Spanish. The National Strategies for Health Care Providers: Pesticide Initiative is an initiative created by the EPA and the National Environmental Education and Training Foundation (NEETF) in collaboration with the U.S. Departments of Health and Human Services, Agriculture and Labor. It is aimed at incorporating pesticide information into the education and practice of health care providers. The goal is to improve the recognition, diagnosis, management, and prevention of adverse health effects from pesticide exposures. This initiative also serves as a model for broader efforts to educate health care providers about the spectrum of environmental health issues. Seven federal agencies and 16 professional associations of health care providers were involved in launching this initiative. These actions address the Petition's request regarding increased research and fidelity to the Executive Order on Environmental Justice.

EPA agrees that where additional data are needed to characterize farm children's exposure to a specific pesticide it will retain the additional 10X safety factor unless reliable data exist that support selection of a different safety factor. Further, EPA will seek additional data on farm children exposure where necessary. Any decision on whether to approve a tolerance where additional data has been required will have to be a case-by-case determination considering other data that is available on the pesticide and the ability of use of additional safety factors to address any uncertainty raised by the requested data. As to making specific findings on all possible pathways of exposure to farm children, EPA will follow a pesticide-specific approach which considers both the generic information and pesticide-specific information in regards to whether a particular pathway has the potential for significant exposure. Finally, EPA agrees that it should not register a new pesticide for use on food unless it has approved an analytical method for detecting the level of pesticide residues in food or found that such a method is unnecessary.

4. *Adequacy of EPA's assessment of the aggregate exposure of children, including children in agricultural areas.* EPA believes that it has adequately assessed the aggregate exposure of children to imidacloprid generally (including both farm children and non-farm children), through its assessment of exposure through food, drinking water and residential use pathways. In support of its objection to this assessment, NRDC cites numerous studies for the proposition that other pathways (e.g., track-in) increase farm children's exposures, and it also cites information purportedly suggesting that volatilization and spray drift lead to higher exposures among farm children. For reasons discussed above, however (see Unit VII.A.), EPA does not believe that this information demonstrates that the pathways asserted, to the extent they exist, lead to farm children experiencing imidacloprid exposure levels higher than those experienced by other children. Rather, these studies are inconclusive, and suggest that farm children and non-farm children generally receive similar levels of exposure. Nor does the information bearing on volatilization and spray drift demonstrate that farm children receive greater imidacloprid exposures through these two additional pathways. For example, as stressed above, imidacloprid exposures due to residential and pet uses common to farm and non-farm areas would dwarf any exposures that might be attributable to either volatilization or spray drift in agricultural areas.

5. *Residential exposure as a result of use requiring a tolerance.* NRDC also argues that EPA has erred in not including the added residential exposure that occurs in the home when an additional agricultural use is added. The reasons explained above as to why any additional exposure to children as a result of their proximity to farming operations is expected to be insignificant as regards imidacloprid apply with equal or more force as to this contention.

6. *Population percentile used in aggregate exposure estimates*—a. *In general.* NRDC contends that EPA in making the reasonable certainty of no harm finding must make such a finding as to ''all children'' - that is, EPA must find that ''no children will be harmed'' by exposure to the pesticide. Although EPA is somewhat uncertain as to precisely what approach to risk assessment and safety findings NRDC is advocating, EPA believes that its approach to implementing the reasonable certainty of no harm standard is consistent with the statutory framework. As specified in the statute, EPA focuses its risk assessment and safety findings on major identifiable population subgroups. 21 U.S.C. 346a(b)(2)(D)(vi). For children EPA has identified the following subgroups: nursing infants (0-6 months); non-nursing infants (6 months - year); 1-2 year-olds; etc. EPA evaluates each of these subgroups to determine if it can be determined that there is a reasonable certainty of no harm for individuals in these subgroups. (See Ref. 48 at 46 and Ref. 51 at 14)

b. *Choice of population percentile.* NRDC asserts that EPA erred by allegedly making its safety decision as to the acute risk posed by imidacloprid based on only a portion of the population, leaving the rest of the population unprotected. According to NRDC, EPA only considered 95% of the affected population. EPA admits using the population percentage cited by NRDC in estimating acute exposure for imidacloprid. EPA most definitely was not, however, acting in a manner designed to only protect 95% of the population. To the contrary, EPA's exposure estimates were designed to capture the full range of exposures in each population subgroup.

As explained in its science policy paper on this subject, EPA, in estimating acute exposure for population subgroups, generally considers various population percentiles of exposure between 95 and 99.9, depending on the extent of overestimation in the residue data used in the assessment.(See Ref. 52) In each exposure assessment EPA is attempting to reasonably estimate the full range of exposures in a subgroup. The use of a particular percentile of exposure is a tool to estimate exposures for the entire population and population subgroups and not a means to eliminate protection for a certain segment of a subgroup. When inputs for pesticide residue values in the exposure estimate are high end (e.g., assuming all food contains tolerance level residues), a lower percentile of exposure (e.g., 95%) is thought to be representative of exposure to the overall population as well as subgroups. As increasingly realistic residue values are used (e.g., information from pesticide residue monitoring), a higher percentile of exposure (e.g., 99.9%) is generally necessary to be protective of the overall population and its subgroups.

This issue was the subject of some attention when EPA began performing probabilistic acute exposure (risk) assessments using monitoring data for residue values and increasingly used a population percentile of 99.9 to estimate exposure. Some affected parties became concerned that EPA was determining that only 99.9% of the population were entitled to protection from potentially unsafe pesticide residues. EPA

addressed this issue in a policy paper, noting that:

> just as when OPP uses the 95th percentile with non-probabilistic exposure assessments OPP is not suggesting that OPP is leaving 5% of the population unprotected, OPP is not by choosing the 99.9th percentile for probabilistic exposure assessments concluding that only 99.9% of the population deserves protection. Rather, it is OPP's view that, with probabilistic assessments, the use of the 99.9th percentile generally produces a reasonable high-end exposure such that if that exposure does not exceed the safe level, OPP can conclude there is a reasonable certainty of no harm to the general population and all significant population groups.

Id. at 31.

Other parties had the opposite concern - namely, that by using the 99.9 percentile EPA was grossly overstating exposure to the population. Interestingly for the purpose of the NRDC's claims regarding imidacloprid, EPA's analysis of the reasonableness of its exposure assessments demonstrated that exposure estimates using high end residue values and the 95th percentile of exposure were significantly greater than exposure estimates for the same pesticide relying on monitoring data and 99.9th percentile. Id. at 16-17 (citing an example showing exposure estimates over an order of magnitude lower when using 99.9th percentile with monitoring data rather than 95th percentile assuming tolerance level residues).

For imidacloprid, EPA estimated acute exposure using the gross overestimate of all crops covered by the tolerance containing residues at tolerance levels. Thus, EPA believes it acted reasonably in using the 95th percentile of exposure in estimating imidacloprid exposure to the overall population and major identifiable subgroups in making its reasonable certainty of no harm finding as to the acute risks posed by imidacloprid.

7. *Lack of residential exposure assessment for adults*. NRDC objects to EPA's decision not to conduct residential exposure assessments for adults despite the fact that imidacloprid has numerous residential uses. Imidacloprid Objections at 16. As explained in Unit VII.B.5. above, EPA has now determined that residential exposure assessments are appropriate as to short-term dermal and inhalation exposures but that other types of residential exposure are unlikely to occur (e.g., short-term adult oral exposure and intermediate-term exposure).

8. *Percent crop treated*. NRDC asserts that EPA's use of percent crop treated data pertaining to blueberries in calculating aggregate exposure for imidacloprid is in violation of the requirements specified in section 408(b)(2)(F). That section imposes certain conditions upon EPA's use of percent crop treated data when assessing chronic dietary risk. Among the specified conditions are the requirements that EPA find that ''the data are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide chemical residue . . . [and] the exposure estimate does not understate exposure for any significant subpopulation group . . . .'' 21 U.S.C. 346a(b)(2)(F). NRDC claims that, because EPA used national percent crop treated data on blueberries even though imidacloprid use on blueberries is only permitted in Michigan and New Jersey, EPA had no ''valid basis'' for projecting the percent crop treated in those two states. Additionally, NRDC argues that use of national percent crop treated data on blueberries will ''understate exposure'' for the significant population group of blueberry consumers in Michigan and New Jersey.

NRDC's argument here is without merit because EPA assumed that 100% of the blueberries consumed in the United States would be treated with imidacloprid in conducting the imidacloprid risk assessment. Although the **Federal Register** notice explaining the basis for the imidacloprid blueberry tolerance does note that ''percent crop treated data [was] used of selected commodities,'' 64 FR 56225, 56228 (November 7, 2001), those commodities did not include blueberries. (Ref. 58; see also Ref. 44 at 43-44)

E. Lack of Emergency

In comments filed on its own objections, NRDC advances a new challenge to the imidacloprid tolerance on blueberries. This challenge is unrelated to the safety issues raised in its objections; rather, it is instead tied to the fact that this imidacloprid tolerance was established in conjunction with EPA's approval of the use of imidacloprid under section 18 of FIFRA to address an emergency situation in the state of Michigan. Section 18 of FIFRA gives EPA the authority to exempt States and Federal agencies from the requirements of FIFRA in emergencies. NRDC claims that the ''alleged'' emergency justifying the approval of imidacloprid on blueberries, and correspondingly the blueberry tolerance, does not meet the criteria for an emergency in EPA regulations.

Under EPA regulations, EPA may authorize an emergency exemption if it determines, among other things, that an ''emergency condition exists.'' 40 CFR 166.25(b)(1)(i). An ''emergency condition'' is defined as ''an urgent, non-routine situation . . . .'' 40 CFR 166.3(d). The regulations deem an emergency condition to exist when (1) no effective, registered pesticides are available to address the conditions; (2) ''no economically or environmentally feasible alternative practices which provide adequate control are available;'' and (3) the situation will cause ''significant economic loss . . . .'' Id. Applicants for emergency exemptions are required to submit information to EPA addressing these issues. 40 CFR 166.20. EPA may ''discontinue processing'' of incomplete applications, 40 CFR 166.30(a)(1), and deny an application for a information gap but must reconsider the application when the information gap is filled. 40 CFR 166.30(a)(2).

EPA first approved the State of Michigan's request for an emergency exemption for the use of imidacloprid on blueberries in July, 2001. The problem faced by growers in Michigan was that the Japanese beetle (an invasive pest introduced to the United States in 1916) was increasingly contaminating shipments of harvested blueberries. Although the beetle does not reduce the production of blueberries in the field, the presence of the beetle mixed in with harvested blueberries has resulted in wholesale rejection by fruit buyers of shipped blueberries. Purchasers, according to Michigan, follow a ''one beetle is too many'' approach. Michigan cited one instance in the prior year (2000) in which two shipments of blueberries totaling 1.7 million pounds of blueberries were rejected at the point of delivery. Looking to the future, Michigan noted that ''the three largest buyers of Michigan blueberries for yogurt production have chosen not to purchase blueberries from Michigan in 2002, because of Japanese beetle contamination in previous years.'' These buyers alone purchased 5 million pounds of the 65 million pound Michigan blueberry crop. Michigan stated that this contamination had occurred despite the addition of more workers on packing lines and investment in expensive color sorting technologies. No pesticides were then registered for control of Japanese beetle grubs in blueberries and the two products registered for control of adult Japanese beetles in blueberries are of limited effectiveness.

The basis for NRDC's challenge to EPA's conclusion that an emergency condition existed in Michigan is (1) that Michigan did not demonstrate that the ''alternative solutions [of using

additional workers or color sorting technologies] are economically or environmentally infeasible;'' and (2) that Michigan has failed to provide economic data on estimated net and gross revenues with and without the pesticide. As to whether Michigan adequately demonstrated the infeasibility of addressing the Japanese beetle problem by using additional workers or sorting technology, EPA believes that Michigan's reliance on the fact that use of these practices has in the past failed to solve the problem is an adequate demonstration. Regarding data on potential economic losses, Michigan's data was not as detailed as EPA would have preferred, but in the context of an emergency situation, providing information indicating that close to 10% of the Michigan blueberry crop had already been threatened by the lack of control of Japanese beetles (the loss of purchasers for 5 million pounds out of Michigan's 65 million pound crop) is sufficient to show a ''significant economic loss.''

In any event, this issue has no relevance to the action being taken today to establish a permanent tolerance for imidacloprid on blueberries because it is not being done in connection with an emergency exemption under FIFRA.

VIII. Response to Comments on NRDC's Objections

EPA has responded to the comments submitted that pertained specifically to imidacloprid to the extent the comments were relevant above. The only remaining comments that EPA believes are appropriate to address are the comments filed by the IWG raising legal objections to EPA's consideration of data bearing on exposure to pesticides other than through pesticide residues in food. EPA has also included a short response to the comments received from citizens and IR-4.

A. IWG Comments

To recap, the IWG's argument is based on the presence of the defined term ''pesticide chemical residue'' in the critical statutory injunctive that a pesticide tolerance is safe only if ''there is reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all dietary exposures and all other exposures for which there is reliable information.'' 21 U.S.C. 346a(b)(2)(A)(ii). The term ''pesticide chemical residue'' is defined to mean a residue of the pesticide, or any substance present as a result of metabolism or degradation of the pesticide, ''in or on raw agricultural commodities or processed food.'' 21 U.S.C. 321(q)(2). The IWG argues that, because aggregate exposure is described only in terms of exposure to the ''pesticide chemical residue'' and a pesticide chemical residue is defined as only including residues in food, aggregate exposure must be limited to exposure to pesticide residues in food. Under this interpretation, EPA may not consider exposures from non-food sources such as residues in drinking water, or residues in or around the home from residential uses of a pesticide in making the safety determination under section 408.

In its initial construction of the FQPA, and consistently thereafter, EPA has taken a distinctly different approach to section 408's safety finding. EPA's interpretation has been that the statute requires EPA, in making a section 408 safety finding, to consider all exposures to the pesticide and related substances, whether the exposure is from food, water, or other sources, with the exception that occupational exposures are excluded. See, e.g., 61 FR 48843, 48844 (September 17, 1996) (Aggregate exposure ''includes exposure through drinking water, but does not include occupational exposure.''); 62 FR 17096, 17097 (April 9, 1997) (''In examining aggregate exposure, FQPA directs EPA to consider available information concerning exposures from pesticide residue in food, including water, and all other non-occupational exposures. The aggregate sources of exposure the Agency looks at includes food, drinking water or ground water, and exposure from pesticide use in gardens, lawns, or buildings (residential and other indoor uses).''); (Ref. 62) (''EPA must now consider other non-occupational sources of pesticide exposure when performing risk assessments and setting tolerances. This includes dietary exposure from drinking water, non-occupational exposure, exposure from like pesticides that share a common mechanism of toxicity as well as other exposure scenarios.''). (Ref. 48 at 36 and Ref. 49 at 8). Since August 3, 1996, the date of the passage of the FQPA, EPA has promulgated hundreds of tolerance rulemakings and conducted thousands of tolerance reassessments based on this interpretation of the statute.

EPA's interpretation that it must consider all non-occupational exposures to pesticides and related substances under section 408 rests on the plain language of the FQPA, its statutory structure, and its legislative history. Section 408, by its very terms, in some places dictates that pesticide chemical residues being referred to are residues ''in or on food'', see, e.g., 21 U.S.C. 346a(a)(1), and yet, in other places omits this ''in or on food'' modifying language. Most notably, the ''in or on food'' qualification is omitted from the aggregate exposure provisions. See 21 U.S.C. 346a(b)(2)(A)(ii); 346a(b)(2)(C)(ii)(I); 346a(b)(2)(D)(vi). Because Congress at times paired the term ''pesticide chemical residue'' with the phrase ''in or on food'' and other times (such as in describing aggregate exposure) did not, EPA believes that Congress' usage of the term ''pesticide chemical residue'' should not be interpreted as restricted to residues in or on food unless Congress explicitly directed in its specific usage of the term ''pesticide chemical residue'' that the residue must be in or on food. Admittedly, the definition in section 201 of ''pesticide chemical residue'' as being a residue in or on food creates ambiguity as to Congress' precise intent with regard to its use of the term ''pesticide chemical residue'' in section 408. As explained below, however, EPA's interpretation is the only reasonable interpretation considering the language, structure, and history of section 408.

First, other plain language in the statute confirms the reasonableness of EPA's interpretation. On two occasions, Congress explicitly referenced other ''sources'' of exposure as being relevant to section 408's safety standard. First, in the provision addressing aggregate exposure, Congress directed that EPA consider aggregate exposure ''to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational *sources*.'' 21 U.S.C. 346a(b)(2)(D)(vi) 346a(b)(2)(C) (emphasis added). Second, in expanding the protection for infants and children, Congress specified that, for the purposes of making a safety finding as to infants and children, ''an additional tenfold margin of safety for the pesticide chemical residue and other *sources* of exposures shall be applied . . . .'' 21 U.S.C. 346a(b)(2)(C)(emphasis added). Thus, Congress could not have intended that residues in food would be the only ''source'' considered in calculating aggregate exposure. The legislative history is quite clear on this point, explicitly noting that aggregate exposure includes both exposure under all tolerances for the pesticide and exposure from other sources:

> The Committee understands ''aggregate exposure'' to the pesticide chemical residue to include dietary exposures under all tolerances for the pesticide chemical residue, and exposure from other non-occupational sources.

H. Rept.104-669, Part 2, 40 (July 23, 1996)

Second, the structure of the statute confirms that considering other ''sources'' of pesticide exposure in section 408's safety determination is the only reasonable interpretation of this section. Congress required consideration of aggregate exposure not just to pesticide chemical residues but also to ''other related substances.'' 21 U.S.C. 346a(b)(2)(D)(vi). In including ''other related substances,'' however, Congress imposed no limitation that aggregate exposure to these ''other related substances'' was confined only to aggregate exposure to these substances in food. It would be unusual indeed to suggest that Congress intended that the section 408 safety determination on a pesticide tolerance be constrained in the type of pesticide exposures that could be considered (i.e., only pesticide exposures in food but not exposures from other sources such as drinking water or residential uses) but that no such limitations applied to exposures to substances related to pesticides (i.e., consider exposures to related substances from all sources including food, drinking water, and residential uses).

In contrast to the reasonable coherence between EPA's approach to interpreting what pesticide residues should be considered in making the section 408 safety determination and the language, structure, and history of the FQPA, the IWG's construction is frequently at odds with these guides to interpretation and, in the end, even if accepted fails to achieve the IWG's goal of excluding EPA's consideration of pesticide residue sources other than food.

The IWG's narrow approach to aggregate exposure cannot explain both the statute's and legislative history's references to other ''sources'' of exposure. The IWG's position is that Congress' reference to ''other non-occupational sources'' is a reference to dermal exposure to pesticides from handling of food containing pesticide residues during food preparation. Yet, exposure to pesticides from food handling does not constitute a different source of pesticide exposure than consumption of food bearing pesticide residues. In either case, the source is the food. Further, strictly following the definition of the term ''pesticide chemical residue'' introduces numerous redundancies, see, e.g., 21 U.S.C. 346a(a) (defining when a ''pesticide chemical residue in or on a food'' is unsafe); 21 U.S.C. 321(s) (where the definition of the term ''food additive'' states that it excludes ''a pesticide chemical residue in or on a raw agricultural commodity or processed food''); 21 U.S.C. 346a(o)(2) (requiring EPA to provide information to retail grocers concerning actions taken ''that may result in pesticide chemical residues in or on food . . . .''), and even anomalies into the statute. For example, if each reference in the FFDCA to ''pesticide chemical residue'' must be to a pesticide residue in a food, then under section 402(a)(2)(B), a food is only rendered adulterated by the presence of a pesticide if it is a pesticide residue that is already in a food, since to be adulterated a food must ''bear[] or contain[] a pesticide chemical residue [in or on a raw agricultural commodity or processed food] . . . .'' 21 U.S.C. 342(a)(2)(B) (bracketed language inserted from the definition of pesticides chemical residues in 21 U.S.C. 321(q)(2)). Although such an approach might be understandable as concerns prepared foods which are a mixture of different commodities, it makes no sense as to raw agricultural commodities which are, and have been, the focus of FDA monitoring efforts regarding pesticide residues in food (Ref. 20 at 3 and Appendices A and B) (''Emphasis is on the raw agricultural product, which is analyzed unwashed and whole (unpeeled).'').

Finally, the reasonableness of the IWG argument is called into question because, even if followed, it seems to make no difference in what substances are to be considered in making section 408 safety determinations. In other words, IWG's construction does not accomplish the IWG objective of limiting the safety determination under section 408 to consideration of pesticide residues in food. This is due to the fact that EPA is required to consider both exposures to ''pesticide chemical residues'' and exposures to ''other related substances.'' If pesticide residues in water, in the air, and on surfaces in and around the home or public spaces are not ''pesticide chemical residues'', they certainly would qualify under the plain meaning of the term ''other related substances.'' For if the IWG position is accepted that every substance that would qualify under the dictionary definition of a pesticide chemical residue does not actually fall within the FFDCA definition of pesticide chemical residue, it follows necessarily that non-FFDCA-qualifying pesticide chemical residues have to be some other type of substance. Further, such other substances are clearly related to FFDCA-defined pesticide chemical residues given that it is only the limiting nature of the statutory definition that keeps them from being considered the same substance. Notably, there is no language in the statute suggesting that ''other related substances'' only pertains to such substances in or on food.

EPA cannot accept the argument that, because the term ''related substances'' appears in the pre-FQPA version of FFDCA section 408 and EPA allegedly has never stated that ''related substances'' extends to substances residing in exposure sources other than food, Congress's repetition of the term ''related substances'' in the FQPA enacted EPA's supposed sub silentio interpretation of the term ''related substances'' as meaning ''related substances in food.'' Courts have found reenactment of administratively-interpreted language to be a ratification of the administrative interpretation but only in circumstances where a longstanding administrative interpretation has been affirmatively brought to Congress' attention and Congress has clearly expressed its approval. *AFL-CIO* v. *Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); accord, *Micron Technology, Inc.* v. U.S., 243 F.3d 1301, 1310-1311 (Fed. Cir. 2001). These circumstances are completely absent here. EPA had not affirmatively interpreted ''related substances'' in the manner suggested by IWG in an administrative proceeding prior to FQPA's enactment, and Congress never explicitly addressed the issue of interpretation of the term.

For all of these reasons, EPA reaffirms its contemporaneous and consistent interpretation of FFDCA section 408 as requiring consideration of all exposures to pesticide residues and other related substances other than those exposures occurring in the occupational setting. Relevant exposures include pesticide residues in food and water and exposures to pesticides around the home or in public from sources other than food and water.

Alternatively, the IWG argues that the requirement that data on ''all other exposures'' be based on ''reliable data'' precludes the consideration of exposure information regarding pesticides in drinking water and pesticides used around the home or in public spaces. EPA has repeatedly rejected this argument in the past in issuing policy statements regarding implementation of the FQPA. (See Ref. 47 at 135-155). After reviewing the IWG's latest reiteration of the argument, EPA finds no reason to differ from its earlier conclusions.

B. Citizen Comments

As mentioned above, EPA received several thousand comments from private citizens in support of NRDC's

objections. These comments, for the most part, use identical language. NRDC has urged EPA not to dismiss the citizen comments because they ''raise a wide range of issues reflecting the different ways that people are personally affected by EPA's tolerance decisions.'' (Ref. 37 at 4). EPA has considered the citizen comments but finds their significance to be limited because they contain only unsubstantiated claims regarding the harms of pesticides or general policy arguments as to why fewer pesticides should be used instead of providing reliable information pertaining to the safety standard in section 408(b)(2).

C. IR-4 Comments

EPA appreciates that, as IR-4 mentioned, imidacloprid is critical for minor crop growers and has an important role as an organophosphate replacement. Consideration of information on pesticidal benefits, however, that is often relevant under FIFRA, see 7 U.S.C. 136(bb), plays a very limited role under section 408, see 21 U.S.C. 346a(b)(2)(B), and is not applicable to pesticides such as imidacloprid which only poses threshold-type risks. 21 U.S.C. 346a(b)(2)(B)(i)(I).

IX. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's final order regarding an objection filed under section 408 of FFDCA. As such, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemakings do not, therefore, apply to this action.

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

XI. Time and Date of Entry of Order

For the purposes of 28 U.S.C. 2112(a), the date of issuance of this order shall be May 26, 2004.

XII. References

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13. Fenske 2002: Fenske, R. A., Lu, C., Barr, D., Needham, L., *Children's Exposure to Chlorpyrifos and Parathion in an Agricultural Community in Central Washington State*, 110 Environmental Health Perspectives 549 (May 2002).

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List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recordkeeping and requirements.

Dated: May 14, 2004.

James Jones,

Director, Office of Pesticide Programs.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0090; FRL–7348–1]

Imidacloprid; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for the combined residues of imidacloprid, and its metabolites containing the 6-chloropyridinyl moiety, all expressed as the parent in or on blueberry. Interregional Research Project Number 4 (IR-4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective May 26, 2004. Objections and requests for hearings must be received on or before July 26, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket ID number OPP–2004–0090. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy 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.

FOR FURTHER INFORMATION CONTACT: Shaja R. Brothers, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–3194; e-mail address: *brothers.shaja@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, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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 Access this Document and Other Related Information?

In addition to using EDOCKET*(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.htm*.

II. Background and Statutory Findings

In the **Federal Register** of February 5, 2003 (68 FR 5880) (FRL–7287–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 1E6268, 1E6254, 1E6237, 1E6225, 0E6203, 2E6403, 2E6406, 2E6409, 2E6417, 2E6421, 2E6435, 2E6414, 2E6458, and 2E6506) by IR-4, 681 U.S. Highway #1 South, North Brunswick, NJ 08902–3390. That notice included a summary of the petitions prepared by Bayer CropScience, the registrant. One comment was received in response to the notice of filing of February 5, 2003, from an individual who requested that information about pesticide tolerances be available in grocery stores next to the food labels.

Pursuant to section 408(o), the Consumer Right to Know provision of the FFDCA as amended by FQPA, the Agency distributes information on the risks and benefits of pesticide chemical residues in or on food to large retail grocers for public display. Copies of this EPA brochure entitled, ''Pesticides and Food: What You and Your Family Need to Know'' (Publication No. 735–F–98–00) may be obtained at no cost (*http://www.epa.gov/pesticides/food/*) or viewed in its entirety at *http://www.pueblo.gsa.gov/cic_text/food/pesticides-andfood/food.html*.

The petitions requested that 40 CFR 180.472 be amended by establishing tolerances for combined residues of the insecticide imidacloprid, (1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine), and its metabolites containing the 6-chloropyridinyl moiety, all expressed as imidacloprid in or on blueberry at 3.5 part per million (ppm), in addition to a variety of raw agricultural commodities previously established in the **Federal Register** of June 13, 2003 (68 FR 35303) (FRL–7310–8). EPA received objections to a time-limited tolerance it established for residues of imidacloprid on blueberries in connection with an emergency exemption for such use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* published in the **Federal Register** of January 18, 2002 (67 FR 2580) (FRL–6817–6). The objections were filed by the Natural Resources Defense Council (NRDC) and raised several issues regarding aggregate exposure estimates and the additional safety factor for the protection of infants and children. NRDC's objections raise complex legal, scientific, policy, and factual matters. Elsewhere in today's **Federal Register** EPA has denied NRDC's objections to the now-expired blueberry tolerance as moot. Because NRDC's objections are relevant to this rulemaking establishing a new tolerance on blueberries, EPA has treated NRDC's objections as comments on the petition to re-establish the blueberry tolerance and taken them into account in the current action. EPA's detailed response to NRDC is included in the document denying its objections. Individual commodity tolerances for other members of the bushberry subgroup (currant, elderberry, gooseberry and huckleberry) were established in the **Federal Register** of June 13, 2003 (68 FR 35303).

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance for combined residues of imidacloprid, and its metabolites containing the 6-chloropyridinyl moiety, all expressed as the parent on blueberry at 3.5 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by imidacloprid as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies reviewed are discussed in Unit III.A. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303).

B. Toxicological Endpoints

A summary of the toxicological endpoints for imidacloprid used for human risk assessment is discussed in Unit III.B. of the final rule published in the **Federal Register** of June 13, 2003 (68 FR 35303). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**. Acute, chronic, and short-term aggregate risk assessments are

appropriate for imidacloprid and were performed by EPA.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Tolerances have been established (40 CFR 180.472) for the combined residues of imidacloprid, in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures from imidacloprid in a variety of raw agricultural commodities. Acute and chronic exposure assessments conducted by EPA to assess dietary exposures from imidacloprid are discussed in Unit III.C.1. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**. The proposed tolerance for blueberry at 3.5 ppm was included in the imidacloprid risk assessment of June 13, 2003.

2. *Dietary exposure from drinking water.* FQPA Index Reservoir Screening Tool (FIRST) and Screening Concentration in Groundwater (SCI-GROW) model estimated environmental concentrations (EECs) for imidacloprid for acute and chronic exposures are discussed in Unit III.C.2. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**.

3. *From non-dietary exposure.* Imidacloprid is currently registered for use on the following residential non-dietary sites: Granular products for application to lawns and ornamental plants; ready-to-use spray for application to flowers, shrubs and house plants; plant spikes for application to indoor and outdoor residential potted plants; ready-to-use potting medium for indoor and outdoor plant containers; liquid concentrate for application to lawns, trees, shrubs and flowers; and ready-to-use liquid for directed spot application to cats and dogs. In addition, there are numerous registered products intended for use by commercial applicators to residential sites. These include gel baits for cockroach control; products intended for commercial ornamental, lawn and turf pest control; products for ant control; and products used as preservatives for wood products, building materials, textiles and plastics. The non-dietary exposure assessment is discussed in the Final Rule on Imidacloprid Pesticide Tolerance published in Unit III.C.3. of the **Federal Register** of June 13, 2003 (68 FR 35303). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to imidacloprid and any other substances and imidacloprid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that imidacloprid has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general.* Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity.* These issues are discussed in Unit III.D.2. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**.

3. *Conclusion.* There is a complete toxicity data base for imidacloprid and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. EPA determined that the 10X safety factor to protect infants and children should be reduced to 3X. For further discussion, see Unit III.D.3. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303) (FRL–7310–8). These issues are also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates drinking water levels of concerns (DWLOCs) which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water (e.g., allowable chronic water exposure (milligrams/kilogram/day) = chronic population adjusted dose - (average food + residential exposure)). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values

as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kilogram (kg) (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, EPA concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because EPA considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, EPA will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. The acute risk assessment for imidacloprid is discussed in Unit III.E.1. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303).

2. *Chronic risk*. The chronic risk assessment for imidacloprid is discussed in Unit III.E.2. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303).

3. *Short-term risk*. Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Imidacloprid is currently registered for use that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and short-term exposures for imidacloprid. The short-term risk assessment for Imidacloprid is discussed in Unit III.E.3. of the Final Rule on Imidacloprid Pesticide Tolerance published in the **Federal Register** of June 13, 2003 (68 FR 35303).

4. *Aggregate cancer risk for U.S. population*. There is no evidence of carcinogenicity to humans based on carcinogenicity studies in male and female rats and mice. The Agency concludes that pesticidal uses of imidacloprid are not likely to pose a cancer risk to humans.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to imidacloprid residues. EPA's safety finding is also discussed in EPA's response to the concerns voiced by NRDC in its objections to the prior imidacloprid blueberry tolerance. EPA's response is published elsewhere in today's **Federal Register**.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methods are available for determination of imidacloprid residues of concern in plant (Bayer Gas Chromatography/Mass Spectrometry (GC/MS) Method 00200) and livestock commodities (Bayer GC/MS Method 00191). These methods have undergone successful EPA petition method validations (PMVs), and the registrant has fulfilled the remaining requirements for additional raw data, method validation, independent laboratory validation (ILV), and an acceptable confirmatory method (high performance liquid chromatography/ultraviolet (HPLC/UV) Method 00357). The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no established Codex, Canadian, or Mexican maximum residue limits (MRLs) for imidacloprid in/on blueberries.

V. Conclusion

Therefore, the tolerance is established for combined residues of imidacloprid, (1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine), and its metabolites containing the 6-chloropyridinyl moiety, all expressed as imidacloprid in or on blueberry at 3.5 ppm.

VI. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0090 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 26, 2004.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector 40 CFR 178.27. Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm. 104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You

must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.1. Mail your copies, identified by docket ID number OPP–2004–0090, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.1. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, 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). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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 rule 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.

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. 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 this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180— [AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.472 is amended by alphabetically adding the following commodity to the table in paragraph (a) to read as follows:

§ 180.472 Imidacloprid; tolerances for residues.

(a) * * *

Commodity	Parts per million	Revocation/ Expiration Date
* * * * *		
Blueberry		
* * * * *		
	3.5	None

* * * * *

Dated: May 11, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–11780 Filed 5–25–04; 8:45 am]

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Federal Register

Wednesday,
May 26, 2004

Part V

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2590

Health Care Continuation Coverage; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AA60

Health Care Continuation Coverage

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rules.

SUMMARY: This document contains final rules implementing the notice requirements of the health care continuation coverage (COBRA) provisions of part 6 of title I of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). The continuation coverage provisions generally require group health plans to provide participants and beneficiaries who under certain circumstances would lose coverage (qualified beneficiaries) the opportunity to elect to continue coverage under the plan at group rates for a limited period of time.

The final rules set minimum standards for the timing and content of the notices required under the continuation coverage provisions and establish standards for administering the notice process. These rules affect administrators of group health plans, participants and beneficiaries (including qualified beneficiaries) of group health plans, and the sponsors and fiduciaries of such plans. These rules also provide model notices for use by administrators of single-employer group health plans to satisfy their obligation to provide general notices and election notices.

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

Applicability date: These regulations apply to notice obligations arising under the COBRA provisions of part 6 of title I of ERISA on or after the first day of the first plan year beginning on or after the date that is six months after May 26, 2004.

FOR FURTHER INFORMATION CONTACT: Lisa M. Alexander or Suzanne M. Adelman, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

The continuation coverage provisions, sections 601 through 608 of title I of ERISA, were enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), which also promulgated parallel provisions that became part of the Internal Revenue Code (Code) and the Public Health ServiceAct (PHSA). [1] *See* Code section 4980B; PHSA, 42 U.S.C. 300bb–1 *et seq.* These provisions are commonly referred to as the COBRA provisions, and the continuation coverage that they mandate is commonly referred to as COBRA coverage. The COBRA provisions of title I of ERISA generally require that ''any group health plan'' [2] offer ''qualified beneficiaries'' the opportunity to elect ''continuation coverage'' following certain events that would otherwise result in the loss of coverage (''qualifying events'').[3] Continuation coverage is a temporary extension of the qualified beneficiary's previous group health coverage. The right to elect continuation coverage allows individuals to maintain group health coverage under adverse circumstances and to bridge gaps in health coverage that otherwise could limit their access to health care.

COBRA, as enacted, provides that the Secretary of Labor (the Secretary) has the authority under section 608 of ERISA to carry out the provisions of part 6 of title I of ERISA. The Conference Report that accompanied COBRA divided interpretive authority over the COBRA provisions between the Secretary and the Secretary of the Treasury (the Treasury) by providing that the Secretary has the authority to issue regulations implementing the notice and disclosure requirements of COBRA, while the Treasury is authorized to issue regulations defining the required continuation coverage.[4] Under its authority to interpret the COBRA provisions, the Treasury has issued final regulations that provide rules for determining which plans are subject to the COBRA provisions, who is or can become a qualified beneficiary, which events constitute qualifying events, what COBRA obligations exist in the case of mergers and acquisitions, and the nature of the continuation coverage that must be offered. See Treas. Reg. §§ 54.4980B–1 through 54.4980B–10.

On May 28, 2003, the Department of Labor (the Department) published in the **Federal Register** (68 FR 31832) proposed regulations governing the timing, content, and administration of the notice obligations arising under sections 601 through 608 of ERISA.[5] In response to the proposed COBRA notice regulations, the Department received 26 public comments from an array of interested parties, including organizations representing employers, group health plans, plan administrators, persons specializing in COBRA administration, and participants and beneficiaries.

The Department has made a number of changes to the regulations and model notices in response to the public comments received on the proposals. The following provides an overview of the final rules, public comments, and changes from the proposed regulations. These final rules implementing the notice requirements of the COBRA provisions of part 6 of title I of ERISA also apply for purposes of the COBRA provisions of section 4980B of the Code.[6]

[1] The Code and PHSA COBRA provisions, although very similar in other ways, are not identical to the COBRA provisions in title I of ERISA in their scope of application. The PHSA provisions apply only to State and local governmental plans, and the Code provisions grant COBRA rights to individuals who would not be considered participants or beneficiaries under ERISA. *See* PHSA, 42 U.S.C. 300bb–8; Code section 5000(b)(1).

[2] A group health plan is not subject to the COBRA provisions for any calendar year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year. *See* ERISA section 601(b).

[3] Each of the quoted terms is specifically defined in the COBRA provisions. In particular, the term ''group health plan'' is defined in section 607(1) of the Act to mean an employee welfare benefit plan as defined in section 3(1) of the Act that provides medical care (as defined in section 213(d) of the Code) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise. The Department notes that employee welfare benefit plans under ERISA include, *inter alia*, plans sponsored by unions for their members as well as plans sponsored by employers for their employees. Such union-sponsored plans would not involve employers in any sponsorship capacity, nor would they necessarily cover individuals all of whom are employees. Although the proposed regulations use the terms ''employer'' and ''employee,'' as do the COBRA provisions, in assigning duties, they are intended to apply to all group health plans, as defined in section 607(1) of the Act, subject to COBRA.

[4] H.R. Conf. Rep. No. 99–453 at 562–63 (1985). The Conference Report further indicated that the Secretary of Health and Human Services, who is to issue regulations implementing the continuation coverage requirements for State and local governments, must conform the actual requirements of those regulations to the regulations issued by the Secretary and the Treasury. *Id.* at 563.

[5] Prior to the development of proposed rules, the Department published a Request for Information (RFI) to assess public views on the advisability of developing regulations on the COBRA notice provisions. *See* 62 FR 49894 (Sept. 23, 1997). The Department received 15 comments, all of which were taken into account in developing the proposed rules.

[6] As noted in footnote 1, above, certain COBRA provisions (such as the definitions of group health plan, employee and employer) are not identical in the Code and title I of ERISA. The Treasury has reviewed these rules and concurs that, in those cases in which the statutory language is not identical, §§ 2590.606–1 through 2590.606–4 would nonetheless apply to the COBRA provisions of § 4980B of the Code, except to the extent that such regulations are inconsistent with the statutory language of the Code.

B. Overview of Final Regulations

The final COBRA notice rules, like the proposals, consist of four separate regulations. Section 2590.606–1 covers the general notice requirement. In an appendix to § 2590.606–1, a model general notice is provided to facilitate compliance with the general notice requirements. Section 2590.606–2 creates rules for employer-provided notices of the occurrence of a qualifying event. Section 2590.606–3 addresses the responsibilities of qualified beneficiaries to provide notice of a qualifying event or a disability. Section 2590.606–4 deals with the election notice and other notices that plan administrators must provide. In an appendix to § 2590.606–4, a model election notice is provided to facilitate compliance with the election notice requirements.

The model notices provided in the appendices to §§ 2590.606–1 and 2590.606–4 are intended to be used by single-employer plans. Other types of plans, such as multiemployer plans and plans sponsored by unions for their members, would have to modify the model notices to reflect the special rules or practices that apply in the case of such plans.[7] The Department further notes that the use of the model notices is not required. The model notices included with these regulations are provided solely for the purpose of facilitating compliance with the applicable notice requirements. The furnishing of appropriately and accurately completed model notices, however, will be considered by the Department to constitute compliance with the requirements of the applicable notice regulation.

Section 2590.606–1 General Notice

Section 606(a)(1) of ERISA requires group health plans to provide written notice of COBRA rights to each covered employee and spouse (if any) ''at the time of commencement of coverage'' under the plan. Section 2590.606–1 establishes the time frames within which this general notice must be provided and describes the specific information that the general notice must contain.

The final regulation retains the same general structure of the proposal. As discussed below, however, some changes to both the regulation and the accompanying model general notice have been made in response to public comments.

Paragraph (b) of the final regulation addresses the timing requirements applicable to the general notice requirement of section 606(a)(1) of the Act. Similar to the proposal, paragraph (b) establishes a 90-day period for furnishing the general notice. Generally, the notice must be furnished to each covered employee and to the employee's spouse (if covered under the plan) not later than the earlier of: (1) either 90 days from the date on which the covered employee or spouse first becomes covered under the plan or, if later, the date on which the plan first becomes subject to the continuation coverage requirements; or (2) the date on which the administrator is required to furnish an election notice to the employee or to his or her spouse or dependent.

While a few commenters expressed concern about the timing of the general notice, the majority of commenters supported the provision as better reflecting current practice and fostering efficiency through its possible combination with the summary plan description (SPD). The Department continues to believe that the timing requirements of the regulation protect covered employees and their spouses during the first 90 days of coverage by ensuring that they timely receive all the information they need to understand their rights. For this reason, the Department has retained the timing provisions as proposed. In response to several comments requesting clarification that the date for the furnishing of the general notice under the regulation is the ''commencement of coverage'' date for purposes of section 606(a)(1) of the Act, the Department has added a new paragraph (§ 2590.606–1(b)(2)), providing that a notice furnished in accordance with the timing requirement of the regulation is deemed to be provided at the time of commencement of coverage under the plan.

A number of commenters questioned the need to furnish a general notice in addition to an election notice when the election notice must be given to an individual within the initial 90-day period of coverage. Having reviewed the information required to be contained in the general notice described in § 2590.606–1(c), and the election notice described in § 2590.606–4(b)(4), the Department believes that, given the comprehensive nature of the information in the election notice and its importance to a qualified beneficiary, the furnishing of a general notice simultaneously with an election notice during the initial 90-day period would be duplicative, if not confusing or distracting. To address this issue, a new paragraph (§ 2590.606–1(b)(3)) has been added to the final regulation providing that, where an individual is required to be furnished an election notice within the 90-day period for furnishing general notices, the plan administrator may satisfy its general notice obligation by furnishing an election notice in accordance with the final regulation (§ 2590.606–4(b)).

Paragraph (c) of the regulation sets forth the required minimum content of a general notice. These content requirements cover basic information regarding COBRA and the rights and responsibilities of qualified beneficiaries that a participant or beneficiary would need to know before the occurrence of a qualifying event in order to be able to protect his or her COBRA rights.

Several commenters argued that the proposed regulation and model notice should be modified to eliminate or reduce plan-specific information. These commenters generally argued that the use of ''generic'' (non-plan specific) general notices could result in cost-savings since the same notice could be used without customization by COBRA administrators for multiple plans. While the Department appreciates the arguments in favor of a ''generic'' notice, the Department believes that covered employees and spouses need to know the name of the plan and a plan contact for further continuation coverage and plan information. The Department notes that Technical Release 86–2 (June 26, 1986), which provided a model general notice for use shortly after COBRA was enacted, required inclusion of plan-specific information for the same reasons. The Department, therefore, has retained these requirements in the regulation. However, in an effort to minimize the difficulty of customizing the general notice, the Department has modified the model general notice to allow placement of plan-specific identification information at the end of the notice. The Department also has modified the model general notice to eliminate identification of both the plan administrator and the COBRA administrator. As modified, the model general notice requires only the name, address, and phone number of a party or parties who will provide information about the plan and COBRA upon request.

A number of commenters argued that the general notice should not be required to address the responsibilities of qualified beneficiaries to provide notice of second qualifying events, noting that such information is more appropriate for the SPD and election notices. The Department agrees with the commenters that the general notice

[7] The model election notice is not designed to be used when bankruptcy is the qualifying event.

should be as informative as possible without being unnecessarily complex. For this reason, the Department has modified paragraph (c)(4) to eliminate the proposed requirement that the notice describe how qualified beneficiaries who are receiving continuation coverage must provide notice of a second qualifying event. In addition to being included in plan SPDs, this information is included as part of the election notice required under § 2590.606–4 and, therefore, will be furnished when it will be more relevant to the qualified beneficiary.

Commenters also argued that, because different qualifying events under a single plan may produce different COBRA coverage start dates (since the plan may choose to begin COBRA coverage on either the date of the qualifying event or the date of loss of coverage), requiring that specific information to be described in the general notice makes the notice unnecessarily complicated, particularly since this information will be available in SPDs. The commenters assumed the regulation required such detail because the proposed model general notice provided for inclusion of this information. The Department agrees with the commenters that such information should not be required as part of the general notice if it will make the notice unnecessarily complicated. While no changes are required to the regulation, to avoid any confusion, the Department has modified the model general notice to eliminate references to COBRA coverage beginning dates. The Department notes, however, that nothing in the regulation or the model general notice precludes a plan administrator from including such information in a plan's general notice.

A few commenters expressed concern that the proposal required the general notice to include a statement that more complete information about continuation coverage and other rights under the plan is available from the plan administrator and the plan's SPD. Because covered employees and spouses may need additional information about their rights under their plan, the Department believes that they should be reminded that there are sources for that information, namely the plan administrator and the plan's SPD. Therefore, this provision is retained in the final regulation.

Paragraph (d) permits delivery of a single notice addressed to a covered employee and the covered employee's spouse at their joint residence, provided the plan's latest information indicates that both reside at that address. A single notice would not be permitted, however, if a spouse's coverage under the plan begins at a different time from the covered employee's coverage, unless the spouse's coverage begins before the date on which the notice must be provided to the covered employee, and a single notice is then timely sent to their joint address. In response to one commenter's request, paragraph (d) has been revised to clarify that there is no requirement to furnish a general notice to dependent children, even if the general notice requirement is triggered early by the occurrence of a qualifying event involving such an individual.

As indicated in the preamble to the proposal, in-hand furnishing of the general notice at the workplace to a covered employee is deemed to be adequate delivery to the employee, although such delivery to the employee would not constitute delivery to the spouse. Except for minor editorial changes intended to make the provision more clear, this paragraph is being retained as proposed.

Paragraph (e) of the final regulation permits plans to satisfy the general notice requirement by including the information described in paragraphs (c)(1), (2), (3), (4), and (5) in the SPD of the plan and providing the SPD at a time that complies with the timing requirements for the general notice. Some commenters argued that, given the importance of the information it contains, the general notice should be required to be furnished as a stand-alone notice, as well as being included in the SPD. The Department continues to believe that many, and perhaps most, plans would prefer to take advantage of the reduced cost and added efficiency of providing a single disclosure document that satisfies both the general notice requirement and the SPD requirement. Moreover, the Department believes that participants and beneficiaries are more likely to retain and have ready access to their SPD than a general notice furnished separate and apart from their SPD. The Department, therefore, has retained this provision without change. The Department emphasizes, however, that retention of this provision is not intended in any way to limit a plan's flexibility to provide other information in other forms to its employees and the spouses of its employees.

As noted in the proposal, if a plan chooses to satisfy its SPD and general notice obligations by furnishing a single document, the plan must ensure that the document satisfies both the general notice content requirements and the SPD content requirements.[8]

Paragraph (f) provides that delivery of the general notice must be made in accordance with the standards of 29 CFR 2520.104b-1, including the standards for use of electronic media. There were no comments suggesting changes to this provision. Accordingly, the provision is being adopted without change. A discussion of general issues relating to the furnishing of notices is contained in section C, entitled ''Miscellaneous.''

The model general notice appended to § 2590.606–1 has been revised to reflect the changes discussed above. The Department also has made a number of editorial changes in response to suggestions and recommendations to improve the clarity of the model general notice.

Section 2590.606–2 Employer's Notice of Qualifying Event

Section 606(a)(2) of ERISA requires an employer to provide notice to the plan administrator of a qualifying event that is either the employee's termination of employment or reduction in hours of employment, the employee's death, the employee's becoming entitled to Medicare, or the commencement of a proceeding in bankruptcy with respect to the employer. Regulation § 2590.606–2 addresses this notice obligation of employers.

Paragraph (b) of the regulation provides that an employer shall notify the plan administrator of a qualifying event no later than 30 days after the date of the qualifying event. However, paragraph (b) further provides that, for any plan under which continuation coverage begins, pursuant to section 607(5) of the Act, with the date of loss of coverage, the 30-day period for providing the notice of qualifying event must also begin with the date of loss of coverage, rather than the date of the qualifying event. Paragraphs (b) and (d) also recognize that multiemployer plans may have different notice periods, as permitted under sections 606(a)(2) and 606(b).

Paragraph (c) of the regulation requires that an employer provide the plan administrator sufficient information to enable the administrator to determine the identity of the plan, the covered employee, the qualifying event, and the date of the qualifying event.

The comments received by the Department on this regulation supported the approach taken in the proposal. The Department, therefore, is

[8] The SPD content regulation, § 2520.102–3, specifies other information, in addition to description of COBRA rights, that must be included in an SPD for a group health plan. See, *e.g.*, § 2520.102–3(j), (l), (s).

adopting this section without modification.

Section 2590.606–3 Qualified Beneficiaries' Notices

Under section 606(a)(3) of the Act, each covered employee or qualified beneficiary is responsible for notifying the plan administrator of a qualifying event that is either the divorce or legal separation of the employee from his or her spouse or a child's becoming no longer eligible to be covered as a dependent under the plan. Regulation § 2590.606–3 provides guidance with respect to this notice obligation and other notice obligations of qualified beneficiaries, such as the notice of disability or second qualifying event. Except as noted below, the final regulation follows the framework of the proposal.

Paragraph (a) describes the notices that covered employees and qualified beneficiaries may be required to provide to the administrator, which include notices of the occurrence of a qualifying event that is a divorce, legal separation, or a child's ceasing to be a dependent under the plan; the occurrence of a second qualifying event; a determination of disability by the Social Security Administration; and a determination by the Social Security Administration that a qualified beneficiary is no longer disabled.

Paragraph (b) of the final regulation, like the proposal, requires plans to establish reasonable procedures for the furnishing of these notices and sets general standards for what will be considered reasonable.[9] Under this provision, a plan's procedures generally will be considered reasonable if they are described in the plan's SPD, specify who is designated to receive notices, and specify the means qualified beneficiaries must use for giving notice and the required content of the notice. Paragraph (b) further provides that, if a plan does not have reasonable procedures for qualified beneficiaries' notices, notice will be deemed to have been provided when a written or oral communication identifying a specific event is communicated in a manner reasonably calculated to bring the information to parties that would customarily be considered to be responsible for the plan. The proposed regulation specified that, in the case of a single-employer plan that failed to adopt reasonable procedures, notice would be deemed provided if communicated either to the person or organizational unit that has customarily handled employee benefit matters of the employer or to any officer of the employer.

While some commenters expressed concern that requiring plans to adopt qualified beneficiary notice procedures may force them into creating formal, inflexible procedures that will harm participants, most commenters recognized and supported the importance of establishing notice processes that are clearly communicated to the plan's participants and beneficiaries. With regard to plans that fail to adopt reasonable procedures, some commenters suggested that notice should also be deemed to have been provided if given to the managers and supervisors of the employee. Other commenters argued that recognizing oral notifications and notifications given to the officers of an employer would cause confusion and uncertainty as to when and if notice was provided. In response to these comments, the Department has decided to retain the default standards recognizing oral notifications, where a plan fails to adopt reasonable notification procedures. To restrict the default notice standards to recognize only written communications would allow plans that fail to adopt express notice procedures to rely on a de facto standard requiring written notice, which in the Department's view would be unfair to participants and beneficiaries. However, the Department recognizes that the breadth of the approach of the proposed regulation in this regard may have the potential for uncertainty and confusion. Since it is reasonable to expect an employee or qualified beneficiary, even in the absence of reasonable plan procedures, to give notice of an event to a party that customarily handles employee benefit matters, the Department has eliminated the reference, at § 2590.606–3(b)(4)(i), to ''any officer of the employer.''

Like the proposal, paragraph (b)(3) of § 2590.606–3 provides that plans may require qualified beneficiaries to provide specific information via a specific form, if the form is easily available to qualified beneficiaries without cost. One commenter objected to allowing plans to require use of a specific form for notice of qualifying event. The Department believes that employees and qualified beneficiaries may, in fact, benefit from a plan's use of specific forms, which would remove uncertainty about how to comply with the plan's requirements. The Department, therefore, has retained this provision in the final regulation without change.

Paragraph (c) provides the time limits that may apply to qualified beneficiaries' notices. These limits are minimums that may be imposed by a plan. There is nothing in the regulation that prevents plans from providing longer periods for furnishing these notices. In general, a plan must allow an employee or qualified beneficiary at least 60 days to provide notice of a qualifying event that is divorce, legal separation, a child's ceasing to be a dependent under the plan, or a second qualifying event. As proposed, the starting date for the minimum 60-day period was based, in part, on what the plan provided for the start of COBRA coverage pursuant to section 607(5) of the Act. At the suggestion of a commenter and for purposes of simplicity, the Department has restructured paragraph (c)(1) of § 2590.606–3 to conform with Treasury regulations by providing that the 60-day period begins to run from the latest of: (1) The date of the qualifying event; (2) the date on which there is a loss of coverage; or (3) the date on which the qualified beneficiary is informed, through the plan's SPD or the general COBRA notice, of his or her obligation to provide notice and the procedures for providing such notice. See Treas. Reg. § 54.4980B–6, Q&A–2.

One commenter questioned why the regulation requires the furnishing of an SPD or general COBRA notice before the 60-day period for notices of qualifying event may begin to run against a qualified beneficiary. Inasmuch as a qualified beneficiary might be denied continuation coverage because he or she failed to furnish timely notice of a qualifying event, the Department believes that disclosing the notice obligations and the procedures for providing such notice is critical to the exercise of statutory rights. The framework of the final regulation, like the proposal, is intended to ensure that qualified beneficiaries will not be adversely affected in efforts to exercise their COBRA rights by a plan's failure to provide adequate disclosure.

Several commenters raised questions concerning the time limits, at § 2590.606–3 (c)(2) of the proposed rule, for notices of disability determinations.[10] Specifically, the

[9] ERISA does not mandate that qualified beneficiaries provide notices of qualifying event or disability. A qualified beneficiary may not wish to elect or extend continuation coverage and may therefore decide to forgo providing the notice of qualifying event without violating the COBRA provisions.

[10] The COBRA provisions require group health plans to provide certain qualified beneficiaries an 11-month disability extension of an 18-month period of COBRA coverage (resulting in a total of 29 months of COBRA coverage), provided the qualified beneficiary (or any other qualified beneficiary who is a member of his or her family)

Continued

commenters suggested that the proposal was ambiguous with respect to individuals who receive a disability determination from the Social Security Administration (SSA) at some time prior to the occurrence of a qualifying event. Since the proposed regulation would permit plans to require qualified beneficiaries to provide a disability notice within 60 days of the later of (1) the date of the SSA disability determination, or (2) the date on which the qualified beneficiary is notified of the obligation to provide the disability notice, the commenters requested that the Department clarify whether and how these rules would apply to individuals who received an SSA disability determination before receiving notice of the obligation to provide the disability notice. The commenters noted that the Treasury regulations create a rule for individuals who have been determined by SSA to be disabled prior to the occurrence of a qualifying event under which their disability is considered to continue to exist as of the qualifying event, provided SSA has not issued a subsequent determination that they are no longer disabled. Under the Treasury regulations, therefore, qualified beneficiaries who have a prior SSA disability determination are considered to meet the statutory requirement of being disabled ''within the first 60 days'' of COBRA coverage. *See* Treas. Reg. § 54.4980B–7, Q&A–5(c).

The Department agrees with the commenters that there is a need for further clarification in this area. Following a review of section 606(a)(3) of the Act, the legislative changes to the COBRA provisions since 1986, and the Treasury regulations, the Department has concluded that, for purposes of section 606(a)(3) of the Act, an SSA disability determination, once issued, should be considered to remain in continuing effect until the SSA makes a contrary determination.[11] For this reason, the Department believes that section 606(a)(3) is best interpreted to permit plans to require qualified beneficiaries to provide a disability notice within 60 days after the latest of: (1) The date of the SSA disability determination; (2) the date on which the qualifying event occurs; (3) the date on which the qualified beneficiary loses coverage; or (4) the date on which the qualified beneficiary is informed of the obligation to provide the disability notice. The final regulation reflects this interpretation in § 2590.606–3(c)(2). Under this interpretation, an individual who previously received an SSA disability determination and has not received a subsequent SSA determination that he or she is no longer disabled would have at least 60 days after the occurrence of a qualifying event to provide the plan with a disability notice in order to be entitled to the disability extension.[12] There is nothing that precludes plans from allowing a longer period for providing this notice. For example, a plan may find it administratively more convenient to permit individuals who receive an SSA determination prior to a qualifying event to provide the notice of disability within the same time period within which the election notice is required to be provided.

Paragraph (d) of § 2590.606–3, like the proposal, provides that a plan may not reject an incomplete notice as untimely if the notice is provided within the plan's time limits and contains enough information to enable the plan administrator to identify the plan, the covered employee and qualified beneficiar(ies), the qualifying event or disability determination, and the date on which such event or determination occurred. However, if a timely notice fails to supply all of the information required under the plan's procedures, the plan administrator can require qualified beneficiaries to supply the missing information. Several commenters asked for a clarification as to whether a plan could reject a deficient notice if, following a request to provide the information required by the plan's procedures, a covered employee or qualified beneficiary fails to provide the requested information. It is the view of the Department that there is nothing in the final regulation that would preclude a plan, following a request for more complete information, from rejecting a notice when an employee or qualified beneficiary fails to provide the requested information within some reasonable period of time. The Department believes that both the plan and the plan's participants and beneficiaries would benefit from a procedure that specifically defines when and under what circumstances, following a request for more complete information, a notice will be rejected due to a failure to provide the information a plan requires.[13]

In view of the comments, paragraph (d) of the proposal is adopted without modification. Inasmuch as no comments were submitted on paragraphs (e) through (g) of the proposal, those paragraphs are also adopted as proposed.

Section 2590.606–4 Plan Administrator's Notice Obligations

Section 606(a)(4) of ERISA requires a plan administrator to notify each qualified beneficiary who is entitled to elect continuation coverage of his or her COBRA rights. Section 606(c) requires a plan administrator to provide such notice within 14 days after the plan administrator is notified of a qualifying event. Regulation § 2590.606–4 provides guidance on the requirements of sections 606(a)(4) and 606(c). In general, the regulation describes timing and content requirements for election notices, requires administrators to notify individuals under certain circumstances if continuation coverage is determined not to be available, and requires plan administrators to provide notice when continuation coverage terminates before the end of the maximum period for such coverage.

Paragraph (a) of the final regulation describes the obligation of the administrator of a group health plan to provide qualified beneficiaries with notice of their right to elect continuation coverage under the plan.

Paragraph (b) of the final regulation addresses the specific timing and content requirements for the election notice.[14] With regard to timing,

is both determined by SSA to be disabled during the first 60 days of COBRA coverage and also provides notice to the plan of SSA's disability determination within 60 days after the date of the determination. The notice must be provided before the end of the first 18 months of continuation coverage. *See* ERISA sections 602(2)(A); 606(a)(3).

[11] Congress recognized the continuing effect of an SSA disability determination by including in the COBRA provisions both a provision requiring a qualified beneficiary who provides a disability notice to provide the plan with a subsequent notice if the SSA determines him or her to be no longer disabled and a provision permitting plans to terminate the 11-month disability extension one month after the SSA makes a determination that the qualified beneficiary is no longer disabled. *See* ERISA sections 602(2)(E); 606(a)(3).

[12] The general notice requirement would also have to have been fulfilled with respect to that individual. Since the general notice is required to be furnished only to the covered employee and spouse (if also covered), the Department will consider furnishing the general notice to either of those two individuals adequate notice with respect to a disabled child of the covered employee for this purpose.

[13] The plan's procedures must be reasonable in all respects, including the rules for what information is required, how much time an individual is given to provide the required information, and the bases for accepting or rejecting a notice.

[14] The regulation requires an administrator to provide an election notice only when it has been determined that a qualified beneficiary is entitled to elect continuation coverage. In this regard, the Department notes that it is the administrator's responsibility to determine whether individuals who are named in a notice of qualifying event are entitled to continuation coverage and that disputes may arise over the correctness of the administrator's determinations. The Department further notes that determinations regarding eligibility for COBRA continuation coverage, like determinations involving eligibility for coverage under a group

paragraph (b)(1) of the final regulation generally provides that the administrator shall furnish an election notice to qualified beneficiaries within 14 days after the receipt of notice of a qualifying event.

Paragraph (b)(2) provides a special timing rule in connection with qualifying events for which the employer must notify the plan, where the employer is also the administrator of the plan. Under the special rule, an election notice must be furnished not later than 44 days after the date of the qualifying event, or, if the plan provides that COBRA coverage starts on the date of loss of coverage, the date the qualified beneficiary loses coverage under the plan. The Department has revised the final regulation, as suggested by one commenter, to make clear that the 44-day rule applies only in those cases where the employer is required to provide notice of a qualifying event to the plan administrator. Paragraph (b)(2) has also been revised to reflect the possibility that a plan may adopt a different starting date for COBRA coverage for different types of qualifying events.

Paragraph (b)(3) of the final regulation contains a special timing rule for multiemployer plans. No comments were received on this provision. Accordingly, paragraph (b)(3) is adopted without modification.

Paragraph (b)(4) of the final regulation sets forth the content requirements for the election notice. The Department received several comments on this section and the corresponding model election notice.

Several commenters argued that the regulation required too much information to be included in the election notice. In this regard, commenters suggested elimination of HIPAA information, information about alternative coverage and conversion rights, and plan contact information because much of that information is available in the SPD. Conversely, other commenters argued that the election notice did not include enough information and suggested that the content requirements be expanded in various ways.

Following a careful review of these comments, the Department has decided to retain the requirements that HIPAA information and plan contact information be included in the election notice. The Department believes it is important that qualified beneficiaries understand that election or non-election of COBRA continuation coverage may have significant implications for their future exercise of HIPAA rights and their ability to obtain health care coverage. The Department is concerned that the significance of the HIPAA information may be lost if the election notice merely refers to the SPD for more information about plan rights. Similarly, the Department believes that qualified beneficiaries should have ready access to additional information about COBRA and their rights under the plan. Because all qualified beneficiaries may not have the plan's SPD, requiring that specific contact information be included in the election notice is the best way to ensure that all qualified beneficiaries have access to the available information.

The Department is persuaded, however, that qualified beneficiaries would not be adversely affected by elimination of the requirement that information concerning alternative coverage and conversion rights be included in the election notice. Accordingly, the final regulation does not include those items in the list of required content for the election notice. In making these changes, the Department notes that information on these subjects is likely to be provided by the plan in some other form, either in connection with offering the individual a choice between COBRA coverage and the plan's alternative coverage options, or at the time that COBRA continuation coverage ends.[15]

Some commenters requested that the regulation and model election notice be modified to clarify that the election notice need not identify by name each qualified beneficiary entitled to elect continuation coverage. In response to this comment, paragraph (b)(4)(iii) has been revised to make clear that identification of qualified beneficiaries may be accomplished either by reference to their status (*e.g.*, employee, spouse, dependent child covered under the plan prior to the qualifying event) or by name. The Department intends that identification by status must be sufficiently detailed to permit the affected individuals to determine whether they are qualified beneficiaries. The model election notice has been revised accordingly.

As proposed, the model election notice included an optional paragraph describing the 65% health coverage tax credit (HCTC) created by the Trade Act of 2002 (the Trade Act) that may be used if an administrator believes employees might be eligible for trade adjustment assistance (TAA) and therefore eligible for the HCTC.[16] Some commenters suggested that Trade Act model language be expanded to refer not only to individuals potentially eligible for the HCTC because of eligibility for TAA (TAA-eligibles) but also to individuals potentially eligible for the HCTC because they may be receiving payments from the Pension Benefit Guaranty Corporation (PBGC-eligibles). Other commenters requested that the Trade Act paragraph be expanded to include additional information on how the new second COBRA election period created by the Trade Act relates to preexisting condition exclusion periods under HIPAA and how to become certified for TAA. Other commenters requested that the Department make clear that the election notice is not required to contain any Trade Act information.

As with the proposed regulation, the final regulation does not impose any specific disclosure requirement regarding rights and duties that may arise as a result of the Trade Act. Nonetheless, the Department has included an optional Trade Act paragraph in the model election notice to assist administrators who wish to notify potentially eligible individuals of their rights under the Trade Act as they relate to continuation coverage. In this regard, the Department has modified the model election notice Trade Act language to reference both PBGC-eligibles and TAA-eligibles. With regard to including more detailed information about Trade Act, the Department believes that the governmental sources identified in the model election notice represent the best sources for detailed information on Trade Act-related rights and procedures.

In addition to the aforementioned comments, the Department received a number of comments suggesting modifications to the model election notice to improve its clarity and readability. In finalizing the model election notice, the Department has taken into account all of these

health plan, are not governed by ERISA's claims procedure regulation unless they relate to a specific claim for benefits. *See* preamble to § 2560.503–1, 65 FR 70246, 70255 (Nov. 21, 2000).

[15] The COBRA provisions separately require plans to provide qualified beneficiaries who receive the maximum amount of COBRA coverage available to them the option of enrollment under a conversion health plan if such right is otherwise generally available under the plan. The option must be provided during the 180-day period ending on the expiration date of the period of COBRA coverage. *See* ERISA section 602(5).

[16] As noted in the preamble to the proposed regulation, it is the view of the Department that information on the possible availability of a new second COBRA election period in the event of TAA eligibility should, pursuant to § 2520.102–3(o), be included in the summary plan description of a group health plan as part of the discussion of the continuation coverage provisions of the plan. *See* 68 FR 31831, 31833 (May 28, 2003).

suggestions and has made a variety of revisions intended to improve, clarify, and simplify the model notice.

The Department received a number of comments on the notice requirements set forth in paragraphs (c) and (d) of proposed § 2590.606–4. Under paragraph (c) of the proposed § 2590.606–4, if a plan administrator receives a notice of a qualifying event pursuant to § 2590.606–3 from an individual not eligible to receive continuation coverage under the plan, the administrator would be required to provide notice to the individual(s) explaining why he or she is not entitled to such coverage. This unavailability notice was to be provided within the same time frame for providing an election notice, *i.e.*, within 14 days after receipt of the notice of a qualifying event. Under paragraph (d) of the proposal, the administrator would be required to provide notice to qualified beneficiaries in the event that continuation coverage terminates before the end of its maximum duration. This early termination notice was to be provided as soon as practicable following the administrator's determination that continuation coverage shall terminate.

A number of commenters argued that the notice provisions of paragraphs (c) and (d) should be eliminated entirely. These commenters generally argued that these notices are not required by statute, that the notices create serious administrative concerns, that they duplicate information already required to be disclosed in plan SPDs or election notices, and that they increase the risk of civil penalties and litigation for plan sponsors. At the same time, commenters indicated that many plans already provide similar notifications. A number of commenters supported these notice requirements, but suggested changes or clarifications.

With regard to the unavailability notice of paragraph (c), some commenters suggested that administrators should be required to provide the notice ''as soon as possible,'' although not later than 14 days after receiving the notice of qualifying event. Another commenter argued that the time frame for furnishing the unavailability notice should conform to the time frame for furnishing notice of a benefit claim denial. Other commenters requested clarification concerning the circumstances that would trigger the notice requirement.

After consideration of the comments, the Department has decided to retain the requirement that notice of unavailability of continuation coverage be provided, with some modification. It is the view of the Department that when a participant or beneficiary submits a request to the plan administrator for COBRA continuation coverage, the individual has an expectation of coverage unless (or until) he or she is notified to the contrary. The Department continues to believe that furnishing the unavailability notice in such circumstances will avoid misunderstandings in this area. The Department also believes that the proposed time frame of 14 days, paralleling the time frame for providing an election notice after receiving a notice of qualifying event, is appropriate for the unavailability notice. Therefore, the final regulation retains the time frame of the proposal.

Commenters questioned whether the unavailability notice is required only after receipt of ''a notice of a qualifying event furnished in accordance with § 2590.606–3,'' as stated in the proposal, or whether the unavailability notice must also be provided after receipt of any qualified beneficiary's notice furnished in accordance with § 2590.606–3. There appears to be little basis for distinguishing among the various qualified beneficiary notices that may be required to be furnished in accordance with § 2590.606–3 on the basis of the expectations of the individual furnishing the notice. Accordingly, the Department has modified the language of paragraph (c)(1) to clarify that the unavailability notice must be furnished when the plan administrator denies coverage after receiving a notice described in § 2590.606–3, regardless of the basis of the denial and regardless of whether the notice involves a first qualifying event, a second qualifying event, or a request for a disability extension. For example, the unavailability notice would be required to be provided when a plan administrator denies continuation coverage because it has been determined that no qualifying event had occurred or because the qualified beneficiary did not furnish the notice of qualifying event notice in a timely manner or did not provide complete information.

With respect to the early termination notice of paragraph (d) of the proposal, in addition to those commenters opposing the notice obligation in its entirety, some commenters suggested changes. One commenter suggested that plan administrators be required to provide an early termination notice in advance of terminating COBRA coverage and that plan administrators should not be allowed to combine the early termination notice with the notice of creditable coverage required to be provided under HIPAA. Another commenter objected to the proposal's adoption of the requirement that the early termination notice be furnished ''as soon as practicable,'' suggesting that a specific time frame would be more workable. One commenter suggested that the early termination notice be required only when coverage terminates ''voluntarily'' or for lack of premium payment.

Following consideration of the comments on paragraph (d), the Department has decided to retain the early termination notice requirements as proposed. As noted in the proposal, continuation coverage may be terminated earlier than the end of the maximum period for many different reasons. The Department continues to believe that providing a notice of early termination serves an important administrative function and permits qualified beneficiaries to take appropriate next steps to protect their access to health coverage, either on a group or individual basis.

In retaining the notice of early termination of continuation coverage requirement, the Department is not requiring that the notice be furnished before COBRA coverage can be terminated or within a specified time frame. To require notification to be made in advance of an otherwise permissible early termination of continuation coverage would extend COBRA continuation coverage beyond the statutory periods, which would be beyond the Department's interpretive and regulatory authority. In recognition of the fact that there may be instances when an administrator is able to furnish an early termination notice in advance of the early termination of COBRA coverage, the Department has retained the requirement that notice of an early termination be furnished as soon as reasonably practicable. The Department believes that this standard is in the best interest of the qualified beneficiaries.

The Department further believes that allowing plans to combine furnishing the early termination notice with the certificate of creditable coverage required under HIPAA would benefit the qualified beneficiary by providing related benefit information in a single information package and would benefit the plan as a result of reduced administrative costs. For this reason, the Department reiterates the view expressed in the proposal that nothing in these regulations is intended to prevent a plan administrator from combining the furnishing of an early termination notice with the furnishing of the certificate of creditable coverage.

One commenter recommended that the Department develop model notices for the unavailability notice and the early termination notice required under paragraphs (c) and (d) of § 2590.606–4. The Department has not adopted this suggestion due to the event-specific nature of the required notices. In the Department's view, it would be difficult to develop a single model form for such notices that would serve adequately to cover every circumstance, or even the most frequent circumstances, under which COBRA continuation coverage might be denied or terminated before the end of its maximum period.

C. Standards for Furnishing Notices

As discussed above, the final regulations provide standards for a variety of notices required to be furnished by and to qualified beneficiaries, employers, and plan administrators. Several commenters requested further guidance on the acceptable methods for furnishing the various notices addressed by the regulations. They also requested guidance on how to determine, for purposes of the various time limits, when a notice should be considered to be furnished.

The Department generally recognizes that disclosures may be furnished through a number of different methods. *See* § 2520.104b–1(b) (describing generally appropriate methods for furnishing reports, statements, notices, and other documents required under title I to individuals). With regard to general notices, election notices, unavailability notices, and early termination notices, each of which is required to be furnished by the plan administrator, the final regulations expressly provide that such notices must be furnished in a manner consistent with the standards set out in § 2520.104b–1(b). *See* § 2590.606–1(f); § 2590.606–4(f).

Under the standards set by § 2520.104b–1(b), and therefore under these regulations, a required notice generally should be considered ''furnished'' by a plan administrator as of the date of mailing, if mailed by first class mail, certified mail, or Express Mail; or as of the date of electronic transmission, if transmitted electronically.[17] When hand delivery is the chosen method of delivery, however, a notice would not be considered furnished until actually received by the individual to whom the notice is directed.[18] In the absence of written plan procedures to the contrary that are communicated to participants and beneficiaries, it is the view of the Department that the same standards would apply to notices of qualifying event furnished by an employer to the plan administrator and to COBRA notices provided by covered employees, qualified beneficiaries, and other persons acting on their behalf to plan administrators.

The regulations contain one exception to this general rule. Section 2590.606–4(b) expressly provides that the 14-day time limit applicable to plan administrators for furnishing an election notice will not begin to run until a plan administrator actually receives a notice furnished in accordance with the requirements of § 2590.606–2 or § 2590.606–3.

D. Effective and Applicability Dates

The Department received a number of comments expressing concern about the proposal's statement of the Department's intention to make final regulations effective and applicable as of the first day of the first plan year occurring on or after January 1, 2004. Commenters argued that such a short time period between publication and effective dates would not provide group health plans sufficient time for an orderly implementation of the changes necessary to accommodate the final COBRA continuation coverage notice regulations. The Department recognizes the importance of providing plans with an adequate period for making the changes to their COBRA processes required by these final COBRA notice regulations. It is in the public interest to enable plans to come into compliance smoothly and economically and to take advantage of the additional opportunities for administrative efficiency provided by these regulations. Accordingly, the Department has determined to provide a period of at least six months after publication of these final regulations before they will be applicable to notice obligations arising under group health plans.

In order to avoid confusion concerning the applicability date of the final rules, each rule (§§ 2590.606–1 through 2590.606–4) has been modified to add a new ''applicability'' paragraph. This paragraph provides that the regulation applies to notice obligations that arise on or after the first day of the first plan year beginning on or after the date that is six months after the date of publication of the final rules in the **Federal Register**.[19] The regulations are scheduled to become effective sixty days after the date of publication in the **Federal Register**.

The preamble to the proposed regulations made clear that plans could no longer rely upon prior guidance issued by the Department shortly after the enactment of COBRA, which provided a model general notice to be used in connection with plans' first becoming covered by COBRA.[20] The Department also stated in the proposal that, in the absence of final regulations, the Department would judge plan compliance with the COBRA statutory notice requirements under the standard set by the COBRA conference report: ''[E]mployers are required to operate in good faith compliance with a reasonable interpretation of these substantive rules, notice requirements, etc.''[21] Several commenters have requested guidance from the Department on whether, in the interim between issuance of the proposed regulations and a future applicability date for new final rules, they could rely on the proposed regulations as a reasonable interpretation of the COBRA statutory notice requirements that would be viewed by the Department as good faith compliance. The Department has determined that it is in the public interest to encourage early compliance with these new standards and, therefore, will, pending the applicability of the final rules, view compliance with either the proposed rules or the final rules, including use of the model notices as proposed or as finalized, to constitute good faith compliance with the COBRA statutory notice requirements.

E. Regulatory Impact Analysis

Summary

The regulatory standards promulgated in these regulations will benefit both

[17] *See* § 2520.104b–1(c) (disclosure through electronic media). The Department recognizes that other methods of furnishing may be available that, under the actual facts and circumstances, should be accorded the same deference as electronic transmission and first class mail.

[18] The use of interoffice mail for purposes of providing a notice to an employee should be considered tantamount to hand delivery and governed by the same standards.

[19] In response to public concerns about the proposed effective date, the Department issued a press release expressing its intention to give group health plans six months after the adoption of final rules to implement administrative changes required by the new rules. *Press Release*, EBSA, *Labor Department Announces Proposed Effective Date of COBRA Regulations Will Be Delayed* (September 17, 2003).

[20] The preamble to the proposed COBRA notice regulations explained that the early guidance and model general notice contained in Technical Release 86–2, issued June 26, 1986, no longer adequately reflected the COBRA provisions due to subsequent amendments and that use of that model notice would no longer be considered good faith compliance with the requirements of section 606(a)(1) of the Act. *See* 68 FR 31832, 31834 n.13 (May 28, 2003).

[21] H.R. Conf. Rep. No. 99–453 at 563.

plan sponsors and participants. They will dispel plan administrators' uncertainty about how to comply with COBRA notice provisions and reduce the risk of inadvertent violations. They will help participants and beneficiaries understand how to exercise their COBRA rights, thereby averting costly disputes and lost opportunities to elect COBRA coverage. This will result in an increase in the number of COBRA elections by qualified beneficiaries. These benefits of the regulations are expected to outweigh their costs.

New administrative costs imposed by these regulations are limited because plan sponsors and administrators already distribute notices pursuant to the COBRA statute, and many of their existing practices likely already satisfy the requirements of these regulations. The Department estimates the new administrative costs to be $2.6 million in the first year that the regulations are effective and $0.9 million annually in subsequent years. The $0.9 million ongoing annual cost is attributable to the new requirements to notify qualified beneficiaries when continuation coverage is unavailable or has been terminated before the maximum period of coverage has ended. The remaining $1.7 million first-year cost reflects the cost to plans to review existing notices and procedures, to make any necessary revisions, and to modify or develop newly required notices.

The Department also expects the number of COBRA elections to increase slightly, by between 0.5 percent and 1.0 percent, which will increase costs to employers. Employers can charge COBRA enrollees the cost of coverage plus an administrative charge, but those electing continuation coverage tend to have higher costs and therefore as a group enjoy a subsidy from plan sponsors equal to about one-third of the cost of their coverage. If COBRA elections increase, the amount of the subsidy will increase by a similar proportion, or between $12 million and $24 million annually.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule's (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is ''significant'' within the meaning of section 3(f)(4) of the Executive Order and therefore subject to review by the Office of Management and Budget (OMB).

Costs.—The administrative cost of these regulations is expected to be modest, primarily because COBRA's statutory provisions have been in effect since 1986. As a result, most group health plans, plan administrators, and health insurance issuers already have developed forms and procedures for the administration of COBRA notices. The Department estimates that the regulations will increase administrative costs by $2.6 million in the first year and $0.9 million annually in subsequent years.

Commenters on the proposed regulations remarked in general terms on the importance of controlling costs in relation to the benefits achieved for qualified beneficiaries. One commenter indicated that revising automated systems that generate COBRA notices would be more costly than the Department had estimated in connection with the proposal because many COBRA administrators currently issue COBRA notices that narrowly target individual audiences, such as spouses or children. Although some COBRA administrators choose to include additional information in their notices for certain types of qualified beneficiaries, the Department continues to believe that few COBRA administrators will be required to make significant changes in order to comply with the basic requirements of these notice provisions. COBRA administrators have in place processes that are, in fact, flexible enough to provide notices that satisfy the need for a generic product suitable for use by multiple plans while remaining sufficiently adaptable to include detailed information unique to the plan or individual qualified beneficiary.

Economies of scale also tend to moderate COBRA administrative costs because the majority of notice obligations are met through the purchase of COBRA administrative services from a number of COBRA administrators that is small relative to the number of group health plans they serve. In addition, not all COBRA administrators or plans will be required to make substantial changes. In estimating the impact of the proposed regulations and model forms, the Department assumed that many COBRA administrators and plans currently use notices that, for the most part, are in compliance with the requirements of the regulations. Comments received did not support a revision of that assumption for the estimate of the economic impact of the final rule. In response to comments, however, the Department has made certain clarifications to the proposed regulations with respect to content and format of the notices and has clarified the model notices accordingly. These changes, discussed more fully earlier in the preamble, will expand opportunities for COBRA administrators to fulfill plans' COBRA notice obligations within the context of their current practices. The clarification of the scope of applicability of the unavailability notice in § 2590.606–4(c) has resulted in an increase in the estimated cost of the final regulations of $204,000.

The Department expects the number of COBRA elections to increase slightly as a result of the implementation of these final regulations. Consequently, a portion of the cost of health care coverage will transfer from those new COBRA enrollees to plan sponsors, thereby increasing the subsidy from employers to COBRA enrollees. The transfer of costs arises because surveys indicate that although qualified beneficiaries that elect COBRA coverage pay a cost consisting of the applicable premium amount for group coverage plus an administrative charge, the actual average cost of continuation coverage is somewhat higher than the combined amount paid by the qualified beneficiary. Payment by a plan sponsor of the difference in these costs constitutes a subsidy of a qualified beneficiary's continuation coverage. As such, the transfer represents a cost to plan sponsors and a benefit to COBRA enrollees.

In estimating the amount of the transfer, the Department observed that the number of inquiries the Department receives annually concerning COBRA, about 59,000, is equivalent to just more than 1 percent of the estimated 5 million annual COBRA qualifying events. It is likely that some but not all of these inquiries reflect notice

inadequacies that these regulations would correct. The Department also noted that approximately 19 percent of qualifying events result in elections, and that the average annualized subsidy from plan sponsors to COBRA enrollees amounts to about $2,500 per enrollee. If between 0.5 percent and 1.0 percent of qualifying events involve missed opportunities due to inadequate notice, and 19 percent of those events would have resulted in elections, then the regulations, by correcting notice deficiencies, would increase COBRA enrollees by between 4,750 and 9,500 each year, and the aggregate subsidy by between $12 million and $24 million. Expressed in unit costs, for every one percent increase in the number of qualified beneficiaries who elect continuation coverage due to improved notices and procedures, there is an estimated incremental increase in cost of $24 million to plan sponsors or an average of approximately $58 per plan.

Both the administrative cost and the transfer cost will be borne by the 411,000 group health plans, covering a total of about 111 million participants and their dependents, that are currently required to offer continuation coverage. Cost estimates recognize only the cost of changes to existing practices that are likely to be associated with these rules; they exclude the pre-regulation impact of the statute itself. Estimates are grounded in an assumption as to the entity expected to perform the needed work (*e.g.*, a health insurer or professional administrator); the assumption should not be interpreted to bear on any party's legal responsibility for COBRA compliance. The costs of the regulations are equal to only one one-hundredth of 1 percent or less of total group health plan costs to entities subject to COBRA. Because the magnitude of the overall increase in costs to plans is small, the Department believes that it will not have a consequential effect on the availability of health coverage for employees.

Benefits.—The benefits of these rules arise from improved administrative efficiency, reduced exposure to risk, and from the potential avoidance of some unnecessary losses of group health plan coverage by qualified beneficiaries.

Improvements in the consistency and quality of information provided to participants and beneficiaries will help them understand their rights and limit their risk of losing the opportunity to elect COBRA coverage. Inconsistent procedures and notices that are not adequate as to content, timing, and form are known to generate questions, delays, disputes, and duplications of effort that require the expenditure of additional resources by both plan administrators and participants and beneficiaries to resolve. Although the magnitude of the costs and potential savings associated with administrative inefficiencies is unknown, clearer and more uniform standards should serve to avoid the otherwise unnecessary expense associated with rectifying procedural and substantive notice inadequacies. Providing greater certainty to plan sponsors and plan administrators as to how their notice obligations can be met should also limit risks to both plans and qualified beneficiaries. Plan sponsors and plan administrators who comply with this guidance will be less likely to be subjected to costly disputes, litigation, or penalties as a result of their compliance with this guidance.

The benefit to COBRA enrollees exceeds the financial value of the transfer insofar as the enrollees will gain access to high-value group coverage rather than having to choose between purchasing generally lower-value individual insurance, usually at a significantly higher rate than a group rate, or going without coverage altogether. Individual coverage is more costly and less efficient due in large part to significantly higher costs of individual policy administration. The uninsured are also known to seek preventive care less frequently and to delay or forgo treatment, which may lead to less favorable health outcomes and higher social costs for acute care at a later time. Interruptions in group health plan coverage can ultimately limit the portability of group coverage, as well. A reduction in the numbers of losses of coverage that result from notification failures results in efficiency gains to the extent that the qualified beneficiaries elect group health plan coverage rather than individual coverage.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA 95), the Department submitted the information collection request (ICR) included in the Notice Requirements of the Health Care Continuation Coverage Provisions to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of Proposed Rulemaking (NPRM) was published. In accordance with 5 CFR 1320.11(c) of the PRA, OMB issued a Notice of Action, on June 6, 2003, deferring action on the request for approval until the submission of the ICR in connection with the final rulemaking. Action was deferred in order to provide the Department with an opportunity to include changes resulting from comments on the proposed regulations. Accordingly, the Department has submitted the ICR included in the Notice of Final Regulations for review and clearance by OMB.

The Department has issued these rules to set minimum standards for the timing and content of the notices required under the continuation coverage provisions of part 6 of title I of ERISA, and to establish uniform standards for administering the notice process. In very general terms, the statute requires that qualified beneficiaries be offered the opportunity to elect to continue group health coverage after losses of coverage due to death of the covered employee, termination of employment or reduction of hours of employment, divorce or legal separation of the covered employee from the employee's spouse, loss of dependent child status, the covered employee's becoming entitled to Medicare, or bankruptcy of an employer that affects covered retirees and their families. Qualified beneficiaries may include covered employees, spouses of covered employees, and dependent children of covered employees. Coverage generally extends for up to 18 or 36 months, depending on the nature of the qualifying event.

The regulations set standards for six types of notices and provide two model notices in the following sections: General Notice of Continuation Coverage; Notice Requirements for Employers; Notice Requirements for Covered Employees and Qualified Beneficiaries; and Notice Requirements for Plan Administrators. The last section covers a notice of right to elect continuation coverage, a notice of unavailability of continuation coverage, and a notice of early termination of continuation coverage. Each of the regulations includes one or more ICRs. It should be noted that this Paperwork Reduction Act analysis includes the cost of the statute (the COBRA provisions) as well as the cost of the discretion exercised in this rulemaking. These costs were developed in the manner described below.

In order to develop estimates of the cost of the review, revision, development, and distribution of COBRA notices, it was first necessary to determine the numbers of participants and beneficiaries in plans that are required to offer COBRA coverage (generally, plans sponsored by employers with 20 or more employees), the numbers of beneficiaries who reside at addresses that are different from related covered employees, and the rates of occurrences of qualifying events that give rise to notice obligations. Also

required were estimates of the number of entities, such as group health insurance issuers and professional administrators, that would review COBRA notices; the number that would consequently revise COBRA notices; and the time required to do so for each type of notice.

The Department derived its estimates of 55.8 million covered employees, 55 million beneficiaries, and 2.5 million COBRA enrollees from the February and March 2001 Current Population Survey (CPS; Census Bureau household surveys), the 2000 Medical Expenditure Panel Survey, Household and Insurance Components (MEPS comprises surveys of households and private establishments conducted jointly by the Census Bureau and the Agency for Healthcare Research and Quality), and the 1996 Panel of the Survey of Income and Program Participation (SIPP; a Census Bureau longitudinal household survey). These data sources also indicate that 67,000 dependents live outside the household of related employees. Frequency rates for qualifying events were also developed from MEPS and SIPP.

An estimate of the number of plans covering these employees and dependents was also needed. About 50,000 group health plans currently file the Form 5500–Annual Return/Report of Employee Benefit Plan each year, including 38,000 large plans, and 8,000 small plans, and a number of plans that may not be required to file. For the purpose of regulatory analysis, plans with fewer than 100 participants are considered to be small. Because the majority of small group health plans are not required to file Form 5500, the number of such plans must be estimated from other data sources. CPS and MEPS data were used to derive an estimate of the number of employers that offer group health coverage, and to exclude employers within that group that have fewer than 20 employees. This estimate indicates that these regulations will affect about 411,000 plans, 38,000 of which are large, and 373,000 of which are small. The number of participants in large plans is estimated at 43.5 million. The number of participants in small plans is estimated to be 12.3 million.

The preparation and distribution of notices (discussed below) is accounted for as cost rather than hours because most COBRA administration is accomplished through the purchase of services for which fees are paid. Start-up costs that arise from these regulations pertain to the review and revision of existing forms and procedures and the development of the new early termination and unavailability notices. The costs for completing and distributing notices are ongoing operating costs.

The Department has assumed that all COBRA administrators will review their existing forms and procedures in response to promulgation of this guidance, and that some of those plan administrators will need to revise their notices and procedures. In order to derive an estimate of the number of entities that will review forms and procedures, the Department looked at the number of health insurers offering group products and the number of professional administrators providing services to group health plans. This results in an estimate of about 3,000 entities that perform COBRA administration for the majority of all plans. All of these entities are expected to review all of their notices and procedures in response to this regulatory guidance. The reviews are assumed to require 2 hours each for the general notice and the election notice. The reviews are expected to be conducted by professionals at the level of financial managers at a cost of $68 per hour.

In order to estimate the number of service providers that would be required to revise their existing notices, the Department first examined its data pertaining to the nature of the telephone inquiries it receives. These data show that about 59,000 inquiries pertaining to COBRA are received each year. Although the portion of these inquiries that pertain to notice provisions is unknown, as is the number of COBRA notification issues that do not give rise to contact with the Department, this number provides the only available proxy for a rate of notice-related difficulties. Given the roughly 5 million COBRA election notices provided each year, the rate of notice inadequacies is assumed to be about 1%. Because some COBRA inquiries received by the Department pertain to issues other than notices, the number of inadequate notices may range from .5% to 1% but 1% has been used for purposes of these estimates.

These regulations will require service providers to revise the .5% to 1% of notices that historically have been inadequate. The cost of these revisions will be driven in part by the number of service providers affected. The proportion of service providers affected may be larger than the proportion of notices that are inadequate. If inadequate notices are concentrated among smaller service providers, then the proportion of service providers affected will be more than .5% to 1%. The Department assumed that 3% of all service providers, or 90 providers, will be affected.

Modifications to the general notice and the election notice are assumed to require two hours per notice, at $68 per hour for a service provider. Additional start-up costs include the cost of four hours of professional time, at $68 per hour, to modify or develop the employer and employee notices and to develop the two newly required early termination and unavailability notices.

Ongoing operating costs arise from completing a notice upon the occurrence of each event that gives rise to a notice obligation and from distributing the completed notice. The Department did not attribute any ongoing operating cost to the provision of the general notice to covered employees and their spouses who reside with them. Under this final rule, a plan administrator may satisfy the general notice requirement by including the required content in the SPD and furnishing a single notice addressed to both the covered employee and the covered employee's spouse. The Department did, however, attribute an ongoing operating cost to completing and distributing the general notice to a spouse of a covered employee who resides at a separate address.

No burden is included for completing the employer's notice because it involves only information that the employer has at hand in its customary personnel practices. Similarly, no completion burden is calculated for the qualified beneficiaries' notices because this information is limited, readily available, and would be provided as a usual practice by only the qualified beneficiary who wishes to elect continuation coverage.

No cost has been included for the completion or distribution of the notice of unavailability of continuation coverage because there is currently no basis for determining the number of these notices that might be sent. The Department has assumed, however, that due to the clear and consistent information provided in the general notice, plan administrators will distribute only a limited number of unavailability notices annually and that the associated cost will be very small.

Finally, the cost for completing the election notice, at 4 minutes per notice, and the early termination notice, at 1 minute per notice, is estimated at $34 per hour. The 4 minutes required to complete an election notice represent a reduction from the 5 minutes originally calculated in the proposed regulation. The one minute saved as a result of clarifications in the final regulations regarding how plans may identify

qualified beneficiaries for purposes of the election notice, is expected to reduce the burden for completing election forms. As such, the estimated operating and maintenance costs for the ICR have been reduced by an estimated $2.7 million.

In determining the cost for distribution of COBRA notices, the Department noted in the proposed regulations that due to the nature of the rights and obligations involved in COBRA notice requirements most plan administrators tend not to choose electronic distribution methods for COBRA notices. The Department further noted that plans are not precluded from using electronic distribution methods that comply with regulations at 29 CFR.104b–1(b) and (c) and specifically requested comment on the use of electronic technologies in COBRA notice administration. The Department received one comment attesting to the availability of electronic information systems that are capable of transmitting COBRA notices and disclosures, and that are efficient, legally protective, and cost effective. The Department recognizes that there may be cost savings when information is transmitted electronically and that some plans may choose to use electronic technologies to fulfill their requirements. For purposes of the PRA, however, the Department has conservatively estimated costs based on first-class mail, which is currently the most common method for delivery of COBRA information. Postage and materials for distribution are estimated at $0.38 per notice. No assumption has been made as to the number of these notices that will be distributed electronically. The application of these assumptions results in an estimated annual distribution of 66,900 general notices, 2,809,000 employer notices, 651,000 qualified beneficiary notices, 4,699,000 plan administrator election notices, and 1,000,000 early termination notices. The number of unavailability notices is unknown.

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Notice Requirements of the Health Care Continuation Coverage Provisions.

OMB Number: 1210–0NEW.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 411,000.

Frequency of Response: On occasion.

Responses: 9,225,900.

Estimated Total Burden Hours: None.

Total Annualized Capital/Startup Costs: 1,656,500.

Total Burden Cost (Operating and Maintenance): $14,723,400.

Total Annualized Cost: $16,379,900.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis at the time of the publication of the NFRM describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of the Act, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure requirements for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued regulations at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10, providing for simplified reporting requirements and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants, that satisfy certain other requirements.

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, EBSA believes that assessing the impact of this rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). At the time of the publication of the NPRM, the Department requested comments on the appropriateness of the size standard used in evaluating the impact of this rule on small entities. No comments were received.

On the basis of this definition, EBSA estimates that the regulations will not have a significant impact on a substantial number of small entities. In support of this conclusion, the Department has conducted a final regulatory flexibility analysis, which is summarized below.

These regulations provide plans and qualified beneficiaries with greater certainty as to how the notice obligations of COBRA can be met. Inquiries to the Department, as well as public comment in response to the 1997 RFI, indicated that service providers and plan administrators would welcome guidance that would provide greater administrative efficiency and reduce exposure to risk resulting from procedural or substantive failures to meet notification requirements. Improvements in the quality of information provided to participants and beneficiaries is expected to help them understand their rights and limit their risk of losing the opportunity to elect the COBRA coverage that is required to be offered.

The COBRA provisions require a group health plan to offer qualified beneficiaries the opportunity to elect continuation coverage when they would otherwise lose group health coverage as a result of certain events described in the statute as ''qualifying events.'' Under section 608 of ERISA, the Secretary has the authority to carry out the provisions of part 6 of title I of ERISA. Further, the Conference Report that accompanied COBRA provided that the Secretary has the authority to issue regulations implementing the notice and disclosure provisions of part 6 of ERISA. The Department's objective in issuing the regulations is to provide guidelines that will assure plan administrators that they are in compliance with the notification provisions of COBRA and that participants and beneficiaries have sufficient information to exercise their COBRA rights. Small plans will benefit from clarifications about the content and timing of notices and from the likelihood that fewer determinations about COBRA coverage will be delayed, disputed, or appealed. In addition, an increased number of qualified beneficiaries in small health plans will be able to obtain COBRA continuation coverage.

The Department believes that, because of the expertise required, small plans will use COBRA administrators to review notices and to modify or adapt the Department's model notices for use

by the plan administrator. Generally, COBRA administrators offer plans ongoing administrative services, such as notifying employees about their group health plan continuation coverage, distributing and processing election forms, collecting and applying premium payments, and monitoring COBRA compliance. Small plans, in particular, are less likely to have in-house capabilities to handle these administrative tasks. For a service provider, reviewing and adopting or modifying forms for plans will result in some direct cost. COBRA administrators may choose to absorb some of the cost in order to maintain competitive products; others may charge the cost to their client plans. Where these costs are charged to plans, the cost will most likely be minimized because of the economies of scale inherent in the use of standardized forms and procedures. Costs to small plans are further reduced because of the large number of small plans that share the cost burden; there are approximately seven times as many small plans as large plans. Finally, to further reduce costs, the Department has provided two model notices that can be adapted by COBRA administrators for use by individual single-employer plans.

The Department estimates that there are approximately 2.5 million plans, each with fewer than 100 participants, that are considered small group health plans under the Department's definition. Among these, COBRA applies to only those plans with 20 or more employees, or 373,000 plans, with a total of approximately 12.3 million participants. While the majority of group health plans subject to COBRA are small plans, participation in those plans represents only about 22% of participation in all plans covered by COBRA.

The cost estimates for small plan compliance recognize only the cost of changes to existing practices associated with the regulations; they exclude the impact of the statute itself. Costs result from the likelihood that COBRA administrators may be required to modify two notices currently used by plans and may modify or develop other notices, including the two new early termination and unavailability notices. The cost to small group health plans to review and modify existing notices is estimated at $275,900. The cost to develop the two new notices and to complete and distribute the early termination notice is estimated at $299,400. No costs have been estimated for completion and distribution of the unavailability notice because the number of notices that might be sent cannot reasonably be determined; it is expected, however, that, with the additional clarity provided by the general notice regulation, the number of unavailability notices required to be sent will be small. The total cost to small plans for a service provider's assistance in reviewing, modifying, or developing notices is estimated to be $575,300, or $1.54 per small plan. The comparable average cost to large plans is $53.09 per plan.

Employers with small plans will also incur transfer costs as a result of an increase in the number of elections of continuation coverage by qualified beneficiaries who would have lost the opportunity to elect COBRA coverage absent improved notices and procedures. A portion of the cost of health care coverage previously borne by these individuals will be transferred to plan sponsors. However, because there are fewer participants in small plans, the per-plan transfer costs are considerably less than for large plans. The potential transfer cost to small plans is estimated to range between $2.6 million and $5.2 million, depending on the number of qualified beneficiaries who will elect COBRA coverage. The rate of potential losses of opportunity to elect COBRA coverage is estimated to fall between .5% and 1%. This represents an average of $7 to $14 per small plan. The comparable cost to large plans ranges from $9.4 million to $18.7 million, an average of $242 to $484 per plan. At the upper bound, the total estimated cost of the regulations for 373,000 small plans is $5.7 million, or an average of $15 per plan.

The basis for the regulations lies in the notice and disclosure provisions of part 6 of title I of ERISA. The regulations do not duplicate, overlap, or conflict with other Federal rules. The COBRA provisions have been in effect for many years. Accordingly, most plan administrators and COBRA administrators have developed procedures to comply with their statutory obligations. The regulations merely seek to provide additional, detailed guidance that will clarify a plan's administrative obligations and assure plan administrators and COBRA administrators that, in complying with the regulations, they have satisfied their statutory obligations.

The Department has attempted to minimize the burden of the review and potential revision of existing notices undertaken in response to this guidance by including model notices that can be adapted to plans' specific circumstances. This should lessen the use of resources for small and large plans alike.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Small Business Regulatory Enforcement Fairness Act

The rule being issued here is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule,'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Federalism Statement

Executive Order 13132 (Aug. 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the

relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Medical child support, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Department amends chapter XXV, subchapter L, part 2590 of title 29 of the Code of Federal Regulations as follows:

Subchapter L—Group Health Plans

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The heading of subchapter L is revised to read as shown above.

■ 2. The heading of part 2590 is revised to read as shown above.

■ 3. The authority citation for part 2590 is revised to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 401(b), Pub. L. 105–200, 112 Stat. 645; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003).

Subpart A—[Amended]

■ 4. Part 290, Subpart A, is amended by adding §§ 2590.606–1 through 2590.606–4 to read as follows:

§ 2590.606–1. General notice of continuation coverage.

(a) *General.* Pursuant to section 606(a)(1) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator of a group health plan subject to the continuation coverage requirements of part 6 of title I of the Act shall provide, in accordance with this section, written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.

(b) *Timing of notice.* (1) The notice required by paragraph (a) of this section shall be furnished to each employee and each employee's spouse, not later than the earlier of:

(i) The date that is 90 days after the date on which such individual's coverage under the plan commences, or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or

(ii) The first date on which the administrator is required, pursuant to § 2590.606–4(b), to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.

(2) A notice that is furnished in accordance with paragraph (b)(1) of this section shall, for purposes of section 606(a)(1) of the Act, be deemed to be provided at the time of commencement of coverage under the plan.

(3) In any case in which an administrator is required to furnish a notice to a covered employee or spouse pursuant to paragraph (b)(1)(ii) of this section, the furnishing of a notice to such individual in accordance with § 2590.606–4(b) shall be deemed to satisfy the requirements of this section.

(c) *Content of notice.* The notice required by paragraph (a) of this section shall be written in a manner calculated to be understood by the average plan participant and shall contain the following information:

(1) The name of the plan under which continuation coverage is available, and the name, address and telephone number of a party or parties from whom additional information about the plan and continuation coverage can be obtained;

(2) A general description of the continuation coverage under the plan, including identification of the classes of individuals who may become qualified beneficiaries, the types of qualifying events that may give rise to the right to continuation coverage, the obligation of the employer to notify the plan administrator of the occurrence of certain qualifying events, the maximum period for which continuation coverage may be available, when and under what circumstances continuation coverage may be extended beyond the applicable maximum period, and the plan's requirements applicable to the payment of premiums for continuation coverage;

(3) An explanation of the plan's requirements regarding the responsibility of a qualified beneficiary to notify the administrator of a qualifying event that is a divorce, legal separation, or a child's ceasing to be a dependent under the terms of the plan, and a description of the plan's procedures for providing such notice;

(4) An explanation of the plan's requirements regarding the responsibility of qualified beneficiaries who are receiving continuation coverage to provide notice to the administrator of a determination by the Social Security Administration, under title II or XVI of the Social Security Act (42 U.S.C. 401 *et seq.* or 1381 *et seq.*), that a qualified beneficiary is disabled, and a description of the plan's procedures for providing such notice;

(5) An explanation of the importance of keeping the administrator informed of the current addresses of all participants or beneficiaries under the plan who are or may become qualified beneficiaries; and

(6) A statement that the notice does not fully describe continuation coverage or other rights under the plan and that more complete information regarding such rights is available from the plan administrator and in the plan's SPD.

(d) *Single notice rule.* A plan administrator may satisfy the requirement to provide notice in accordance with this section to a covered employee and the covered employee's spouse by furnishing a single notice addressed to both the covered employee and the covered employee's spouse, if, on the basis of the most recent information available to the plan, the covered employee's spouse resides at the same location as the covered employee, and the spouse's coverage under the plan commences on or after the date on which the covered employee's coverage commences, but not later than the date on which the notice required by this section is required to be provided to the covered employee. Nothing in this section shall be construed to create a requirement to provide a separate notice to dependent children who share a residence with a covered employer or a covered employee's spouse to whom notice is provided in accordance with this section.

(e) *Notice in summary plan description.* A plan administrator may satisfy the requirement to provide notice in accordance with this section by including the information described in paragraphs (c)(1), (2), (3), (4), and (5) of this section in a summary plan description meeting the requirements of § 2520.102–3 of this chapter furnished in accordance with paragraph (b) of this section.

(f) *Delivery of notice.* The notice required by this section shall be furnished in a manner consistent with the requirements of § 2520.104b–1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

(g) *Model notice.* The appendix to this section contains a model notice that is intended to assist administrators in discharging the notice obligations of this section. Use of the model notice is not mandatory. The model notice reflects the requirements of this section as they would apply to single-employer group health plans and must be modified if used to provide notice with respect to other types of group health plans, such as multiemployer plans or plans

established and maintained by employee organizations for their members. In order to use the model notice, administrators must appropriately add relevant information where indicated in the model notice, select among alternative language, and supplement the model notice to reflect applicable plan provisions. Items of information that are not applicable to a particular plan may be deleted. Use of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements of paragraph (c) of this section.

(h) *Applicability.* This section shall apply to any notice obligation described in this section that arises on or after the first day of the first plan year beginning on or after November 26, 2004.

BILLING CODE 4510–29–P

APPENDIX TO § 2590.606-1

MODEL GENERAL NOTICE OF COBRA CONTINUATION COVERAGE RIGHTS
(For use by single-employer group health plans)

** CONTINUATION COVERAGE RIGHTS UNDER COBRA**

Introduction

You are receiving this notice because you have recently become covered under a group health plan (the Plan). This notice contains important information about your right to COBRA continuation coverage, which is a temporary extension of coverage under the Plan. **This notice generally explains COBRA continuation coverage, when it may become available to you and your family, and what you need to do to protect the right to receive it.**

The right to COBRA continuation coverage was created by a federal law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). COBRA continuation coverage can become available to you when you would otherwise lose your group health coverage. It can also become available to other members of your family who are covered under the Plan when they would otherwise lose their group health coverage. For additional information about your rights and obligations under the Plan and under federal law, you should review the Plan's Summary Plan Description or contact the Plan Administrator.

What is COBRA Continuation Coverage?

COBRA continuation coverage is a continuation of Plan coverage when coverage would otherwise end because of a life event known as a "qualifying event." Specific qualifying events are listed later in this notice. After a qualifying event, COBRA continuation coverage must be offered to each person who is a "qualified beneficiary." You, your spouse, and your dependent children could become qualified beneficiaries if coverage under the Plan is lost because of the qualifying event. Under the Plan, qualified beneficiaries who elect COBRA continuation coverage [*choose and enter appropriate information:* must pay *or* are not required to pay] for COBRA continuation coverage.

If you are an employee, you will become a qualified beneficiary if you lose your coverage under the Plan because either one of the following qualifying events happens:

- Your hours of employment are reduced, or
- Your employment ends for any reason other than your gross misconduct.

If you are the spouse of an employee, you will become a qualified beneficiary if you lose your coverage under the Plan because any of the following qualifying events happens:

- Your spouse dies;
- Your spouse's hours of employment are reduced;
- Your spouse's employment ends for any reason other than his or her gross misconduct;
- Your spouse becomes entitled to Medicare benefits (under Part A, Part B, or both); or
- You become divorced or legally separated from your spouse.

Your dependent children will become qualified beneficiaries if they lose coverage under the Plan because any of the following qualifying events happens:

- The parent-employee dies;
- The parent-employee's hours of employment are reduced;
- The parent-employee's employment ends for any reason other than his or her gross misconduct;
- The parent-employee becomes entitled to Medicare benefits (Part A, Part B, or both);
- The parents become divorced or legally separated; or
- The child stops being eligible for coverage under the plan as a "dependent child."

[*If the Plan provides retiree health coverage, add the following paragraph:*]

Sometimes, filing a proceeding in bankruptcy under title 11 of the United States Code can be a qualifying event. If a proceeding in bankruptcy is filed with respect to [*enter name of employer sponsoring the plan*], and that bankruptcy results in the loss of coverage of any retired employee covered under the Plan, the retired employee will become a qualified beneficiary with respect to the bankruptcy. The retired employee's spouse, surviving spouse, and dependent children will also become qualified beneficiaries if bankruptcy results in the loss of their coverage under the Plan.

When is COBRA Coverage Available?

The Plan will offer COBRA continuation coverage to qualified beneficiaries only after the Plan Administrator has been notified that a qualifying event has occurred. When the qualifying event is the end of employment or reduction of hours of employment, death of the employee, [*add if Plan provides retiree health coverage:* commencement of a proceeding in bankruptcy with respect to the employer,] or the employee's becoming entitled to Medicare benefits (under Part A, Part B, or both), the employer must notify the Plan Administrator of the qualifying event.

You Must Give Notice of Some Qualifying Events

For the other qualifying events (divorce or legal separation of the employee and spouse or a dependent child's losing eligibility for coverage as a dependent child), you must notify the Plan Administrator within 60 days [*or enter longer period permitted under the terms of the Plan*] after the qualifying event occurs. You must provide this notice to: [*Enter name of appropriate party*]. [*Add description of any additional Plan procedures for this notice, including a description of any required information or documentation.*]

How is COBRA Coverage Provided?

Once the Plan Administrator receives notice that a qualifying event has occurred, COBRA continuation coverage will be offered to each of the qualified beneficiaries. Each qualified beneficiary will have an independent right to elect COBRA continuation coverage. Covered employees may elect COBRA continuation coverage on behalf of their spouses, and parents may elect COBRA continuation coverage on behalf of their children.

COBRA continuation coverage is a temporary continuation of coverage. When the qualifying event is the death of the employee, the employee's becoming entitled to Medicare benefits (under Part A, Part B, or both), your divorce or legal separation, or a dependent child's losing eligibility as a dependent child, COBRA continuation coverage lasts for up to a total of 36 months. When the qualifying event is the end of employment or reduction of the employee's hours of employment, and the employee became entitled to Medicare benefits less than 18 months before the qualifying event, COBRA continuation coverage for qualified beneficiaries other than the employee lasts until 36 months after the date of Medicare entitlement. For example, if a covered employee becomes entitled to Medicare 8 months before the date on which his employment terminates, COBRA continuation coverage for his spouse and children can last up to 36 months after the date of Medicare entitlement, which is equal to 28 months after the date of the qualifying event (36 months minus 8 months). Otherwise, when the qualifying event is the end of employment or reduction of the employee's hours of employment, COBRA continuation coverage generally lasts for only up to a total of 18 months. There are two ways in which this 18-month period of COBRA continuation coverage can be extended.

Disability extension of 18-month period of continuation coverage

If you or anyone in your family covered under the Plan is determined by the Social Security Administration to be disabled and you notify the Plan Administrator in a timely fashion, you and your entire family may be entitled to receive up to an additional 11 months of COBRA continuation coverage, for a total maximum of 29 months. The disability would have to have started at some time before the 60th day of COBRA continuation coverage and must last at least until the end of the 18-month period of continuation coverage. [*Add description of any additional Plan procedures for this notice, including a description of any required information or documentation, the name of the appropriate party to whom notice must be sent, and the time period for giving notice*].

Second qualifying event extension of 18-month period of continuation coverage

If your family experiences another qualifying event while receiving 18 months of COBRA continuation coverage, the spouse and dependent children in your family can get up to 18 additional months of COBRA continuation coverage, for a maximum of 36 months, if notice of the second qualifying event is properly given to the Plan. This extension may be available to the spouse and any dependent children receiving continuation coverage if the employee or former employee dies, becomes entitled to Medicare benefits (under Part A, Part B, or both), or gets divorced or legally separated, or if the dependent child stops being eligible under the Plan as a dependent child, but only if the event would have caused the spouse or dependent child to lose coverage under the Plan had the first qualifying event not occurred.

If You Have Questions

Questions concerning your Plan or your COBRA continuation coverage rights should be addressed to the contact or contacts identified below. For more information about your rights under ERISA, including COBRA, the Health Insurance Portability and Accountability Act (HIPAA), and other laws affecting group health plans, contact the nearest Regional or District Office of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) in your area or visit the EBSA website at www.dol.gov/ebsa. (Addresses and phone numbers of Regional and District EBSA Offices are available through EBSA's website.)

Keep Your Plan Informed of Address Changes

In order to protect your family's rights, you should keep the Plan Administrator informed of any changes in the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Plan Contact Information

[Enter name of group health plan and name (or position), address and phone number of party or parties from whom information about the plan and COBRA continuation coverage can be obtained on request.]

BILLING CODE 4910–29–C

§ 2590.606–2. Notice requirement for employers.

(a) *General.* Pursuant to section 606(a)(2) of the Employee Retirement Income Security Act of 1974, as amended (the Act), except as otherwise provided herein, the employer of a covered employee under a group health plan subject to the continuation coverage requirements of part 6 of title I of the Act shall provide, in accordance with this section, notice to the administrator of the plan of the occurrence of a qualifying event that is the covered employee's death, termination of employment (other than by reason of gross misconduct), reduction in hours of employment, Medicare entitlement, or a proceeding in a case under title 11, United States Code, with respect to the employer from whose employment the covered employee retired at any time.

(b) *Timing of notice.* The notice required by this section shall be furnished to the administrator of the plan—

(1) In the case of a plan that provides, with respect to a qualifying event, pursuant to section 607(5) of the Act, that continuation coverage and the applicable period for providing notice under section 606(a)(2) of the Act shall commence on the date of loss of coverage, not later than 30 days after the date on which a qualified beneficiary loses coverage under the plan due to the qualifying event;

(2) In the case of a multiemployer plan that provides, pursuant to section 606(a)(2) of the Act, for a longer period of time within which employers may provide notice of a qualifying event, not later than the end of the period provided pursuant to the plan's terms for such notice; and

(3) In all other cases, not later than 30 days after the date on which the qualifying event occurred.

(c) *Content of notice.* The notice required by this section shall include sufficient information to enable the administrator to determine the plan, the covered employee, the qualifying event, and the date of the qualifying event.

(d) *Multiemployer plan special rules.* This section shall not apply to any employer that maintains a multiemployer plan, with respect to qualifying events affecting coverage under such plan, if the plan provides, pursuant to section 606(b) of the Act, that the administrator shall determine whether such a qualifying event has occurred.

(e) *Applicability.* This section shall apply to any notice obligation described in this section that arises on or after the first day of the first plan year beginning on or after November 26, 2004.

§ 2590.606–3. Notice requirements for covered employees and qualified beneficiaries.

(a) *General.* In accordance with the authority of sections 505 and 606(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (the Act), this section sets forth requirements for group health plans subject to the continuation coverage requirements of part 6 of title I of the Act with respect to the responsibility of covered employees and qualified beneficiaries to provide the following notices to administrators:

(1) Notice of the occurrence of a qualifying event that is a divorce or legal separation of a covered employee from his or her spouse;

(2) Notice of the occurrence of a qualifying event that is a beneficiary's ceasing to be covered under a plan as a dependent child of a participant;

(3) Notice of the occurrence of a second qualifying event after a qualified beneficiary has become entitled to continuation coverage with a maximum duration of 18 (or 29) months;

(4) Notice that a qualified beneficiary entitled to receive continuation coverage with a maximum duration of 18 months has been determined by the Social Security Administration, under title II or XVI of the Social Security Act (42 U.S.C. 401 *et seq.* or 1381 *et seq.*) (SSA), to be disabled at any time during the first 60 days of continuation coverage; and

(5) Notice that a qualified beneficiary, with respect to whom a notice described in paragraph (a)(4) of this section has been provided, has subsequently been determined by the Social Security Administration, under title II or XVI of the SSA to no longer be disabled.

(b) *Reasonable procedures.* (1) A plan subject to the continuation coverage requirements shall establish reasonable procedures for the furnishing of the notices described in paragraph (a) of this section.

(2) For purposes of this section, a plan's notice procedures shall be deemed reasonable only if such procedures:

(i) Are described in the plan's summary plan description required by § 2520.102–3 of this chapter;

(ii) Specify the individual or entity designated to receive such notices;

(iii) Specify the means by which notice may be given;

(iv) Describe the information concerning the qualifying event or determination of disability that the plan deems necessary in order to provide continuation coverage rights consistent with the requirements of the Act; and

(v) Comply with the requirements of paragraphs (c), (d), and (e) of this section.

(3) A plan's procedures will not fail to be reasonable, pursuant to this section, solely because the procedures require a covered employee or qualified beneficiary to utilize a specific form to provide notice to the administrator, provided that any such form is easily available, without cost, to covered employees and qualified beneficiaries.

(4) If a plan has not established reasonable procedures for providing a notice required by this section, such notice shall be deemed to have been provided when a written or oral communication identifying a specific

event is made in a manner reasonably calculated to bring the information to the attention of any of the following:

(i) In the case of a single-employer plan, the person or organizational unit that customarily handles employee benefits matters of the employer;

(ii) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee, or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily are referred; or

(iii) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization subject to regulation under the insurance laws of one or more States, the person or organizational unit that customarily handles claims for benefits under the plan or any officer of the insurance company, insurance service, or other similar organization.

(c) *Periods of time for providing notice.* A plan may establish a reasonable period of time for furnishing any of the notices described in paragraph (a) of this section, provided that any time limit imposed by the plan with respect to a particular notice may not be shorter than the time limit described in this paragraph (c) with respect to that notice.

(1) *Time limits for notices of qualifying events.* The period of time for furnishing a notice described in paragraph (a)(1), (2), or (3) of this section may not end before the date that is 60 days after the latest of:

(i) The date on which the relevant qualifying event occurs;

(ii) The date on which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or

(iii) The date on which the qualified beneficiary is informed, through the furnishing of the plan's summary plan description or the notice described in § 2590.606–1, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator.

(2) *Time limits for notice of disability determination.* (i) Subject to paragraph (c)(2)(ii) of this section, the period of time for furnishing the notice described in paragraph (a)(4) of this section may not end before the date that is 60 days after the latest of:

(A) The date of the disability determination by the Social Security Administration;

(B) The date on which a qualifying event occurs;

(C) The date on which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or

(D) The date on which the qualified beneficiary is informed, through the furnishing of the summary plan description or the notice described in § 2590.606–1, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator.

(ii) Notwithstanding paragraph (c)(2)(i) of this section, a plan may require the notice described in paragraph (a)(4) of this section to be furnished before the end of the first 18 months of continuation coverage.

(3) *Time limits for notice of change in disability status.* The period of time for furnishing the notice described in paragraph (a)(5) of this section may not end before the date that is 30 days after the later of:

(i) The date of the final determination by the Social Security Administration, under title II or XVI of the SSA, that the qualified beneficiary is no longer disabled; or

(ii) The date on which the qualified beneficiary is informed, through the furnishing of the plan's summary plan description or the notice described in § 2590.606–1, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator.

(d) *Required contents of notice.* (1) A plan may establish reasonable requirements for the content of any notice described in this section, provided that a plan may not deem a notice to have been provided untimely if such notice, although not containing all of the information required by the plan, is provided within the time limit established under the plan in conformity with paragraph (c) of this section, and the administrator is able to determine from such notice the plan, the covered employee and qualified beneficiary(ies), the qualifying event or disability, and the date on which the qualifying event (if any) occurred.

(2) An administrator may require a notice that does not contain all of the information required by the plan to be supplemented with the additional information necessary to meet the plan's reasonable content requirements for such notice in order for the notice to be deemed to have been provided in accordance with this section.

(e) *Who may provide notice.* With respect to each of the notice requirements of this section, any individual who is either the covered employee, a qualified beneficiary with respect to the qualifying event, or any representative acting on behalf of the covered employee or qualified beneficiary may provide the notice, and the provision of notice by one individual shall satisfy any responsibility to provide notice on behalf of all related qualified beneficiaries with respect to the qualifying event.

(f) *Plan provisions.* To the extent that a plan provides a covered employee or qualified beneficiary a period of time longer than that specified in this section to provide notice to the administrator, the terms of the plan shall govern the time frame for such notice.

(g) *Additional rights to continuation coverage.* Nothing in this section shall be construed to preclude a plan from providing, in accordance with its terms, continuation coverage to a qualified beneficiary although a notice requirement of this section was not satisfied.

(h) *Applicability.* This section shall apply to any notice obligation described in this section that arises on or after the first day of the first plan year beginning on or after November 26, 2004.

§ 2590.606–4. Notice requirements for plan administrators.

(a) *General.* Pursuant to section 606(a)(4) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator of a group health plan subject to the continuation coverage requirements of Part 6 of title I of the Act shall provide, in accordance with this section, notice to each qualified beneficiary of the qualified beneficiary's rights to continuation coverage under the plan.

(b) *Notice of right to elect continuation coverage.* (1) Except as provided in paragraph (b) (2) or (3) of this section, upon receipt of a notice of qualifying event furnished in accordance with § 2590.606–2 or § 2590.606–3, the administrator shall furnish to each qualified beneficiary, not later than 14 days after receipt of the notice of qualifying event, a notice meeting the requirements of paragraph (b)(4) of this section.

(2) In the case of a plan with respect to which an employer of a covered employee is also the administrator of the plan, except as provided in paragraph (b)(3) of this section, if the employer is otherwise required to furnish a notice of a qualifying event to an administrator pursuant to § 2590.606–2, the administrator shall furnish to each qualified beneficiary a notice meeting the requirements of

paragraph (b)(4) of this section not later than 44 days after:

(i) In the case of a plan that provides, with respect to the qualifying event, that continuation coverage and the applicable period for providing notice under section 606(a)(2) of the Act shall commence with the date of loss of coverage, the date on which a qualified beneficiary loses coverage under the plan due to the qualifying event; or

(ii) In all other cases, the date on which the qualifying event occurred.

(3) In the case of a plan that is a multiemployer plan, a notice meeting the requirements of paragraph (b)(4) of this section shall be furnished not later than the later of:

(i) The end of the time period provided in paragraph (b)(1) of this section; or

(ii) The end of the time period provided in the terms of the plan for such purpose.

(4) The notice required by this paragraph (b) shall be written in a manner calculated to be understood by the average plan participant and shall contain the following information:

(i) The name of the plan under which continuation coverage is available; and the name, address and telephone number of the party responsible under the plan for the administration of continuation coverage benefits;

(ii) Identification of the qualifying event;

(iii) Identification, by status or name, of the qualified beneficiaries who are recognized by the plan as being entitled to elect continuation coverage with respect to the qualifying event, and the date on which coverage under the plan will terminate (or has terminated) unless continuation coverage is elected;

(iv) A statement that each individual who is a qualified beneficiary with respect to the qualifying event has an independent right to elect continuation coverage, that a covered employee or a qualified beneficiary who is the spouse of the covered employee (or was the spouse of the covered employee on the day before the qualifying event occurred) may elect continuation coverage on behalf of all other qualified beneficiaries with respect to the qualifying event, and that a parent or legal guardian may elect continuation coverage on behalf of a minor child;

(v) An explanation of the plan's procedures for electing continuation coverage, including an explanation of the time period during which the election must be made, and the date by which the election must be made;

(vi) An explanation of the consequences of failing to elect or waiving continuation coverage, including an explanation that a qualified beneficiary's decision whether to elect continuation coverage will affect the future rights of qualified beneficiaries to portability of group health coverage, guaranteed access to individual health coverage, and special enrollment under part 7 of title I of the Act, with a reference to where a qualified beneficiary may obtain additional information about such rights; and a description of the plan's procedures for revoking a waiver of the right to continuation coverage before the date by which the election must be made;

(vii) A description of the continuation coverage that will be made available under the plan, if elected, including the date on which such coverage will commence, either by providing a description of the coverage or by reference to the plan's summary plan description;

(viii) An explanation of the maximum period for which continuation coverage will be available under the plan, if elected; an explanation of the continuation coverage termination date; and an explanation of any events that might cause continuation coverage to be terminated earlier than the end of the maximum period;

(ix) A description of the circumstances (if any) under which the maximum period of continuation coverage may be extended due either to the occurrence of a second qualifying event or a determination by the Social Security Administration, under title II or XVI of the Social Security Act (42 U.S.C. 401 *et seq.* or 1381 *et seq.*) (SSA), that the qualified beneficiary is disabled, and the length of any such extension;

(x) In the case of a notice that offers continuation coverage with a maximum duration of less than 36 months, a description of the plan's requirements regarding the responsibility of qualified beneficiaries to provide notice of a second qualifying event and notice of a disability determination under the SSA, along with a description of the plan's procedures for providing such notices, including the times within which such notices must be provided and the consequences of failing to provide such notices. The notice shall also explain the responsibility of qualified beneficiaries to provide notice that a disabled qualified beneficiary has subsequently been determined to no longer be disabled;

(xi) A description of the amount, if any, that each qualified beneficiary will be required to pay for continuation coverage;

(xii) A description of the due dates for payments, the qualified beneficiaries' right to pay on a monthly basis, the grace periods for payment, the address to which payments should be sent, and the consequences of delayed payment and non-payment;

(xiii) An explanation of the importance of keeping the administrator informed of the current addresses of all participants or beneficiaries under the plan who are or may become qualified beneficiaries; and

(xiv) A statement that the notice does not fully describe continuation coverage or other rights under the plan, and that more complete information regarding such rights is available in the plan's summary plan description or from the plan administrator.

(c) *Notice of unavailability of continuation coverage.* (1) In the event that an administrator receives a notice furnished in accordance with § 2590.606–3 relating to a qualifying event, second qualifying event, or determination of disability by the Social Security Administration regarding a covered employee, qualified beneficiary, or other individual and determines that the individual is not entitled to continuation coverage under part 6 of title I of the Act, the administrator shall provide to such individual an explanation as to why the individual is not entitled to continuation coverage.

(2) The notice required by this paragraph (c) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished by the administrator in accordance with the time frame set out in paragraph (b) of this section that would apply if the administrator received a notice of qualifying event and determined that the individual was entitled to continuation coverage.

(d) *Notice of termination of continuation coverage.* (1) The administrator of a plan that is providing continuation coverage to one or more qualified beneficiaries with respect to a qualifying event shall provide, in accordance with this paragraph (d), notice to each such qualified beneficiary of any termination of continuation coverage that takes effect earlier than the end of the maximum period of continuation coverage applicable to such qualifying event.

(2) The notice required by this paragraph (d) shall be written in a manner calculated to be understood by the average plan participant and shall contain the following information:

(i) The reason that continuation coverage has terminated earlier than the end of the maximum period of

continuation coverage applicable to such qualifying event;

(ii) The date of termination of continuation coverage; and

(iii) Any rights the qualified beneficiary may have under the plan or under applicable law to elect an alternative group or individual coverage, such as a conversion right.

(3) The notice required by this paragraph (d) shall be furnished by the administrator as soon as practicable following the administrator's determination that continuation coverage shall terminate.

(e) *Special notice rules.* The notices required by paragraphs (b), (c), and (d) of this section shall be furnished to each qualified beneficiary or individual, except that:

(1) An administrator may provide notice to a covered employee and the covered employee's spouse by furnishing a single notice addressed to both the covered employee and the covered employee's spouse, if, on the basis of the most recent information available to the plan, the covered employee's spouse resides at the same location as the covered employee; and

(2) An administrator may provide notice to each qualified beneficiary who is the dependent child of a covered employee by furnishing a single notice to the covered employee or the covered employee's spouse, if, on the basis of the most recent information available to the plan, the dependent child resides at the same location as the individual to whom such notice is provided.

(f) *Delivery of notice.* The notices required by this section shall be furnished in any manner consistent with the requirements of § 2520.104b–1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

(g) *Model notice.* The appendix to this section contains a model notice that is intended to assist administrators in discharging the notice obligations of paragraph (b) of this section. Use of the model notice is not mandatory. The model notice reflects the requirements of this section as they would apply to single-employer group health plans and must be modified if used to provide notice with respect to other types of group health plans, such as multiemployer plans or plans established and maintained by employee organizations for their members. In order to use the model notice, administrators must appropriately add relevant information where indicated in the model notice, select among alternative language and supplement the model notice to reflect applicable plan provisions. Items of information that are not applicable to a particular plan may be deleted. Use of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements of paragraph (b)(4) of this section.

(h) *Applicability.* This section shall apply to any notice obligation described in this section that arises on or after the first day of the first plan year beginning on or after November 26, 2004.

BILLING CODE 4510–29–P

APPENDIX TO § 2590.606-4

MODEL COBRA CONTINUATION COVERAGE ELECTION NOTICE
(For use by single-employer group health plans)

[*Enter date of notice*]

Dear: [*Identify the qualified beneficiary(ies), by name or status*]

This notice contains important information about your right to continue your health care coverage in the [*enter name of group health plan*] (the Plan). Please read the information contained in this notice very carefully.

To elect COBRA continuation coverage, follow the instructions on the next page to complete the enclosed Election Form and submit it to us.

If you do not elect COBRA continuation coverage, your coverage under the Plan will end on [*enter date*] due to [*check appropriate box*]:

☐ End of employment
☐ Death of employee
☐ Entitlement to Medicare
☐ Reduction in hours of employment
☐ Divorce or legal separation
☐ Loss of dependent child status

Each person ("qualified beneficiary") in the category(ies) checked below is entitled to elect COBRA continuation coverage, which will continue group health care coverage under the Plan for up to ___ months [*enter* 18 *or* 36*, as appropriate and check appropriate box or boxes; names may be added*]:

☐ Employee or former employee
☐ Spouse or former spouse
☐ Dependent child(ren) covered under the Plan on the day before the event that caused the loss of coverage
☐ Child who is losing coverage under the Plan because he or she is no longer a dependent under the Plan

If elected, COBRA continuation coverage will begin on [*enter date*] and can last until [*enter date*]. [*Add, if appropriate:* You may elect any of the following options for COBRA continuation coverage: [*list available coverage options*].

COBRA continuation coverage will cost: [*enter amount each qualified beneficiary will be required to pay for each option per month of coverage and any other permitted coverage periods.*] You do not have to send any payment with the Election Form. Important additional information about payment for COBRA continuation coverage is included in the pages following the Election Form.

If you have any questions about this notice or your rights to COBRA continuation coverage, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

COBRA CONTINUATION COVERAGE ELECTION FORM

INSTRUCTIONS: To elect COBRA continuation coverage, complete this Election Form and return it to us. Under federal law, you must have 60 days after the date of this notice to decide whether you want to elect COBRA continuation coverage under the Plan.

Send completed Election Form to: [*Enter Name and Address*]

This Election Form must be completed and returned by mail [*or describe other means of submission and due date*]. If mailed, it must be post-marked no later than [*enter date*].

If you do not submit a completed Election Form by the due date shown above, you will lose your right to elect COBRA continuation coverage. If you reject COBRA continuation coverage before the due date, you may change your mind as long as you furnish a completed Election Form before the due date. However, if you change your mind after first rejecting COBRA continuation coverage, your COBRA continuation coverage will begin on the date you furnish the completed Election Form.

Read the important information about your rights included in the pages after the Election Form.

I (We) elect COBRA continuation coverage in the [*enter name of plan*] (the Plan) as indicated below:

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

[*Add if appropriate:* Coverage option elected: _____]

b. _____

[*Add if appropriate:* Coverage option elected: _____]

c. _____

[*Add if appropriate:* Coverage option elected: _____]

_____ _____

Signature Date

_____ _____

Print Name Relationship to individual(s) listed above

_____

_____

_____ _____

Print Address Telephone number

IMPORTANT INFORMATION ABOUT YOUR COBRA CONTINUATION COVERAGE RIGHTS

What is continuation coverage?

Federal law requires that most group health plans (including this Plan) give employees and their families the opportunity to continue their health care coverage when there is a "qualifying event" that would result in a loss of coverage under an employer's plan. Depending on the type of qualifying event, "qualified beneficiaries" can include the employee (or retired employee) covered under the group health plan, the covered employee's spouse, and the dependent children of the covered employee.

Continuation coverage is the same coverage that the Plan gives to other participants or beneficiaries under the Plan who are not receiving continuation coverage. Each qualified beneficiary who elects continuation coverage will have the same rights under the Plan as other participants or beneficiaries covered under the Plan, including [*add if applicable:* open enrollment and] special enrollment rights.

How long will continuation coverage last?

In the case of a loss of coverage due to end of employment or reduction in hours of employment, coverage generally may be continued only for up to a total of 18 months. In the case of losses of coverage due to an employee's death, divorce or legal separation, the employee's becoming entitled to Medicare benefits or a dependent child ceasing to be a dependent under the terms of the plan, coverage may be continued for up to a total of 36 months. When the qualifying event is the end of employment or reduction of the employee's hours of employment, and the employee became entitled to Medicare benefits less than 18 months before the qualifying event, COBRA continuation coverage for qualified beneficiaries other than the employee lasts until 36 months after the date of Medicare entitlement. This notice shows the maximum period of continuation coverage available to the qualified beneficiaries.

Continuation coverage will be terminated before the end of the maximum period if:

- any required premium is not paid in full on time,
- a qualified beneficiary becomes covered, after electing continuation coverage, under another group health plan that does not impose any pre-existing condition exclusion for a pre-existing condition of the qualified beneficiary,
- a covered employee becomes entitled to Medicare benefits (under Part A, Part B, or both) after electing continuation coverage, or
- the employer ceases to provide any group health plan for its employees.

Continuation coverage may also be terminated for any reason the Plan would terminate coverage of a participant or beneficiary not receiving continuation coverage (such as fraud).

[*If the maximum period shown on page 1 of this notice is less than 36 months, add the following three paragraphs:*]

How can you extend the length of COBRA continuation coverage?

If you elect continuation coverage, an extension of the maximum period of coverage may be available if a qualified beneficiary is disabled or a second qualifying event occurs. You must notify [*enter name of party responsible for COBRA administration*] of a disability or a second qualifying event in order to extend the period of continuation coverage. Failure to provide notice of a disability or second qualifying event may affect the right to extend the period of continuation coverage.

Disability

An 11-month extension of coverage may be available if any of the qualified beneficiaries is determined by the Social Security Administration (SSA) to be disabled. The disability has to have started at some time before the 60th day of COBRA continuation coverage and must last at least until the end of the 18-month period of continuation coverage. [*Describe Plan provisions for requiring notice of disability determination, including time frames and procedures.*] Each qualified beneficiary who has elected continuation coverage will be entitled to the 11-month disability extension if one of them qualifies. If the qualified beneficiary is determined by SSA to no longer be disabled, you must notify the Plan of that fact within 30 days after SSA's determination.

Second Qualifying Event

An 18-month extension of coverage will be available to spouses and dependent children who elect continuation coverage if a second qualifying event occurs during the first 18 months of continuation coverage. The maximum amount of continuation coverage available when a second qualifying event occurs is 36 months. Such second qualifying events may include the death of a covered employee, divorce or separation from the covered employee, the covered employee's becoming entitled to Medicare benefits (under Part A, Part B, or both), or a dependent child's ceasing to be eligible for coverage as a dependent under the Plan. These events can be a second qualifying event only if they would have caused the qualified beneficiary to lose coverage under the Plan if the first qualifying event had not occurred. You must notify the Plan within 60 days after a second qualifying event occurs if you want to extend your continuation coverage.

How can you elect COBRA continuation coverage?

To elect continuation coverage, you must complete the Election Form and furnish it according to the directions on the form. Each qualified beneficiary has a separate right to elect continuation coverage. For example, the employee's spouse may elect continuation coverage even if the employee does not. Continuation coverage may be elected for only one, several, or for all dependent children who are qualified beneficiaries. A parent may elect to continue coverage on behalf of any dependent children. The employee or the employee's spouse can elect continuation coverage on behalf of all of the qualified beneficiaries.

In considering whether to elect continuation coverage, you should take into account that a failure to continue your group health coverage will affect your future rights under federal law. First, you can lose the right to avoid having pre-existing condition exclusions applied to you by other group health plans if you have more than a 63-day gap in health coverage, and election of continuation coverage may help you not have such a gap. Second, you will lose the guaranteed right to purchase individual health insurance policies that do not impose such pre-existing condition exclusions if you do not get continuation coverage for the maximum time available to you. Finally, you should take into account that you have special enrollment rights under federal law. You have the right to request special enrollment in another group health plan for which you are otherwise eligible (such as a plan sponsored by your spouse's employer) within 30 days after your group health coverage ends because of the qualifying event listed above. You will also have the same special enrollment right at the end of continuation coverage if you get continuation coverage for the maximum time available to you.

How much does COBRA continuation coverage cost?

Generally, each qualified beneficiary may be required to pay the entire cost of continuation coverage. The amount a qualified beneficiary may be required to pay may not exceed 102 percent (or, in the case of an extension of continuation coverage due to a disability, 150 percent) of the cost to the group health plan (including both employer and employee contributions) for coverage of a similarly situated plan participant or beneficiary who is not receiving continuation coverage. The required payment for each continuation coverage period for each option is described in this notice.

[*If employees might be eligible for trade adjustment assistance, the following information may be added*: The Trade Act of 2002 created a new tax credit for certain individuals who become eligible for trade adjustment assistance and for certain retired employees who are receiving pension payments from the Pension Benefit Guaranty Corporation (PBGC) (eligible individuals). Under the new tax provisions, eligible individuals can either take a tax credit or get advance payment of 65% of premiums paid for qualified health insurance, including continuation coverage. If you have questions about these new tax provisions, you may call the Health Coverage Tax Credit Customer Contact Center toll-free at 1-866-628-4282. TTD/TTY callers may call toll-free at 1-866-626-4282. More information about the Trade Act is also available at www.doleta.gov/tradeact/2002act_index.asp.

When and how must payment for COBRA continuation coverage be made?

First payment for continuation coverage

If you elect continuation coverage, you do not have to send any payment with the Election Form. However, you must make your first payment for continuation coverage not later than 45 days after the date of your election. (This is the date the Election Notice is post-marked, if mailed.) If you do not make your first payment for continuation coverage in full not later than 45 days after the date of your election, you will lose all continuation coverage rights under the Plan. You are responsible for making sure that the amount of your first payment is correct. You may contact

[*enter appropriate contact information, e.g., the Plan Administrator or other party responsible for COBRA administration under the Plan*] to confirm the correct amount of your first payment.

Periodic payments for continuation coverage

After you make your first payment for continuation coverage, you will be required to make periodic payments for each subsequent coverage period. The amount due for each coverage period for each qualified beneficiary is shown in this notice. The periodic payments can be made on a monthly basis. Under the Plan, each of these periodic payments for continuation coverage is due on the [*enter due day for each monthly payment*] for that coverage period. [*If Plan offers other payment schedules, enter with appropriate dates:* You may instead make payments for continuation coverage for the following coverage periods, due on the following dates:]. If you make a periodic payment on or before the first day of the coverage period to which it applies, your coverage under the Plan will continue for that coverage period without any break. The Plan [*select one:* will *or* will not] send periodic notices of payments due for these coverage periods.

Grace periods for periodic payments

Although periodic payments are due on the dates shown above, you will be given a grace period of 30 days after the first day of the coverage period [*or enter longer period permitted by Plan*] to make each periodic payment. Your continuation coverage will be provided for each coverage period as long as payment for that coverage period is made before the end of the grace period for that payment. [*If Plan suspends coverage during grace period for nonpayment, enter and modify as necessary:* However, if you pay a periodic payment later than the first day of the coverage period to which it applies, but before the end of the grace period for the coverage period, your coverage under the Plan will be suspended as of the first day of the coverage period and then retroactively reinstated (going back to the first day of the coverage period) when the periodic payment is received. This means that any claim you submit for benefits while your coverage is suspended may be denied and may have to be resubmitted once your coverage is reinstated.]

If you fail to make a periodic payment before the end of the grace period for that coverage period, you will lose all rights to continuation coverage under the Plan.

Your first payment and all periodic payments for continuation coverage should be sent to:

[*enter appropriate payment address*]

For more information

This notice does not fully describe continuation coverage or other rights under the Plan. More information about continuation coverage and your rights under the Plan is available in your summary plan description or from the Plan Administrator.

If you have any questions concerning the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

For more information about your rights under ERISA, including COBRA, the Health Insurance Portability and Accountability Act (HIPAA), and other laws affecting group health plans, contact the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) in your area or visit the EBSA website at www.dol.gov/ebsa. (Addresses and phone numbers of Regional and District EBSA Offices are available through EBSA's website.)

Keep Your Plan Informed of Address Changes

In order to protect your and your family's rights, you should keep the Plan Administrator informed of any changes in your address and the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Signed at Washington, DC., this 19th day of May, 2004.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 04–11796 Filed 5–25–04; 8:45 am]

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May 26, 2004

Part VI

Department of Transportation

Research and Special Programs Administration

49 CFR Part 171

Hazardous Materials: Revisions to Incident Reporting Requirements and the Hazardous Materials Incident Report Form; Correction; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 171

[Docket No. RSPA–99–5013 (HM–229)]

RIN 2137–AD21

Hazardous Materials: Revisions to Incident Reporting Requirements and the Hazardous Materials Incident Report Form; Correction

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; response to appeals and correction.

SUMMARY: On December 3, 2003, RSPA published a final rule under Docket No. RSPA–99–5013 (HM–229) to update and clarify requirements in the Hazardous Materials Regulations applicable to incident reporting requirements and the Hazardous Materials Incident Report (HMIR) DOT Form F 5800.1. In response to appeals submitted by persons affected by the December 3, 2003 final rule, this final rule amends certain requirements, and makes minor editorial corrections. This final rule is effective January 1, 2005. The effective date for the final rule published on December 3, 2003 has been extended from July 1, 2004 to January 1, 2005.

DATES: *Effective Date:* This final rule is effective on January 1, 2005. The effective date for the final rule published on December 3, 2003 has been extended from July 1, 2004 to January 1, 2005. Only the revised DOT Form F 5800.1 (01–2004) specified in this final rule will be accepted for incidents occurring on or after January 1, 2005. Filers must use the previous DOT Form F 5800.1 (Rev 6/89) form for all incidents up to and including December 31, 2004.

FOR FURTHER INFORMATION CONTACT: T. Glenn Foster, (202) 366–8553, Office of Hazardous Materials Standards, Research and Special Programs Administration, or Kevin Coburn, (202) 366–4555, Office of Hazardous Materials Planning & Analysis, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background

On December 3, 2003, the Research and Special Programs Administration (RSPA, we) published a final rule under Docket HM–229 (68 FR 67746) revising incident reporting requirements of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) and the Hazardous Materials Incident Report Form DOT F 5800.1. Specifically, the final rule:

- Revised the hazardous materials incident report form;
- Provided for electronic filing of incident reports;
- Established one-call reporting of hazardous materials incidents;
- Expanded reporting requirements to persons other than carriers;
- Expanded reporting exceptions;
- Provided criteria for telephonic notification;
- Provided criteria for updates to incident reports;
- Required reporting of undeclared shipments of hazardous materials;
- Required reporting of non-release incidents involving cargo tanks;
- Provided definitions of ''Undeclared Hazardous Material'' and ''Unintentional Release''; and
- Eliminated redundant or unnecessary regulations. In addition, the December 3 final rule revised the HMR to address three recommendations from the National Transportation Safety Board (NTSB):
- Consistent with NTSB Recommendation H–92–6, established a program to collect information necessary to identify patterns of cargo tank equipment failures, including the reporting of all accidents involving a DOT specification cargo tank, with or without a release of hazardous materials.
- Consistent with NTSB recommendation R–89–52, set forth procedures being implemented to ensure there is feedback to shippers when an incident has occurred.
- Consistent with NTSB recommendation H–99–58, established a specific time period for reporting incidents meeting criteria in § 171.15 (telephonic notification).

II. Appeals

The following organizations and one individual submitted appeals to the December 3, 2003 final rule, in accordance with 49 CFR Part 106: The Air Transport Association (ATA-Air); the American Trucking Associations (ATA-Trucking); the Association of American Railroads (AAR); the National Propane Gas Association (NPGA); the National Tank Truck Carriers, Inc. (NTTC); the Petroleum Transportation & Storage Association (PTSA); and Mr. John V. Currie. The appellants expressed concern about several revisions included in the final rule. In addition, two appellants asked for a revision to the effective date of the final rule. The issues raised by the appellants are discussed in detail below.

A. Appeals Granted

Electronic Filing—The December 3 final rule revised § 171.16 (b) to require each person reporting under this section to submit a written or electronic HMIR to the Information Systems Manager at the Research and Special Programs Administration. Mr. John Currie stated that as drafted, § 171.16(b)(1) could be interpreted to require both the submission of a written and electronic HMIR. We agree that the language is unclear and could lead to unnecessary submissions of duplicate reports. Therefore, in this final rule, we are adding the word ''or'' between the addresses for written and electronic submittal of the HMIR to clarify that either a written or electronic report must be submitted, not both.

Revised Hazardous Materials Incident Form DOT F 5800.1—The December 3 final rule revised the HMIR Form DOT F 5800.1 and instructions. AAR requested that RSPA reconsider eliminating certain required information on the HMIR that AAR considers unnecessary and difficult to obtain. AAR notes that, as drafted, the instructions following Item 23 instruct the filer to skip Part III ''Packing Information'' and proceed to Part IV, which AAR believes was not RSPA's intent. However, if Part III is to be completed, AAR takes issue with two points related to Item 28, found in Part III. The first point is discussed here; the second point can be found under the ''Appeals Denied'' section of this document.

Item 28 requires the identification of the manufacturer and model number for any valve or device that failed on a tank car. AAR stated that this poses a problem if the specification plates containing this information are missing or obscured. The builder of the tank car may not be able to provide this information on the HMIR if subsequent owners or lessees have changed valves. Railroads would be compelled to rely on the efforts of car owners for this information in order to complete the required entry on the incident report form. This reliance on an outside party could jeopardize the thirty-day filing requirement. AAR believes RSPA should require this information to be clearly marked on valves and other devices at all times, if RSPA determines it is necessary.

We agree with AAR's comment regarding reference to the guidance immediately following Item 23 of the HMIR. As drafted, the instructions omit Part III and instruct the filer to proceed

directly to Part IV for a hazardous materials incident, or a specification cargo tank 1,000 gallons or greater containing any hazardous material that received structural damage to the lading retention system that requires repair and did not have a release. This was not our intent. One of our objectives is to acquire accurate and complete data on incidents. In this final rule, we are removing the supplemental guidance immediately following Item 23 from the HMIR.

We also agree with AAR's concern regarding reporting the manufacturer and model number for any valve or device that failed on a tank car. In this final rule, we are retaining the requirement to specify the ''type'' of valve or device that failed during an incident. However, we are amending the requirement to provide the manufacturer and model number for any valve or device that failed on a tank to include the words ''if present and legible.''

B. Appeals Denied

Effective Date of the Final Rule—The December 3, 2003 final rule established the effective date of this rule as July 1, 2004. ATA-Air and ATA-Trucking request RSPA to reconsider the July 1, 2004 effective date. ATA-Air requests that RSPA allow carriers to begin complying with the new rules (other than those applicable to discoveries of undeclared hazardous materials) earlier than July 1, 2004. ATA-Air notes that many companies have pre-established training schedules and could begin their employees on the new requirements immediately. In addition, rather than expecting employees to retain the new incident reporting information for several months, the Association contends it would be beneficial to apply the training immediately. The appellant sees no potential concern if the carriers begin following the revised requirements earlier than currently required.

ATA-Trucking recommends that RSPA delay the effective date for 12 months following the publication of guidance implementing the electronic filing procedures and provide a three-month transitional period for the new system. The appellant states industry bears significant costs, including the revision of internal computer software and employee training, whenever an information requirement is revised. The appellant asserts the July 1, 2004 effective date would not provide industry adequate time to train its employees. In addition, this appellant notes the HM–229 NPRM called for the implementation of a variety of electronic filing methods, including facsimile, electronic mail, and internet-based filing options. The appellant states the final rule does not provide for electronic filing. Instead, RSPA indicated that it is ''in the process of developing the capability to allow electronic submission of the form and bulk transfer, and will issue an advisory notification upon completion.'' ATA-Trucking explains that, ''* * * depending upon the date electronic filing options go live, motor carriers will have to train their employees on the new form and then subsequently train them to implement the electronic filing options.'' The appellant contends this ''* * * will force industry to incur unnecessary training expenses.'' ATA-Trucking also believes ''there should be a period of time (*i.e.,* three months) following the effective date, where the use of the existing HMIR form would result in a formal warning, rather than a notice of violation and civil penalty.'' The appellant believes a provision by RSPA ''* * * would help companies with multiple facilities train each potentially affected person,'' thus avoiding situations of non-compliance. The appellant notes that because most companies have already approved technical and informational projects for 2004 and finalized their 2004 capital budgets, it will be difficult to implement an informational change before the 2005 budget year. RSPA does not agree that we have not addressed electronic filing methods. We fully anticipate an operational electronic system by the effective date of the final rule, which, as previously stated, is the earliest date the revised form will be accepted. RSPA also recognizes that filers of the revised incident report may benefit from a tutorial phase for training purposes and orientation, and anticipates an interactive incident report form on our Web site prior to the effective date. This development will provide accessibility by filers and downloading capabilities of the revised form. In addition, RSPA is making available a dedicated facsimile phone line to facilitate this alternate reporting option. We are reconfiguring our computer software programs to accept electronic submissions via the Web site, and providing an electronic version of the form that can be completed, printed, and mailed or faxed to RSPA. Finally, a bulk transfer system is being developed to allow for batch transmittals of multiple incident reports. We reiterate that an advisory notification will be issued upon completion and availability of these alternate methods of incident report filing. We do not agree that an immediate effective date, nor a delay of the effective date for 12 months following the publication of guidance implementing the electronic filing procedures with a three-month transitional period for the new system, is necessary, therefore these appeals are denied. However, we are extending the effective date until January 1, 2005 to provide companies with additional time for training and familiarization with the new HMIR. We reiterate that only the revised DOT Form F 5800.1 (01–2004) specified in this final rule will be accepted for incidents occurring on or after January 1, 2005. Filers must use the previous DOT Form F 5800.1 (Rev 6/89) form for all incidents up to and including December 31, 2004.

Expansion of Reporting Requirements to Persons other than Shippers—The December 3 final rule revised the HMR to expand the requirement to report incidents to the person in physical possession of a hazardous material at the time an incident occurs during transportation.

ATA-Trucking states that RSPA is ''* * * handcuffed by the jurisdictional decisions made in connection with the HM–223 rulemaking'' and ''* * * has excluded unloading activities performed by non-carrier personnel from the scope of the hazardous materials incident reporting requirements.'' The appellant asserts that ''* * * RSPA's decision to exclude activities performed by the consignee will reduce the *quantity* of hazardous materials incident reports by RSPA.'' In addition, it states that ''* * * the *quality* of the information RSPA receives will be impacted, as the data will be over-weighted with packaging failures that occur during accidents, while the number of reports received from packaging failures that occur under normal conditions of transportation and are only discovered during the unloading process will be artificially under-weighted.'' RSPA's ''* * * decision to exempt consignees from the requirement to complete incident reports undermines the fundamental purpose of the Hazardous Materials Incident Reporting system, which is to collect meaningful data on the performance of DOT packaging standards under conditions normally incidental to transportation.'' ATA-Trucking recommends RSPA reconsider this aspect of the final rule and expand the hazardous materials incident reporting obligation to individuals responsible for the unloading of hazardous materials.

We disagree. The reporting requirements found in §§ 171.15 and 171.16 pertain to incidents that occur

during transportation, including storage incidental to transportation. The issues posed by the appellant concern whether incidents involving pre-transportation functions are reportable under §§ 171.15 and 171.16. While pre-transportation functions, such as shipper loading operations when a carrier is not present, are regulated under the HMR, they have not been and are not subject to the incident reporting requirements under this rulemaking because incidents related to pre-transportation functions occur prior to the beginning of transportation in commerce. Therefore, the status of reporting these pre-transportation functions has not been changed by either the HM–229 or HM–223 (68 FR 61905) final rules. Regarding our decision to exempt consignees from incident reporting, we point out that consignees have never been subject to incident reporting (except for consignees unloading rail cars in accordance with § 174.67). The clarifications in HM–223 are consistent with our long-standing interpretations of our statutory authority. In addition, we note that carrier reports, including reports by carriers involved in unloading hazardous materials at consignee facilities, are and have been sufficient to enable us to receive accurate information about packaging failures that occur during normal transportation operations. For these reasons, the ATA-Trucking's appeal concerning the expansion of reporting requirements to the person in physical possession of a hazardous material at the time an incident occurs in transportation is denied.

Reporting Non-Release Incidents Involving Cargo Tanks—The December 3 final rule requires an HMIR be submitted when a specification cargo tank with a capacity of 1,000 gallons or greater containing any hazardous material suffers structural damage to the lading retention system or damage that requires repair to a system intended to protect the lading retention system, even if there is no release of hazardous material. NTTC, ATA-Trucking, NPGA, and PTSA appealed this provision on the basis that it: (1) Is vague; (2) removes the certainty of whether to file an incident report; (3) could not be enforced in an equitable manner; and (4) places carriers in a compliance trap. The appellants recommend the provision either be deleted or modified to include a statement referencing damage requiring test and inspection of cargo tanks as set forth in § 180.407(b).

NTTC contends a product could be loaded into a cargo tank that was not designed for or otherwise suitable for the product, resulting in a compromise of the lading retention system. In a second example, NTTC describes a carrier driver relinquishing control of the cargo tank to a shipper before the unit is staged for loading. Damage that may result from these activities might not be discovered for a considerable amount of time. NTTC does not believe RSPA addressed these concerns in the final rule and reiterates them in its appeal to this rulemaking. NTTC believes RSPA has unfairly and unwisely placed tank truck carriers in a ''compliance trap'' and wonders if tank truck operators will have to perform '' * * * detailed internal and external inspections of all lading retention systems after each 'near-miss'?'' NTTC states RSPA justified this requirement by relying on a decade-old report by the NTSB (PB92–917220) and questions the relevancy of that report and recommendations. NTTC states the NTSB report contains only data of so-called ''rollover'' accidents involving cargo tank motor vehicles; all of the incidents in the report involved releases of hazardous materials in the environment and pertained to measurable specification shortages on vehicles that have previously been addressed by RSPA and the Federal Motor Carrier Safety Administration (FMCSA). NTTC states that if RSPA truly believes ''accurate ('near miss' or 'close call') data will prevent safety gaps,'' as well as determine ''* * * how to allocate limited funds of the regulated community to provide the greatest safety benefits, RSPA would be remiss in not extending such reporting to all specification packagings.'' As an alternative, NTTC suggests the following modification: ''A specification cargo tank with a capacity of 1,000 gallons or greater containing any hazardous material is damaged to the extent that it becomes subject to 49 CFR § 180.407(b).''

ATA-Trucking states that in addition to ''* * * artificially limiting the number of reports received from incidents discovered during unloading, RSPA has expanded the number of reports it will collect by expanding the incident reporting requirement to bulk cargo tanks that suffer certain damage that does not result in a release of hazardous materials.'' ATA-Trucking believes this ''standard for reporting damage in the absence of a release is vague and will potentially lead to instances of non-compliance.'' ATA-Trucking supports the proposal crafted by NTTC. ATA-Trucking believes NTTC's proposal ''* * * would create objective reporting criteria and reduce instances of non-compliance resulting from the uncertainty of whether to file an incident report'' * * * ATA-Trucking recommends RSPA eliminate the tank truck operator's obligation to file a hazardous materials report when no hazardous material has been released or in the alternative, amend § 171.16(a)(3) to reference § 180.407(b) as suggested by NTTC.

NPGA also ''* * * opposes the last portion of this provision and believes the collection of this incident information will not provide the type of data sought by RSPA that would result in increased safety.'' NPGA believes this provision is ''* * * vague, fails to provide the regulated parties the requisite certainty to enable compliance, and will lead to inconsistent enforcement in the field.'' NPGA reminds RSPA of its comments during the rulemaking stage noting the genesis of HM–229 was the HM–225A negotiated rulemaking between the cargo tank industry and DOT. NPGA argues that more data is not better data. NPGA notes RSPA's HM–229 preamble discussion ''* * * that such reporting can provide information concerning packaging integrity.'' This final rule expands the incident database ''* * * to include ''near miss'' or ''close call'' incidents, which ''* * * have the potential for significant consequences.'' NPGA believes the vagueness of this regulation creates uncertainty as to when a report should be filed. ''* * * Multiple instances of less serious damage could lead to a form of damage considered more serious, thus necessitating a report filing.'' NPGA recommends RSPA delete the phrase '' * * * even if there is no release of hazardous material'' from § 171.16(a)(3), and modify the provision to reference § 180.407(b) as suggested by NTTC. NPGA contends this section ''* * * is much more familiar to the industry and provides a form of criteria for filing reports that the currently adopted provision lacks.''

PTSA states this provision is vague, will lead to uneven compliance and inconsistent enforcement, and places a greater and unwarranted compliance burden on small business petroleum marketers. According to PTSA, ''* * * petroleum marketers are likely to incur undeserved civil penalties and unjustified safety rating scores * * *'' PTSA states that the ability for small business petroleum marketers to obtain certainty of compliance is vital to ensure the safe transportation of hazardous materials and maintain a competitive edge against larger hazardous materials carriers with more compliance resources. PTSA believes the information collected from non-

release incidents is subjective and disagrees with RSPA's belief that information collected can provide valuable data on packaging integrity. PTSA argues the terms ''near miss'' or ''close call'' in the preamble are too ambiguous to provide any degree of certainty. PTSA believes that ''* * * only engineering studies, under controlled conditions and involving expert analysis can provide the objective information regarding packaging integrity that RSPA seeks to collect.'' PTSA recommends RSPA eliminate the requirement for reporting under § 171.16(a)(3) involving incidents where no release occurs. If RSPA chooses not to follow this recommendation, PTSA contends that a less desirable, but more acceptable alternative would be to amend § 171.16(a)(3) to reference § 180.407(b) as suggested by NTTC.

RSPA disagrees with the appellants. We believe the revisions in this final rule encompass and exceed the conditions in § 180.407(b) by requiring a more detailed accounting of incidents involving hazardous materials, providing specific failure codes, expanding the reporting requirements to persons other than carriers, and defining an ''undeclared hazardous material'' and ''unintentional release.'' We rationalize that ''structural damage'' is any damage that causes a person to ask the question implied in § 180.407(b)(2)—was the cargo tank damaged to an extent that its lading retention capability may be affected? If the damage is sufficient to trigger the repair of the cargo tank, an HMIR should be filed. Consequently, if the question is answered affirmatively, testing and inspection are also required. While RSPA recognizes that some judgment may still be involved, we do not foresee this causing a significant number of new reports being generated. In addition, such reporting will provide us with a better idea of the number of cargo tanks involved in accidents with at least some damage to the lading retention or lading protection system. As noted in the December 3 final rule, information gathered on damage to certified cargo tanks of 1,000 gallons or more that do not result in a release will be analyzed over the next several years to determine its usefulness in practice and if further rulemaking is necessary. As also noted in the December 3 final rule, RSPA may address requiring additional information for other bulk packagings in a future rulemaking. For these reasons, the appeals of NTTC, ATA-Trucking, NPGA, and PTSA regarding the reporting of non-release incidents involving cargo tanks are denied.

Reporting Undeclared Shipments of Hazardous Materials—The December 3 final rule revised § 171.16 to require a person who discovers an undeclared hazardous material to submit an HMIR. ATA-Air requests reconsideration of the new requirement ''* * * in light of the current airport security environment, which did not exist during the comment period * * *'' of the final rule. This appellant notes the Transportation Security Administration (TSA) inspects checked baggage, resulting in a dramatic increase in the volume of such discoveries, and ''* * * the consumer-goods nature of most items found merits consideration.'' ATA-Air states that the revised four-page HMIR is an unnecessary burden and duplicates carriers' existing discrepancy reporting obligations for the same items under 49 CFR § 175.31.'' ATA-Air also stated that RSPA is required by the Paperwork Reduction Act (PRA) ''* * * to avoid such complication and duplication, particularly in view of carriers' dire financial circumstances and sharply reduced staffing * * *'' in the wake of September 11, 2001. The appellant disputes that the average number of incident reports from 1997–2000 is representative of current experience. The appellant stated that RSPA's analysis cited under the PRA section in the final rule preamble ''* * * should be updated to take into account the greatly increased volume of discoveries stemming from TSA screening.'' ATA-Air suggests RSPA defer implementation of this aspect of the rule until these issues are resolved. ATA-Air recommends RSPA ''* * * convene an advisory committee to bring together all stakeholders, including RSPA, Federal Aviation Administration (FAA), ATA-Air, and the carriers, to develop a workable solution to these issues.'' ATA-Air urges RSPA to ''* * * re-open the comment period for this aspect of the final rule, and revise the rule in accordance with those supplemental comments.''

RSPA agrees with the appellant that the potential for the discoveries of undeclared shipments has greatly increased due to heightened awareness of airport security following the tragic September 11, 2001 attacks. However, in § 171.16(d)(3) of the December 3 final rule, we provided an exception from reporting hazardous material discovered in an air passenger's checked or carry-on baggage during the airport screening process. In addition, we acknowledge the potential for burdensome and duplicative discrepancy reporting obligations and refer the filer to § 175.31 of the HMR for discrepancy reporting by carriers. For these reasons, ATA-Air's appeal concerning the reporting of undeclared shipments of hazardous materials is denied.

Requirements To Update the Incident Report—The December 3 final rule amended the HMR to require that an HMIR must be updated within one year of the date of occurrence of the incident whenever one or more of the following occur: (1) A death results from injury caused by a hazardous material; (2) there was a misidentification of the hazardous material or package information on a prior incident report; (3) damage, loss or related cost that was not known when the initial incident report was filed becomes known; or (4) damage, loss, or related cost changes by $25,000 or more, or 10% of the prior total estimate, whichever is greater. ATA-Trucking requests that with the exception of an incident that results in a death subsequent to the filing of the report, RSPA reconsider the obligation to update the incident report. The appellant states that although the preamble ''* * * references comments filed by industry indicating a substantial burden associated with this aspect of the final rule, RSPA has done little more than quote from these comments.'' ATA-Trucking also stated ''RSPA performed no analysis of the burden associated with this requirement or the benefit of the update requirement (*i.e.*, the number of updates that would result in a material impact upon RSPA's analyses). Instead, RSPA justified the update requirement with * * *'' two sentences. ATA-Trucking asserts that ''RSPA has a legal obligation to analyze the issue and discuss its conclusion in the final rule,'' and that RSPA ''* * * failed to respond meaningfully to these comments.'' ATA-Trucking recommends RSPA reconsider this requirement of the final rule by narrowing the scope of updating requirements to instances where a death occurs subsequent to the filing of an HMIR.

We disagree. RSPA believes the criteria outlined in the December 3 final rule to update an incident report are essential in monitoring the results of hazardous materials incidents. By establishing a requirement to report subsequent developments of hazardous materials incidents, RSPA is better equipped to increase the accuracy of the incident reporting database, highlight packaging shortcomings, and identify deficiencies in the handling and transportation of hazardous materials. In addition, we believe the factors necessary to warrant an additional update are severe enough to demand their addition to the incident report

database. For example, a carrier involved in an incident involving black powder reported damages of $120,000, however, subsequent evaluation by the Federal Highway Administration (FHWA) estimated costs of $25 million in terms of impacts due to traffic delays. We believe that better determinations of overall costs by carriers when filing the initial HMIR will minimize the need for subsequent updated reports. We disagree that an analysis of the burden associated with this requirement or the benefit of the update requirement was not performed. As previously stated in the December 3 final rule, we estimate approximately 800 incidents reported each year would require an update at a cost on average of $6.00 per company, or $4,800.00. An analysis of the associated costs to update the approximately 800 incident reports can be found in the regulatory evaluation as referenced under ''Executive Order 12866 and DOT Regulatory Policies and Procedure'' of the ''Regulatory Analyses and Notices'' section of the December 3 final rule, as well as the ''Potential Cost Impacts'' heading found under the ''Regulatory Flexibility Act'' of the December 3 final rule. For these reasons, ATA-Trucking's appeal is denied.

Revised Hazardous Materials Incident Form DOT F 5800.1—The December 3 final rule revised the HMIR and instructions. AAR requests that RSPA reconsider certain required information on the HMIR that AAR considers unnecessary and difficult to obtain. The appellant asserts the shipper/offeror's hazardous materials registration number required by Item 11 of the form is not readily available to carriers. The appellant believes that ''* * * railroads will have difficulty acquiring the shipper's registration number within the thirty (30) day filing limit specified in § 171.16(a),'' therefore, registration numbers should be required on shipping papers if their inclusion is viewed as necessary by RSPA. In addition, the appellant is concerned that report numbers for reports filed by fire, police, and emergency responders required by Item 31 of the form are not readily available, and it does not perceive a need by RSPA for this information. The appellant contends this lack of easily accessible information presents another opportunity to exceed the thirty (30) day filing limit.

We disagree that the inclusion of the registration number of a shipper/offeror as required in Item 11, and an emergency responder's report number as required in Item 31 are unnecessary. This information is vital to constructing a thorough and comprehensive database of incident reports and subsequent responses by emergency personnel. This cross-reference information provides RSPA with an enhanced capability to identify the effectiveness of existing regulations and industry operational procedures, focus on potential problems areas such as training and the handling and transportation of hazardous materials, improve analysis of hazardous materials incidents, and extend outreach to shippers of incidents involving materials they have offered for transportation. In addition, RSPA believes registration numbers can be acquired from the shipper/offeror during the standard notification between shippers and carriers that would normally follow in the aftermath of a hazardous materials incident. Likewise, a fire, police, or emergency responder report number can be obtained by the person in physical possession of the shipment from the responder at the time of an incident. For these reasons, AAR's petitions regarding Items 11 and 31 are denied.

AAR notes that, as drafted, the instructions following Item 23 instruct the filer to skip Part III ''Packing Information'' and proceed to Part IV. The appellant does not believe this was RSPA's intention. We agree, and address this issue under the ''Appeals Granted'' section of this document. AAR further states that if Part III is to be completed, it takes issue with two aspects of Item 28, found in Part III of the form. The first point regarding reporting the manufacturer and model number for any valve that failed on a tank car can be found under the ''Appeals Granted'' section of this document. The second point is discussed here. Item 28 requires a filer to indicate material of construction, design pressure, shell thickness, and head thickness as part of the packing construction and test information. AAR contends the tank car specification is previously required to be supplied for Item 26a; thus negating the need to provide the construction information requirement of Item 28.

We do not agree with AAR's appeal regarding the request for material of construction, design pressure, shell thickness, and head thickness required by Item 28 of the incident report. While Item 26a requires the identification markings of packagings, only the specification requirements can be obtained, not the actual pressure or thickness of an individual tank car. RSPA has determined that this information is necessary to gauge the effectiveness of packagings in the event of an incident, and can utilize this feedback to determine if future rulemakings pertaining to packaging specifications and minimal requirements are warranted. Therefore, AAR's petition to omit the requirement to report material of construction, design pressure, shell thickness, and head thickness in Item 28 is denied.

C. Clarification

A concerned industry member suggested that the definition of an ''undeclared hazardous material'' as revised in the December 3 final rule could be interpreted to exclude a shipment described as ''freight all kinds.'' This is not our intention. A key objective of this final rule is to focus on defining and identifying undeclared hazardous material shipments. Undeclared shipments are a high priority and concern within the Department, especially in light of the increased safety environment that has become prevalent following the September 11, 2001 attacks. Our intent in this rule is to discover undeclared hazardous material shipments that have been buried or hidden in order to prevent damage to property, loss of life, or lack of communication to emergency responders. In that regard, we are amending the definition of ''undeclared shipments'' in § 171.8 to assist in further clarifying the regulations as follows: *Undeclared hazardous material* means a hazardous material that is: (1) Subject to any of the hazard communication requirements in subparts C (Shipping Papers), D (Marking), E (Labeling), and F (Placarding) of Part 172 of this subchapter, or an alternative marking requirement in Part 173 of this subchapter (such as §§ 173.4(a)(10) and 173.6(c)); and (2) offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container, or package.

III. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not a significant action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. This final rule is not a significant action under the Regulatory Policies and Procedures of the Department of Transportation. The revisions adopted in this final rule do not alter the cost-benefit analysis and conclusions contained in the Regulatory Evaluation prepared for the December 3, 2003 final rule. The Regulatory Evaluation is

available for review in the public docket for this rulemaking.

B. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule preempts state, local, and Indian tribe requirements, but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts state, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(1) The designation, description, and classification of hazardous materials;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses covered subject item number (4) above and preempts state, local, and Indian tribe requirements not meeting the ''substantively the same'' standard. This final rule is necessary to increase the usefulness of data collected for risk analysis and management by government and industry and, where possible, provide relief from regulatory requirements.

Federal hazardous materials transportation law provides at § 5125(b)(2) that, if we issue a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance.

C. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this final rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply and a tribal summary impact statement is not required.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires each agency to analyze proposed regulations and assess their impact on small businesses and other small entities to determine whether the proposed rule is expected to have a significant impact on a substantial number of small entities. The revisions adopted in this final rule do not alter the cost-benefit analysis and conclusions contained in the Regulatory Evaluation prepared for the December 3, 2003 final rule. Based on the assessment in the regulatory evaluation, I certify that, while this final rule applies to a substantial number of small entities, the economic impact on those small entities is not significant.

This final rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of final rules on small entities are properly considered.

E. Paperwork Reduction Act

This revisions adopted in this final rule do not alter the cost-benefit analysis and conclusions contained in the regulatory evaluation prepared for the December 3, 2003 final rule.

F. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of more than $100 million or more to state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

H. Environmental Assessment

This final rule does not affect packaging or hazard communication requirements for shipments of hazardous materials transported in commerce. We find that there are no significant environmental impacts associated with this final rule.

List of Subjects in 49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and record keeping requirements.

■ In consideration of the foregoing, we are making the following corrections to FR Doc. 03–29597, appearing on page 67746 in the **Federal Register** of Wednesday, December 3, 2003:

PART 171—[CORRECTED]

■ 1. On page 67758, in the third column and continuing on page 67759, correct the definition for ''undeclared hazardous material'' to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Undeclared hazardous material means a hazardous material that is: (1) Subject to any of the hazard communication requirements in subparts C (Shipping Papers), D (Marking), E (Labeling), and F (Placarding) of Part 172 of this subchapter, or an alternative marking requirement in Part 173 of this subchapter (such as §§ 173.4(a)(10) and 173.6(c)); and (2) offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container, or package.

* * * * *

■ 2. On page 67759, in the third column, correct paragraph (b)(1) of § 171.16 to read as follows:

§ 171.16 Detailed hazardous materials incidents reports.

* * * * *

(1) * * *

(b) *Providing and retaining copies of the report.* Each person reporting under this section must—

(1) Submit a written Hazardous Materials Incident Report to the

Information Systems Manager, DHM–63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001, or an electronic Hazardous Material Incident Report to the Information System Manager, DHM–63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001 at *http://hazmat.dot.gov;*

* * * * *

■ 3. Beginning on page 67761, correct Attachment 1—Hazardous Materials Incident Report, to read as set forth below.

Issued in Washington, DC, on May 14, 2004, under the authority delegated in 49 CFR Part 1.

Samuel G. Bonasso,

Deputy Administrator, Research and Special Programs Administration.

BILLING CODE 4910–60–P

Attachment 1—Hazardous Materials Incident Report

Note: This attachment will not appear in the Code of Federal Regulations.

U.S. Department of Transportation
Research and Special Programs
Administration

Hazardous Materials Incident Report

Form Approval OMB No. 2137-0039

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 2137-0039. The filling out of this information is mandatory and will take 96 minutes to complete.

INSTRUCTIONS: Submit this report to the Information Systems Manager, U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Safety, DHM-63, Washington, D.C. 20590-0001. If space provided for any item is inadequate, use a seperate sheet of paper, identifying the entry number being completed. Copies of this form and instructions can be obtained from the Office of Hazardous Materials Website at http://hazmat.dot.gov. If you have any questions, you can contact the Hazardous Materials Information Center at 1-800-HMR-4922 (1-800-467-4922) or online at http://hazmat.dot.gov.

PART I - REPORT TYPE

1. This is to report: ☐ **A)** A hazardous material incident ☐ **B)** An undeclared shipment with no release

☐ **C)** A specification cargo tank 1,000 gallons or greater containing any hazardous materials that (1) received structural damage to the lading retention system or damage that requires repair to a system intended to protect the lading retention system and (2) did not have a release.

2. Indicate whether this is: ☐ An initial report ☐ A supplemental (follow-up) report ☐ Additional Pages

PART II - GENERAL INCIDENT INFORMATION

3. Date of Incident: _____ **4.** Time of Incident (use 24-hour time): _____

5. Enter National Response Center Report Number (if applicable): _____

6. If you submitted a report to another Federal DOT agency, enter the agency and report number: _____

7. Location of Incident: City: _____ County: _____ State: _____ ZIP Code (if known): _____

Street Address/Mile Marker/Yardname/Airport/Body of Water/River Mile _____

8. Mode of Transportation ☐ Air ☐ Highway ☐ Rail ☐ Water

9. Transportation Phase ☐ In Transit ☐ Loading ☐ Unloading ☐ In Transit Storage

10. Carrier/Reporter
Name _____
Street _____
City _____ State _____ ZIP Code _____
Federal DOT ID Number _____ Hazmat Registration Number _____

11. Shipper/Offeror
Name _____
Street _____
City _____ State _____ ZIP Code _____
Waybill/Shipping Paper _____ Hazmat Registration Number _____

12. Origin (if different from shipper address)
Street _____
City _____ State _____ ZIP Code _____

13. Destination
Street _____
City _____ State _____ ZIP Code _____

14. Proper Shipping Name of Hazardous Material: _____

15. Technical/Trade Name: _____

16. Hazardous Class/ Division: _____ **17.** Identification Number: _____ (E.g. UN2764, NA 2020) **18.** Packing Group: _____ (if applicable) **19.** Quantity Released: _____ (Include Measurement Units)

20. Was the material shipped as a hazardous waste? ☐ Yes ☐ No If yes, provide the EPA Manifest Number: _____

21. Is this a Toxic by Inhalation (TIH) material? ☐ Yes ☐ No If yes, provide the Hazard Zone: _____

22. Was the material shipped under an Exemption, Approval, or Competent Authority Certificate? ☐ Yes ☐ No

If yes, provide the Exemption, Approval, or CA number: _____

23. Was this an undeclared hazardous materials shipment? ☐ Yes ☐ No

Form DOT F 5800.1 (01-2004) Page **1** Reproduction of this form is permitted

PART III - PACKAGING INFORMATION

24. Check Packaging Type (check only one - if more than one, list type of packaging, copy Part III, and complete for each type:

☐ Non-bulk ☐ IBC ☐ Cargo tank Motor Vehicle (CTMV) ☐ Tank Car

☐ Cylinder ☐ RAM ☐ Portable Tank ☐ Other _____

25. See instructions and enter the appropriate failure codes found at the end of the instructions. Be sure to enter the codes from the list that corresponds to the particular packaging type checked above. Enter the number of codes as appropriate to describe the incident. Enter the most important failure point in line 1. If there are more than two failure points, provide in this format in part VI.

1. What Failed: ____ ____ ____ How Failed: ____ ____ ____ Causes of Failure: ____ ____ ____

2. What Failed: ____ ____ ____ How Failed: ____ ____ ____ Causes of Failure: ____ ____ ____

26a. Provide the packaging identification markings, if available.

Identification Markings: _____

(Examples: 1A1/Y1.4/150/92/USA/RB/93/RL, UN31H1/Y0493/USA/M9339/10800/1200, DOT - 105A - 100W (RAIL), DOT 406 (HIGHWAY), DOT 51, DOT 3-A)

26b. For Non-bulk, IBC, or non-specification packaging, if identification markings are incomplete or unavailable, see instructions and complete the following:

Single Package or Outer Packaging:

Packaging Type: _____

Material of Construction: _____

Single Package or Inner Packaging (if any):

Packaging Type: _____

Material of Construction: _____

Head Type (Drums only): ☐ Removable ☐ Non - Removable

27. Describe the package capacity and the quantity:

Single Package or Outer Packaging:

Package Capacity: _____

Amount in Package: _____

Number in Shipment: _____

Number Failed: _____

Single Package or Inner Packaging (if any):

Package Capacity: _____

Amount in Package: _____

Number in Shipment: _____

Number Failed: _____

28. Provide packaging construction and test information, as appropriate:

Manufacturer: _____ Manufacture Date: _____

Serial Number: _____ Last Test Date: _____

Material of Construction: _____ (if Tank Car, CTMV, Portable Tank, or Cylinder)

Design Pressure: _____ (if Tank Car, CTMV, Portable Tank)

Shell Thickness: _____ (if Tank Car, CTMV, Portable Tank)

Head Thickness: _____ (if Tank Car, CTMV)

Service Pressure: _____ (if Cylinder)

If valve or device failed:

Type: _____ Manufacturer: _____ (if present and legible) Model: _____ (if present and legible)

29. If the packaging is for Radioactive Materials, complete the following:

Packaging Category: ☐ Type A ☐ Type B ☐ Type C ☐ Excepted ☐ Industrial

Packaging Certification: ☐ Self Certified ☐ U.S. Certification Certification Number _____

Nuclide(s) Present: _____ Transport Index: _____

Activity: _____ Critical Safety Index: _____

PART IV - CONSEQUENCES

30. Result of Incident (check all that apply): ☐ Spillage ☐ Fire ☐ Explosion ☐ Material Entered Waterway/Storm Sewer ☐ Vapor (Gas) Dispersion ☐ Environmental Damage ☐ No Release

31. Emergency Response : The following entities responded to the incident: (Check all that apply)

☐ Fire/EMS Report # _____ ☐ Police Report # _____ ☐ In-house cleanup ☐ Other Cleanup

32. Damages: Was the total damage cost more than $500? ☐ Yes ☐ No

If yes, enter the following information: If no, go to question 33.

Material Loss: $ _____ Carrier Damage: $ _____ Property Damage: $ _____ Response Cost: $ _____ Remediation/Cleanup Cost: $ _____

(See damage definitions in the instructions)

33a. Did the hazardous material cause or contribute to a human fatality? ☐ Yes ☐ No

If yes, enter the number of fatalities resulting from the hazardous material:

Fatalities: Employees _____ Responders _____ General Public _____

33b. Were there human fatalities that did not result from the hazardous material? ☐ Yes ☐ No If yes, how many? _____

34. Did the hazardous material cause or contribute to personal injury? ☐ Yes ☐ No

If yes, enter the number of injuries resulting from the hazardous material:

Hospitalized (Admitted Only): Employees _____ Responders _____ General Public _____

Non-Hospitalized: Employees _____ Responders _____ General Public _____

(e.g.: On site first aid or Emergency Room observation and release)

35. Did the hazardous material cause or contribute to an evacuation? ☐ Yes ☐ No

If yes, provide the following information:

Total number of general public evacuated _____ Total number of employees evacuated _____ Total Evacuated _____

Duration of the evacuation _____ (hours)

36. Was a major transportation artery or facility closed? ☐ Yes ☐ No If yes, how many? _____ (hours)

37. Was the material involved in a crash or derailment? ☐ Yes ☐ No

If yes, provide the following information: Estimated speed (mph): _____ Weather conditions: _____

Vehicle overturn? ☐ Yes ☐ No

Vehicle left roadway/track? ☐ Yes ☐ No

PART V - AIR INCIDENT INFORMATION (please refer to § 175.31 to report a discrepancy for air shipments)

38. Was the shipment on a passenger aircraft? ☐ Yes ☐ No

If yes, was it tendered as cargo, or as passenger baggage?

☐ Cargo ☐ Passenger baggage

39. Where did the incident occur (if unknown, check the appropriate box for the location where the incident was discovered)?

☐ Air carrier cargo facility ☐ Sort center ☐ Baggage area

☐ By surface to/from airport ☐ During flight ☐ During loading/unloading of aircraft

40. What phase(s) had the shipment already undergone prior to the incident? (Check all that apply)

☐ Shipment had not been transported ☐ Transported by air (first flight) ☐ Transport by air (subsequent flights)

☐ Initial transport by highway to cargo facility ☐ Transfer at sort center/cargo facility

PART VI - DESCRIPTION OF EVENTS & PACKAGE FAILURE

Describe the sequence of events that led to the incident and the actions taken at the time it was discovered. Describe the package failure, including the size and location of holes, cracks, etc. Photographs and diagrams should be submitted if needed for clarification. Estimate the duration of the release, if possible. Describe what was done to mitigate the effects of the release. Continue on additional sheets if necessary.

PART VII - RECOMMENDATIONS/ACTIONS TAKEN TO PREVENT RECURRENCE

Where you are able to do so, suggest or describe changes (such as additional training, use of better packaging, or improved operating procedures) to help prevent recurrence. Provide recommendations for improvement to hazardous materials transportation beyond the control of your individual company. Continue on additional sheets if necessary.

PART VIII- CONTACT INFORMATION

Contact's Name (Type or Print): _____ Telephone Number: ( ) _____

Contact's Title: _____ Fax Number: ( ) _____

Business Name and Address: _____ Hazmat Registration Number (if not already provided): _____

E-mail Address: _____ Date: _____

Preparer is: ☐ Carrier ☐ Shipper ☐ Facility ☐ Other _____

BILLING CODE 4910–60–C

General Overview for Completing the Hazardous Materials Incident Report—Department of Transportation Form F 5800.1

What Federal Regulation Requires Me To Submit the Report?

The Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) require that certain types of incidents be reported to the Research and Special Programs Administration (RSPA). Section 171.15 of the HMR requires an immediate telephonic report (within 12 hours) of certain types of hazardous materials incidents and a follow-up written report. Section 171.16 requires a written report for certain types of hazardous materials incidents within 30 days. Each type of report is explained below. (The full text of these sections is at the end of the instructions.)

What Is the Purpose of the Report?

The information you are providing in this report is fundamental to hazardous material transportation risk analysis and risk management by government and industry. It allows us to better understand the causes and consequences of hazardous material transportation incidents. The data is used to identify trends and provide basic program performance measures. It helps to demonstrate the effectiveness of existing regulations and to identify areas where changes should be considered. It also assists all parties, including industry segments and individual companies, in understanding the types and frequencies of incidents, what can go wrong, and possible measures that would prevent their recurrence. Your accurate and complete description of incidents can make a significant contribution to continual safety improvement through better regulations, cooperative partnerships, and individual efforts.

Who Must Complete the Report?

Any person in possession of a hazardous material during transportation, including loading, unloading and storage incidental to transportation, must report to the Department of Transportation (DOT) if certain conditions are met. This means that when the conditions apply for completing the report, the entity having physical control of the shipment is responsible for filling out and filing Form DOT F 5800.1.

For example, if a shipper is carrying hazardous material, the consignee is unloading the material and there is an incident involving this material, the consignee is responsible for filling out and filing the form. However, if the consignee is unloading the hazardous material and causes a hazardous materials incident involving a consignment intended for someone else, the shipper is responsible for filling out and filing the form.

What Definitions Should I Know in Order To Complete the Report?

In order to accurately complete the report, you should be familiar with the following terms. A complete list of definitions is contained in § 171.8.

Bulk packaging—a packaging, other than a vessel or a barge, including a transport vehicle or freight container, in which hazardous materials are loaded with no intermediate form of containment and which has:

(1) A maximum capacity greater than 450 liters (119 gallons) as a receptacle for a liquid;

(2) A maximum net mass greater than 400 kilograms (822 pounds) and a maximum capacity greater than 450 liters (119 gallons) as a receptacle for a solid; or

(3) A water capacity greater than 454 kilograms (1000 pounds) as a receptacle for a gas as defined in § 173.115.

Cargo tank—a bulk packaging which is:

(1) A tank intended primarily for the carriage of liquids or gases and includes appurtenances, reinforcements, fittings, and closures;

(2) Is permanently attached to or forms a part of a motor vehicle, or is not permanently attached to a motor vehicle but which, by reason of its size, construction, or attachment to a motor vehicle, is loaded or unloaded without being removed from the motor vehicle; and

(3) Is not fabricated under a specification for cylinders, portable tanks, tank cars, or multi-unit tank car tanks.

Hazardous material—a substance or material that has been determined to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and that has been so designated. The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous under the provisions of § 172.101, the Hazardous Materials Table (HMT), and materials that meet the defining criteria for hazard classes and divisions in Part 173.

Hazardous substance—a material, including its mixtures and solutions, that—

(1) Is listed in Appendix A to § 172.101;

(2) Is in a quantity, in one package, which equals or exceeds the reportable quantity (RQ) listed in Appendix A to § 172.101; and

(3) When in a mixture or solution—

(i) For radionuclides, conforms to paragraph 7 of Appendix A to § 172.101.

(ii) For other than radionuclides, is in a concentration by weight which equals or exceeds the concentration corresponding to the RQ of the material, as shown in the following table:

RQ pounds (kilograms)	Concentration by weight	
	Percent	PPM
5000 (2270)	10	100,000
1000 (454)	2	20,000
100 (45.4)	0.2	2,000
10 (4.54)	0.02	200
1 (0.454)	0.002	20

The term *hazardous substance* does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance in Appendix A to § 172.101, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas useable for fuel (or mixtures of natural gas and such synthetic gas).

Hazardous waste—any material that is subject to the Hazardous Waste Manifest Requirements of the U.S. Environmental Protection Agency specified in 40 CFR Part 262.

Marine pollutant—a material that is listed in Appendix B to § 172.101 (also see § 171.4) and, when in a solution or mixture of one or more marine pollutants, is packaged in a concentration that equals or exceeds:

(1) Ten percent by weight of the solution or mixture for materials listed in Appendix B; or

(2) One percent by weight of the solution or mixture for materials that are identified as severe marine pollutants in Appendix B.

Undeclared hazardous material—means a hazardous material that is:

(1) Subject to any of the hazard communication requirements in subparts C (Shipping Papers), D (Marking), E (Labeling), and F (Placarding) of Part 172 of this subchapter, or an alternative marking requirement in Part 173 of this subchapter (such as §§ 173.4(a)(10) and 173.6(c)); and

(2) Offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container, or package.

Unintentional release—the escape of a hazardous material from a package on an occasion not anticipated or planned. This includes releases resulting from collision, package failures, human error, criminal activity, negligence, improper packing, or unusual conditions such as the operation of pressure relief devices as a result of over-pressurization, overfill, or fire exposure. It does not include releases, such as venting of packages, where allowed, and the operational discharge of contents from packages.

Additionally, for purposes of reporting on this form, the following definitions should be used:

Lading retention system—a lading retention system consists of those items or equipment that provide containment of hazardous materials at some point during transportation, including loading and unloading. The cargo tank shell, associated piping, and valves are an example of a lading retention system. Dents or damage to a tank requiring repair to an accident protection system guarding the tank are examples of incidents that must be reported. Paint chips and scratches to either the tank or the accident protection system are examples of incidents that do not require reporting.

Major transportation artery—a highway, main road or secondary road but not a side street or dirt road. In the case of rail, any rail line except a rail spur.

When Must I Submit a Written Report (DOT Form F 5800.1)?

Under § 171.16, you must submit a written report within 30 days after any of the following:

- An incident that was reported by telephonic notice under § 171.15;
- An unintentional release (see definitions) of a hazardous material during transportation including loading, unloading

and temporary storage related to transportation;

- A hazardous waste is released;
- An undeclared shipment with no release is discovered; or
- A specification cargo tank 1,000 gallons or greater containing any hazardous materials that (1) received structural damage to the lading retention system or damage that requires repair to a system intended to protect the lading retention system, and (2) did not have a release.

To clarify the requirement for a report based on structural damage to a specification cargo tank, the table below illustrates some examples:

EXAMPLES TO CLARIFY WHEN TO REPORT STRUCTURAL DAMAGE TO A SPECIFICATION CARGO TANK

Incident report required	No incident report required
Damage to an outlet valve that affects seating and requires replacement.	Handle broken or knocked off valve—but otherwise undamaged.
Serious damage that, if worse, could have resulted in the loss of the contents of the cargo tank. Damage to outlet lines that contain hazardous materials during transportation is in this category.	Serious damage that, even if worse, would not have resulted in the loss of the contents of the cargo tank. Damage to outlet lines that are normally not charged during transportation is in this category.
Cargo tank damage that requires professional inspection or recertification to ensure it is capable of meeting requirements.	Minor damage that obviously will not affect continuation of the cargo tank in service.
Cargo tank damage that requires immediate or subsequent repair because of questions about cargo tank integrity.	Cargo tank damage that requires repair for cosmetic reasons only.

When Is a Report Not Required?

You are not required to report a release of a hazardous material if ALL of the following apply:

- The shipment is not being offered for transportation or being transported by air;
- None of the criteria in § 171.15(a) applies;
- The material is not a hazardous waste;
- The material is properly classed as an ORM D, or a Packing Group III material in Class or Division 3, 4, 5, 6.1, 8, or 9;
- Each package has a capacity of less than 20 liters (5.2 gallons) for liquids or less than 30 kg (66 pounds) for solids;
- The total aggregate release is less than 20 liters (5.2 gallons) for liquids or less than 30 kg (66 pounds) for solids;
- The material does not meet the definition of an undeclared hazardous material in § 171.8; AND
- The shipment is an undeclared material discovered in an air passenger's checked or carry-on baggage during the airport screening process.

Also, you are not required to report releases of minimal amounts of material (*i.e.,* a pint or less) released from the manual operation of seals of pumps, compressors, or valves, during the connecting or disconnecting of loading and unloading lines, or, for materials for which venting is authorized, from vents, provided these releases do not result in property damage or trigger any of the telephonic notifications requirements found in § 171.15.

When Must I Make a Telephonic Report?

Under § 171.15, you must provide telephone notice within 12 hours after the incident occurs when one of the following conditions occurs during the course of transportation and is a direct result of the hazardous material:

- A person is killed;
- A person receives an injury requiring admittance to a hospital;
- The general public is evacuated for one hour or more;
- One or more major transportation arteries or facilities are closed for one hour or more;
- The operational flight plan or routine of an aircraft is altered;
- Fire, breakage, spillage or suspected radioactive contamination occurs involving a radioactive material;
- Fire, breakage, spillage or suspected contamination occurs involving an infectious substance other than a diagnostic specimen or regulated medical waste;
- There is a release of a marine pollutant in a quantity exceeding 450 liters (119) gallons) for liquids or 400 kilograms (882 pounds) for solids; or
- A situation exists of such a nature that in the judgment of the person in possession of the hazardous material, it should be reported to DOT's National Response Center even though it does not meet the above criteria.

You may decide that the situation should be reported even though it does not meet any of the above criteria.

Make sure that you request the NRC report number when you make your telephonic report.

What Telephone Number Do I Call To Make an Immediate Notification of a Hazardous Materials Incident?

You must call 800–424–8802 (toll-free) or 202–267–2675 (toll-call) to make a telephonic incident report. This is the number to the National Response Center. This call must be made within 12 hours of the events that trigger this requirement. If the incident involves an infectious substance, you may notify the Director, Center for Disease Control and Prevention (CDC), U.S. Public Health Service, Atlanta, Georgia, toll-free at 800–232–0124. If a discrepancy of a shipment intended for air is discovered following its acceptance aboard aircraft, notify the nearest Federal Aviation Administration Civil Aviation Security Office as soon as practical.

How Long Do I Have To Submit the Written Report?

You must submit your written report within 30 days of discovery of the incident, § 171.16(a).

Am I Required To Update the Information in the Report?

Yes. You must use DOT Form F 5800.1 and check the ''A supplemental (follow-up) report'' box on question #2 to provide additional information after the initial report. You are required to provide updates for up to one year after the initial filing if more information is gained or new developments arise concerning the following, for example:

- A death results from injuries caused by a hazardous material;
- The person responsible for preparing the original report learns that there is a misidentification of hazardous material or package information;
- Damage or loss or related costs that were not known at the time the report was filed become known; or
- Revised estimates of damages, losses, and related costs result in a change of $25,000 or more, or 10% of the original cost estimates, whichever is greater, even if the original estimate was under $500.

How and Where Do I Submit My Completed Report?

- You can mail paper copies of the report to the Information Systems Manager, U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Safety, DHM–63, Washington, DC 20590–0001; or
- You can submit the report on-line at *http://hazmat.dot.gov.*

How Long Must I Keep a Copy of the Report?

You must keep a copy of each report or an electronic image of the report for two years after the date you submit it to RSPA (§ 171.16(b)(3)).

Where Must I Keep a Copy of the Report?

The report must be accessible through your company's principal place(s) of business. You must be able to make the report available upon request to authorized representatives or a special agent of the Department within 24 hours of such a request (§ 171.16(b)(3)).

How Can I Get a Blank Copy of the Form F 5800.1?

There are a variety of sources for obtaining the Form F 5800.1. Please note that you are allowed to make unlimited photocopies of the form and distribute them.

- You may obtain limited copies of the form from the Information Systems Manager at the above address.

• You may download a copy of the form from our Web site at *http://hazmat.dot.gov/spills.htm*.

• Our Fax on Demand service has copies of the instructions and the form. Call 1–800–467–4922 and choose the Fax on Demand option #2.

How Long Does It Take To Complete the Report?

RSPA anticipates that it will take you approximately 1.6 hours to complete this report. This estimate includes the time it will take you to review the instructions, search your existing data sources for information, gather the required data, and complete and review the report.

How Can I Comment on the Length of Time Needed To Complete the Report or on the Amount of Information Required in the Report?

You can send your comments on the report, and any suggestions you have for reducing the amount of time needed to complete the report, to the following address:

(1) Information Systems Manager, U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Safety, DHM–63, Washington, DC 20590–0001.

Please verify that your information is accurate. Although the required information is generally available at the time of the incident, you may need to do some additional investigation in order to obtain all of the facts pertaining to deaths, injuries or damage amounts. If you submit complete and accurate information at the time you file the report, it will decrease the chance of your having to supply missing information to DOT at a later date. RSPA may follow up on incomplete forms.

Instructions for Form DOT F 5800.1

Please print. Fill in all applicable blanks accurately to the best of your ability.

Part I: Report Type

(1) This is to report: Check the box that describes why you are filling out this form. This will normally be ''A) A hazardous material incident.'' If you are reporting an undeclared shipment with no release, check the corresponding box, ''B).'' If you are reporting an incident involving a cargo tank motor vehicle containing a hazardous material that received structural damage to the lading retention system that may affect its ability to retain lading but does not release a hazardous material, check that appropriate box, ''C).''

(2) Indicate what type of report this is: If this is an initial report, check the ''initial report'' box. If this is a follow-up to a previous report, check the ''A supplemental (follow-up) report'' box. If you are using additional pages, check the ''Additional Pages'' box.

Part II: General Incident Information

(3), (4) Date & Time of Incident: Enter the date and time the incident occurred. If you do not know the actual date and time, give the date and time you discovered the incident. Use 24-hour time for the incident time (*e.g.* ''2400'' for midnight, ''1200'' for noon, ''0747'' for 7:47 a.m., ''2115'' for 9:15 p.m.).

(5) Enter National Response Center Report Number: If this incident was reported to the National Response Center (NRC), fill in the report number NRC assigned to the incident.

(6) If you submitted a report to another Federal DOT agency, enter the agency and report number: If you were required to fill out a report for another federal DOT agency such as the Federal Railroad Administration or the Federal Motor Carrier Safety Administration for this incident, please include the agency and report number. This will facilitate our combination of information.

(7) Location of Incident: Enter the geographic location of the incident (city, county, state, and zip code). If you do not know the actual location where the incident occurred, give the location where it was discovered. If the incident occurred at an airport or rail yard, include the name of the facility. If the incident occurred on a body of water, include the name and/or river mile. If you do not know the street address, or if the incident occurred on a highway, include a description such as ''On I–70, mile marker 240.''

(8) Mode of Transportation: Enter the code that corresponds to the mode of transportation in which the incident occurred or was discovered. If the incident occurred or was discovered in an in-transit storage area (*e.g.*, a terminal or warehouse), check the box that corresponds to the mode by which the package was last transported.

(9) Transportation Phase: Enter the code that describes where the incident occurred in the transportation system. In transit means the incident occurred or was first discovered while the package was in the process of being transported. In-transit storage is storage incidental to transportation, such as at a terminal waiting for the next leg of transportation.

(10) Carrier/Reporter: Provide the name, street address, Federal DOT number (if applicable), and hazmat registration number of the carrier or the entity who is reporting the incident (if other than a carrier). The entity in physical possession of the material when the incident occurred or was discovered must report the incident.

(11) Shipper/Offeror: Enter the information about the person or entity that originally offered for transportation the material or package involved in the incident.

(12) Origin: Enter the origin of the shipment if the address is different than the shipper/offeror information entered in item #11.

(13) Destination: Enter the final destination of the shipment involved in the incident.

(14) through (19):

Hazardous Material Description: Enter the proper shipping name, technical or trade name, hazard class or division, ID number, packing group, and amount of material released. All of this information, except the amount of material released, can be found on the shipping papers that accompany the shipment, § 172.202. When indicating the amount of material released, include units of measurements (examples: 115 gallons, 69 tons).

(20) Was the material shipped as a hazardous waste? Check the ''Yes'' box if the material meets the definition of a hazardous waste in § 171.8 (requires an EPA Uniform Hazardous Waste Manifest). Include the EPA Manifest number.

(21) Is this a Toxic by Inhalation (TIH) material? If the material involved in the incident meets the definition of a Toxic by Inhalation material in § 173.132, check the ''Yes'' box and enter the Hazard Zone in the space provided.

(22) Was the material shipped under an Exemption, Approval, or Competent Authority Certificate? If the shipment was shipped under an exemption, an approval, or a Competent Authority Certificate, check the ''Yes'' box and provide the appropriate assigned number.

(23) Was this an undeclared hazardous materials shipment? If this material was not indicated in any way to be a hazardous material even though it was required to be described as such on a shipping paper, or if the material would normally be excepted from the shipping paper requirements (such as a small quantity material) and does not have the required markings, it is considered an undeclared hazardous material shipment. Check the appropriate box.

Part III: Packaging Information

(24) Packaging Type: Check the box that corresponds to the type of packaging involved in the incident. If more than one packaging type was involved in an incident, reproduce Part III of the form and fill out this section for each of the packaging types. For example, if three different packaging types were involved in an incident, fill out a separate Part III for each packaging type. If the type of packaging is not represented, check the ''Other'' box and enter a brief description such as ''non-specification bulk bin.''

(25) Enter the appropriate failure codes (found at the end of the instructions): Enter the codes that describe what failed on the packaging, how the packaging failed, and the cause(s) of the failure. Be sure to enter the codes from the list that corresponds to the particular packaging types checked above (#24). Enter the most important failure point in line 1. If there is a second failure point, enter in line 2. If there are more than two failure points, provide additional information in this format in Part VI. The following explains the content of each line:

What Failed: You can enter up to 2 ''What Failed'' codes to describe the part of the packaging that fails and was the immediate cause of the release. Often, on a simple packaging, only one code will be required. On more complex packaging, additional entries will help identify where that failure occurred. The first entry should designate the specific point of failure, followed by entries that help identify where that failure occurred. For instance, a deteriorated gasket on a pipe flange on the liquid line would have failure code 121 for gasket entered first and failure code 118 for flange entered second.

How Failed: Enter the ''Failure'' code that describes how the corresponding part of the packaging failed. The primary way the packaging failed should be entered first.

Cause(s) of Failure: Enter the ''Cause of Failure'' code that describes what caused the corresponding part of the packaging to fail in the way it did. The most probable or fundamental cause of failure should be entered first.

If none of the codes on the list fit exactly, use the closest matches and provide additional detail in Part VI. Also, if you believe a better set of codes would be more descriptive of what failed, how it failed, and the causes of failure, suggest them in Part VII.

(26a) Provide the complete packaging identification markings, if available: Every specification packaging, UN or DOT, has a packaging identification printed or stamped on it or on a plate attached to the packaging. Examples are provided on the form.

(26b) For Non-bulk, IBC, or non-specification packaging: Only fill out 26b if the marking is incomplete, destroyed, or unknown. Fill in the Outer and Inner packaging type and material of construction information, as appropriate. If the packaging is Non-bulk or Intermediate Bulk Container (IBC), use the codes below to enter the number or letter that applies for either Non-bulk or IBC packaging. For non-bulk, IBC or non-specification packaging provide a description of the packaging in the space(s) provided.

Non-Bulk Packaging Identification Codes

Outer Packaging

Type
1 = Drum
2 = Wooden Barrel
3 = Jerrican
4 = Box
5 = Bag
6 = Composite Packaging
7 = Pressure receptacle

Material
A = Steel
B = Aluminum
C = Natural Wood
D = Plywood
F = Reconstituted Wood
G = Fiberboard
H = Plastic
L = Textile
M = Paper, multi-wall
N = Metal other than steel or aluminum
P = Glass, porcelain, or stoneware

Head Type
1 = Non-removable
2 = Removable

Inner Packaging

Type
1 = Bottle
2 = Can
3 = Box
4 = Bag
5 = Cylinder

Material
A = Metal (any type)
B = Glass, porcelain, or stoneware
C = Plastic
D = Fiberboard or cardboard
E = Wood (any type)

IBC Packaging Identification Codes

Material of Construction

1—Metal
2—Plastic
3—Composite
4—Fiberboard
5—Wooden
6—Flexible

(27) Describe the package capacity and the quantity: Enter the total capacity of the inner and outer package. Also enter the actual amount of hazardous material that was shipped in the package, the number of packages in the shipment, and the number of packages that failed. Please include the units of measurement (liter, gallons, pounds, cubic feet, *etc.*)

(28) Provide package construction and test information, as appropriate: In the case of Non-bulk packagings or IBCs enter the name of the packaging manufacturer or the symbol of the manufacturer only if complete identification markings were not provided in #26b. Enter the date of manufacture and the serial number, if applicable. Enter the last test date if the packaging requires periodic testing. Also include the design pressure, shell thickness, head thickness, and service pressure if the failed packagings are of the type indicated in parenthesis after each question. If the packaging contained a valve, or other device that failed and resulted in a hazardous material release, enter the valve or device type, manufacturer (if present and legible), and model number (if present and legible).

(29) If the package is for Radioactive Materials, complete the following: Complete this question only if a radioactive material was involved. Indicate the packaging category, the packaging certification, certification number, and which nuclides were present, the transportation index (TI), activity of the nuclides, and the criticality safety index.

Part IV: Consequences

(30) Result of Incident: Check all boxes that describe what occurred during the incident or as a result of the incident. For example, in a situation where a truckload of 55 gallon drums of corrosive liquids overturns resulting in a release that contaminates a nearby wetlands and stream the boxes ''Spillage,'' ''Material Entered Waterway/Storm Sewer,'' and ''Environmental Damage'' may apply.

(31) Emergency Response: Check all boxes that correspond with any emergency response and cleanup crews that participated in resolving the incident. If a fire crew, EMS, or police unit responded to the incident, include the report number.

(32) Damages: You are required to provide information on estimated damages if your damages exceed $500.00. This figure includes the cost of the material lost, property damage, vehicle damage, response costs, and clean-up costs. If you do not know these amounts at the time you complete the report, or the actual costs are revised by more than $25,000, you must submit a follow-up report after you determine the amounts. The following definitions explain each of the costs:

Material Loss: Enter the value of material released and unrecoverable. Base this entry on the amount of material released multiplied by the unit value (*e.g.*, price per gallon or price per pound) as listed on the shipper's invoice. If the invoice is not available, estimate the cost per unit using the shipper's basis.

Carrier Damage: Enter the total value of damage incurred by the carrier. Major components include costs to repair the damaged vehicle and costs resulting from damage to cargo. If the vehicle is declared ''totaled,'' enter the insured value of the vehicle. This entry should not include damage to other property or to vehicles owned by other persons.

Property Damage: Enter the total value of costs resulting from damage to the property of others involved in the incident. These include: repair and replacement costs of other vehicles; repair and replacement costs to buildings and other fixed facilities; and restoration of open land beyond decontamination and cleanup.

Response Cost: Enter the total value of response costs. Response costs are those costs incurred immediately after the incident, and include local emergency response from police and fire departments and emergency response teams, as well as costs incurred by the responsible party. Response costs also include costs to contain the hazardous material released.

Remediation/Cleanup Cost: Enter the total value of the cost to cleanup and remediate the site. Cleanup costs are those costs incurred to collect, transport, and ultimately dispose of all material collected during the response phase. Remediation costs are those costs incurred to restore the incident scene to its pre-incident state, and could include excavation, disposal and replacement of contaminated soil, pumping, treatment and re-injection of contaminated groundwater, or absorption and disposal of hazardous material released into surface water.

(33a) Did the hazardous material cause or contribute to a human fatality? If a person was fatally injured by contact with the hazardous material or its vapors or by a fire or explosion that resulted from the hazardous material, check the ''Yes'' box and enter the number of fatalities that resulted directly from the hazardous material.

(33b) Were there human fatalities that did not result from the hazardous material? If the fatalities were not caused directly by the hazardous material, check the ''Yes'' box and enter the number of fatalities. An example: if a passenger car collided with a cargo tank carrying gasoline and the automobile driver was killed due to the collision, then the fatality was not caused by the hazardous material released. If, however, the accident resulted in the release of gasoline from the cargo tank and a resulting fire killed the automobile driver, then the fatality was caused by the hazardous material.

(34) Did the hazardous material cause or contribute to a personal injury? If a person was injured by contact with the hazardous material or its vapors or by a fire or explosion that resulted from the hazardous material, check the ''Yes'' box and enter the number of persons injured by the hazardous material.

Hospitalized means admitted to a medical facility, not treated and released from a facility, such as a hospital emergency room, where the person was never admitted to the hospital proper. Non-hospitalized

individuals are those who may have received attention from medical personnel on-site or at a facility (including hospital emergency room), but were not admitted to a medical facility. Indicate the number of injured employees, emergency responders (firefighters, police, medics, *etc.*) and members of the general public.

(35) Did the hazardous material cause or contribute to an evacuation? If the incident required the evacuation or removal of persons from a specific area because of possible or actual contact with the hazardous materials involved in the incident, check the ''Yes'' box. Separately specify the numbers of individuals from the general public evacuated and number of employees of the facility or workers in the area that were evacuated. Also provide the total number of individuals evacuated. Indicate the duration of the evacuation (in hours).

(36) Was a transportation artery or facility closed? If a road or transportation facility was closed due to the incident, check the ''Yes'' box and indicate the duration (in hours) here.

(37) Was the material involved in a crash or derailment? Check the ''Yes'' box if a hazardous material was involved in a crash or derailment. Provide the estimated speed and weather conditions at the time of the crash, such as rain, blowing snow, sleet, iced roadway, sun glare, fog, dry pavement, high winds, etc. Indicate if the vehicle overturned or left the roadway or track.

Part V: Air Incident Information

This section is for incidents with packagings transported or intended for transportation by aircraft. If your packaging was not transported or intended to be transported by air, skip this section.

(38) Was the shipment on a passenger aircraft? Indicate whether the shipment in question was on a commercial passenger aircraft. If so, indicate if the material was tendered (accepted for shipment) as cargo, or was located in a passenger's baggage, either in the cabin or baggage compartment.

(39) Where did the incident occur or where was the incident discovered? Indicate where in the course of transportation the incident occurred or was discovered.

(40) What phase(s) had the shipment already undergone prior to the incident? Check all boxes that describe the transportation phases the shipment went through before the incident occurred or was discovered.

Part VI: Description of Events and Packaging Failure

Please describe the events involved in the incident to provide us with a better understanding of the incident. Include information that has not been collected elsewhere on this form, and include special scenarios, outstanding circumstances, or other information that provides a complete picture of the incident. Describe the sequence of events that led to the incident, the package failure (if any) and actions taken at the time of discovery. Submit photographs and diagrams when necessary for clarification. You may continue on additional sheets if necessary.

Part VII: Recommendations/Actions Taken To Prevent Future Incidents

Recommendations may be preliminary in nature, may suggest actions by other parties, and may be subject to further investigation, refinement, acceptance, or rejection. Often, it may be beyond the ability of the preparer to offer recommendations, but where such recommendations can be made they have the potential of resulting in important improvements with safety benefits. For instance, such information can help companies identify common problems and alert the DOT to the need for additional measures such as outreach or broad training needs. This information can also help support regulatory changes.

Part VIII: Contact Information

Provide the name, title, telephone number, fax number, business name and address, hazmat registration number and email address of the contact person at your company who can answer questions about the information provided on this form. Make sure to check the box that describes the function of your firm: carrier, shipper, facility owner/operator, or other. If ''Other'' is checked, describe the function.

Instructions for Form DOT F 5800.1—Failure Codes for Part 3 of Form DOT F 5800.1

Complete Listing—All Packaging Types

Code What Failed

101 Air Inlet
102 Auxiliary Valve
103 Basic Material
104 Body
105 Bolts or Nuts
106 Bottom Outlet Valve
107 Check Valve
108 Chime
109 Closure (*e.g.,* Cap, Top, or Plug)
110 Cover
111 Cylinder Neck or Shoulder
112 Cylinder Sidewall—Near Base
113 Cylinder Sidewall—Other
114 Cylinder Valve
115 Discharge Valve or Coupling
116 Excess Flow Valve
117 Fill Hole
118 Flange
119 Frangible Disc
120 Fusible Pressure Relief Device or Element
121 Gasket
122 Gauging Device
123 Heater Coil
124 High Level Sensor
125 Hose
126 Hose Adaptor or Coupling
127 Inlet (Loading) Valve
128 Inner Packaging
129 Inner Receptacle
130 Lifting Feature
131 Lifting Lug
132 Liner
133 Liquid Line
134 Liquid Valve
135 Loading or Unloading Lines
136 Locking Bar
137 Manway or Dome Cover
138 Mounting Studs
139 O-Ring or Seals
140 Outer Frame
141 Piping or Fittings
142 Piping Shear Section
143 Pressure Relief Valve or Device—Non-Reclosing
144 Pressure Relief Valve or Device—Reclosing
145 Remote Control Device
146 Sample Line
147 Stub Still (Tank Car)
148 Sump
149 Tank Head
150 Tank Shell
151 Thermometer Well
152 Threaded Connection
153 Vacuum Relief Valve
154 Valve Body
155 Valve Seat
156 Valve Spring
157 Valve Stem
158 Vapor Valve
159 Vent
160 Washout
161 Weld or Seam

Code How Failed

301 Abraded
302 Bent
303 Burst or Ruptured
304 Cracked
305 Crushed
306 Failed to Operate
307 Gouged or Cut
308 Leaked
309 Punctured
310 Ripped or Torn
311 Structural
312 Torn Off or Damaged
313 Vented

Code Cause(s) of Failure

501 Abrasion
502 Broken Component or Device
503 Commodity Self-ignition
504 Commodity Polymerization
505 Conveyer or Material Handling Equipment Mishap
506 Corrosion—Exterior
507 Corrosion—Interior
508 Defective Component or Device
509 Derailment
510 Deterioration or Aging
511 Dropped
512 Fire, Temperature, or Heat
513 Forklift Accident
514 Freezing
515 Human Error
516 Impact with Sharp or Protruding Object (*e.g.,* nails)
517 Improper Preparation for Transportation
518 Inadequate Accident Damage Protection
519 Inadequate Blocking and Bracing
520 Inadequate Maintenance
521 Inadequate Preparation for Transportation
522 Inadequate Procedures
523 Inadequate Training
524 Incompatible Product
525 Incorrectly Sized Component or Device
526 Loose Closure, Component, or Device
527 Misaligned Material, Component, or Device
528 Missing Component or Device
529 Overfilled
530 Overpressurized

531 Rollover Accident
532 Stub Sill Separation from Tank (Tank Cars)
533 Threads Worn or Cross Threaded
534 Too Much Weight on Package
535 Valve Open
536 Vandalism
537 Vehicular Crash or Accident Damage
538 Water Damage

General Non-bulk and IBCs

Code What Failed

103 Basic Material
104 Body
105 Bolts or Nuts
108 Chime
109 Closure (*e.g.*, Cap, Top, or Plug)
110 Cover
119 Frangible Disc
120 Fusible Pressure Relief Device or Element
121 Gasket
125 Hose
128 Inner Packaging
129 Inner Receptacle
130 Lifting Feature
132 Liner
140 Outer Frame
143 Pressure Relief Valve or Device—Non-Reclosing
144 Pressure Relief Valve or Device—Reclosing
161 Weld or Seam

Code How Failed

301 Abraded
302 Bent
303 Burst or Ruptured
304 Cracked
305 Crushed
306 Failed to Operate
307 Gouged or Cut
308 Leaked
309 Punctured
310 Ripped or Torn
311 Structural
312 Torn Off or Damaged
313 Vented

Code Causes of Failure

501 Abrasion
503 Commodity Self-ignition
504 Commodity Polymerization
505 Conveyer or Material Handling Equipment Mishap
506 Corrosion—Exterior
507 Corrosion—Interior
508 Defective Component or Device
510 Deterioration or Aging
511 Dropped
513 Forklift Accident
514 Freezing
515 Human Error
516 Impact with Sharp or Protruding Object (*e.g.*, nails)
517 Improper Preparation for Transportation
521 Inadequate Preparation for Transportation
522 Inadequate Procedures
523 Inadequate Training
529 Overfilled
530 Overpressurized
534 Too Much Weight on Package
535 Valve Open
536 Vandalism
537 Vehicular Crash or Accident Damage
538 Water Damage

Cylinders

Code What Failed

111 Cylinder Neck or Shoulder
112 Cylinder Sidewall—Near Base
113 Cylinder Sidewall—Other
114 Cylinder Valve
119 Frangible Disc
120 Fusible Pressure Relief Device or Element
122 Gauging Device
132 Liner
143 Pressure Relief Valve or Device—Non-Reclosing
144 Pressure Relief Valve or Device—Reclosing
161 Weld or Seam

Code How Failed

301 Abraded
303 Burst or Ruptured
304 Cracked
306 Failed to Operate
307 Gouged or Cut
308 Leaked
309 Punctured
313 Vented

Code Cause(s) of Failure

501 Abrasion
502 Broken Component or Device
503 Commodity Self-ignition
504 Commodity Polymerization
505 Conveyer or Material Handling Equipment Mishap
506 Corrosion—Exterior
507 Corrosion—Interior
508 Defective Component or Device
510 Deterioration or Aging
512 Fire, Temperature, or Heat
513 Forklift Accident
514 Freezing
515 Human Error
516 Impact with Sharp or Protruding Object (*e.g.*, nails)
517 Improper Preparation for Transportation
519 Inadequate Blocking and Bracing
520 Inadequate Maintenance
521 Inadequate Preparation for Transportation
522 Inadequate Procedures
523 Inadequate Training
524 Incompatible Product
525 Incorrectly Sized Component or Device
526 Loose Closure, Component, or Device
527 Misaligned Material, Component, or Device
528 Missing Component or Device
529 Overfilled
530 Overpressurized
535 Valve Open
536 Vandalism
537 Vehicular Crash or Accident Damage

Portable Tanks

Code What Failed

105 Bolts or Nuts
106 Bottom Outlet Valve
107 Check Valve
108 Chime
109 Closure (*e.g.*, Cap, Top, or Plug)
110 Cover
119 Frangible Disc
120 Fusible Pressure Relief Device or Element
121 Gasket
122 Gauging Device
125 Hose
127 Inlet (Loading) Valve
131 Lifting Lug
132 Liner
135 Loading or Unloading Lines
137 Manway or Dome Cover
140 Outer Frame
141 Piping or Fittings
143 Pressure Relief Valve or Device—Non-Reclosing
144 Pressure Relief Valve or Device—Reclosing
152 Threaded Connection
153 Vacuum Relief Valve
161 Weld or Seam

Code How Failed

301 Abraded
302 Bent
303 Burst or Ruptured
304 Cracked
305 Crushed
306 Failed to Operate
307 Gouged or Cut
308 Leaked
309 Punctured
310 Ripped or Torn
312 Torn Off or Damaged
313 Vented

Code Cause(s) of Failure

501 Abrasion
502 Broken Component or Device
503 Commodity Self-ignition
504 Commodity Polymerization
505 Conveyer or Material Handling Equipment Mishap
506 Corrosion—Exterior
507 Corrosion—Interior
508 Defective Component or Device
509 Derailment
510 Deterioration or Aging
511 Dropped
512 Fire, Temperature, or Heat
514 Freezing
515 Human Error
517 Improper Preparation for Transportation
520 Inadequate Maintenance
521 Inadequate Preparation for Transportation
522 Inadequate Procedures
523 Inadequate Training
524 Incompatible Product
525 Incorrectly Sized Component or Device
526 Loose Closure, Component, or Device
527 Misaligned Material, Component, or Device
528 Missing Component or Device
529 Overfilled
530 Overpressurized
531 Rollover Accident
536 Vandalism
537 Vehicular Crash or Accident Damage

Bulk Tank Vehicles—Cargo Tank Motor Vehicles (CTMV) and Tank Cars

Code What Failed

101 Air Inlet
105 Bolts or Nuts
106 Bottom Outlet Valve
107 Check Valve
110 Cover
115 Discharge Valve or Coupling
116 Excess Flow Valve

117 Fill Hole
118 Flange
119 Frangible Disc
120 Fusible Pressure Relief Device or Element
121 Gasket
122 Gauging Device
123 Heater Coil
124 High Level Sensor
125 Hose
126 Hose Adaptor or Coupling
127 Inlet (Loading) Valve
131 Lifting Lug
132 Liner
133 Liquid Line
134 Liquid Valve
135 Loading or Unloading Lines
136 Locking Bar
137 Manway or Dome Cover
138 Mounting Studs
139 O-Ring or Seals
141 Piping or Fittings
142 Piping Shear Section
143 Pressure Relief Valve or Device—Non-Reclosing
144 Pressure Relief Valve or Device—Reclosing
145 Remote Control Device
146 Sample Line
147 Stub Sill (Tank Car)
148 Sump
149 Tank Head
150 Tank Shell
151 Thermometer Well
152 Threaded Connection
153 Vacuum Relief Valve
154 Valve Body
155 Valve Seat
156 Valve Spring
157 Valve Stem
158 Vapor Valve
159 Vent
160 Washout
161 Weld or Seam

Code How Failed

301 Abraded
302 Bent
303 Burst or Ruptured
304 Cracked
305 Crushed
306 Failed to Operate
307 Gouged or Cut
308 Leaked
309 Punctured
310 Ripped or Torn
311 Structural
312 Torn Off or Damaged
313 Vented

Code Cause(s) of Failure

501 Abrasion
502 Broken Component or Device
503 Commodity Self-ignition
504 Commodity Polymerization
505 Conveyer or Material Handling Equipment Mishap
506 Corrosion—Exterior
507 Corrosion—Interior
508 Defective Component or Device
509 Derailment
510 Deterioration or Aging
511 Dropped
512 Fire, Temperature, or Heat
515 Human Error
517 Improper Preparation for Transportation
518 Inadequate Accident Damage Protection
519 Inadequate Blocking and Bracing
520 Inadequate Maintenance
521 Inadequate Preparation for Transportation
522 Inadequate Procedures
523 Inadequate Training
524 Incompatible Product
525 Incorrectly Sized Component or Device
526 Loose Closure, Component, or Device
527 Misaligned Material, Component, or Device
528 Missing Component or Device
529 Overfilled
530 Overpressurized
531 Rollover Accident
532 Stub Sill Separation from Tank (Tank Cars)
533 Threads Worn or Cross Threaded
536 Vandalism
537 Vehicular Crash or Accident Damage

Hazardous Materials Regulations 49 CFR Sections 171.15 and 171.16

§ 171.15—Immediate notice of certain hazardous materials incidents.

(a) *General.* As soon as practical but no later than 12 hours after the occurrence of any incident described in paragraph (b) of this section, each person in physical possession of the hazardous material must provide notice by telephone to the National Response Center (NRC) on 800–424–8802 (toll free) or 202–267–2675 (toll call). Notice involving an infectious substance (etiologic agent) may be given to the Director, Centers for Disease Control and Prevention, U.S. Public Health Service, Atlanta, GA, 800–232–0124 (toll free), in place of notice to the NRC. Each notice must include the following information:

(1) Name of reporter;

(2) Name and address of person represented by reporter;

(3) Phone number where reporter can be contacted;

(4) Date, time, and location of incident;

(5) The extent of injury, if any;

(6) Class or division, proper shipping name, and quantity of hazardous materials involved, if such information is available; and

(7) Type of incident and nature of hazardous material involvement and whether a continuing danger to life exists at the scene.

(b) *Reportable incident.* A telephone report is required whenever any of the following occurs during the course of transportation in commerce (including loading, unloading, and temporary storage):

(1) As a direct result of a hazardous material—

(i) A person is killed;

(ii) A person receives an injury requiring admittance to a hospital;

(iii) The general public is evacuated for one hour or more;

(iv) A major transportation artery or facility is closed or shut down for one hour or more; or

(v) The operational flight pattern or routine of an aircraft is altered;

(2) Fire, breakage, spillage, or suspected radioactive contamination occurs involving a radioactive material (*see also* § 176.48 of this subchapter);

(3) Fire, breakage, spillage, or suspected contamination occurs involving an infectious substance other than a diagnostic specimen or regulated medical waste;

(4) A release of a marine pollutant occurs in a quantity exceeding 450 L (119 gallons) for a liquid or 400 kg (882 pounds) for a solid; or

(5) A situation exists of such a nature (*e.g.*, a continuing danger to life exists at the scene of the incident) that, in the judgment of the person in possession of the hazardous material, it should be reported to the NRC even though it does not meet the criteria of paragraph (b)(1), (2), (3) or (4) of this section.

(c) *Written report.* Each person making a report under this section must also make the report required by § 171.16 of this subpart.

Note to § 171.15: Under 40 CFR 302.6, EPA requires persons in charge of facilities (including transport vehicles, vessels, and aircraft) to report any release of a hazardous substance in a quantity equal to or greater than its reportable quantity, as soon as that person has knowledge of the release, to DOT's National Response Center at (toll free) 800–424–8802 or (toll) 202–267–2675.

§ 171.16—Detailed hazardous materials incident reports.

(a) *General.* Each person in physical possession of a hazardous material at the time that any of the following incidents occurs during transportation (including loading, unloading, and temporary storage) must submit a Hazardous Materials Incident Report on DOT Form F 5800.1 (01–2004) within 30 days of discovery of the incident:

(1) Any of the circumstances set forth in § 171.15(b);

(2) An unintentional release of a hazardous material or the discharge of any quantity of hazardous waste;

(3) A specification cargo tank with a capacity of 1,000 gallons or greater containing any hazardous material suffers structural damage to the lading retention system or damage that requires repair to a system intended to protect the lading retention system, even if there is no release of hazardous material; or

(4) An undeclared hazardous material is discovered.

(b) *Providing and retaining copies of the report.* Each person reporting under this section must—

(1) Submit a written Hazardous Materials Incident Report to the Information Systems Manager, DHM–63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001, or an electronic Hazardous Material Incident Report to the Information System Manager, DHM–63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001 at *http://hazmat.dot.gov;*

(2) For an incident involving transportation by aircraft, submit a written or electronic copy of the Hazardous Materials Incident Report to the FAA Security Field Office nearest the location of the incident; and

(3) Retain a written or electronic copy of the Hazardous Materials Incident Report for

a period of two years at the reporting person's principal place of business. If the written or electronic Hazardous Materials Incident Report is maintained at other than the reporting person's principal place of business, the report must be made available at the reporting person's principal place of business within 24 hours of a request for the report by an authorized representative or special agent of the Department of Transportation.

(c) *Updating the incident report.* A Hazardous Materials Incident Report must be updated within one year of the date of occurrence of the incident whenever:

(1) A death results from injury caused by a hazardous material;

(2) There was a misidentification of the hazardous material or packaging information on a prior incident report;

(3) Damage, loss or related cost that was not known when the initial incident report was filed becomes known; or

(4) Damage, loss, or related cost changes by $25,000 or more, or 10% of the prior total estimate, whichever is greater.

(d) *Exceptions.* Unless a telephone report is required under the provisions of § 171.15 of this part, the requirements of paragraphs (a), (b), and (c) of this section do not apply to the following incidents:

(1) A release of a minimal amount of material from—

(i) a vent, for materials for which venting is authorized;

(ii) the routine operation of a seal, pump, compressor, or valve; or

(iii) connection or disconnection of loading or unloading lines, provided that the release does not result in property damage.

(2) An unintentional release of hazardous material when:

(i) The material is properly classed as—

(A) ORM–D; or

(B) a Packing Group III material in Class or Division 3, 4, 5, 6.1, 8, or 9;

(ii) Each packaging has a capacity of less than 20 liters (5.2 gallons) for liquids or less than 30 kg (66 pounds) for solids;

(iii) The total aggregate release is less than 20 liters (5.2 gallons) for liquids or less than 30 kg (66 pounds) for solids; and

(iv) The material is not—

(A) offered for transportation or transported by aircraft,

(B) a hazardous waste, or

(C) an undeclared hazardous material.

(3) An undeclared hazardous material discovered in an air passenger's checked or carry-on baggage during the airport screening process. (For discrepancy reporting by carriers, *see* § 175.31 of this subchapter.)

[FR Doc. 04–11398 Filed 5–25–04; 8:45 am]

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Federal Register

Wednesday,
May 26, 2004

Part VII

Department of Labor

Delegation of Authorities and Assignment of Responsibilities for the Department of Labor's Internal Equal Employment Opportunity Programs; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 1–2004]

Delegation of Authorities and Assignment of Responsibilities for the Department of Labor's Internal Equal Employment Opportunity Programs

1. *Purpose.* To establish policy, delegate authority, and assign responsibility for complying with and enforcing equal employment opportunity (EEO) laws and regulations applicable to Federal employment in the Department of Labor (DOL).

2. *Authority and Directives Affected.*

a. *Authority.* This Order is issued pursuant to civil rights and nondiscrimination statutes, executive orders, and implementing regulations related to Federal employment and equal employment opportunity programs. This includes, but is not limited to: Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act; the Age Discrimination in Employment Act of 1967, as amended, the Rehabilitation Act of 1973, as amended; the Civil Service Reform Act of 1978; the Civil Rights Act of 1991; the No FEAR Act; Executive Order 11478, as amended; Executive Order 11375, as amended; Executive Order 13145; Executive Order 13163; Executive Order 13164; Executive Order 13171; 5 U.S.C. 720 (marital status and political affiliation); 5 U.S.C. 7201 (Federal Equal Opportunity Recruitment Program); 38 U.S.C. 4214 (Disabled Veterans Affirmative Action Plan); 29 U.S.C. 791 (Affirmative Action Program Plan for Individuals with Disabilities); 38 U.S.C. 4212 (Vietnam Era Veterans' Readjustment Assistance Act of 1974), as amended; 29 CFR 1614 (EEOC Complaint Procedures Regulations); and the Equal Employment Opportunity Commission's (EEOC) Management Directives 110 (Complaint Processing) and 715 (Affirmative Action).

b. *Directives Affected.* Secretary's Order 03–96 is cancelled.

3. *Policy.* It is the policy of the Department to provide equal employment opportunity for all DOL employees and applicants for DOL employment in accordance with applicable federal statutes, regulations, executive orders and departmental policy.

4. *Scope.* This Order applies to all DOL personnel, organizational components, and activities.

5. *Delegation of Authority and Assignment of Responsibilities.*

a. *The Assistant Secretary for Administration and Management (''ASAM'')* is delegated authority and assigned responsibility for:

(1) Administering a comprehensive, department-wide program to carry out the Department's equal employment opportunity policy and fulfilling the Department's obligations arising from equal employment opportunity statutes and their implementing executive orders, rules, regulations, and guidelines covering Federal employees and applicants for Federal employment;

(2) Appointing Departmental managers for special emphasis programs, such as the Federal Women's Program, Hispanic Employment Program, and the Disability Employment Program;

(3) Preparing Employment Program plans for women and minorities and making recommendations to Agency Heads for any necessary modifications prior to preparing and forwarding the Departmental plan to the Secretary of Labor for transmittal to EEOC;

(4) Preparing the Department's Disabled Veterans Affirmative Action Program (DVAAP), Federal Equal Employment Opportunity Recruitment Program (FEORP) plans, and the Affirmative Employment Program Plan for Individuals with Disabilities;

(5) Providing effective leadership in the implementation of special employment programs, such as the Federal Women's Program and the Hispanic Employment Program; and

(6) Making further delegations of the authority and assignments of the responsibility described in 5a of this Order.

b. *The Director of the Civil Rights Center (''CRC''),* within the Office of the Assistant Secretary for Administration and Management, is delegated the authority and assigned the responsibility for:

(1) Administering all aspects of the administrative processing of discrimination complaints filed by employees and applicants for employment in accordance with 29 CFR part 1614 including, but not limited to, providing for counseling, alternative dispute resolution, and investigation of such complaints, except those that include allegations against the CRC, the immediate office of the ASAM and for other complaints determined by the Director of the CRC to constitute a potential conflict of interest;

(2) Issuing final decisions and taking final actions on discrimination complaints in a timely manner in accordance with 29 CFR part 1614, except those decisions on complaints filed by employees and applicants for employment arising from within the Office of the Inspector General, which will be issued by the Secretary;

(3) Appointing counselors, fact-finders, mediators or other individuals to engage in alternative dispute resolution;

(4) Preparing such EEO-related reports as may be required by the EEOC or the Office of Personnel Management, except the DVAAP plan, the FEORP plan and Affirmative Employment Program Plan for Individuals with Disabilities;

(5) Advising the Secretary of Labor, through the ASAM, about the status of equal employment opportunity throughout DOL;

(6) Recommending changes to programs and procedures designed to eliminate practices that act as barriers to the hiring and advancement of women, minorities, and persons with disabilities, with the goal of improving the Department's overall EEO Program;

(7) Advising the agencies about physical and program accessibility issues that affect individuals with disabilities;

(8) Evaluating the sufficiency of the total Agency program for equal employment opportunity and reporting to the head of the Agency with recommendations as to any improvements or corrections needed, including remedial and disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(9) Reviewing appeal recommendations by a Department of Labor Agency and counsel representing the Agency at hearings before the EEOC and deciding, with the concurrence of the Office of the Solicitor, whether to appeal adverse decisions issued by EEOC administrative judges; and

(10) Making further delegations of authority and assignments of the responsibilities described in 5b of this Order.

c. *The Solicitor of Labor* is delegated authority and assigned responsibility for the following aspects of the Department's EEO program:

(1) Providing counsel to the Secretary, ASAM, the Director of the CRC, and Agency Heads in implementing the Department's EEO program;

(2) Providing legal representation to the Department at hearings and court proceedings arising out of the EEO program;

(3) Providing legal advice to managers, supervisors, and other employees who are assisting management in personnel matters during the course of their official duties, and who, in their official capacity, request a review of their EEO affidavits prior to their submission to an EEO

investigator for inclusion in the EEO file;

(4) Providing advice and counsel to the CRC regarding appeal recommendations as described in 5b(9) of this Order; and

(5) Making further delegations of authority and assignments of the responsibilities described in 5c of this Order.

d. *The Chair of the Administrative Review Board* is delegated authority and assigned responsibility for the following aspects of the Department's EEO programs:

(1) Providing for all aspects of the administrative processing of discrimination complaints including the assignment of counselors, investigators, and the issuance of final decisions in complaints involving allegations of discrimination against the CRC, the immediate office of the ASAM, and for those complaints determined by the Director of the CRC to constitute a potential conflict of interest; and

(2) Making further delegations of the authority and assignment of responsibilities described in 5d of this Order.

e. *DOL Agency Heads* are delegated authority and assigned responsibility for leadership in the implementation of the Department's EEO program and policies within the Agency pursuant to policy direction from the ASAM and procedural guidance from the Director of the CRC or the officials acting in those capacities. Such responsibilities include, but are not limited to, the following:

(1) Providing active support of, and participation in, the planning and implementation of affirmative employment and special emphasis program initiatives including the appointment of EEO Coordinators and the establishment of EEO Committees;

(2) Assuring full and prompt cooperation of Agency employees and officials with DOL's EEO policies, procedures, and direction from officials charged with implementing DOL's equal employment opportunity program;

(3) Providing sufficient Agency funds and other resources to assure effective implementation of DOL's EEO policies and procedures including training of employees on EEO matters, expenditures related to reasonable accommodations, such as payment of interpreter services, and medical review of reasonable accommodation requests;

(4) Providing facilities for and bearing all costs related to a discrimination complaint filed against the Agency including, but not limited to, Agency EEO counselor training and travel as may be required, all hearing costs, settlement costs, including compensatory damages, and attorney fees as may be applicable; and

(5) Making further delegations of the authority and assignment of responsibilities described in 5e of this Order.

f. *The Office of the Chief Financial Officer* is delegated authority and assigned responsibility for the following aspects of the Department's EEO programs:

(1) Processing the payment of all awards and/or settlement agreements resulting from EEO complaints; and

(2) Making further delegations of the authority and assignment of responsibilities described in 5f of this Order.

6. *Effective Date.* This Order is effective immediately.

Dated: April 15, 2004.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 04–11869 Filed 5–25–04; 8:45 am]

BILLING CODE 4510–23–P

Federal Register

Wednesday,
May 26, 2004

Part VIII

Department of Education

Special Demonstration Programs—Model Demonstration Projects—Positive Psychology; Notice

DEPARTMENT OF EDUCATION

RIN 1820–ZA35

Special Demonstration Programs—Model Demonstration Projects—Positive Psychology

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed priority, definitions, and application requirements.

SUMMARY: The Assistant Secretary for the Office of Special Education and Rehabilitative Services proposes a priority, definitions, and application requirements under the Special Demonstration Programs focusing on developing models that adapt positive psychology techniques for use by vocational rehabilitation (VR) professionals to improve the employment outcomes of VR consumers. The positive psychology models developed under this priority must incorporate effective, research-based principles. The Assistant Secretary may use this priority, definitions, and application requirements for competitions in fiscal year (FY) 2004 and later years. We take this action to improve the quality of employment outcomes for VR consumers through testing and measuring the effects of three specific positive psychology techniques for use within State VR agencies.

DATES: We must receive your comments on or before June 25, 2004.

ADDRESSES: Address all comments about this proposed priority, definitions, and application requirements to Alfreda Reeves, U.S. Department of Education, 400 Maryland Avenue, SW., room 3314, Switzer Building, Washington, DC 20202–2645 (on or before June 4, 2004); room 5040, Potomac Center Plaza, Washington, DC 20202–2645 (after June 4, 2004). If you prefer to send your comments through the Internet, use the following address: *Alfreda.Reeves@ed.gov.*

You must include the term ''SPECIAL DEMONSTRATION: POSITIVE PSYCHOLOGY'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Alfreda Reeves. Telephone: (202) 205–9361 (on or before June 4, 2004); (202) 245–7485 (after June 4, 2004); or via Internet: *Alfreda.Reeves@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, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding this proposed priority, definitions, and application requirements.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from this notice. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this proposed priority, definitions, and application requirements between the hours of 8:30 a.m. and 4 p.m., eastern time, Monday through Friday of each week except Federal holidays. On or before June 4, 2004, you may inspect the comments in room 3038, 330 C Street, SW., Washington, DC. After June 4, 2004, you may inspect the comments in room 5058, 550 12th Street, SW., Washington, DC.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

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 or other documents in the public rulemaking record for this proposed priority, definitions, and application requirements. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

We will announce the final priority, definitions, and application requirements in a notice in the **Federal Register**. We will determine the final priority, definitions, and application requirements after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing or funding additional priorities, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use this proposed priority, definitions, and application requirements, we invite applications through a notice in the **Federal Register**.

When inviting applications we designate the priority as absolute, competitive preference, or invitational. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by either (1) awarding additional points, depending on how well or the extent to which the application meets the competitive priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the competitive priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the invitational priority. However, we do not give an application that meets the invitational priority a competitive or absolute preference over other applications (34 CFR 75.105(c)(1)).

Priority

Proposed Priority, Definitions, and Application Requirements—Model Demonstration Projects—Positive Psychology

These model demonstration projects would improve the quality of employment outcomes for VR consumers through testing and measuring the effects of three specific positive psychology techniques for use within State VR agencies.

The program will be conducted under section 303(b) of the Rehabilitation Act of 1973, as amended (Act). The proposed priority supports section 303(b) by furthering the purposes of the Act, specifically empowering consumers of VR by implementing techniques that will increase the skills of individuals with disabilities, enabling them to achieve high quality employment outcomes.

Background

Positive psychology is the study and practice of counseling techniques based on cognitive-behavioral therapy to assist individuals to develop an increased awareness of their own positive character strengths, emotional processing, and belief systems (Seligman & Csikszentmihalyi, 2000). These techniques help consumers to build skills to accurately assess their

internal beliefs that create barriers to effectively cope with adversities that occur in their lives and to expand their ability to challenge these beliefs in order to pursue flexible and appropriate responses to the adversities. Positive psychology techniques empower individuals to take control of their own lives, to increase their capacity for effective decisionmaking, and to persist in pursuing goal-directed activities.

The principles of positive psychology and the effectiveness of counseling techniques using these principles are well documented in the literature (Reivich & Shatte, 2002; Fredrickson, 2001; Sheldon & King, 2001; Seligman & Csikszentmihalyi, 2000; Vaillant, 2000; Peterson & Seligman, 1984). Positive psychology factors have been demonstrated to affect the subjective experience of disability and the use of effective coping skills by individuals with a variety of physical and psychological conditions (Helgeson, Snyder, and Seltman, 2004; Brissette, Leventhal & Leventhal, 2003; Fredrickson, B. L., *et al.*, 2003; Symister & Friend, 2003; Penedo, *et al.*, 2003; Chapin & Kewman, 2001; Waldrop, *et al.*, 2001; Seligman & Csikszentmihalyi, 2000; Callahan, 2000). A review of the literature by the National Institute on Disability Rehabilitation Research (NIDRR) and use of the PsychArticles research database revealed one reported application of the principles of positive psychology to the employment outcomes of individuals with disabilities (Chapin & Kewin, 2001). However, no research literature was identified that applied these principles and techniques to individuals with disabilities in VR settings.

Therefore, this proposed priority is intended to develop and demonstrate the validity of counseling tools and techniques based on the principles of positive psychology with individuals with disabilities in the VR system. Research in positive psychology has yielded a variety of approaches to assist individuals to identify their own beliefs and actions that are barriers to their ability to handle effectively life's adversities. These approaches are based on the techniques of cognitive-behavioral skills development and include models developed to change rigid and pessimistic beliefs and cognitive constructs to more flexible and positive ones. Major work in developing positive psychology approaches has been reported by Martin Seligman (1991), Barbara Fredrickson (2001), Mihaly Csikszentmihalyi (1997), Reivich & Shatte (2002), and others. Successful projects under this model demonstration program would address three specific aspects of positive psychology and their application to rehabilitation—learned optimism; strengths and virtues versus talents for employment; and subjective well-being.

The learned optimism technique has been demonstrated to be an effective clinical therapeutic intervention in numerous studies (Reivich & Shatte, 2002; Fredrickson, 2001; Sheldon & King, 2001; Seligman & Csikszentmihalyi, 2000; Vaillant, 2000; Peterson & Seligman, 1984, for example). Optimistic individuals have the skill to see setbacks as temporary and local, whereas pessimistic individuals see setbacks as permanent, pervasive, and personal. Pessimism primarily undermines people by lowering response initiation: Pessimistic people give up easily.

Research demonstrates that learned optimism results in less depression, better productivity (including work productivity), and better overall health (Helgeson, Snyder, & Seltman, 2004; Riolli & Savicki, 2003; Brissette, Leventhal & Leventhal, 2003; Morris & Long, 2002; Waldrop, *et al.*, 2001; Lyubomirsky, Tucker, Caldwell & Berg, 1999; Segerstrom, Taylor, Kemeny, & Fahey, 1998).

The field of positive psychology has demonstrated the effectiveness of learned optimism principles and techniques in changing pessimism to optimism, but these principles and techniques have not been applied to individuals with disabilities in the public VR setting.

Strengths and virtues versus talents for employment is a theoretical approach that has identified a paradox about most work settings: Individuals are selected and educated for jobs based on their talents, but much of their success, retention, and productivity at work depends, not on talents, but on their strengths and virtues. Physical coordination, analytic intelligence, and verbal fluency are examples of some of the talents that result in obtaining jobs, but persistence, social intelligence, kindness, humor, sense of purpose, and loyalty are some examples of the strengths and virtues that have been identified as resulting in keeping jobs (Seligman, 2002).

Methodology using the principles of positive psychology exists for assessing strengths and virtues as a means of determining an individual's compatibility with a particular job. Research has demonstrated that individuals who use their ''signature strengths'' on the job have higher job satisfaction, more loyalty, better productivity, are more engaged, and are more likely to have peak experiences related to their work (Seligman, 2002). Some individuals with disabilities may lack access or functional abilities to gain some work-related talents, but they may possess a variety of individual strengths and virtues. Identifying employment settings based on individuals' strengths and virtues may result in a better match for individuals to employment opportunities, higher productivity, and longer job retention.

Positive psychology techniques have been linked to improved subjective well-being (SWB) (Segerstrom, Taylor, Kemeny, & Fahey, 1998; Lucas, Diener & Suh, 1996; Smith, Christensen, Peck, & Ward, 1994; Mikulincer, 1989; Peterson, Luborsky, & Seligman, 1983). Individuals with high SWB take better care of themselves than do individuals with low SWB.

For example, the Surgeon General's report on smoking revealed that optimists (those believing ''what I do matters'') gave up smoking at a higher rate than pessimists. Coping well with a disability often requires compliance with medical, physical, and rehabilitation planning and activities. For example, individuals in recovery from many types of cardiac conditions are often recommended to make medication, dietary, and exercise changes in their lives. Research in positive psychology has demonstrated that individuals with low SWB fail to follow these medical recommendations and, as a result, experience increased levels of functional limitation more often than individuals with high SWB. Research in the field of positive psychology has developed interventions that produce improved SWB.

To date, these three interventions have not been used with individuals with disabilities in the VR setting to demonstrate their effect on high quality employment outcomes.

Priority

Under 34 CFR 75.105(b)(2)(v) and section 303(b)(1) of the Rehabilitation Act of 1973, as amended (Act), this priority supports projects that test and measure the effects of three specific positive psychology techniques for vocational rehabilitation (VR) professionals for improving the quality of employment outcomes for individuals with disabilities. The models tested under this program must incorporate effective, research-based positive psychology methods.

A. Definitions

Learned optimism teaches people to become more hopeful, realistic, and flexible in their identification of and disputation of internal beliefs that result

in rigid, pessimistic, and negative outcome expectations.

Strengths and virtues versus talents for employment is a theoretical concept that links the internal characteristics of individuals rather than specific functional skills or talents with employment success.

Subjective well-being (SWB) is a measurement of an individual's positive view of himself or herself across a number of dimensions, including optimism, life satisfaction, engagement, health, and sense of purpose.

B. General Requirements for Applicants

These model demonstration projects must focus on research-based positive psychology principles that adapt appropriate techniques for VR professionals to use to assist VR consumers to obtain meaningful postsecondary education and employment outcomes. The projects must test and measure the effects of three specific techniques on achieving meaningful postsecondary education and employment outcomes. The projects must measure outcomes associated with each required technique. An applicant must be specific about what data it will collect in order to measure project outcomes against the established goals. To meet the requirements an applicant must—

(1) Describe the manner in which positive psychology strategies will increase participation in postsecondary education and employment outcomes for consumers of the public VR program;

(2) Adapt, test, and measure the impact of three positive psychology strategies on increasing the level of optimism of consumers of the public VR program and investigate the relationship between learned optimism and consumers' outcomes;

(3) Adapt and develop positive psychology assessment tools to identify the strengths and virtues of individuals with disabilities, identify specific job environments that match specific strengths and virtues, pilot placement activities with individuals with disabilities based on the fit of their strengths and virtues, and investigate the relationship of consumers' strengths and virtues and meaningful postsecondary education and employment outcomes;

(4) Develop positive psychology strategies to enhance SWB of people with disabilities in the VR setting. Projects must investigate the relationship between these strategies and meaningful postsecondary education and employment outcomes;

(5) Design and implement an evaluation plan that—

(a) assesses the validity of the models tested and developed under this program;

(b) includes use of objective performance measures that are clearly related to the intended outcomes and goals of the project and will produce quantitative and qualitative data to the extent possible; and

(c) provides performance feedback and permits periodic assessment of progress toward achieving intended outcomes and goals; and

(6) Disseminate these strategies, as appropriate, to State VR agencies, their service providers, and independent living centers funded by the Rehabilitation Services Administration and other agencies and entities funded under the Act.

Executive Order 12866

This notice of proposed priority, definitions, and application requirements has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice, we have determined that the benefits of the proposed priority, definitions, and application requirements justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The Assistant Secretary has determined that the cost to the Federal Government associated with this program will not exceed $300,000 in FY 2004. No other costs will result from the announcement of this proposed priority, definitions, and application requirements.

The benefit of this proposed priority, definitions, and application requirements will be the establishment of model demonstration projects that will lead to improving the quality of employment outcomes for VR customers through developing positive psychology techniques for use within State VR agencies.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Applicable Program Regulations: 34 CFR part 373.

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(Catalog of Federal Domestic Assistance Number 84.235A Special Demonstration Programs—Model Demonstration Projects—Positive Psychology)

Program Authority: 29 U.S.C. 773(b).

Dated: April 14, 2004.

Troy R. Justesen,

Acting Deputy Assistant Secretary for Special Education and Rehabilitative Services.

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Part IX

Securities and Exchange Commission

17 CFR Parts 200, 230, 240, 242, and 249
Regulation NMS; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, 240, 242, and 249

[Release No. 34–49749; File No. S7–10–04]

RIN 3235–AJ18

Regulation NMS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period and supplemental request for comment.

SUMMARY: The Securities and Exchange Commission (''Commission'') is extending the comment period on rules proposed under Regulation NMS, which were published in Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126 (March 9, 2004) (''Proposing Release''). The original comment period would have expired on May 24, 2004. The new comment period will expire on June 30, 2004. In addition, the Commission is supplementing its request for comment on the proposed rules to reflect the hearing on Regulation NMS that was held on April 21, 2004 (''NMS Hearing''). During the NMS Hearing, panelists discussed developments that bear on many significant issues raised by the proposed rules. The Commission is publishing this supplemental request for comment and extending the comment period to assure that the public has a full opportunity to address such issues in their comments.

DATES: Comments should be received on or before June 30, 2004.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–10–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number S7–10–04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Daniel M. Gray, Attorney Fellow, at (202) 942–0159, or Heather Seidel, Attorney Fellow, at (202) 942–0788, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Proposing Release published Regulation NMS for public comment. In addition to redesignating the existing national market system (''NMS'') rules adopted under Section 11A of the Securities Exchange Act of 1934 (''Exchange Act''), Regulation NMS incorporated four substantive proposals that are designed to enhance and modernize the regulatory structure of the U.S. equity markets. First, the Commission proposed a uniform rule for all NMS market centers that, subject to two significant exceptions, would require a market center to establish, maintain, and enforce policies and procedures reasonably designed to prevent ''trade-throughs''—the execution of an order in its market at a price that is inferior to a price displayed in another market (''Trade-Through Proposal''). Second, the Commission proposed a rule that would modernize the terms of access to quotations and execution of orders in the NMS (''Access Proposal''). The third proposal would prohibit market participants from accepting, ranking, or displaying orders, quotes, or indications of interest in a pricing increment finer than a penny, except for securities with a share price of below $1.00 (''Sub-Penny Quoting Proposal''). Finally, the Commission proposed amendments to the rules and joint industry plans for disseminating market information to the public that, among other things, would modify the formulas for allocating plan revenues to reward markets for more broadly based contributions to public price discovery (''Market Data Proposal'').

On April 21, 2004, the Commission held the NMS Hearing in New York City.[1] The NMS Hearing was composed of a series of seven panels that collectively addressed each of the four proposals. The panelists included a wide range of market participants who discussed the proposals themselves, as well as their own initiatives intended, at least in part, to respond to the proposals. The Commission is extending the comment period and publishing this supplemental request for comment to give the public a fuller opportunity to reflect the NMS Hearing in their comments on the proposals.[2]

A significant element of the NMS Hearing was the intention expressed by various representatives of exchanges with traditional trading floors to establish facilities in the coming months that will offer automatic execution of orders seeking to interact with their displayed quotations (''Auto-Ex Facilities'').[3] Panelists also emphasized that the essential element of an effective Auto-Ex Facility is an immediate automated response (*i.e.*, one without any manual intervention) to the router of the incoming order.[4] They stated that the response must be either that the order was executed (in full or in part) or that it could not be executed (because, for example, a prior incoming order already had executed against the displayed quotation). The exchange representatives acknowledged the challenges posed by developing an efficient hybrid market—one that integrates an active trading floor with an Auto-Ex Facility. They emphasized, however, that they were well advanced in their efforts and indicated that such facilities are likely to become operational within a time frame that could precede any potential implementation date for Regulation NMS, should the Commission decide to adopt the proposals.[5]

In addition, panelists at the NMS Hearing noted that existing order routing technologies were capable of identifying, on a quote-by-quote basis, indications from a market center that a particular quotation was not accessible

[1] A full transcript of the NMS Hearing (''Hearing Tr.''), as well as an archived video and audio webcast, is available on the Commission's Internet Web site (*http://www.sec.gov*).

[2] The discussion in this supplemental request for comment assumes familiarity with the Proposing Release and therefore does not restate all of the specific terms of the proposals. In addition, the Commission continues to request comment on all of the matters set forth in the Proposing Release.

[3] Hearing Tr. at 85, 90–92, 94–97, 120.

[4] Hearing Tr. at 32, 55–56, 65–66, 158.

[5] For each of the four substantive proposals under Regulation NMS, the Proposing Release requested comment on the appropriate phase-in period that would be needed to allow participants time to adapt to the proposed new regulatory environment.

through an Auto-Ex Facility.[6] The ability to display such a quotation potentially would give exchanges with trading floors the flexibility to integrate effectively the trading floor with an Auto-Ex Facility. Rather than being classified as ''fast'' or ''slow,'' markets would be allowed to offer choices to investors. In those particular contexts when a market's quotation was not accessible through an Auto-Ex Facility (for example, to provide an opportunity for the floor to generate additional price discovery or price improvement), the quotation would be identified as such and order-routers could respond accordingly. As discussed further below, the Regulation NMS proposals also could be drafted to reflect whether a quotation was, or was not, accessible through an Auto-Ex Facility. Competitive forces and the needs of investors, rather than regulatory classifications, would determine the relative success of various types of manual and automated trading facilities.

The near-term prospect that quotations displayed in the NMS may be predominantly accessible through Auto-Ex Facilities, but with some flexibility for markets to offer investors the choice of manual trading, potentially has very significant consequences for the rules proposed under Regulation NMS. Some of the most difficult issues raised by the proposals, particularly those relating to trade-throughs, access, and market data, derive from the problem of accommodating both auto-executable and manual quotations within the NMS. These problems could largely disappear in the near future if NMS quotes become predominately accessible through Auto-Ex Facilities. One of the primary purposes of the supplemental request for comment that follows is to encourage the public to address the opportunities that such a development would offer for making substantial progress toward a more efficient NMS for investors.

II. Trade-Through Proposal

A. Exception for Manual Quotes

The Proposing Release recognized that there are differences between the speed and certainty of response in electronic (*i.e.* automated) versus manual (*i.e.* non-automated) markets. To provide flexibility to market centers with different market structures, the Commission proposed an exception to the trade-through rule to allow an automated market to trade-through a non-automated market up to a certain amount.[7] Many panelists at the NMS Hearing agreed that the distinction between an automated and non-automated market—a market that provides immediate access to its quotes through automatic execution and one that does not—is important, and that market participants should be able to trade-through a manual market.[8] Panelists at the NMS Hearing, however, expressed the view that the distinction could, and perhaps should, be made between manual and automated quotes, rather than manual and automated markets.[9]

The Commission therefore requests further comment on the operation of the proposed exception for manual markets. Specifically, the Commission requests comment as to whether the exception from the proposed trade-through rule should apply to quotes that are not immediately accessible through an Auto-Ex Facility (a manual or non-automated quote), rather than providing an overall exception for a manual market.[10] Would narrowing the scope of the proposed exception to manual quotes allow market centers and broker-dealers to more efficiently execute orders across markets, while at the same time preserving the protections of a trade-through rule? By not forcing a market center into a rigid classification—automated or manual, would providing an exception for manual quotes, on a quote-by-quote basis, provide more flexibility for market centers with different market structures to compete more fairly with each other? For instance, would narrowing the exception to manual quotes, which would allow a market center with an Auto-Ex Facility to display a manual quote in particular limited circumstances, provide more flexibility for a market center with a floor-based structure to effectively integrate its trading floor with an Auto-Ex Facility, if it so desired?[11] Would a quote-by-quote exception allow markets more flexibility to provide investors a choice as to a manual or automatic execution? Comment also is requested on whether a quote-by-quote exception would create difficulties for routing systems that could not be easily managed.

The Commission requests comment as to the best way to effectuate a quote-by-quote exception to the proposed trade-through rule for manual quotes. Panelists at the NMS Hearing stated that it would be possible to attach an identifier to manual quotes in the consolidated quote stream so that all market participants would know the quote was a manual quote.[12] The Commission requests comment on the feasibility of this approach, and how it would work in practice. Should the Commission explicitly require each market center, as part of its required policies and procedures,[13] to implement a process to identify any non-automated bid or offer that it posts in the consolidated quote stream as manual? Should the Commission require that the NMS plans that govern the collection, consolidation and dissemination of quotes in NYSE, Amex and Nasdaq-listed stocks be amended to provide for this functionality with regard to the quotes sent to the processors for those plans?[14] Should each self-regulatory organization (''SRO'') be required, as part of its policies and procedures for complying with the proposed trade-through rule, to impose a requirement on its members that they identify their bids and offers as manual when submitting them to the SRO?

Comment also is requested on whether a market center should be able to decide on a security-by-security basis whether its quotes will be automated or manual. The Commission recognizes that an exception for manual quotes, as outlined above, would necessarily provide market centers with this (and more) flexibility, by allowing them to identify all quotes in a particular security as manual quotes. If the Commission adopted an exception to the trade-through rule for manual markets rather than manual quotes, however, should the exception explicitly allow a market to choose to be

[6] Hearing Tr. at 57, 142–144, 157–158.

[7] The Commission requested comment on all aspects of this proposed exception, including in particular how to define an automated market, and by what amount a market should be allowed to trade-through a manual market. *See* Section III.D.2 of the Proposing Release.

[8] *See, e.g.*, Hearing Tr. at 56–57, 63–67, 72, 75–76, 86, 132, 136, 142, 158. One panelist characterized the distinction as between ''maybe'' and executable firm quotes. See Hearing Tr. at 52–53, 55–57.

[9] Hearing Tr. at 57–58, 142–144, 157–158.

[10] In Section III.B of this Release, the Commission requests further comment on whether or not there should be trade-through protection for ''high-fee'' quotes. *See also* Section III.F of the Proposing Release that requested comment on this issue as well.

[11] *See* Hearing Tr. at 57 (panelist expressing the view that focusing on automated quotes would provide market centers with flexibility to evolve towards a more automated system in any way they see fit).

[12] Hearing Tr. at 57, 142, 157–158.

[13] *See* Section III.C.5 of the Proposing Release for a discussion of the required policies and procedures that each order execution facility would be required to establish, maintain and enforce pursuant to the proposed trade-through rule, proposed Rule 611 of Regulation NMS.

[14] The NMS plans are described in Sections III.B.1 and VI.A of the Proposing Release.

automated or manual on a security-by-security basis?

1. Definition of an ''Automated'' Quote

Several panelists at the NMS Hearing expressed the view that the concept of an ''automated'' market or quote must encompass an immediate automated response to the order router as to what action was taken with respect to the order.[15] In other words, certainty as to whether an order seeking to interact with a displayed quote can immediately interact with such quote—knowing instantaneously whether an order was executed (in full or in part) or cancelled—is key.

In the Proposing Release, the Commission proposed to define an ''automated order execution facility'' as a order execution facility that provides for an immediate automated response to all incoming orders for up to the full size of its best bid and offer disseminated pursuant to an effective national market system plan, without any restrictions on executions.[16] The Commission requests comment on whether it should make explicit in the proposed definition of an automated market or automated quote that providing an immediate automated response would include immediately sending a report back to the market center that submitted the order, either reporting an execution or cancellation. In addition, should the Commission make explicit that the automated market or quote must provide an automatic execution functionality for the whole order or provide an automatic cancellation for the remaining portion of an order not executed against the quote?

The Commission also requested comment in the Proposing Release as to whether it should provide specific guidance with regard to what ''immediate'' would mean in terms of providing an automated response.[17] Panelists believed that, at a minimum, for a quote to be considered automated there must be no manual or human intervention involved in responding to an order seeking to interact with that quote.[18] In the Proposing Release, the Commission requested comment as to whether it would be appropriate to impose a performance standard with respect to response times.[19] The Commission notes that panelists at the NMS Hearing advocated imposing a maximum response time, such as one second or a quarter of a second.[20]

The Commission requests further comment on whether it should impose performance standards, such as no less than one second, or a quarter of a second, or some other time frame, on the total time for a market center to respond to an order in an automated manner, *i.e.*, the time from when the order is received by the executing market center to the time that the executing market center sends a report back to the order router indicating the action taken with respect to the order. Would imposing a performance standard alleviate concern that, because each market otherwise would be able to determine what ''immediate'' means with respect to its own bids and offers, a market participant might be required to access a better price on a market center that it did not believe provided an immediate response? Would market centers continue to have an incentive to compete on the basis of execution speed if a performance standard were imposed?[21] The Commission also requests comment on whether there is a need to impose a response time of less than one second. Specifically, would investors benefit significantly, or at all, from sub-second response times? If so, how would they benefit? Additionally, would it be necessary or advisable to impose sub-second response times in order to promote a smoothly operating marketplace?

The Commission requests comment with regard to surveiling for and enforcing compliance with a performance standard. In particular, the Commission requests comment on whether, if it were to adopt a performance standard, it should require that each market center publicly disclose the percentage of time, or each actual instance, that it did not provide a response in compliance with the standards required by the rule. Would requiring public disclosure provide an added incentive for market centers to continue to improve their technology and the services they provide? Would it allow market participants and the Commission to better determine if the quotes of a market center that the market center determine to be automated are indeed automated in compliance with the proposed standards? Is there any other mechanism by which market participants could determine whether market centers were providing an immediate automated response in compliance with any performance standards imposed?

One panelist at the NMS Hearing expressed the view that a market center posting a bid or offer should be required to automatically update that quote, in order to be deemed an automated market.[22] The Commission agrees that providing an automatic update to the best bid or offer is important because market participants other than the participant whose order executed against the quote need to know whether a particular quote is still available or not. Not updating a quote to immediately reflect the true status of the quote inhibits full transparency and could lead to uncertainty as to whether the market center's quotes are indeed immediately accessible through an Auto-Ex Facility. The Commission therefore requests comment on whether, in order for a market center or quote to be considered automated, the market center posting the quote should be required to provide for an automated update to the quote it is executed against. The Commission also requests comment on whether it should impose a performance standard, such as one second, on the time within which the order execution facility would be required to update its automated quote. Finally, comment is requested on whether the Commission should require market centers to provide an automatic cancellation functionality that would allow a market participant that has put a limit order on the market center's limit order book to automatically cancel the limit order. If so, should the Commission require that cancellations be honored within a certain time frame, such as less than one second?

2. Allowable Trade-Through Amount

In the Proposing Release, the Commission requested comment on the amount by which a market should be allowed to trade through a manual market.[23] Panelists at the NMS Hearing expressed the view that a market center should be allowed to trade-through a manual market by an unlimited amount.[24] One panelist stated that the ability to trade-through a manual market has to be ''unfettered'' because of a concern with the practicality of complying with the proposed tiered approach (which would look to the NBBO of the security at the time of execution for purposes of determining the allowable trade-through amount)

[15] *See, e.g.*, Hearing Tr. at 54–57, 65–66, 133, 158.

[16] *See* Section III.D.2.a of the Proposing Release and paragraph (b)(3) of proposed Rule 600 of Regulation NMS. The Commission requested detailed comment on this proposed definition. See Section III.D.2 of the Proposing Release.

[17] *See* Section III.D.2.a of the Proposing Release.

[18] *See* Hearing Tr. at 29, 32, 55–56, 59.

[19] *See* Section III.D.2.a of the Proposing Release.

[20] *See* Hearing Tr. 59 and 86 (advocating a ¼ of a second, at least 98% of the time), 62 (advocating that a fast market is under one second).

[21] *See* Hearing Tr. at 25–28.

[22] Hearing Tr. at 14.

[23] *See* Section III.D.2.c of the Proposing Release.

[24] Hearing Tr. at 57–58, 67.

given the incidence of flickering prices in today's market.[25] The Commission requests further comment as to the amount by which a market should be allowed to trade through a manual quote. Specifically, the Commission requests comment as to whether there should be no limit. As emphasized in the Proposing Release, however, such an exception to the trade-through rule would in no way alter or lessen a broker-dealer's duty to achieve best execution.[26]

B. Opt-Out Exception

Panelists were split about the need for an opt-out exception. Some panelists at the NMS Hearing expressed the view that there would be no need, or valid policy reason, to allow a market to trade through an automated market or automated quote of another market.[27] In addition, representatives of two floor-based exchanges have publicly expressed the intent to take the necessary steps to become automated for purposes of the proposed exception to the trade-through rule.[28] Thus, the Commission requests comment as to whether, if it were to adopt an exception to the trade-through rule for manual quotes, the proposed opt-out exception would still be necessary or desirable.

Other panelists supported an opt-out exception.[29] Several panelists at the NMS Hearing stated that one benefit of the proposed opt-out exception is that it could create market pressure that would discipline markets that provided slow executions or inadequate access to their markets.[30] The Commission requests comment on this issue. Would there be less of a need for the opt-out as a mechanism for market discipline if the Commission were to adopt explicit performance standards with regard to defining what an ''immediate'' automated response means under an exception for manual quotes?

If commenters believe that an additional mechanism is needed to exert market pressure on market centers, what type of mechanism would be effective but still support the underlying goals of price protection and best execution? For instance, as discussed above in Section II.A.1, whether or not the Commission adopted a performance standard with regard to an exception for a manual market or quote, should the Commission require each market center to publicly disclose how often it provided an immediate automated response within certain time frames or within the performance standards?

Another potential use of the opt-out exception could be to by-pass quotations likely to be unavailable due to prior execution. Such a use could arise, for example, when a quotation suddenly becomes attractive to many traders at the same time (*e.g.*, because of a price change in a related security). One can conceive of circumstances in which a large, and perhaps rapidly growing, number of orders pursues a small and rapidly changing number of quotations. The Commission would be concerned if such scenarios could severely impact individual market centers or even interfere with the smooth functioning of the marketplace. The Commission requests comment on whether such scenarios are likely, what their potential impact might be, and whether a specific exception to the trade-through rule is needed to provide market participants with acceptable means to execute their orders under such conditions. If commenters believe an exception is needed, the Commission requests information on the nature of the requirement and the form that such an exception might take. The Commission requests comment on whether an opt-out exception would be needed for customers of order execution facilities that do not currently interact with other exchanges or order execution facilities.

C. Other Exceptions

The Commission also is requesting further comment as to whether there are particular types of transactions the execution of which should be excepted from the proposed trade-through rule that are not covered by the proposed exceptions, consistent with the fundamental policies of price priority.[31] For example, should there be an exception provided for basket or program trades that are executed at a single price distinct from current prices for each of the securities contained in the basket? In addition, should an exception be provided for an ''intermarket sweep order'' by which a market participant can simultaneously route orders to interact with all best bids and offers displayed in the consolidated quote system?[32] As proposed, paragraph (b)(7) of Rule 611 of Regulation NMS would provide an exception for those instances where an order execution facility sends an order to execute against a better-priced order displayed on another market at the same time or prior to executing an order in its own market at an inferior price.[33] The Commission recognizes, however, that a market center that receives one part of an ''intermarket sweep order'' would not know that other ''sweep'' order(s) have been sent to other market centers to attempt to execute against any better-priced bids or offers displayed on those markets, unless the order(s) were identified in some manner. Thus, the receiving market could, pursuant to the proposed trade-through rule, route the order it received to another market displaying a better price, even though the order router already has attempted to take out those better prices. Therefore, the Commission is requesting comment as to how each order sent by a market participant in compliance with a ''sweep order'' exception should be identified so that the receiving market center would be able to execute the order without regard to whether a better price were displayed on another market center.

D. Type of Securities Subject to the Proposed Rule

Some panelists at the NMS Hearing questioned the need for a trade-through rule and argued against extending the trade-through rule to the Nasdaq market. Given the prospect of greater automation of execution facilities discussed at the NMS Hearing, the Commission requests comment on how such a development would affect the need for a trade-through rule in the market for listed securities. In this connection, the Commission also reiterates its request for comment on the need to expand the trade-through rule to the Nasdaq market.

III. Access Proposal

The Access Proposal includes three primary parts: standards for market access, limitations on access fees, and standards to address locked or crossed quotations. An overview of the Access Proposal is set forth below to promote greater understanding of its details and to assist commenters in formulating their views. Next, additional comment is requested on the potential alternatives

[25] Hearing Tr. at 67. *See* Section III.D.2.c of the Proposing Release for a detailed description of the proposed allowable trade-through amounts.

[26] Section III.C.7 of the Proposing Release.

[27] Hearing Tr. at 32, 58, 65, 74, 80, 84, 85, 154.

[28] Hearing Tr. at 85, 88, 90–92, 94–95, 97, 116.

[29] Hearing Tr. at 14–15, 18, 19, 36.

[30] Hearing Tr. at 28, 35–36, 43.

[31] *See* Section III.D of the Proposing Release for a discussion of the proposed exceptions to the trade-through rule.

[32] An ''intermarket sweep order'' could arise where a market center wants to be able to route an order(s) to execute against any better-priced bid(s) or offer(s) on other market center(s) at the same time as or prior to executing the remaining balance in its own market at an inferior price, or a market participant could wish to execute the entirety of an order it holds by sending orders to interact with the best bids and offers displayed on other market centers. *See* Hearing Tr. at 53–54, 145–146.

[33] *See* Section III.D.3 and note 82 of the Proposing Release.

for other aspects of Regulation NMS if access fees are not limited to a *de minimis* amount.

A. Overview of Access Proposal

1. Market Access Standards

Paragraph (a) of proposed Rule 610 under Regulation NMS would establish access standards for two types of market centers, which between the two would encompass all quotations that are disseminated to the public through the consolidated data stream. First, an SRO order execution facility (defined in proposed Rule 600(b)(61) as a ''quoting market center'') would be prohibited from imposing unfairly discriminatory terms that inhibit a non-member, non-customer, or non-subscriber from obtaining access to quotations and the execution of orders through a member, customer, or subscriber.[34] Second, any broker-dealer whose quotations are *not* available for execution through any SRO order execution facility (such a broker-dealer would be defined in proposed Rule 600(b)(62) as a ''quoting market participant'' (''QMP'')) [35] also would be prohibited from imposing unfairly discriminatory terms that inhibited a non-member, non-customer, or non-subscriber from obtaining access to quotations or the execution of orders through a member, customer, or subscriber. This standard is intended to assure that all parties have effective indirect access through members and subscribers to quotations displayed by SRO order execution facilities and QMPs, thereby obviating the necessity for direct, intermarket linkages between market centers such as the Intermarket Trading System (''ITS'').

In addition, the Access Proposal would address *direct* access to markets in two contexts. First, paragraph (a)(2)(i) of proposed Rule 610 would require a QMP to provide access to its quotations to allow SRO order execution facilities and other QMPs to route orders for execution to the QMP on terms as favorable as those that the QMP grants to its most preferred member, customer, or subscriber. This additional requirement is necessary because a QMP's quotes would not, by definition, be otherwise available for execution through any SRO order execution facility. Second, the trading threshold that triggers the fair access standards of Rule 301(b)(5) of Regulation ATS would be lowered from 20% to 5% of the average daily volume in a security.[36] When subject to such fair access standards, an ATS is prohibited from unreasonably limiting any person from obtaining access to the ATS's services, such as by becoming a direct subscriber of the ATS.[37]

The Commission continues to request comment on all of the issues relating to standards of direct and indirect access that were raised in the Proposing Release. In addition, panelists at the NMS Hearing indicated that access could remain a problem at relatively inactive ATSs or market makers with little trading volume whose quotations were displayed only in the ADF (and therefore fell within the proposed definition of a QMP).[38] Market participants could obtain access to such quotations only through direct connections with the particular ATS or market maker. Panelists suggested that such an entity should be required to publish its quotations in an SRO order execution facility, at least until its share of trading reached a point where the cost of direct connections with multiple market participants would not be out of proportion to the entity's level of trading. Comment is requested on this issue. Alternatively, SROs without an order execution facility could be required to ensure that any potential QMP is directly connected to most market participants, before publishing that QMP's quotations. Finally, comment is requested in general on whether market participants currently have effective and efficient access to SRO order execution facilities and QMPs and whether this access provides a sound basis for the proposed regulatory approach.

2. Limitations on Access Fees

Paragraph (b) of proposed Rule 610 would establish a *de minimis* standard for access fees. The fee limitation with the broadest scope is set forth in proposed paragraph (b)(4), which would limit to no more than $0.002 per share in any transaction the accumulated access fees that could be charged by any SRO order execution facility, QMP, or other broker-dealer to any person, including subscribers, members, or other market centers.[39] This *de minimis* standard is designed to promote a common quoting convention and to facilitate the ready comparison of quotations across the NMS.

Application of the proposed fee limitations to different types of entities would vary depending on how a quotation were accessed by an order router. Such access could be divided into three categories.

First, quotations could be accessed through an SRO order execution facility. Under paragraph (b)(1) of proposed Rule 610, the SRO order execution facility would be authorized to charge a fee of no more than $0.001 per share. In addition, if the quote were attributable to a particular broker-dealer, the broker-dealer also would be authorized to charge a fee of no more than $0.001 per share under paragraph (b)(3) of proposed Rule 610. The purpose of the ''attributable'' requirement is to enable an order router to know in advance whether an additional broker-dealer fee would be charged when a quotation is accessed through an SRO order execution facility.[40] The quotation therefore would not need to be explicitly attributed to a broker-dealer individually in the consolidated data stream. Instead, the ''attributable'' requirement would be satisfied if an SRO effectively and publicly identified the broker-dealer responsible for a quotation. For example, a quotation would be attributable if the SRO identified a single specialist responsible for all quotations in a given security, or

[34] The phrase ''access to quotations and execution of orders'' would encompass access both to a market's best bid and offer and to quotations included in a market's ''depth of book.''

[35] Currently, the only broker-dealers that would fall within the proposed definition of a QMP are ATSs or market makers whose quotations are displayed in the consolidated data stream solely through the Alternative Display Facility (''ADF'') operated by the NASD. If a broker-dealer makes its quotations available for execution through any SRO order execution facility, it would not fall within the proposed definition of a QMP.

[36] 17 CFR 242.301(b)(5).

[37] The fair access standards of paragraph (b)(5) of Rule 301 of Regulation ATS do not require ATSs to provide indirect access to non-subscribers to such services as displaying limit orders, use of special handling orders, or proprietary market data. Paragraph (b)(3) of Rule 301 addresses the ''execution access'' required to an ATS's best bid and offer that is provided to an SRO for inclusion in the consolidated data stream. It requires an ATS to provide execution access that is equivalent to the access provided to other quotations displayed through such SRO.

[38] Hearing Tr. at 135, 138–139.

[39] The term ''access fee'' as used in proposed Rule 610 would include any fee charged by an SRO order execution facility, QMP, or broker-dealer that is based on the execution of orders against its displayed quotations. It therefore encompasses both the specific fees charged by ATSs to non-subscribers for access to their quotations, as well as any other fees charged by SROs and ATSs to their members and subscribers that are based on the execution of orders against their displayed quotations. Comment is requested on the definition of access fees. Should it be broadened to include order cancellation fees, fees for capacity usage, or any fee charged by the market center specific to a transaction?

[40] Comment is requested on whether this policy objective to give advance notice could be achieved with respect to non-attributable quotes (for example, if the SRO specified the fee that could be charged by broker-dealers who displayed non-attributable quotes through the SRO's order execution facility). Comment also is requested on alternatives other than an attribution requirement for achieving the objective of notifying order-routers that an additional broker-dealer fee would be charged for accessing a quotation through an SRO order execution facility.

if the SRO disseminated a proprietary public data stream identifying the broker-dealer responsible for a particular quotation.

Second, quotations could be accessed through a QMP (*i.e.*, an ATS or market maker whose quotes were displayed in the ADF and were not accessible through any SRO order execution facility). This type of entity would be authorized to charge a fee of no more than $0.001 per share.

Third, quotes could be accessed directly through a broker-dealer who was not a QMP because its quotes also were accessible through an SRO order execution facility. Except for the accumulated fee limitation of $0.002 per share set forth in paragraph (b)(4) of proposed Rule 610, this type of direct access to a non-QMP broker-dealer's quotes is not specifically covered by the proposal. Consequently, the fees for this type of access to quotations would continue to be governed by existing rules, which vary depending on whether the broker-dealer is an ATS or a market maker.

Under this third type of access, ATSs, which are subject to the access standards of Regulation ATS, would continue to be allowed to charge a fee for access to their quotations, subject to the accumulated fee limitation of $0.002 per share. Although ATSs would not be explicitly limited to a fee of $0.001, as are SRO order execution facilities, competitive factors likely would preclude ATSs from being able to retain more than $0.001 of the maximum $0.002 fee. Broker-dealers with displayable orders would know that they could submit such orders directly to an SRO order execution facility and charge a fee of $0.001.[41] Consequently, they would be unlikely to submit their orders to an ATS if the ATS does not agree to pay a rebate of at least $0.001 to match what the broker-dealer could obtain through an SRO order execution facility. If the ATS charged the maximum $0.002 fee, this would leave the ATS with only $0.001 after the rebate to the broker-dealer—the same fee that an SRO order execution facility would be authorized to charge under paragraph (b)(1) of proposed Rule 610.

In contrast to ATSs, market makers currently are not permitted to charge a fee for access to their quotes under Exchange Act Rule 11Ac1–1(c)(2) (the ''Quote Rule'') (proposed to be redesignated as Rule 602 under Regulation NMS). If adopted, Rule 610(b)(3) would affirmatively authorize a market maker to charge a fee of no more than $0.001 per share only in the specific context of when an attributable quote were accessed through an SRO order execution facility. Outside of this context, however, existing rules would continue to apply and market makers would not be authorized to charge a fee for direct access to their quotes. Unlike ATSs, market makers are not subject to the additional access requirements imposed by Regulation ATS.

For each of the fee limitations in proposed Rule 610(b), the scope of quotations covered by the limitation should be interpreted in conjunction with the definitions in proposed Rule 600(b)(61) and (62) of a ''quoting market center'' and a ''quoting market participant.'' The definitions would encompass, respectively, an SRO order execution facility that made its best bid and offer available pursuant to the Quote Rule, and a broker-dealer that provided its best bid and offer to an SRO pursuant the Quote Rule or Regulation ATS. The scope of the fee limitations in proposed Rule 610(b) would be limited to these best bids and offers, all of which are disseminated to the public through the consolidated data stream. Such bids and offers would be eligible for trade-through protection under the proposed trade-through rule. These bids and offers also are eligible to be designated as national best bids and offers (''NBBOs) and therefore could have significant implications for purposes of a broker-dealer's duty of best execution. The proposed fee limitations would help assure that all order routers had efficient access to the quotations necessary to fulfill their regulatory responsibilities. The fee limitations would not, however, cover quotations included in a market's depth of book. Accessing depth of book is more subject to the choice of order routers than accessing best bids and offers. Also, order routers can avoid interacting with a market's depth of book by submitting an order with a limit price at the best bid or offer.[42]

Comment is requested on the structure of the various fee limitations set forth in proposed Rule 610(b). Comment also is requested on whether the Commission should simply adopt a single accumulated fee limitation, such as the one set forth in paragraph (b)(4) that would apply to all types of market centers. If a single accumulated fee limitation were adopted, would $0.002 per share be an appropriate amount, or should it be higher or lower? Comment also is requested on whether fee limitations should apply to undisplayed orders at prices better than the best displayed quote, reserve size at the displayed quote, or quotes displayed or available at prices inferior to the displayed quote. Are these limitations needed to avoid discouraging the display of quotes? Further, would limiting access fees discourage the display of quotes?

3. Locked or Crossed Quotations

Paragraph (c) of proposed Rule 610 sets forth standards addressing locked or crossed quotations. It would require every SRO to establish and enforce rules that require its members to avoid locking or crossing quotations, that are reasonably designed to enable market participants to reconcile locked or crossed quotations, and that prohibit its members from engaging in a pattern or practice of locking or crossing quotations.

As discussed above, panelists at the NMS Hearing suggested that quotations not accessible through an Auto-Ex Facility should be identified as such in the consolidated data stream. Comment is requested on whether market participants submitting quotations that *are* automatically executable should be allowed to lock or cross quotations that are identified as *not* being automatically executable.[43]

B. Alternatives to Access Fee Limitations

The Proposing Release requested comment on how other aspects of proposed Regulation NMS would be affected if the Commission ultimately determined not to limit access fees to a *de minimis* amount. In the discussion of the Trade-Through Proposal, for example, comment was requested on whether, if fees were not limited, quotations with fees of greater than a *de minimis* amount should be excluded from protection under the proposed trade-through rule.[44] In addition, the discussion of the Market Data Proposal noted the close connection between the

[41] If, however, the broker-dealer with a displayable order wished to retain anonymity, it could not charge a fee for an execution through an SRO order execution facility because the quote would not be attributable. In contrast, the broker-dealer could retain its anonymity by placing the order with an ATS. Comment is requested in note 42 above on possible alternatives to the attribution requirement, which could eliminate the difference in treatment between access to quotations through SRO order execution facilities and direct access through ATSs.

[42] The fee limitations would apply to any order execution at the displayed price of the best bid or offer. They therefore would encompass executions against both the displayed size and the reserve size of a quotation.

[43] As discussed below, the Commission also is requesting comment on the issue of whether, if the proposed fee limitations are not adopted, markets with *de minimis* fees should be allowed to display quotations that lock quotations with high fees.

[44] Section III.F of the Proposing Release.

issue of limiting access fees and allocating market data revenues based on a market's quotations. Comment was requested on whether, if fees were not limited, quotations with greater than *de minimis* fees should be excluded from an allocation of market data revenues.[45]

The Commission renews its request for comment on whether it should or should not adopt any access fee limitation and, if it does not adopt a fee limitation, on alternative measures that potentially could be adopted. In particular, should quotations with high fees be treated differently than quotations with *de minimis* fees for purposes of the other proposals? The differing treatment could reflect the fact that, for example, a $10.00 quotation with a high fee is not equal to $10.00 quotation with a *de minimis* fee. Quotations with fees of more than a *de minimis* amount could be identified as such in the consolidated data stream, analogous to the identification of quotations not accessible through an Auto-Ex Facility that was discussed above. Such high-fee quotations could be excluded from protection under the trade-through rule, eliminated from the allocation of market data revenues, and subject to locking quotations from market centers with *de minimis* fees.[46] Comment is requested on the advisability of these alternatives, as compared with adopting a limitation on access fees.

IV. Market Data Proposal

At the NMS Hearing, the market data panelists focused primarily on two issues—the level of market data fees and the complexity of the proposed formula for allocating market data revenues to the SROs. The Commission wishes to request additional comment on these issues.

A. Market Data Fees

Several panelists at the NMS Hearing addressed the current level of fees charged by the market data Networks and questioned whether such fees remain reasonably related to the cost of market data.[47] For example, a representative of Nasdaq stated that it recently had examined its costs and concluded that, instead of the current $20 monthly fee for professional investors to obtain basic data—NBBO and trades—in Nasdaq-listed stocks, the number should be approximately $5 to $7 per month.[48] He did not discuss, however, the costs incurred by Nasdaq to produce the full quotation data (''Level II data'') that is disseminated by Network C. Another panelist stated that the Networks should be required to disclose publicly the actual cost of providing market data to the public.[49] The Commission would welcome public comment addressing the reasonableness of market data fees and whether the Commission should modify its approach to reviewing such fees. As noted in the Proposing Release, one of the Commission's primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of market information.[50] Indeed, an extensive public record has been developed on this issue over the last five years. This record includes the Commission's 1999 concept release on market information fees and revenues (''Concept Release''),[51] the public comments received in response to the Concept Release, and the 2001 report of the Commission's Advisory Committee on Market Information (''Advisory Committee'').[52] In formulating their comments on these matters, commenters are encouraged to consider and respond to the views reflected in the public record.

B. Revenue Allocation Formula

At the NMS Hearing, some panelists questioned the complexity and cost of the proposed formula for allocating market data revenues to the SROs. The Commission wishes to request supplemental comment on this issue.

First, the prospect that, in the future, displayed quotes for NMS stocks may be predominantly accessible through Auto-Ex Facilities presents an opportunity for simplifying the proposed formula. As proposed, the calculation of an SRO's Quoting Share, which would reward markets for the time and size of their quotes at the NBBO, would include an automatic cut-off when quotes that are not fully accessible through automatic execution are left alone at the NBBO. The purpose of the automatic cutoff for manual quotes was to minimize the reward for quotes that could be stale if in the process of being manually updated. The Commission requests comment on whether only quotes that are accessible through an Auto-Ex Facility should be considered in the allocation of market data revenues, thereby eliminating any need for the formula to include an automatic cutoff applicable to manual quotes.[53]

Second, comment is requested on whether, if manual quotes were excluded from the calculation of Quoting Shares, the proposed additional measure of quoting activity—the proposed NBBO Improvement Share—should be eliminated from the formula. The NBBO Improvement Share is significantly more complex than the other aspects of the formula, which essentially are calculated already by those who track the trading and quoting activity of market centers. The NBBO Improvement Share was designed primarily to single out and reward price leaders—those market centers that quote most aggressively by frequently displaying better prices and thereby helping to narrow quoted spreads. An additional measure of quoting activity was particularly important to offset the advantage that manual quotes could have in the calculation of Quoting Shares. Such manual quotes might merely match the prices set by other markets, yet not be accessed quickly because not automatically executable. As a result, manual quotes would tend to equal the NBBO for long periods of time merely because they were the least accessible quotes available at the price. If manual quotes were excluded from the calculation of Quoting Shares, the need for an additional quoting measure would be somewhat diminished. Comment is requested on whether the benefit of rewarding aggressive quote improvement justifies the increased complexity of calculating the NBBO Improvement Share.

Finally, although the Proposing Release itself recognized that the proposed formula is relatively complex, the difficulty and cost of implementing the formula may have been overstated at the NMS Hearing. No additional data is necessary to calculate the formula beyond the quote and trade data that

[45] Section VI.C.2 and note 289 of the Proposing Release. The Proposing Release also noted that quotations displayed in the consolidated data stream often may be locked because one or both quotes may have a fee attached. Comment was requested on whether limiting fees to a *de minimis* amount would help address this problem. Section IV.B.4 of the Proposing Release.

[46] In Section IV.B.4 of the Proposing Release, the Commission requested comment on whether there should be an exception from the locked quotation provisions of proposed Rule 610(c) for quotations of automated markets that lock quotations that are only manually accessible. A similar exception could be made for quotations of *de minimis* fee markets that lock quotations with high fees.

[47] *See, e.g.*, Hearing Tr. at 223–224, 228–229, 230–231.

[48] Hearing Tr. at 223–224.

[49] Hearing Tr. at 230.

[50] Section VI.B of the Proposing Release.

[51] Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December. 17, 1999).

[52] Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001) (available at *http://www.sec.gov*).

[53] Comment was requested in section III.B above on whether, if access fees are not limited, quotes with fees of greater than a *de minimis* amount should be excluded from the allocation of market data revenue.

already is disseminated by the Network processors and stored by data vendors. The formula would not need to be calculated in real-time, nor would anyone other than the Network processors and other industry participants need to deal with the formula directly. Consequently, it does not appear that adoption of the formula would impose any additional ''downstream'' systems costs on vendors or broker-dealers. Indeed, if necessary, a single vendor could be retained by all three Networks to program and process the calculations required by the proposed formula, thereby potentially reducing the implementation costs by a significant amount. Comment is requested on the potential implementation costs of the proposed formula and on possible ways to minimize such costs.

V. General Request For Comment

In addition to the supplemental requests for comment set forth above, the Commission renews its requests for comment on the Regulation NMS proposals that were published in the Proposing Release. It particularly encourages the public to consider the significant matters discussed during the NMS Hearing when formulating their comments.

Dated: May 20, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

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S. 2315/P.L. 108–228

To amend the Communications Satellite Act of 1962 to extend the deadline for the INTELSAT initial public offering. (May 18, 2004; 118 Stat. 644)

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